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January 15, 2010

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Re: Preserving the Open Internet, GN Docket No. 09-191  
Broadband Industry Practices, WC Docket No. 07-52

Dear Ms. Dortch

Attached is a corrected copy of our filing in the above-referenced dockets. In the original copy filed yesterday, one of the docket numbers was erroneously identified.

Respectfully,

**/s/ Michael S. Schooler**

Michael S. Schooler

cc: Attachment

**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  
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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**COMMENTS OF  
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (“NCTA”) hereby submits its comments on the Notice of Proposed Rulemaking in the above-captioned proceeding.<sup>1</sup>

**INTRODUCTION AND SUMMARY**

In this proceeding, the Commission is proposing a set of rules and regulations the purpose of which is to *preserve* the openness of the Internet. Not to *create* an open Internet, because, as everyone agrees, the Internet is already the epitome of openness, enabling the continuous creation and accessibility of new content and applications. And not to *accelerate* these developments, because it’s hard to imagine how new content and applications could be invented and made accessible to consumers any more rapidly than they have been in the last few years.

Yet, oddly, the Commission’s proposed approach to preserving the status quo with respect to this openness is to fundamentally *alter* the regulatory environment in which it has developed and flourished. As the National Telecommunications and Information Administration recently explained, the Internet’s explosive growth and development has required and resulted

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<sup>1</sup> *In re Preserving the Open Internet; Broadband Industry Practices*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 ¶ 56 (2009) (“*Notice*”).

from investment and innovation in the infrastructure and in the provision of Internet access, as well as in Internet content and applications:

The Internet's innovation ecosystem is built on, and thus depends upon, a communications infrastructure operating at broadband speeds, with robust bi-directional service. Indeed, the social and economic fruits of the Internet economy are the result of a virtuous cycle of innovation and growth between that ecosystem and the underlying infrastructure – the infrastructure enabling the development and dissemination of Internet-based services and applications, with the demand and use of those services and applications by consumers and businesses driving improvements in the infrastructure, which, in turn, support further innovation in services and applications. And, of course, rivalry among the various firms providing broadband services also has expanded the availability and capabilities of that underlying infrastructure.<sup>2</sup>

From the outset, the Internet has been nurtured to its present state by an absence of – and then a specific policy of refraining from – regulation. This is true not only with respect to the providers of content and applications at the outer edge of the Internet ecosystem but also with respect to those who offer consumers access to the Internet – the Internet service providers (ISPs). It's not true that, as some proponents of regulation persistently maintain, the Commission's decision to classify cable modem service – and, subsequently, other wireline and wireless high-speed Internet service – as “information services” constituted a reversal of longstanding regulation of ISPs. To the contrary, dial-up ISPs were not subject to regulation.

And after cable operators began providing cable modem service, the Commission specifically adhered to a policy of “vigilant restraint” – a policy that recognized that, in the absence of any market failure, prophylactic regulation was likely to do more harm than good. Congress had reached the same policy conclusion in 1996 when it proclaimed, in the Telecommunications Act of 1996, that “[i]t is the policy of the United States . . . to preserve the

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<sup>2</sup> Letter from Lawrence E. Strickling, Assistant Secretary of Commerce and Administrator of NTIA, to Chairman Julius Genachowski, FCC, Docket No. 09-51 (Jan. 4, 2010), at 2, *available at* [http://www.ntia.doc.gov/filings/2009/FCCLetter\\_Docket09-51\\_20100104.pdf](http://www.ntia.doc.gov/filings/2009/FCCLetter_Docket09-51_20100104.pdf).

vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*” 47 U.S.C. § 230 (emphasis added).

The “Policy Statement” adopted by the Commission in 2005 was not a departure from the approach of vigilant restraint. It set forth elements of Internet openness to which, in the Commission’s view, consumers should be entitled. But the Commission made clear that the Policy Statement was not an enforceable document or set of rules – and there was no indication or reason to believe that the status quo was in any way at odds with the aspirational principles embodied in the Policy Statement.

Nor is today’s status quo at odds with those principles. While the policy of vigilant restraint has been in effect, competition, openness and innovation have flourished throughout the Internet, among content and application providers, and among wireline and wireless Internet service providers. Consumer demand and use of high speed Internet service has created a greater need for network management by ISPs to prevent congestion, thwart unlawful uses of the Internet, and ensure an optimal experience for consumers. But there is no indication that reasonable network management for such purposes – which the Policy Statement expressly approved – is in any way threatening that competition, openness and innovation. In only one instance has the Commission found an ISP’s network management approach to be unreasonable – under a standard that the Commission, in this proceeding, has found to be too restrictive and inappropriate.

In these circumstances, abandoning the vigilant restraint approach and codifying the four principles of the Policy Statement – much less adding another two restrictive principles – as enforceable obligations would be both unwarranted and counterproductive. The imposition for

the first time of a comprehensive regulatory regime on Internet service providers would impose costs and deter investment without any countervailing benefits. The proposed rules would create uncertainty regarding the use of network management, subjecting ISPs to the threat and costs of litigation and delaying and deterring them from implementing techniques to keep up with ever-changing levels and causes of congestion – and ever-changing efforts to use the Internet for unlawful purposes. And, while these costs and uncertainty will inevitably have a dampening effect on investment, the proposed rule prohibiting “discrimination” – which, as proposed, would directly restrict business relationships between ISPs and application and content providers – would surely compound these effects.

The Commission should refrain from adopting any rules at this time. The proposed rules would be particularly intrusive and inappropriate. Even codifying the four principles of the Policy Statement would be unwarranted, and if adopted, should be construed only to prohibit practices that deny or substantially and materially prevent consumers from accessing and using lawful Internet content and applications – not temporary, occasional or insignificant delays that do not have the purpose and effect of making content or applications permanently inaccessible or unusable.

In particular, ISPs need and should be given discretion and deference in exploring and employing techniques to keep up with evolving challenges in managing the flow of traffic on their networks. The Commission is right to abandon the “strict scrutiny” approach that it used in the only case in which it enforced the Policy Statement and found a network management technique to be unreasonable. Instead, a network management technique should be deemed reasonable if it is intended to alleviate a legitimate network management problem. It should not be found unreasonable unless a complaining party demonstrates that it was *not* a bona fide

attempt to alleviate a legitimate network management problem and that its primary purpose and effect was to harm a competitor and/or discourage the dissemination of certain content or applications for reasons other than network management and that it harms consumers.

Adding a “nondiscrimination” principle, as the Commission proposes, would be especially problematic. There is no evidence of a “discrimination” problem that is harming openness and innovation on the Internet and warrants a rule, but, in any event, there is no justification for a rule that goes beyond “unreasonable” and anticompetitive discrimination and bars *any* differential treatment of content and application providers, no matter for what purpose, as the language of the proposed rule seems to do.

But apart from the actual language of the proposed nondiscrimination rule, the Commission suggests that the rule should be interpreted to prohibit any business arrangements under which content and application providers compensate ISPs for enhancements or prioritized treatment that they may require or desire to offer their services to an ISP’s customers. Such a prohibition would be particularly ill-advised and harmful to consumers. In some circumstances, this would prevent the development of unique Internet services that require customized quality of service enhancements or prioritization. In other cases, it would block or hinder the development of competition to dominant and well-funded content and application providers who have already acquired prioritized access to customers through arrangements with “content delivery systems” or other means that might not be available to new competitors. Moreover, effectively requiring ISPs to obtain all their compensation from consumers would only serve to inflate the price of Internet service – an odd policy choice at a time when policymakers are seeking ways to increase the rate of consumer adoption and utilization of broadband services.

The Commission rightly recognizes that not all services offered by ISPs on shared facilities – and not even all services provided over the Internet on such facilities – should be subject to its proposed rules. It should go without saying that rules should not apply at all to services that are not provided on the Internet, such as the video programming and telephone services provided by cable operators and telephone companies. But there may also be services offered by ISPs that *are* transported over the Internet but are separate and different from the Internet access service provided to subscribers – including, for example, but not limited to the “telemedicine, smart grid, or eLearning applications” suggested by the Commission -- for which customized and “managed” treatment by the ISP is wholly appropriate.

There are also likely to be a range of services and applications that might be offered on the Internet – *not* by the ISP but by third parties – that require a level of active management or enhancement by the ISP if they are to operate optimally for consumers – or operate at all. Unless the Commission also exempted such “managed” services from any nondiscrimination rule that it might adopt, its rules would have the perverse effect of discouraging the very innovation by content and application providers that it purports to be seeking to encourage.

In addition to adding a nondiscrimination principle, the Commission also proposes a new principle of transparency. A rule requiring disclosure of network management techniques should be a last resort, applied only where there is evidence that voluntary disclosures to consumers and the Internet community, along with ongoing discussions among ISPs and application providers to enable the development of new products, are not sufficient to foster and preserve a vibrant, innovative Internet marketplace for consumers and for service providers. If that were the case and rules were needed to ensure the interoperability of applications and networks, those rules would need to apply across the board – to application providers and content delivery networks as

well as ISPs – so that consumers, ISPs and application providers all have the information they need to effectively use and provide Internet services. And they would need to be limited to ensure that disclosure of tools used for legitimate network management purposes, such as preventing congestion and the unlawful transmission of pirated content, is not used to subvert those purposes. But where such voluntary disclosures and collaborative efforts are working and such a vibrant marketplace exists, it would be unnecessary and potentially counterproductive to impose a burdensome disclosure requirement at this time.

If, as the Commission suggests, its purpose in considering rules in this proceeding is to prevent those who provide access or serve as gateways to Internet content and application from engaging in conduct that might make certain content or applications unduly inaccessible in a way that threatens the openness of the Internet, it should be obvious that any such rules, to be effective – and to ensure regulatory parity – must apply to *all* competing providers of Internet access, as well as other entities at all layers of the Internet that serve as consumer gateways to such content and applications.

Finally, while all these public policy reasons provide more than ample basis for adhering to the successful policy of vigilant restraint and refraining from adopting rules in this proceeding, the adoption of any such rules would, in any event, be unlikely to survive First Amendment scrutiny. The Internet, while serving many purposes, is primarily a marketplace for speech, and under the First Amendment, any government interference with a marketplace for speech is highly suspect. In such a marketplace, the First Amendment protects not only those who create speech, but also those that provide a forum for its communication to the public – and the proposed rules would restrict the protected speech of both.

