

**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 NETFLIX, INC.

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SUMMARY

Netflix, Inc. (“Netflix”) strongly supports the Commission’s effort to adopt rules that will preserve an open Internet. The Commission’s proposed rules, taken as a whole, offer an effective framework for assuring an open Internet – balancing the interests of both network operators and users. By adopting these rules, the Commission will help assure that the Internet remains a force for innovation, commerce and consumer choice. These rules, including meaningful disclosure regarding network management practices, clear definitions on “managed services,” and swift enforcement, will also help level the playing field among network operators, their affiliated businesses, and various competitors.

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I. INTRODUCTION

With more than 11 million subscribers, Netflix is the largest online movie rental subscription service in the United States.¹ Netflix offers a variety of subscription plans that allow Netflix members to watch movies and TV shows instantly as well as receive DVDs delivered quickly by U.S. mail to their homes, all without due dates, late fees or pay-per-view fees.

Having built a successful DVD-by-mail rental subscription business, Netflix has become a pioneer in online video, offering its subscribers a large and growing library of movies and TV shows streamed to their computers and TVs.²

¹ Netflix, founded in 1997, is headquartered in Los Gatos, California and is publicly traded on the NASDAQ under the symbol, NFLX.

² Netflix has relied upon the U.S. mail, one of the world's oldest open communications networks, to grow its business. Now, for continue success, Netflix will rely on the newest open communication network. During the forthcoming discussions on network neutrality, it is worth keeping in mind that even in the early days of our Republic an open network of communication was seen as an appropriate aim and activity of even a limited government. "The post-office, under proper regulations, is one of the most

This streaming offering has been very popular with Netflix subscribers. As of the 4th quarter of 2009, nearly half of Netflix's more than 11 million subscribers instantly watched 15 minutes or more of streaming content.

In addition, Netflix is partnering with a broad array of consumer electronics providers to bring to market a range of devices that will permit Netflix subscribers to stream movies and TV episodes instantly and directly to their viewing screens. These devices include Blu-ray disc players and Internet-enabled TVs from LG Electronics; Blu-ray disc players from Samsung, Sony and Best Buy's Insignia brand; the Roku digital video player; Microsoft's Xbox 360, Nintendo Wii, and Sony's PlayStation 3 game consoles; TiVo digital video recorders; and Internet-enabled TVs from Sony and VIZIO. Netflix estimates that by the end of 2010, its streaming service will be available through over one hundred different consumer devices.

As so aptly demonstrated by the growth and popularity of Netflix, consumers benefit from the wide array of innovative services and products arising from the Internet. As such, preserving an open Internet will be vital for

beneficial establishments which can be introduced by any government; by providing the means of intercourse between the citizens of remote parts of the confederation, on such a regular footing, as must contribute greatly to the convenience of commerce, and to the free, and frequent communication of facts, and sentiments between individuals." Tucker, St. George. *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*, available at. http://press-pubs.uchicago.edu/founders/documents/a1_8_7s5.html (last visited January 13, 2010) (Blackstone's Commentaries on the Postal Clause of the U.S. Constitution).

assuring ongoing consumer choice as well as continued robust development of ideas, applications and services on the Internet.

II. THE COMMISSION’S PROPOSED RULES CREATE AN EFFECTIVE FRAMEWORK FOR PRESERVING AN OPEN INTERNET

The openness of the Internet is not accidental and it is not immutable.

Government policies requiring neutrality and non-discrimination of those providing telecom network services permitted the initial flowering of an open Internet.³ However, new technologies, such as “deep packet inspection,” as well as the emergence of viable competition, such as Netflix, to affiliated businesses of network operators, provide both the means and motive for network operators to change the historically open nature of Internet – heightening the need for the Commission to announce clear rules prohibiting discriminatory practices.⁴

The open Internet serves as an amazing engine for driving innovation and commerce. By merely using the standard protocols and open architecture of the Internet, anyone can innovate on it. Success or failure rides upon the utility of the innovation – consumers pick the winners and losers in an open Internet, not the government or network operators. Allowing network operators to discriminate among the types of ideas, services or applications that traverse their

³ *Preserving the Open Internet; Broadband Industry Practices*, Notice of Proposed Rulemaking, GN Docket No. 09-191, WC Docket No. 07-52, FCC 09-93, at 11, ¶ 28 (rel. Oct. 22, 2009) (“*NPRM*”) (“For many years and in a variety of different proceedings and contexts, the Commission has considered the issue of network openness and developed policies to preserve and promote the open Internet.”); *see also id.* at 9-11, ¶¶ 24-27 (describing the Commission’s *Carterfone* and *Computer Inquiries* policies and their contribution to the early rapid growth of an open Internet).

⁴ *NPRM* at 24-25, ¶¶ 57-58.

networks will only result in inefficiency and entrenchment while reducing the amount and quality of innovation.⁵ Likewise, creating burdensome government regulation or approvals will only frustrate the inventive process by creating unnecessary barriers to entry.