The proposed rules would, for example, prohibit ISPs not only from refusing to carry but also from providing any enhancement or prioritization to any content or application for any reason other than “reasonable” network management. Correspondingly, it would prevent content and application providers from acquiring any such enhancement or prioritization that they might need or desire in offering their services to consumers. As demonstrated below, these restrictions on speech would not survive First Amendment scrutiny. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994) (“When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply ‘posit the existence of the disease sought to be cured’” and “must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”)<sup>3</sup>

**I. THE BEST WAY TO PRESERVE THE OPENNESS OF THE INTERNET IS TO ADHERE TO THE “VIGILANT RESTRAINT” APPROACH UNDER WHICH INVESTMENT, INNOVATION AND OPENNESS HAVE FLOURISHED.**

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**A. Internet Service Providers Have Not Been Subject To Regulation – Even in the Days of Dial-up Service.**

Consumer access to the Internet largely evolved from online services that, at their inception, had nothing to do with the Internet – services such as America Online (AOL), Prodigy and CompuServe. Initially, those services offered consumers access on their personal computers to a variety of information, entertainment and communications services (including messaging services that allowed the sending of e-mail among a service’s customers), some of which were

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<sup>3</sup> The Commission has already concluded in the Notice, based on its previous determination in its *Comcast Network Management Order*, that it has statutory authority “to regulate the network practices of facilities-based broadband Internet access service providers.” *Notice* ¶ 83. Judicial review of that determination is currently pending in the United States Court of Appeals for the District of Columbia Circuit. *Comcast Corp. v. FCC*, Case No. 08-1291. For the reasons set forth in NCTA’s brief as Intervenor in that case, as well as in the brief of Petitioner Comcast Corporation, NCTA believes that the statutory provisions relied upon by the Commission there and in the Notice in this proceeding do not provide a basis for the exercise of jurisdiction to adopt regulations in this proceeding.

their own proprietary services and some of which were provided pursuant to contractual arrangements with third-parties. Consumers paid a fee to subscribe to these services and accessed them by dialing them up, via a modem, on their telephone lines. These closed systems – sometimes referred to as “walled gardens” – were never subject to any form of government regulation.

Eventually, the walled gardens of the proprietary networks were eclipsed by the development of the Internet-based World Wide Web. Unlike the walled gardens, the Internet is an inherently open ecosystem. Anyone can acquire access to the Internet, anyone with such access can post content and applications, and anyone with such access can view any content and use any applications that have been posted (although third parties posting content and applications may charge for such viewing and use of their services). As more and more content began to appear on the Web, new companies began offering consumers dial-up access to the Internet, along with access, in many cases, to their own proprietary content. And as more and more consumers began to access and explore the offerings of the Web, the proprietary networks themselves began to offer their customers access to the Internet along with their proprietary content.

Still none of these dial-up on-ramps to the Internet – neither the new entities spawned by the Internet nor the formerly closed, proprietary networks – were ever subject to regulation with respect to their provision of Internet access service. That this absence of regulation in any way inhibited the attractiveness of the Internet to consumers, the explosive growth of Web-based content and applications, or the flourishing of innovation is hard to discern. To the contrary, those very characteristics of the Internet that the Commission seeks in this proceeding to preserve irreversibly took hold without any governmental mandates or constraints.

**B. The Commission Has Refrained from Regulating High-Speed Broadband Internet Service While Adhering to a Policy of “Vigilant Restraint”.**

But dial-up service was just the first stage in the transformational development of the Internet that has been unfolding in the last decade. When cable operators began offering always-on high-speed broadband Internet service in the 1990s, the possibilities and opportunities for innovation at the edge of and throughout the Internet became virtually limitless. These enormous benefits of high-speed Internet service – which no one else was offering at the time – were, however, accompanied by some perceived potential risks. In particular, the provision by cable operators of a direct on-ramp between consumers’ homes and the Internet was likely eventually to displace dial-up ISPs. Although those ISPs had never been subject to any rules requiring them to provide access to all Internet sites and services, concerns were raised by some that if the multiplicity of dial-up ISPs were ultimately replaced by a much smaller number of facilities-based broadband providers, those new providers could engage in conduct that could undo or interfere with the open nature of the Internet.

Congress and the Commission, however, repeatedly determined that the potential adverse effects of imposing a prophylactic regulatory regime on ISPs outweighed any potential benefits. When it adopted the Telecommunications Act of 1996, Congress was aware of the Internet’s looming presence and its enormous potential. But far from bringing ISPs and other Internet entities under the umbrella of the Commission’s regulatory authority, Congress established that “[i]t is the 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.*”<sup>4</sup>

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<sup>4</sup> 47 U.S.C. § 230 (emphasis added).

Three years later, FCC Chairman Kennard, while recognizing the changes that cable modem service were bringing to the competitive ISP marketplace, specifically declined the path of prophylactic regulatory intervention. Although some had urged the Commission to adopt or endorse regulation requiring cable operators to make their facilities available to multiple competing ISPs in order to recreate artificially the multiplicity of ISPs that existed in the dial-up world, Chairman Kennard believed that even the initiation of a proceeding to *consider* such rules was likely to do more harm than good, “chill[ing] investment in cable modem service, which in turn would reduce the competitive pressure on local phone companies and others who are currently investing in alternative means of providing consumers with access to broadband.”<sup>5</sup>

Instead, Chairman Kennard adopted a policy of “vigilant restraint,” keeping a watchful eye on marketplace developments while refraining from regulation. As he noted, that policy was already

produc[ing] impressive results across the country. The increasing deployment of cable modem service by cable operators has prompted local phone companies to speed up their rollout of DSL service. And charges for DSL service continue to drop as the competition intensifies. ISPs and others are also exploring the potential of satellite and wireless technologies as promising sources of broadband access. These developments will maximize consumer choice and welfare more effectively and more quickly than government intervention could hope to do.<sup>6</sup>

In 2002, the Commission’s policy of vigilant restraint was solidified when the Commission issued a declaratory ruling that cable modem service was not a “telecommunications service” (which would have subjected it to regulation under Title II of the Communications Act), but was an “interstate information service” – a classification that subjected cable modem service to no direct statutory regulation but placed it within the ambit of

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<sup>5</sup> Letter from William Kennard, Chairman, FCC, to Mr. Kenneth S. Fellman, Chairman, Local & State Government Advisory Committee (Aug. 10, 1999) *available at* <http://www.fcc.gov/Speeches/Kennard/Statements/stwek952.html>.

<sup>6</sup> *Id.*

the Commission's general purview under Title I of the Act.<sup>7</sup> Chairman Powell asserted that the Commission retained sufficient jurisdiction under Title I to regulate cable modem service should the need arise, thereby in effect continuing the policy and approach of vigilant restraint.<sup>8</sup> Subsequently, the Commission similarly classified the provision of high-speed Internet access service by telephone companies and by wireless providers as interstate information services.<sup>9</sup>

It is a common mantra of those seeking "net neutrality" rules that these decisions classifying high-speed Internet access services as information services effectively eliminated a longstanding regulatory regime that had nurtured Internet openness. But, as the foregoing discussion shows, that quite simply is false. Dial-up ISPs were never subject to regulation, and neither were cable operators. Telephone companies were, of course, required to transmit consumers calls to dial-up ISPs, but the ISPs themselves – including those that began life as walled gardens – had no obligation at all to provide Internet access to all content and applications, much less to do so on a regulated or nondiscriminatory basis.

Because of their status as common carriers with respect to their provision of telephone service, local exchange carriers, when they began offering DSL service, *were* generally subject to certain common carrier requirements that did not generally apply to cable operators or to dial-up ISPs. So, the Commission's decision to classify DSL and other high-speed Internet service offered by telephone companies as information services did alter the regulatory status of those

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<sup>7</sup> *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, et al.*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 (2002) ("*Cable Modem Declaratory Ruling*"); *aff'd Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

<sup>8</sup> *Cable Modem Declaratory Ruling* at 4867 (Separate Statement of Chairman Michael Powell).

<sup>9</sup> *See In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report & Order and NPRM, 20 FCC Rcd. 14853 (2005) ("*Wireline Broadband Order*"); *In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007).

services. But to view that change as one that fundamentally *reversed* the policies that had produced the growth and openness of the Internet turns the history of the Internet inside out.

During most of the development of the Internet, Title II common carrier-regulated telephone companies played a relatively minimal role in providing Internet access service to consumers, and virtually no role in offering high-speed Internet access to consumers. While offering high-speed T1 service to business users, the telephone companies largely refrained from developing and offering DSL service to consumers – until cable operators began capturing broadband customers with their high-speed cable modem service. Even then, DSL’s deployment lagged that of cable modem service and did not notably accelerate, along with the deployment of more robust, fiber-based Internet access facilities and services, until the Commission’s decision classifying these telco-provided services as outside the scope of Title II regulation – after which telco-provided high-speed Internet service flourished. Today, both telephone companies and cable operators offer high-speed Internet access service to most areas of the country.<sup>10</sup>

In other words, Title II regulation was hardly the *sine qua non* of the Internet’s growth and development. To the contrary, such regulation appears only to have deterred and impeded the deployment of broadband and Internet access by the only group of ISPs that were historically subject to such regulation.

On the same day that the Commission adopted its decision classifying telco high-speed Internet service as an information service, it also adopted a “Policy Statement” that was intended to provide “guidance and insight into its approach to the Internet and broadband.”<sup>11</sup> The *Policy Statement* enumerated four entitlements of consumers, each of which was intended to “encourage

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<sup>10</sup> See, e.g., Industry Analysis & Technology Division, Wireline Competition Bureau, FCC, *High-Speed Services for Internet Access: Status as of June 30, 2008*, at tables 2 & 14.

<sup>11</sup> See *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, Policy Statement, 20 FCC Rcd 14986 ¶ 3 (2005) (“*Policy Statement*”).

broadband deployment and preserve and promote the open and interconnected nature of the public Internet.”<sup>12</sup> Specifically, the Commission determined that consumers should, as a matter of policy, be entitled to:

- access the lawful Internet content of their choice.
- run applications and use services of their choice, subject to the needs of law enforcement.
- connect their choice of legal devices that do not harm the network.
- competition among network providers, application and service providers, and content providers.<sup>13</sup>

The Commission made clear that, in each case, these entitlements were subject to “reasonable network management.”<sup>14</sup>

When these principles were adopted, they appeared simply to reaffirm and amplify the existing policy of vigilant restraint. The Commission made clear that it was not adopting rules but merely stating its views of the policies that would guide its future policy activities. And, as Chairman Martin pointed out, there was every indication that the marketplace was working to provide consumers with the entitlements set forth in the *Policy Statement*: “Competition has ensured consumers have had these rights to date, and I remain confident that it will continue to do so.”<sup>15</sup>

Indeed, by the time that the Commission adopted the *Policy Statement*, it had become clear that the dire warnings of those who had urged the Commission to impose Title II regulation on cable modem service and who had told Congress in 2002 that unless it adopted net neutrality legislation, “the Internet as we know it will come to an end” were completely wrong. There had been no return to walled gardens, nor had cable operators prevented their customers from

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<sup>12</sup> *Policy Statement* ¶ 4.

<sup>13</sup> *See id.*

<sup>14</sup> *Id.* ¶ 5 & n.15.

<sup>15</sup> *Wireline Broadband Order* at 14976 (Statement of Chairman Kevin J. Martin).

accessing any lawful Internet content and applications. Moreover, there had been no stifling of investment and innovation by new and existing content and application providers, precisely because there had also been no stifling of investment and innovation – *or of network management* – by cable operators.