Netflix believes that the codification of the existing network neutrality principles, together with the addition of nondiscrimination and transparency, create an effective framework for preserving an open Internet. These rules will allow all parts of the industry – network operators, consumer electronics manufacturers, and edge providers of content, applications, and services – to continue to innovate at a rapid pace, unburdened by the unnecessary intervention of network operators or government regulators. Because the proposed rules are largely principle-based and envision case-by-case enforcement of violations, the Commission will be able to assure that discriminatory actions and practices, as such may evolve over time, are policed, while avoiding the promulgation of detailed technical rules that may have the effect of stifling innovation, freezing technology, and raising costs to consumers. Rules permitting “reasonable network management” acknowledge the need for network operators to address technical challenges posed by the growth of broadband traffic, while also establishing that such network management must not be discriminatory or anticompetitive.

⁵ See Brief Amicus Curiae of Professor Jack M. Balkin et al. at 13-21, Comcast Corp. v. FCC (D.C. Cir. Argued Jan. 8, 2010) (No. 08-1291).

III. NETWORK OPERATORS HAVE SIGNIFICANT INCENTIVES TO ENGAGE IN DISCRIMINATORY PRACTICES AGAINST ONLINE VIDEO SERVICE PROVIDERS SUCH AS NETFLIX, HEIGHTENING THE NEED FOR RULES PRESERVING AN OPEN INTERNET

At its heart, the Commission's codification of broadband policy principles stems from the market power of network operators. The incentives to discriminate or otherwise hinder the workings of an open Internet arise from a lack of meaningful consumer choice in broadband access and from vertical integration among network operators, service providers and content owners.

In most parts of the country, broadband access is effectively a duopoly between incumbent cable and telephone providers.⁶ In addition, the high switching costs associated with changing network operators creates a significant barrier to the effectiveness of any limited competition. Network operators also generate significant revenue from their video services and content ownership.⁷ The fact that network operators control the delivery pipes and generate significant revenue from content that travels over those pipes provides both the means and motive for discriminating against new ventures that might threaten revenue sources of the network operators.⁸ It is also important to note that these

⁶ See Comments of Free Press, GN Docket No. 09-137, at 45-48 (Sep. 4, 2009) (providing data based on FCC and carrier-provided information demonstrating that in most parts of the country, the incumbent cable and telephone companies control at least 95% of the market).

⁷ For example, according to Comcast's 2008 annual report, 58% of its total revenue was attributable to video services (the rest coming from high-speed Internet services, phone services, etc.). Comcast Corp. 2008 Annual Report on Form 10-K, at 69, available at <http://www.comcast.com/2008annualreview/pdf/2008comcast10K.pdf>.

⁸ While cable, telco and other MVPDs remain the largest providers of video content to U.S. households, a growing number of households are accessing video content online.

same network operators, through their affiliated video services companies, exercise significant content purchasing power which they can use to extract discriminatory concessions from unaffiliated video content providers.

Recent industry developments illustrate these concerns. Comcast, Time Warner, and other MVPDs have begun offering, or are working to offer, so-called “TV Everywhere” services, under which MVPDs arrange with programming networks to make certain video content available online while using an authentication system that ensures that only subscribers to existing MVPD services have access to this online content. By bundling the traditional cable TV offering with Internet delivery of content, vertically integrated MVPDs and network operators are potentially extending and expanding their dominant market position at the expense of competitive online offerings. Moreover, the recent announcement of the proposed merger of Comcast and NBC Universal serves to exacerbate the growing concern that MVPDs will use their control over programming networks to stifle competition, including the growing competition from online video providers like Netflix.⁹

According to one study, 8% of adults view TV shows online at least once a week. Christopher Lawton, *More Households Cut the Cord on Cable*, Wall St. J., May 28, 2009, at D2 (citing a survey by Leichtman Research Group).

⁹ See Editorial, *Concerns About Comcast-NBC*, N.Y. Times, Dec. 7, 2009, at A28, available at <http://www.nytimes.com/2009/12/07/opinion/07mon3.html> (“[T]he biggest potential threat from a combination of Comcast and NBC is to the development of video delivery over the Internet and its promise of à la carte programming — which promises to expand viewers’ choices, allowing them to elude the bundling strategies common to cable and satellite TV that force them to pay hundreds of dollars for content they do not want. . . . Being one of the largest broadband Internet service providers in the country, Comcast could now be tempted to limit access to NBC content on rival Internet services,

In light of the foregoing, the Commission should not take too narrow a view of the type of discrimination by network operators that should be cognizable under the new rules. There is substantial discrimination and consumer harm if a network operator uses its ownership affiliation with a program content provider, or even its bulk buying leverage with a video content provider, to deny attractive programming to a competing online video service. The concern that network operators will use their gatekeeper control over broadband access services to discriminate against unaffiliated content in a variety of ways is central to the Commission's proposed open Internet policies, and a wide variety of discriminatory conduct that stems from such gatekeeper control should be cognizable under the net neutrality rules.¹⁰

or charge them high fees. And Comcast could take its bundling business model to the Internet by forcing customers to buy cable packages in order to see content from NBC's network online.").