**C. Network Management Has Always Been Necessary To Make the Internet Work, It Has Always Required Flexibility To Respond To New Sources of Congestion, and It Has Never Been Subject To Regulation.**

From the very outset, Internet engineers have recognized the need for techniques to ensure a smooth and workable transmission of material over a shared network, and, in particular, to control congestion of data flow:

. . . Internet congestion is a direct result of the resource “sharing” that is central to notions of why the Internet is so valuable and has been so successful. The Internet provides a shared resource platform that supports interoperability and interconnection for diverse types of applications across heterogeneous networking infrastructures (high and low speed, wired and wireless) on a global basis. When resources are shared, there is the potential that demand for those resources may exceed available supply, requiring some sort of allocation mechanism to address the imbalance and determine which resources get served first.<sup>16</sup>

Although ISPs do not guarantee any particular quality of transmission service, they still have a strong interest in ensuring that information uploaded or downloaded by their customers reaches its destination in a timely, efficient manner. Each ISP network has its unique characteristics, and not every network management technique is appropriate for every network. For example, for many years, the principal means of managing *congestion* was the use of Transmission Control Protocol (“TCP”). TCP is

[a]n algorithmic mechanism implemented by the operating system of senders and receivers that continually probes the network by gradually increasing the sending rate until a packet loss is detected. When a packet loss is detected an inference is

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<sup>16</sup> S. Bauer, D. Clark & W. Lehr, *The Evolution of Internet Congestion 2* (2009), available at [http://mitas.csail.mit.edu/papers/Bauer\\_Clark\\_Lehr\\_2009.pdf](http://mitas.csail.mit.edu/papers/Bauer_Clark_Lehr_2009.pdf).

made that the loss occurred because of congestion. The sending rate is cut in half and the cycle repeats. This is referred to as a “flow-based” control mechanism because it is implemented on the sending and receiving host or end-nodes of each TCP session or flow. *By limiting the traffic offered by the sender when it detects congestion*, TCP reduces the load offered to “the network” associated with that flow, thereby alleviating the excess demand condition that results in congestion somewhere downstream in the network.<sup>17</sup>

While TCP (which required little intervention by ISPs) was largely adequate to manage congestion in the era of dial-up Internet access, “[t]he transition to broadband represented a seismic shift in the nature of the congestion problem”:

First, broadband makes it attractive from the perspective of the user’s experience to use much more rich media-intensive, bandwidth hungry applications like streaming video, peer-to-peer (p2p) file sharing for large files (mostly music and movies), and interactive gaming. Elimination of the dialup bottleneck was matched by complementary investments upstream (in more powerful multimedia-capable PCs in the home and home networks capable of supporting multiple users on a single broadband connection) and downstream (in rich media content and other on-line services that are worth going to).

Second, the larger access capacities makes it feasible most of the time to run even real-time applications like voice-over-IP (VoIP) over best-effort broadband services with a fair degree of reliability – even though this was not anticipated by the original designers. Many users today expect that voice over IP services (such as Vonage) running “over the top” on the best effort network will be a substitute for their dedicated phone lines.<sup>18</sup>

These changes have required ISPs to seek new ways to actively manage short-term congestion problems within their networks to ensure a quality experience for their customers – problems that TCP is incapable of controlling:

These traffic management techniques include 1) volume caps that limit the total volume of traffic over different durations of times and in the upstream and or downstream directions, 2) prioritizing subscriber or application traffic based upon factors such as the amount of traffic sent during congested periods or assumptions regarding what subscribers would prefer to be prioritized (such as voice traffic

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<sup>17</sup> *Id.* at 5 (emphasis added).

<sup>18</sup> *Id.* at 15.

over bulk transfers) and 3) rate limiting traffic classes, such as peer-to-peer traffic, that are believed to significantly contribute to congestion.<sup>19</sup>

What is most important for purposes of this proceeding is that there has been, and still is, no consensus among Internet engineers or among network operators – much less among policy advocates and policymakers – regarding which of these techniques is, in any particular circumstances, the “right” or “best” or “fairest” or “most effective” way to manage congestion and ensure an Internet access service that is optimal for consumers.<sup>20</sup> The ongoing debate and challenge is not merely academic; network operators have had continually to find new ways to deal with new causes of network congestion. And, at least until the Commission decided not only that the *Policy Statement* had created enforceable obligations but also that a particular network management approach adopted by Comcast to deal with P2P congestion was “unreasonable,” operators were able to explore and experiment with possible solutions without the threat of regulatory second guessing.

**D. Replacing “Vigilant Restraint” With Regulation Is Unnecessary and Would Inhibit Continued Investment and Innovation by ISPs *and* Content and Application Providers.**

In this proceeding, the Commission proposes to abandon the policy of vigilant restraint that has until now supported the robust, flourishing, ever-expanding and “open” Internet that it seeks to preserve. Not only does the Commission propose transforming the *Policy Statement* into enforceable ISP obligations, but it also proposes to add two new enforceable obligations of “nondiscrimination” and “transparency.”

Imposing this regulatory regime would have precisely the adverse effects that the Commission previously foresaw when it deliberately refrained from regulating and adopted its

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<sup>19</sup> *Id.* at 3.

<sup>20</sup> *See* Bauer, Clark & Lehr, *supra* note 16, at 20.

policy of vigilant restraint. It would impose direct costs on ISPs and on their customers; it would create uncertainty resulting in the reluctance of ISPs to implement wholly reasonable network management practices and to enter into procompetitive business arrangements that would enhance consumer welfare; and it would dampen investment in upgrades to Internet facilities that would ensure and promote continued innovation, development and availability to consumers of Internet content and applications.

Especially where, as here, there is substantial ambiguity and room for interpretation and disagreement over what the proposed rules would and would not permit, the costs of regulation would be substantial. The proposed rules, for example, would prohibit ISPs from “preventing” consumers from sending or receiving lawful content or from using applications.<sup>21</sup> On its face, this language would not seem to bar anything but the outright blocking of particular content or applications. But this “plain meaning” interpretation may be deceptive, since some interested parties, including the parties that brought a complaint against Comcast’s network management practice, have argued that delaying access even for a very short time or “degrading” access were encompassed by the first two principles of the *Policy Statement* – and the Commission appeared to agree, leaving the meaning of “preventing” uncertain.<sup>22</sup> Moreover, while the Commission has rightly recognized that any rules must include exceptions for “reasonable network management” or other “reasonable” conduct, this will necessarily result in uncertainty as to what is or is not “reasonable.”

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<sup>21</sup> Notice ¶ 92.

<sup>22</sup> See generally *In re 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 & Order, 23 FCC Rcd 13028 (2008) (“*Comcast Network Management Order*”).

Complaints and drawn out litigation over these ambiguous terms not only impose monetary costs but disrupt and substantially delay the ability of ISPs to adopt and implement practices that may ultimately be deemed completely reasonable and legitimate. Indeed, the prospect of such complaints and litigation creates uncertainty that may deter the adoption and implementation of such practices in the first place. Wholly apart from the costs of defending against even a frivolous complaint, regulatory *outcomes* are particularly uncertain where, as here, even the Commission may lack the expertise to determine whether a particular practice is “reasonable.” Whether a network management practice is a reasonable and effective means of dealing with congestion or some other legitimate network practice is often something that cannot be fully assessed until it is deployed. Similarly, whether a particular practice or business arrangement with content or application providers is likely to have anticompetitive effects and whether any such effects would outweigh any accompanying beneficial pro-competitive effects that enhance consumer welfare would be a particularly knotty issue even for antitrust officials and courts.

These costs and uncertainties – along with any outright prohibition on revenue-producing pro-competitive business arrangements with content and application providers – would have a chilling effect on investment decisions and the availability of investment capital. If, as history has shown, every expansion of network capacity is met with increased demand for capacity, and if there continue to be applications such as P2P that are engineered to seek out and use any and all available capacity, a facilities-based ISP is less likely to invest in network upgrades where there is a cloud over its ability to manage congestion. Although most of today’s Internet applications have been developed to function on the “best efforts” public Internet, going forward there may be many applications that depend on customized platform enhancements,

prioritization, or quality of service that cannot be provided throughout the network. ISPs are unlikely to invest in – or attract the capital to invest in – upgrades that make such new applications feasible where they cannot offer or charge for such customized services. Nor, for that matter, will such applications be as likely to be launched.

As Economist Michael Katz explained in an appendix to Verizon’s comments in the Commission’s ongoing proceeding aimed at adopting a National Broadband Plan,

It is important to recognize that public policies regarding business practices in the areas of network management, vertical contractual relations, and sophisticated pricing can also have significant effects on network investment incentives. This is so because . . . network management, vertical contracting, and sophisticated pricing can all promote investment in both network infrastructure and complementary equipment and applications. It follows that public policies that restrict these business practices can have significant adverse effects on network investment incentives.<sup>23</sup>

Also, as Katz pointed out, it is both unnecessary and counterproductive to put “one size fits all” requirements in place as prophylactic measures to prevent hypothetical problems before they have occurred. If isolated problems arise, case-by-case enforcement of the antitrust laws is a sufficient and narrowly tailored way to assess whether the effect of a particular practice is, on balance, to promote or impair competition. On the other hand, “[p]ublic policies that force a single approach to openness on the industry are likely to harm innovation and limit experimentation. If policy makers mandate a single approach and get it wrong, there is no safety valve to fix the problem, as there would be under unfettered competition.”<sup>24</sup>

Because this cloud on investment is inherently speculative – since historically there have been no such regulatory constraints on ISPs – it may be hard for proponents of regulation to

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<sup>23</sup> Declaration of Michael L. Katz, *Investment, Innovation, and Competition in the Provision of Broadband Infrastructure*, June 8, 2009 at 11, ¶ 22 (attached to Comments of Verizon and Verizon Wireless, GN Docket No. 09-51 (filed June 8, 2009)).

<sup>24</sup> *Id.* at 3.

imagine that the continuing vibrant investment in the Internet would be stopped in its tracks by imposition of the proposed regulatory regime. Those who remember the last time that the Commission imposed a comprehensive and restrictive regulatory regime on a flourishing cable business – regulation of rates for video programming – should know better. Then, too, proponents of regulation were skeptical that regulation would affect continued investment in cable facilities upgrades and in the development of cable programming networks – until such regulation went into effect. As the Commission and Congress ultimately recognized in first loosening and then eliminating regulation of most cable rates, the regulations were directly responsible for bringing investment and growth to a near standstill.

Financing for cable networks dried up, investment in expanded facilities was virtually non-existent, and the rate of growth in the number of households choosing to purchase cable service – which at that time was still only 60% of homes – reversed course, and the penetration rate grew at a significantly slower pace.<sup>25</sup> When the Commission loosened its rules to enable operators to recover increased programming costs, investment in programming by program networks and by cable operators resumed.<sup>26</sup> And when most rate regulation was eliminated by the Telecommunications Act of 1996, cable operators embarked on their largest investment ever – more than \$150 billion since then to upgrade and rebuild their systems in a manner that made possible the high-speed Internet service that is the focus of this proceeding.

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<sup>25</sup> See Paul Kagan Associates, *Cable TV Programming*, Aug. 14, 1992, at 2; see also Brian L. Roberts, *The Greatest Story Never Told: How the 1996 Telecommunications Act Helped to Transform Cable's Future*, 58 Fed. Comm. L.J. 571, at 573 (explaining that the 1992 Cable Act “undercut investor confidence and choked off investment. In the words of two economists who examined the aftermath, ‘One revealing fall-out from rate regulation under the 1992 Cable Act was that the U.S. cable industry largely missed an entire capital upgrade cycle.’ The launch of new cable networks and the introduction of new services essentially ground to a halt. The excitement of cable growth in the 1980s gave way to a serious case of Wall Street malaise for cable that persisted for years.”) (internal citations omitted).

<sup>26</sup> See Kagan, *supra* note 25; SNL Kagan, *Economics of Basic Cable Networks*, 2009 Ed., at 16.

Regulation *does* affect investment, and its effects can be severe. This is precisely what the Commission recognized when it adopted its policy of vigilant restraint. Indeed, the case for continued regulatory restraint is greater today than when it was announced a decade ago. Not only has vigilant restraint been shown to work, but there is also more at risk if regulation were to erode the underpinnings of the Internet's transformational development.

What is the countervailing case for abandoning vigilant restraint in the midst of these unprecedented and continuing growth and innovation? As the Commission's *Notice* makes clear, the proposed rules are aimed not at stopping conduct that has been occurring, and they are not aimed at any imminent threat. According to the Commission, "Despite our efforts to date, 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, and doing so without disclosing those practices to users."<sup>27</sup> In a footnote, the Commission cites exactly two familiar and isolated instances of such conduct.<sup>28</sup>

One is the oft-cited *Madison River* case, in which a local telephone company ISP directly blocked its customers' ability to access a competing VoIP service on the Internet. That case arose and was quickly settled by a consent order *more than four years ago*.<sup>29</sup> Evidently, no similar cases involving the direct blocking of an ISP's competitive service have come to the Commission's attention since then.

The second case is the *Comcast* network management case, in which the Commission found that Comcast's effort to control network congestion by using a technique that singled out

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<sup>27</sup> *Notice* ¶ 50.

<sup>28</sup> *Notice* ¶ 50 & n.113.

<sup>29</sup> *In re Madison River Communications, LLC and Affiliated Companies*, Order, 20 FCC Rcd 4295 (Enf. Bur. 2005).

and temporarily prevented use of a particular (and particularly congestive) P2P application was not sufficiently “narrowly or carefully tailored” to serve a “critically important interest”<sup>30</sup> – a standard that the Commission now itself rightly views as “unnecessarily restrictive.”<sup>31</sup> In applying that standard, the Commission stated that the technique used by Comcast to alleviate the congestion caused by P2P traffic was underinclusive because it did not restrict traffic of *all* P2P applications, and overinclusive because it restricted the use of certain P2P applications by *all* customers regardless of the extent to which those customers used such applications. But it does not automatically follow that there were more narrowly targeted techniques available that would have been equally effective – and, wholly apart from whether the Commission was in a position to make determine the relative efficacy of various techniques, it made no such determination.

Those are apparently the only indications of looming problems that warrant abandoning vigilant restraint and adopting a comprehensive regime of prophylactic regulation. Another reason cited by the Commission for intervening at this time is to “provide greater clarity and certainty to Internet users; content and application, and service providers; and broadband Internet access service providers regarding the Commission’s approach to safeguarding the open Internet.”<sup>32</sup> But, of course, that is a circular reason. There is no need to clarify the Commission’s regulatory approach until there is a need to regulate. There was, for example, never a need to clarify the policy of vigilant restraint.

Adopting regulations to prevent hypothetical conduct in the future is a particularly bad idea where technology and innovation are occurring at such a rapid rate. Guessing how the

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<sup>30</sup> See *Comcast Network Management Order* ¶ 47.

<sup>31</sup> *Notice* ¶ 137.

<sup>32</sup> *Id.* ¶ 50.

future will unfold is, in such circumstances, unlikely to come anywhere near the mark – as the Commission’s invention of “video dial tone” service shows.<sup>33</sup> Rules adopted now are unlikely to be well-suited (or narrowly or carefully tailored) to address any real problems, were they to occur in the future. But rules adopted now *are* likely to have an immediate and adverse effect on a well-functioning marketplace and to stifle rather than promote Internet investment, innovation and growth. The best path, by far, would be to refrain from such regulation.

**II. IF THERE ARE TO BE RULES, THEY NEED TO BE NARROWLY TAILORED TO TARGET CONDUCT THAT MATERIALLY AND SIGNIFICANTLY THREATENS THE OPENNESS OF THE INTERNET, WHILE PRESERVING THE ABILITY OF CABLE OPERATORS TO INNOVATE, INVEST IN, AND PROMOTE A ROBUST INTERNET.**

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For all the reasons described above, departing from the successful policy of “vigilant restraint” and transforming the principles of the *Policy Statement* into enforceable obligations of ISPs would almost certainly do more harm than good. The Commission has already taken an unfortunate step in that direction by deciding, in ruling on a complaint against a particular network management approach used by Comcast, that the principles of the *Policy Statement* are enforceable via case-by-case adjudication. As noted above, the Commission’s statutory authority to enforce such obligations is questionable at best and is under review by the United States Court of Appeals for the District of Columbia Circuit in the currently pending appeal of the *Comcast Network Management Order*.<sup>34</sup> Even if the Commission’s statutory jurisdiction were to be upheld, the best approach would still be to return to a policy of vigilant restraint.

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<sup>33</sup> See *In re Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems; Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, Report & Order and Notice of Proposed Rulemaking, 11 FCC Rcd 14639 ¶¶ 2-3 (1996) (reporting that Congress repealed the video dial tone rules and stating that “[u]ltimately, the 1996 Act recognizes that vigorously competitive markets, not regulation, are the best way to serve consumers’ interests”).

<sup>34</sup> See *supra* note 3.

But if the Commission instead chooses to codify and enforce openness obligations, the rules that it adopts should clarify – and, in some cases, modify or reject – the approach set forth in the *Comcast* decision and in the *Notice*. To minimize the damage to the continued growth and potential of the Internet, the Commission should limit any enforceable obligations to the four principles set forth in the *Policy Statement*, along with the proviso that permits reasonable network management – a proviso that, as proposed in the *Notice*, should be construed much less restrictively than in the *Comcast* decision. The addition of enforceable nondiscrimination and transparency principles would, unless very carefully tailored, seriously impair consumer welfare in the development of Internet services.

**A. The Four Principles Should Be Construed Only To Prohibit Practices That Deny or Substantially and Materially Prevent Consumers From Accessing and Using Lawful Internet Content and Applications.**

Chairman Genachowski has described the essence of the existing *Policy Statement*'s principles as the following: “Network operators cannot prevent users from accessing the lawful Internet content, applications, and services of their choice, nor can they prohibit users from attaching non-harmful devices to the network.”<sup>35</sup> The proposed rules use similar language, and, as in the *Policy Statement*, the prohibitions in the rules are subject to reasonable network management.

Given the ubiquitous traffic management and congestion control that has always been part of the Internet, and given the broad purposes underlying the *Policy Statement* and the proposed rules – “to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers,”<sup>36</sup> and to preclude practices that “have the potential to change the

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<sup>35</sup> Julius Genachowski, Chairman, FCC, *Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity*, Remarks before The Brookings Institution, Washington, DC (Sept. 21, 2009) (“*Genachowski Brookings Institution Speech*”), available at <http://www.openinternet.gov/read-speech.html>.

<sup>36</sup> *Policy Statement* ¶ 4.

Internet from an open platform that enables widespread innovation and entrepreneurship to an increasingly closed system with higher barriers to participation and reduced user choice and competition”<sup>37</sup> – one would expect this language, and the terms “prevent” and “prohibit,” to mean that network operators may not completely or effectively block the availability, accessibility or use of particular content, applications or devices. So, for example, when a local exchange carrier or a wireless telephone provider refuses to allow its Internet customers to access and use an Internet telephone service, or when a wireless provider refuses to allow its customers to download and use particular Internet-based applications on their “smart phones,” that conduct would obviously preclude the use of the content or applications at issue.

But the Commission’s *Comcast* decision, which purported to enforce the principles of the *Policy Statement*, suggested that ISPs may not even temporarily restrict or delay access to an Internet site. The effect of that interpretation is to treat virtually every network management technique that controls congestion by temporarily delaying a customer’s access to particular content as the blocking of content, which must then be justified as “reasonable” network management. Putting aside when and whether any such conduct should separately be subject to a new “nondiscrimination” principle, any codification of the existing principles should make clear that temporary, occasional or insignificant delays do not constitute the sort of blocking of content or applications that is contemplated by the existing principles. Indeed, in an interconnected environment where every network and every network element that handles Internet traffic is operating on a “best efforts” basis, it makes no sense to assume that a customer’s broadband provider is the network responsible for any minor delays in sending or receiving traffic.

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<sup>37</sup> Notice ¶ 8.

Conduct that does not have the purpose and effect of making content or applications permanently inaccessible or unusable – that does not substantially and materially prevent consumers from accessing and using lawful Internet content and applications – should not be subject to complaints and should not have to be justified in each case as “reasonable.” It is hard to see how the goal of preserving Internet openness requires subjecting all such network management techniques to regulatory review and approval – even if the Commission had the expertise to do so, and even if the costs and uncertainty accompanying such a process did not themselves drastically curtail Internet innovation and growth.

**B. Any Rules Should Afford ISPs Broad Flexibility To Implement Network Management Techniques.**

Mirroring the *Policy Statement*, the proposed rules would specify that even blocking or any other conduct that would otherwise be at odds with the specified prohibitions would not be deemed unlawful if they constituted “reasonable network management.” As discussed above, network management is an essential tool in maintaining a workable and attractive high-speed Internet service for consumers in the face of ever-changing applications, technologies and ways of using the Internet. Moreover, because of the wide and technologically diverse variety of applications made possible by high-speed broadband Internet access, the tools, such as TCP, that have worked in the past to manage congestion throughout the network now need to be continually supplemented by new and updated management techniques implemented by facilities-based ISPs.

As explained in Section I.C, *supra*, even among engineers and technologists, there is debate and disagreement over the relative effectiveness and efficiency of various network management techniques. Any rules adopted by the Commission need to ensure that ISPs have broad flexibility to experiment with and find the network management techniques that keep pace

with these changes and ensure a good Internet experience for their customers. Proponents of net neutrality regulation seem to think they are qualified to assess the reasonableness of particular techniques and to determine easily whether another technique might be just as effective and efficient as one chosen by an ISP. They are not, and, as the *Notice* appears to recognize, even an expert agency needs to afford broad leeway to ISPs' efforts to manage their networks.