¹⁰ The video distribution market has long suffered from the effects of vertical integration or affiliation between content and service providers and the owners of the distribution network. Concerns related to vertical integration between MVPDs and video content providers are at the heart of the Commission's program access rules. In connection with this rulemaking, it is perhaps insightful as to future potential network operator conduct to note that where vertically integrated programming is delivered terrestrially and therefore beyond the scope of the Commission's program access rules there is factual evidence that cable operators have withheld this programming from competitors. In two instances — in San Diego and Philadelphia — there is empirical evidence that such withholding of programming has had a material adverse impact on competition in the video distribution market. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, Report and Order and Notice of Proposed Rulemaking*, MB Docket Nos. 07-29 & 07-198, FCC 07-169, at 44, ¶ 61 (rel. Oct. 1, 2007).

IV. NETFLIX SUPPORTS MEANINGFUL DISCLOSURE CONCERNING NETWORK MANAGEMENT PRACTICES

Netflix agrees with the Commission's proposed transparency principle, one that would require network operators to disclose practices that affect the consumers' ability to access content, use devices or services, and run applications. Network operators should be required to disclose relevant information regarding their broadband access service offerings, in particular the actual speeds and/or ranges of speeds that consumers can expect as well as network management practices that may slow the delivery of certain traffic, including any time-of-day restrictions. The required disclosure should be meaningful and made in a clear and conspicuous manner both at the time of purchasing access services and at regular intervals such that the consumer can make informed decisions about the network operator's services. The Commission and consumer and other watchdog groups can monitor these disclosures to ensure that the associated practices do not violate the other open Internet rules, and the Commission should stand ready to take enforcement action in the event of any violations.

Furthermore, in light of the highly dynamic nature of the content, services and applications utilizing the Internet, and of network management practices, the Commission should not limit its rules to specific disclosure requirements, but instead should establish an expert working group tasked with determining, on a periodic basis, the type of information to be disclosed to consumers and the

manner of such disclosure. Notwithstanding these disclosure requirements, the Commission should be mindful of the effectiveness of disclosures to consumers as a check on network operator practices in light of the high switching costs discussed above.

V. THE COMMISSION SHOULD ENSURE THAT THE “MANAGED SERVICES” CATEGORY DOES NOT RENDER ITS INTERNET OPENNESS RULES INEFFECTIVE

The potential category of “managed services” discussed in the *NPRM*¹¹ is of concern, particularly if this category of services is exempt from the openness or nondiscrimination provisions of the rules. The *NPRM* does not provide much detail as to the scope of the “managed services” category, and much will depend on the details of the definition. Netflix is concerned that network operators will use so-called managed services in a way that harms unaffiliated content or service providers that compete directly with services provided by the network operator, owing either to their vertical integration, as discussed above, or resulting from competitive threats to their legacy “managed services” business. This concern is heightened in light of the fact that such “managed services” are offered over the same physical network as broadband Internet access.¹²

As the Commission considers whether to adopt a “managed services” category and, if so, how to define such services, it must ensure, at a minimum, that: (1) network operators not simply use the “managed services” category to

¹¹ *NPRM* at 53-54, ¶¶ 148-53.

¹² *NPRM* at 54, ¶ 153.

end-run the openness and nondiscrimination rules, and (2) “managed services” should not adversely impact the provision of a robust, open Internet access service offering. In doing so, the Commission would help assure that the “managed services” exception does not become so extensive as to in effect create a “fast lane” for service offerings from network operators and their affiliates while relegating all unaffiliated entities to the “slow lane” of the open public Internet.

In short, if left unchecked, the “managed services” category could engulf the Commission’s open Internet policies altogether. As such, the Commission must carefully circumscribe the network operators’ ability to exempt certain services from the openness rules by classifying them as managed services.

VI. THE OPENNESS RULES MUST BE BACKED WITH EFFECTIVE AND TIMELY ENFORCEMENT

Obviously, the openness rules will be effective only if they are backed with rigorous and timely enforcement. Netflix supports case-by-case adjudication of alleged violations of the proposed open Internet rules, but such an approach is effective only if the Commission’s case-by-case consideration of alleged violations establishes clear procedural and substantive precedents. Furthermore, it is vital that any such adjudication be conducted swiftly. In the era of the Internet, where innovation happens almost instantaneously, a delay in resolving complaints could be the difference between an entrepreneur’s success and failure.

The Commission should consider adopting rules outlining the procedures under which such complaints would be heard, including a timeline for addressing and resolving complaints. This is especially true if the default process would be to file informal complaints under Section 1.41 of the rules, as the Commission's rules provide relatively little guidance as to the format and substance of such complaints, the timeline for addressing them, etc. The Commission could model enforcement procedures after the rules governing formal complaints under Section 208 of the Communications Act,¹³ as well as the Commission's procedures for addressing complaints of the open access provisions of the 700 MHz "C Block" rules.¹⁴

* * *

¹³ 47 C.F.R. § 1.711 *et seq.*

¹⁴ See *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, WT Docket No. 06-150, FCC 07-132, at 92-93 (¶¶ 229-30) (rel. Aug. 10, 2007) (establishing a burden of proof rule and a timeline for enforcing the provisions for open access for devices and applications in the 700 MHz C-Block); 47 C.F.R. § 27.16(f).

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