The approach announced by the Commission in the *Comcast* decision embodied no such recognition. Instead of affording ISPs flexibility in finding and implementing effective network management techniques, the Commission adopted a "strict scrutiny" standard under which even good faith attempts to manage traffic flow and prevent excessive congestion will not be permitted if they treat certain applications differently from others, unless "there is a tight fit between its chosen practices and a significant goal."<sup>38</sup> Any such practice must "further a critically important interest and be narrowly or carefully tailored to serve that interest."<sup>39</sup>

In the *Notice*, the Commission has rightly recognized that this strict scrutiny standard is "unnecessarily restrictive" and should not be used.<sup>40</sup> First, it makes no sense to presume, in effect, that a network management technique that treats some applications differently from others is highly suspect and almost always unreasonable when it has always been the case that certain applications require unique management techniques to enable them to co-exist with others with whom they share the Internet highway. As discussed above, high-speed broadband Internet service has fostered the growth of an even broader diversity in the types of Internet applications and online services and in the way that these different applications and services use – and burden – capacity. Moreover, the addition of wireless ISPs and other new competitors to the already

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<sup>38</sup> *Comcast Network Management Order* ¶ 47.

<sup>39</sup> *Id.*

<sup>40</sup> *Notice* ¶ 137.

vigorous competition between cable operators and telephone companies for high-speed Internet customers further constrains any conceivable ability of ISPs to restrict their subscribers' access to lawful Internet content for anticompetitive purposes.

Second, it makes no sense, in the highly technical and increasingly complex world of Internet management, to assign the Commission the task of determining whether a particular technique is narrowly tailored to prevent congestion or to achieve some other important network management objective, or whether other techniques that are not application-specific can do the job as well. If, as Bauer, Clark & Lehr describe, there are ongoing, contentious and unresolved debates among technological experts in the Internet community regarding the most effective, efficient and fair ways to manage Internet congestion, and it “would be premature to conclude that we know what the best mechanisms for congestion control are,”<sup>41</sup> how is the Commission to assess – except in the most egregious cases of anticompetitive purpose and effect – whether the mechanism chosen by an ISP is more or less effective than another mechanism?

ISPs need and should be given discretion and deference in finding, experimenting with and employing techniques to keep up with evolving problems in managing the flow of traffic on their networks. In particular, a network management technique should be presumed reasonable if it is intended to alleviate a legitimate network management problem. To rebut the presumption of reasonableness, a complaining party should be required to present clear and convincing evidence that the challenged technique was *not* a bona fide attempt to alleviate such a legitimate problem and that its primary purpose and effect was to harm a competitor and/or discourage the dissemination of certain content or applications for reasons other than network management.

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<sup>41</sup> Bauer, Clark & Lehr, *supra* note 16, at 3.

The Commission has identified three categories of network management problems that should be deemed legitimate for these purposes. First, it notes that taking steps to reduce or mitigate the adverse effects of congestion would, of course, be a legitimate objective of network management. The *Notice* specifically identifies various restrictions applied to an ISP's *subscribers* that may be reasonable – such as “temporarily limit[ing] the bandwidth available to individual users in that neighborhood who are using a substantially disproportionate amount of bandwidth,” or “limiting usage or charging subscribers based on their usage rather than a flat monthly fee.”<sup>42</sup> But it may also be reasonable to take steps that temporarily limit the bandwidth available to particular *applications* that are using a substantially disproportionate amount of bandwidth. Each approach may have benefits and disadvantages to an ISP seeking to maximize the attractiveness and usability of its service to consumers. Especially because of the inherent difficulty of balancing the benefits and disadvantages of different approaches and assessing the effects of each on consumer satisfaction, each should be entitled to at least a rebuttable presumption of reasonableness under the standard of scrutiny described above.

Second, the Commission proposes that “broadband Internet access service providers may address *harmful* traffic or traffic *unwanted by users* as a reasonable network management practice.”<sup>43</sup> The Commission is right to recognize that cable operators and other ISPs, when they offer Internet access to subscribers, are not mere passive conduits and that subscribers want and expect their providers to be able to prevent certain types of content from reaching their homes. The Commission is also right that, “[f]or example, blocking spam appears to be a reasonable network management practice, as does blocking malware or malicious traffic originating from malware, as well as any traffic that a particular user has requested be blocked (*e.g.*, blocking

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<sup>42</sup> *Notice* ¶ 137.

<sup>43</sup> *Id.* ¶ 138 (emphasis added).

pornography for a particular user who has asked the broadband Internet access service provider to do so).”<sup>44</sup> These practices and others aimed at content or applications that are harmful or unwanted by users should be deemed reasonable unless a complaining party can prove that this was not their purpose and that they had an unreasonable principal purpose and effect.

Third, the Commission proposes “that broadband Internet access service providers would not violate the principles in taking reasonable steps to address unlawful conduct on the Internet. Specifically, we propose that broadband Internet access service providers may reasonably prevent the transfer of content that is unlawful.”<sup>45</sup> Again, in offering Internet service to their subscribers, cable operators and other ISPs have never been required or expected to participate in the transmission of material provided by content and application providers with whom they have no contractual or other relationship, where they have reason to believe that such material may be unlawful. In particular, cable operators – whose business has always depended on and respected the rights of copyright owners and copyrighted works – should not be restricted in taking steps to prevent the transmission on its facilities of unlawfully pirated material.

It is critically important that, as the Commission proposes, “taking reasonable steps” to address copyright, pornography and other unlawful conduct on the Internet be sufficient to be deemed reasonable network management for purposes of any proposed rules. Whether particular content is, in fact, pirated material is not always clear-cut. Nor, for that matter, are the lines between lawful and unlawful pornography or obscenity. “Reasonable steps” to prevent the unlawful transmission of unlawful content could conceivably affect content that turns out, after court review, to be deemed lawful. If the steps taken by an ISP are a bona fide, good faith

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* ¶ 139.

attempt to target unlawful material, the ISP should not be liable merely because some of the affected content turns out to be lawful.

Finally, the Commission takes exactly the right step in adding to these three specific categories of reasonable network management a residual “catch-all” proposal “that broadband Internet access service providers may take other reasonable steps to maintain the proper functioning of their networks.”<sup>46</sup> The Commission’s reasons for including this proposal speak for themselves:

First, we do not presume to know now everything that providers may need to do to provide robust, safe, and secure Internet access to their subscribers, much less everything they may need to do as technologies and usage patterns change in the future. Second, we believe that additional flexibility to engage in reasonable network management provides network operators with an important tool to experiment and innovate as user needs change.<sup>47</sup>

Those reasons help explain why “vigilant restraint” has been and continues to be the wisest approach to regulation of the Internet. At the very least, they provide a sound basis for replacing the strict scrutiny approach of the *Comcast* decision with an approach that presumes the reasonableness of an operator’s network management steps with a heavy burden of rebuttal. The Commission’s recognition that neither it – nor the proponents of net neutrality regulation – can anticipate with any confidence how the Internet will develop and what effects prophylactic regulation may have on such development should be front and center throughout this proceeding.

### **C. Adding a Nondiscrimination Prohibition to the Principles of the Policy Statement Is Fraught With Problems.**

When Chairman Genachowski, in his speech at the Brookings Institution, proposed adding a nondiscrimination principle to the four principles of the *Policy Statement* that would be codified as binding rules, he described that principle as meaning that ISPs “cannot block or

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<sup>46</sup> See *id.* ¶ 140.

<sup>47</sup> *Id.*

degrade lawful traffic over their networks, or pick winners by favoring some content or applications over others in the connection to subscribers' homes. Nor can they disfavor an Internet service just because it competes with a similar service offered by that broadband provider.”<sup>48</sup> The impact of such a rule, if narrowly and carefully drafted and accompanied by an exception for “reasonable network management,” could at least be confined to reasonably limited circumstances.

As discussed above, while any rules transforming the four principles into enforceable prohibitions raise the prospect of frivolous complaints and uncertain enforcement that would have adverse effects on Internet growth and development, the cable industry does not block lawful content that its customers want to access. And if the Chairman meant also to bar conduct that is essentially tantamount to blocking insofar as it significantly deters the ability of subscribers to access and use particular content, the industry's practices are generally consistent with that, too.

The Chairman's view that ISPs should not “pick winners by favoring some content or applications over others” seems to confirm that merely treating some content or applications differently than others should not in itself be viewed as prohibited discrimination. A principle or prohibition against “picking winners” would logically apply only to conduct that significantly affected – and, indeed, was intended to affect – the availability, use and competitive status of a content or application provider – *i.e.*, whether it will or will not be a “winner.”

Indeed, the Chairman had it right when he suggested that if there is to be a nondiscrimination rule, it should be aimed at preventing a broadband ISP from “disfavoring an Internet service *just because it competes with a similar service offered by that broadband*

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<sup>48</sup> Genachowski Brookings Institution Speech, *supra* note 35.

*provider.*”<sup>49</sup> Any nondiscrimination rule that extended beyond the no-blocking rule could be limited to discrimination that (a) targets a service that competes with a service offered by the ISP, (b) has no reasonable purpose other than to disfavor a competitor, and (c) harms consumers. A party complaining of discrimination could have the burden of showing that the discrimination is likely to have a significant anticompetitive effect and that the reason for the discrimination is “just because it competes with a similar service offered by” the ISP.

The *Notice*, however, proposes a much more extreme approach than what the Chairman suggested. First, the proposed rule is not even limited to “unreasonable” discrimination, much less to anticompetitive discrimination that harms consumers. It would be impossible to justify a rule that barred *any* differential treatment of content and application providers, no matter for what purpose. This is because, as AT&T has recently pointed out, in a multi-purpose, multi-application network, “different applications demand different levels of performance to function properly. For example, real-time VoIP and video applications are far more sensitive to network performance than non-real-time applications like email and Web browsing.”<sup>50</sup>

The language in the *Notice* regarding what the proposed nondiscrimination rule would prohibit is no more comforting or reasonable:

We understand the term ‘nondiscriminatory’ to mean that a broadband Internet access service provider may not charge a content, application, or service provider for enhanced or prioritized access to the subscribers of the broadband Internet access service provider.... We propose that this rule would not prevent a broadband Internet access service provider from charging subscribers different prices for different services.<sup>51</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> Letter from James Cicconi, Senior Executive Vice President, External & Legislative Affairs, AT&T Services, Inc., to Julius Genachowski, Chairman, FCC (Jan. 12, 2010), at 1, *available at* <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020363792>.

<sup>51</sup> *Notice* ¶ 106.

This is an odd definition of “nondiscrimination,” which does not match up with the approach described by the Chairman or with common usage of the term. It appears, on the one hand, to permit ISPs to treat Internet content and application providers differently and to enhance or prioritize content – even if it favors an affiliated company and is aimed at inflicting anticompetitive harm on a competitor – as long as the ISP does not *charge* for such enhancements or prioritization. On the other hand, it prohibits any imposition of a charge for enhancements or prioritization.

In other words, the proposed rule, as described in the *Notice*, is not a nondiscrimination rule at all, much less the targeted nondiscrimination rule previously described by the Chairman. Instead, it’s a rule foreclosing business arrangements between ISPs and content and application providers in which the ISP is compensated, regardless of whether it is discriminatory and regardless of whether it has any anticompetitive purpose or effect.

Such an across-the-board prohibition on charging for enhancements or prioritization would, in essence, provide that unless an ISP chooses to charge its subscribers for any enhancements or prioritization that it may provide for particular applications and content, quality of service can never exceed the level of service that can economically and technologically be offered to *all* application and content providers. This would hardly promote competition and innovation among Internet content and application providers. To the contrary, it would serve to protect *from* competition those content and application providers who already have acquired the ability to get their content delivered *to ISPs* in a prioritized manner or with high quality of service.

Content delivery networks (CDNs) like Akamai and Limelight enable those content providers that pay to use these services the ability to deliver traffic to their destination more

quickly than if they were carried solely by the “best efforts” public Internet. Similarly, Google’s OpenEdge platform essentially replicates the CDN model by placing edge servers within the networks of major ISPs, thus enabling Google’s products to be delivered faster and with better quality of service. As one commentator has noted, “A richly funded Web site, which delivers data faster than its competitors to the front porches of the Internet service providers, wants it delivered the rest of the way on an equal basis. This system, which Google calls broadband neutrality, actually preserves a more fundamental inequality.”<sup>52</sup>

This outcome would only harm consumers. In some cases, it would prevent the development and provision of rich and robust Internet services that require unique quality of service enhancements or prioritization (and could deter investment in facilities capable of offering such enhancements) simply because the services would be prohibited from paying to have its service delivered in the manner that it needs and desires. In other cases, it would block or hinder the development of competition to dominant, “richly funded” application providers.

Moreover, forcing ISPs to derive virtually all their revenues from end-users and denying them the right to receive payments from content and application providers would inevitably result in higher prices for end-users. This hardly seems beneficial to consumers.<sup>53</sup> But more importantly, now that broadband facilities have been deployed and high-speed Internet service is *available* to more than 92% of the nation’s households, most policymakers have recognized that a principal task is to identify and implement policies that improve the *adoption* of broadband services, including policies that promote the affordability of the broadband experience (both the

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<sup>52</sup> See, e.g., Richard Bennett, *Google’s Political Head-Fake*, S.F. Chron., July 9, 2008, available at [http://articles.sfgate.com/2008-07-09/opinion/17172352\\_1\\_google-ceo-eric-schmidt-google-yahoo-net-neutrality](http://articles.sfgate.com/2008-07-09/opinion/17172352_1_google-ceo-eric-schmidt-google-yahoo-net-neutrality).

<sup>53</sup> See, e.g., Brent Wilkes (National Executive Director for the League of United Latin American Citizens), *Net Neutrality Shouldn’t Be Used To Shift Costs to Consumers*, Mercury News, Jan. 5, 2010, available at [http://www.mercurynews.com/opinion/ci\\_14127209](http://www.mercurynews.com/opinion/ci_14127209).

upfront cost of acquiring a computer and the ongoing cost of high-speed Internet access service). Indeed, as part of its mandate to develop a “National Broadband Plan,” the Commission has been tasked by Congress to formulate “a detailed strategy for achieving affordability of such service and maximum utilization of broadband infrastructure and service by the public.”<sup>54</sup> A rule that prohibits ISPs from charging anyone but consumers for Internet-related services would be directly at odds with any such strategy.

**D. Any Rules Should Broadly Exempt “Managed Services” That Are Outside the Scope and Purpose of Rules Designed to Preserve the Openness of the Internet.**

The *Notice* appropriately recognizes a problem that would inevitably arise if it were to codify a nondiscrimination requirement in addition to the four principles of the *Policy Statement*. As the Commission points out, there may be services provided to consumers over the same broadband networks used for high-speed Internet access services that “differ from broadband Internet access services in ways that recommend a different policy approach, and it may be inappropriate to apply the rules proposed here to [such] managed or specialized services.”<sup>55</sup> In particular, such services may require certain enhancements, prioritization or individualized contractual relationships with a facilities-based broadband ISP which should neither be prohibited nor required to be provided to all Internet-based content and application providers.

There are several distinct categories of “managed or specialized services” that should be outside the scope of any rules adopted in this proceeding:

First, as the *Notice* points out, some services are offered by cable operators and other ISPs over their broadband facilities that, while perhaps using IP-protocol, are not Internet

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<sup>54</sup> American Recovery & Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2)(B), 123 Stat. 115, 516 (2009).

<sup>55</sup> *Notice* ¶ 149.

services – *i.e.*, they do not use the public Internet and are not generally accessible on the Internet. The most obvious examples are the provision of video programming and telephone service by cable operators and telephone companies who also offer high-speed Internet access service. Some cable and phone companies already offer video services using Internet protocol, and some offer voice-over-Internet-protocol (VoIP) telephone service. But neither of these services is provided by such companies over the Internet, and neither has anything to do with their provision of high-speed Internet access service. Indeed, if the Commission had not mentioned them as services that might be *exempted* from the rules proposed in this proceeding, it would have gone without saying that they were outside the scope of those rules.

A second category of services that the Commission should identify as outside the scope of any rules includes content and application services that *are* transported over the Internet but are offered by the ISP separately from its Internet access service. These may be unique and specialized offerings such as, but not limited to, those identified in the *Notice* – “telemedicine, smart grid, or eLearning applications” – that the ISP offers to consumers or to businesses, schools or governmental entities, perhaps in partnership with a third-party service provider. Or they could include content and applications services that ISPs offer, at a separate charge, to consumers via the Internet, while also offering an Internet access service that enables access to everything (lawfully) available on the public Internet. In neither case would the offering of these services on a “managed” basis – *i.e.*, allowing the ISP to provide quality of service enhancements that are not generally offered to all services provided to subscribers to the ISPs Internet access service, and allowing the ISP to determine which services it chooses to include in its own separate offerings to consumers – in any way block or impair Internet access customers’ access

to any services available on the Internet, which would generally remain subject to any non-blocking and nondiscrimination rules that the Commission may adopt.

Third, just as the Commission has proposed a residual “catch-all” category of possible reasonable justifications that might arise in particular cases, it should recognize that there are likely to be a range of services and applications that might be offered on the Internet – not by the ISP but by third parties – that require a level of active management or enhancement by the ISP not simply to provide a “fast lane” or a sharper picture but to operate at all. These could include some of the same services discussed in the previous paragraph – such as telemedicine and eLearning. Thus, instead of partnering with the ISP, a hospital or HMO might itself want to deliver medical services over the Internet, for which it would require quality of service guarantees and specialized access to consumers of its services.

But while it’s easy today to identify telemedicine, eLearning and smart grid services as special cases that would require customized service and prioritization from ISPs, it is virtually impossible to foresee all the potential future Internet services that would also be unable to function without such active management and dedicated connectivity. Some such services on the horizon could include direct business to consumer offerings, such as enhanced streaming and downloading of movies offered by third-party IP video providers. Businesses could want to use next-generation peer-to-peer technology to distribute content or files securely among offices or to clients. As the concept of “Cloud Computing” takes hold, companies and organizations might choose to employ this technology to store libraries and files for remote access by telecommuters or by traveling sales personnel and service providers. Other companies might need secure or managed connections to offer ultra secure connections to provide, for example, banking and

financial services or the transmission of private medical records between hospitals, doctors' offices and patients, or to offer secure remote storage of sensitive materials.

These are just examples of services that are foreseeable and conceivable today. But even those who are closest to the technology and business models being developed today can only guess at the services that are just around the corner. "Cloud computing," for example, seems to be on the agenda at every Internet technology conference these days, but how many panels were focusing on that concept just a couple of years ago? It would be ironic if, in a proceeding designed to preserve the continued development of new Internet services and applications – whether in garages at the edge of the Internet, in the engineering and technology departments of established content and application providers, or as the result of continuing innovation by facilities-based ISPs – the Commission adopted rules that prevented the offering of new services and applications by preventing ISPs from offering the customized enhancements or quality of service guarantees that such services and applications require.

Rules that generally prohibit "discrimination" among content and application providers and prohibit ISPs from charging for any customized services will inevitably have this effect, and trying to identify in advance the specific applications that should be exempt from such a rule is an impossible task that is certain to yield under-inclusive results. At the very least, exceptions for specific "managed services" should also include a general residual category of other services that may require enhancements, prioritization or other customization by ISPs. Even such an exception would impose uncertainty and potential costs on application providers and ISPs if they could be required, in each case, to demonstrate their need for such customized treatment.

The best approach, in order to avoid this chilling effect, would be to refrain from imposing a nondiscrimination rule at all. And if there is to be such a rule, it should only prohibit

“unreasonable” discrimination – where a complainant would bear a heavy burden of demonstrating that particular differential treatment has an unreasonable and anticompetitive purpose and effect. In any event, it is critically important to provide a means of exempting from the rules those “managed services” that cannot reasonably or practicably be provided to all application and content providers but are important to the provision of particular applications and content.

**E. Voluntary Disclosure of Necessary Information By ISPs and Providers of Internet Transport Services and Applications Is Sufficient and a Better Means Than Prescriptive Regulation To Ensure Sufficient Internet Transparency.**

In addition to adding a nondiscrimination principle to the four principles of the *Policy Statement* that it proposes to codify, the Commission also proposes a new principle of transparency. The Commission states that, in general, “sunlight is the best disinfectant and that transparency discourages inefficient and socially harmful market behavior.”<sup>56</sup> There is certainly much truth in that. In a well-functioning marketplace, high speed Internet consumers would, as the Commission suggests, have sufficient information to enable them “to understand and take advantage of the technical capabilities and limitations of the services they purchase.”<sup>57</sup> And Internet content and application providers would have access to sufficient information “needed to develop and market new Internet offerings.”<sup>58</sup>

But adopting a rule that requires all Internet service providers to “disclose such information concerning network management and other practices as is reasonably required for users and content, application and service providers to enjoy the protections specified in” the five

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<sup>56</sup> *Id.* ¶ 118.

<sup>57</sup> *Id.* ¶ 119.

<sup>58</sup> *Id.*

other proposed rules<sup>59</sup> would create tremendous uncertainty and impose an enormous burden both on ISPs and on the Commission. If the Commission were to adopt the broad and open-ended language it proposes, ISPs would be subject to the prospect of endless potential complaints and litigation over what information is “reasonably required” by subscribers and by content and application providers. On the other hand, any effort by the Commission to specify exactly what information is “reasonably required” will never be able to keep up with the ever-changing technology of the Internet and the constant development of new applications and will result in a one-size-fits-all set of disclosures that will at the same time be both unduly burdensome and quickly out-of-date.

Such a task would only make sense if there were evidence and reason to believe that the Internet marketplace is *not* functioning well and that a lack of sufficient information of network management techniques is preventing consumers from understanding and using their Internet access service and is thwarting the development new offerings by content and application providers. All evidence, however, is to the contrary. The Internet ecosystem is thriving: Content and application providers continue to offer new services that are almost unimaginable until they appear. And then, within what seems like a nanosecond, the same consumers who once had trouble figuring out how to program their VCRs are using services like Facebook, Twitter, Skype and Hulu.

In part, this is because most of the details regarding ISPs’ network management techniques do not constitute critical or even useful information to consumers or to content and application providers. But in part, it is also because any information that *is* necessary has generally been available. For example, NCTA recently submitted comments to the Commission

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<sup>59</sup> *Id.* ¶ 16.

describing the myriad ways that the cable industry is working to meet the needs of consumers with respect to billing and information about service offerings, including broadband services.<sup>60</sup>

As those comments showed, cable operators provide an extensive amount of information, in a variety of formats, to consumers to assist at all stages of the purchasing process, including choosing a provider, choosing a service plan, managing use of the service plan, and deciding whether and when to switch from an existing provider or plan.<sup>61</sup> Cable operators continually work to enhance their websites and other consumer-facing materials with easier ways to obtain information of particular importance to consumers, including information about the broadband services to which they subscribe. For example, many cable operators are expanding the broadband service tools offered to consumers, including by providing speed tests and data usage meters.<sup>62</sup>

Much of this information is, of course, also accessible to content and application providers. There is no reason to believe that any more extensive or more detailed disclosure of network management practices would be of any significant value to consumers or enable them to make better use of their Internet access service. Nor is there any indication that content and application providers are being stymied by the lack of any such disclosure requirements.

Requiring ISPs to provide detailed disclosures of their network management techniques would, however, impose substantial burdens on ISPs while only overwhelming consumers with

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<sup>60</sup> See, e.g., Comments of the National Cable & Telecommunications Association, CG Docket No. 09-158, CC Docket No 98-170, & WC Docket No. 04-36 (filed Oct. 13, 2009); Reply Comments of the National Cable & Telecommunications Association, CG Docket No. 09-158, CC Docket No 98-170, & WC Docket No. 04-36 (filed Oct. 28, 2009); Comments of the National Cable & Telecommunications Association, GN Docket Nos. 09-137, 09-51, & 09-47 (filed Dec. 14, 2009) (“*NCTA PN #24 Comments*”).

<sup>61</sup> To communicate with consumers, cable operators utilize direct mailings, advertising in mass media, billing inserts, toll-free numbers, and up-to-date, detailed information on their company websites. *NCTA PN #24 Comments* at 3.

<sup>62</sup> *Id.* at 3-4. Cable operators also continually innovate their customer service practices in response to consumer demand, as exemplified by the use of web-based services such as Twitter to identify and resolve issues, as well as web-based discussion forums, and by providing customer service assistance via online chats. *Id.* at 4.

too much information.<sup>63</sup> Technological developments requiring network management occur rapidly, and ISPs need the flexibility to respond quickly and efficiently to technological developments. Requiring new ISP disclosures for every change in technique would either deter necessary action or impose unnecessary costs.

Finally, such generally available disclosures could undermine the very purposes of network management – *i.e.*, limiting congestion and protecting against unlawful content. To the extent that network management techniques are designed to alleviate congestion, ensure smooth operation of the network, and detect and prevent the transmission of unlawful content, required disclosures of such techniques could enable parties – consumers *and* application and service providers – to circumvent management techniques so that the goals of network management are subverted.<sup>64</sup> Even as vigorous a proponent of Internet openness and transparency as Jonathan Rosenberg, Google’s Senior Vice President for Product Management, has pointed out that transparency can, for these reasons, sometimes be harmful and inappropriate:

Our goal is to keep the Internet open, which promotes choice and competition and keeps users and developers from getting locked in. In many cases, most notably our search and ads products, opening up the code would not contribute to these goals and would actually hurt users. . . . [O]pening up these systems would allow people to “game” our algorithms to manipulate search and ads quality rankings, reducing our quality for everyone.<sup>65</sup>

A rule requiring general, one-size-fits-all disclosure of network management techniques should be a last resort, where there is reason to believe that voluntary disclosures to consumers

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<sup>63</sup> See *NCTA PN #24 Comments* at 4 (“As NCTA has explained previously, in the absence of clear evidence that cable operators are providing inadequate information and disclosure, there is no policy reason to impose new billing and consumer information regulation. As Comcast observed, any Commission action in this area should be approached with caution, because ‘it risks disrupting marketplace-driven disclosure practices, impeding innovation, and overwhelming consumers with information they neither want nor need.’”).

<sup>64</sup> The Commission has recognized this concern. See *Notice* ¶ 131 (“We also seek comment on whether transparency will encourage or enable users and/or content, application, and service providers to circumvent legitimate network management tools designed, for example, to manage congestion.”).

<sup>65</sup> J. Rosenberg, *The Meaning of Open*, Google Public Policy Blog, Dec. 21, 2009, at <http://googlepublicpolicy.blogspot.com/2009/12/meaning-of-open.html> (last visited Jan. 12, 2010).

and the Internet community, along with ongoing discussions among ISPs and application providers to enable the development of new products, are not sufficient to foster and preserve a vibrant, innovative Internet marketplace for consumers and for service providers. If that were the case and disclosure rules were needed to ensure the interoperability of applications and networks, those rules would need to apply across the board – *to application providers and CDNs as well as ISPs* – so that consumers, ISPs and application providers all have the information they need to effectively use and provide Internet services. But where such voluntary disclosures and collaborative efforts are working and such a vibrant marketplace exists, it would be premature, unnecessary and counterproductive to impose a burdensome disclosure requirement – or, indeed, *any* prophylactic rules to ensure openness – at this time.

**III. IF PROPHYLACTIC RULES ARE ADOPTED TO PROTECT THE OPENNESS OF THE INTERNET, THEY SHOULD APPLY TO ALL COMPETING PROVIDERS OF INTERNET ACCESS – AND TO OTHER GATEWAYS THAT HAVE THE ABILITY TO THWART THE ACCESSIBILITY OF INTERNET CONTENT AND APPLICATIONS.**

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The Commission states, in the *Notice*, that “[a]s our choices for accessing the Internet continue to increase, and as users connect to the Internet through different technologies, the principles we propose today seek to safeguard its openness for *all* users.”<sup>66</sup> It affirms that “the six principles that we propose to codify today would apply to *all* platforms for broadband Internet access” – although it acknowledges that differences among such platforms “may justify differences in *how* we apply” the principles to different platforms.<sup>67</sup> In this regard, it asks specifically how (not whether) to apply the rules to wireless Internet access providers and applications.

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<sup>66</sup> *Notice* ¶ 154 (emphasis added).

<sup>67</sup> *Id.*

All of this is right, for two fundamental reasons. *First*, as the Commission suggests, if the goal is to prevent those who provide access or serve as gateways to Internet content and application from engaging in conduct that might make certain content or applications unduly inaccessible in a way that threatens the openness of the Internet, it would be arbitrary and capricious – and ineffective – to subject only wireline ISPs to such rules while exempting providers of wireless access or other Internet gateways that serve millions of users and have similar potential to affect accessibility of content and applications. As Commissioner Copps pointed out, “we need to recognize that the gatekeepers of today may not be the gatekeepers of tomorrow.”<sup>68</sup> *Second*, principles of regulatory parity dictate that marketplace outcomes not be unfairly and uneconomically skewed by artificial regulatory advantages.

It may be the case that broadband Internet access service providers face different operational issues in attempting to manage their networks depending on any unique aspects of their particular networks regardless of the technology employed. But, beyond that, there is no basis for differentiating among specific broadband Internet access technologies – current or future – with respect to the applicability of any rules ultimately adopted.

Indeed, while cable operators generally do not block access to Internet content and applications, providers of wireless Internet access unabashedly engage in outright blocking. Thus, consumers who use iPhones to access the Internet have found that certain Internet applications, such as the SlingBox application that allows streaming of video content to mobile

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<sup>68</sup> *Id.* at 13157 (Separate Statement of Commissioner Michael J. Copps).

phones, have been blocked.<sup>69</sup> AT&T's iPhone customers have also been blocked from using the Google Voice application, which competes with AT&T's own wireless phone service.<sup>70</sup>

There has been some dispute as to whether it is AT&T (the wireless Internet service provider) or Apple (the wireless *device* provider) that is blocking access to these services. But that dispute simply highlights the fact that while the Commission properly proposes to extend to wireless ISPs any rules that it may adopt in this proceeding, there are other entities that also serve as gateways to Internet content and applications to which prophylactic rules should similarly apply.

Providers of wireless *devices* that increasingly provide access to applications and content on a selective, "walled garden" basis include not only the iPhone and other "smart phones," but also the Kindle and other similar devices for obtaining e-books, newspapers, magazines and other content via the Internet. In addition, search engines, browsers and other applications on the Internet are the means by which large numbers of Internet users find and access content and other applications. By blocking or discriminating against certain content and application providers, some of these entities – which are used by more consumers than subscribe to any single cable operator's Internet access service – could affect the openness of the Internet and innovation at the edge to an even greater extent than any ISP.

Thus, as Adam Raff, the founder of an Internet technology firm discovered, "[t]oday, search engines like Google, Yahoo and Microsoft's new Bing have become the Internet's gatekeepers, and the crucial role they play in directing users to Web sites means they are now as

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<sup>69</sup> See Ryan Singel, *Group Calls Foul on AT&T Blocking Some iPhone Video Apps*, Wired.com, June 18, 2009, at <http://www.wired.com/epicenter/2009/06/group-calls-foul-on-att-blocking-some-iphone-video-apps/> (last visited Jan. 12, 2010).

<sup>70</sup> See Jenna Wortham, *Even Google Is Blocked With Apps for iPhone*, N.Y. Times, Jul. 29, 2009, at B1 available at <http://www.nytimes.com/2009/07/29/technology/companies/29apps.html>.

essential a component of its infrastructure as the physical network itself.”<sup>71</sup> In particular, “with 71 percent of the United States search market (and 90 percent in Britain), Google’s dominance of both search and search advertising gives it overwhelming control.”<sup>72</sup>

Raff illustrates how Google can affect – and, in his company’s case, cripple – Internet content and application providers as well as companies that use the Internet to do business:

One way that Google exploits this control is by imposing covert “penalties” that can strike legitimate and useful Web sites, removing them entirely from its search results or placing them so far down the rankings that they will in all likelihood never be found. For three years, my company’s vertical search and price-comparison site, Foundem, was effectively “disappeared” from the Internet in this way.<sup>73</sup>

While there may be any number of reasons why a search algorithm might adversely affect particular websites, there is at least the potential for anticompetitive abuse of such power and control – which Raff suggests is not merely hypothetical:

Another way that Google exploits its control is through preferential placement. With the introduction in 2007 of what it calls “universal search,” Google began promoting its own services at or near the top of its search results, bypassing the algorithms it uses to rank the services of others. Google now favors its own price-comparison results for product queries, its own map results for geographic queries, its own news results for topical queries, and its own YouTube results for video queries.<sup>74</sup>

In any event, whatever its purpose, Google’s ability to affect the Internet marketplace is apparent and certainly warrants at least as much attention as any potential threat posed by cable operators and other ISPs:

The preferential placement of Google Maps helped it unseat MapQuest from its position as America’s leading online mapping service virtually overnight. The

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<sup>71</sup> Adam Raff, *Search, But You May Not Find*, N.Y. Times, Dec. 28, 2009, at A27, available at <http://www.nytimes.com/2009/12/28/opinion/28raff.html?scp=2&sq=google%20&st=cse>.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

share price of TomTom, a maker of navigation systems, has fallen by some 40 percent in the weeks since the announcement of Google's free turn-by-turn satellite navigation service. And RightMove, Britain's leading real-estate portal, lost 10 percent of its market value this month on the mere rumor that Google planned a real-estate search service here.<sup>75</sup>

With this sort of gatekeeper control, it is not hard to see why, as discussed previously, Google (and other dominant Internet service providers) might prefer that ISPs be "net neutral." But acceding to this request would hardly preserve Internet openness. It would simply preserve whatever market structure exists just beyond the ISP's headend. But if the Commission were to impose the obligations proposed in the *Notice* on cable operators and other wireline and wireless ISPs for the ostensible purpose of preserving Internet openness, it is hard to imagine how it could reasonably refrain from imposing similar obligations on Internet-based applications that also control consumers' access to other Internet content and applications.

#### **IV. THE PROPOSED RULES WOULD VIOLATE THE FIRST AMENDMENT.**

The Commission's proposed rules would also be inconsistent with basic First Amendment principles. In seeking to impose broad rules barring private decision-making about what content is communicated to Internet users, and how it is presented, the Commission would be exerting an unprecedented degree of control over a private marketplace for speech. That expansive restriction of private choice cannot be justified by concerns about service providers' improper exploitation of a "bottleneck," *see, e.g., Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 661 (1994) (*Turner I*), because the Commission acknowledges that there is "effective competition" in various markets for Internet service, *see Notice* ¶ 68, making the proposed rules, at best, substantially overbroad. Likewise, the proposed rules cannot be supported by any independent government interests in promoting "diversity" or "parity" in a speech marketplace,

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<sup>75</sup> *Id.*

*first*, because there is and (would be) ample “diversity” on the Internet without the Commission’s intervention and, *second*, because government attempts to dictate “parity” with respect to private speech are fundamentally illegitimate. *See, e.g., Davis v. FEC*, 128 S.Ct. 2759, 2773 (2008). As written, therefore, the proposed rules cannot withstand First Amendment scrutiny.

**A. The Proposed Rules Would Significantly Curtail The Choices Available to Participants in a Private Marketplace for Speech.**

We begin with two straightforward propositions. The first is that the Internet, while serving many purposes, is primarily a marketplace for speech. The Supreme Court has observed that, through the Internet, “individuals can access material about topics ranging from aardvarks to Zoroastrianism.” *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 566 (2002). Similarly, Congress has said that the Internet “offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” 47 U.S.C. § 230(a)(3). And the Commission itself describes the Internet as “provid[ing] an unprecedented platform for speech, democratic engagement, and cultural development.” *Notice* ¶ 23. *See also Notice* ¶ 95 (characterizing Internet as a “marketplace of ideas”).

The second proposition is that, under the First Amendment, any government interference with a marketplace for speech is highly suspect. As the Supreme Court has observed, “[t]he First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference.” *New York State Bd. Of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008). Rather than having government determine what speech is to be available, “[t]he constitutional right of free expression is . . . intended to remove government restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely in the hands of each of us . . . .” *Leathers v. Medlock*, 499 U.S. 439, 448-49

(1991) (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)). This freedom from government control extends, not just to those who create speech, but also to those that provide a forum for its communication to the public. See, e.g., *Turner I*, 512 U.S. at 636 (“[c]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment”).

The Commission’s proposed rules, however, would exert just that kind of government interference with private speech. In particular, they would explicitly bar a service provider from “prevent[ing] any of its users from sending or receiving the lawful content of the user’s choice,” regardless of provider’s reasons (other than “reasonable network management”) for doing so. See *Notice* ¶ 92. Moreover, the proposed rules would prohibit service providers from implementing any preferences (again, except for “reasonable network management” and, perhaps, the provision of as-yet undefined “managed or specialized services” (*Notice* ¶¶ 148-53)) with respect to “lawful content, application, and services . . . .” *Notice* ¶ 104. A service provider thus cannot “favor or disfavor” particular speech – based on either its nature or its source – unless *the government* declares the content to be unlawful or allows the provider to treat the speech as part of a managed or specialized service. See *Notice* ¶ 11.

These significant government curbs on freedom of speech are quite deliberate. Although the First Amendment protects “the decision of both what to say and what *not* to say,” *Riley v. Nat’l Federation of the Blind*, 487 U.S. 781, 796-97 (1988); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995), the Commission makes clear that it intends to force carriage of speech that system providers might otherwise elect not to carry. Thus, the Commission explains the need for the rules by hypothesizing that, without them, service providers might “block, slow, or redirect access to websites espousing public

policy positions that the [service provider] considers contrary to its interests, or controversial content to which the service provider wants to avoid any connection.” *Notice* ¶ 75. Similarly, to make sure that service providers cannot use the “reasonable network management” exceptions to exercise discretion about speech, the Commission has declared in advance that it would not “consider the singling out of any particular content (*i.e.*, viewpoint) for blocking or deprioritization to be reasonable, in the absence of evidence that such traffic or content was harmful.” *Notice* ¶ 137.

The restrictions do not just affect the speech rights of service providers. The Commission also circumscribes the speech rights of content providers – including service providers that create or package their own content – by prohibiting them from entering into arrangements that would give their speech a competitive advantage in the marketplace. The Commission points out that service providers now can “ensure that one class of traffic enjoys a greater share of [system] capacity,” *Notice* ¶ 57, or provide favorable “scheduling” of particular packets for transmission, *id.*, or “allow[] consumers quicker access to websites using [the service provider’s] caching services,” *id.*, all of which might help a content provider reach a larger audience and offer a better experience for those interested in its speech. However, instead of allowing each content provider to decide how best to deliver its speech, the Commission seeks to mandate a level playing field for all content providers by prohibiting the purchase and sale of such enhanced services. *See Notice* ¶ 106 (“we understand the term ‘nondiscriminatory’ to mean that a broadband Internet access service provider may not charge a content, application, or service provider for enhanced or prioritized access to the subscribers of the broadband Internet access service provider . . .”).

Because “[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it,” *Riley*, 487 U.S. at 790-91, any government attempt to prevent speakers from presenting their material in the most beneficial way itself raises serious First Amendment issues. Nor are those constitutional questions avoided by the fact that the Commission is apparently targeting only *paid* efforts to enhance the effectiveness of speech. The freedom of individuals and businesses to expend money in order to promote their speech is part of the freedom of speech itself. *See Davis*, 128 S.Ct. at 2771; *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976) (*per curiam*). Under the First Amendment, publishers may offer financial incentives to bookstores to secure more prominent placement for their works, and advertisers may pay a premium to have their advertisements appear on more frequently viewed magazine pages or online websites, and the assertion of government control over such private dealings would, at the very least, face severe constitutional hurdles. The Commission’s proposed regulation of the Internet is subject to the same close scrutiny.

**B. The Proposed Rules Broadly Restrict Speech Without An Adequate Justification.**

The fact that a law restricts speech does not mean, of course, that it automatically violates the First Amendment. *See Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 803-04 (1984) (“to say that [a law] presents a First Amendment issue is not necessarily to say that it constitutes a First Amendment violation”) (internal quotation marks omitted). However, because the Commission is singling out particular speech businesses for specific regulation – as opposed to applying a general law broadly applicable to non-speech activities as well (*see, e.g., Associated Press v. United States*, 326 U.S. 1 (1945)) – it bears a high burden of justification. *See Turner I*, 512 U.S. at 640-641. As the Supreme Court has stated, “laws that single out the press, or certain elements thereof, for special treatment, ‘pose a

particular danger of abuse by the State,’ *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987), and so are always subject to at least some degree of heightened First Amendment scrutiny.” *Turner I*, 512 U.S. at 640-41.

For the proposed rules to pass First Amendment muster, therefore, the Commission would need to demonstrate, at a minimum, that they “advance[] important governmental interests unrelated to the suppression of free speech and do[] not burden substantially more speech than necessary to further those interests.” *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (2007) (*Turner II*). Furthermore, and of particular importance here, “[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply ‘posit the existence of the disease sought to be cured.’” *Turner I*, 512 U.S. at 664 (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir 1985)). Instead, “[i]t must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.” *Turner I*, 512 U.S. at 664. *See also Time Warner Entertainment Co., L.P. v FCC*, 240 F.3d 1126, 1133 (D.C. Cir 2001). The proposed rules cannot be justified under those standards.

### **1. The Proposed Rules Are Extremely Broad.**

To begin with, it is important to recognize that the proposed rules are extraordinarily sweeping. As we have noted, *see* page 8 and Section II.C, *supra*, except for whatever limited freedom is encompassed within the “reasonable network management” and “managed or specialized services” exceptions, the rules preempt the exercise of discretion by all system providers with respect to all lawful content, barring them, not just from blocking, but also from favoring or disfavoring, the speech of any content provider, including their own. Likewise, the rules bar any content provider from entering into a paid arrangement with any system provider to obtain priority for the content provider’s speech. As a consequence, although the Commission

does not quite say so, the rules aim to turn service providers into what amounts to common carriers, with final judgments about the treatment of particular content left up to the Commission.

It is difficult to imagine a more extensive displacement of private decision-making in a private marketplace for speech. By way of comparison, the obligations imposed by the must-carry law applied only to a limited portion of each cable system, requiring cable operators (the counterpart to system providers here) to yield control over no more than one-third of their channel capacity for broadcast stations. *See* 47 U.S.C. § 534(b)(1). Even if set-asides for leased access and public, educational, and governmental channels are taken into account, the must-carry law still permitted a cable operator to exercise full discretion over a significant portion of its system. In turn, cable programmers (the counterpart to Internet content providers) were free to compete for carriage on the uncommitted channels, without any government restriction on offering financial incentives. For present purposes, therefore, it is noteworthy that, in finding the must-carry law to be narrowly tailored to its objectives, the Supreme Court expressly pointed to the extent of discretion still exercised by cable operators over their systems, *see Turner II*, 520 U.S. at 216, stressing that “Congress took steps to confine the breadth and burden of the regulatory scheme.” *Id.* The Commission’s proposed rules show no such restraint.

## **2. There is No Legitimate Justification for the Proposed Rules.**

What is the justification for so expansive a government role in private speech? There is no suggestion – nor could there be – that the Commission’s proposed rules are somehow tied to the government’s unique, and uniquely pervasive, role in establishing and protecting the over-the-air broadcasting system, *see, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), so the Commission necessarily must invoke some other government interest that is both substantial and legitimate. *See Turner II*, 520 U.S. at 189. Of the apparent possible interests, however, none can support these rules. As we discuss below, the familiar government interest in

protecting against exploitation of monopoly power, or a “bottleneck,” cannot justify the rules because they apply to all system providers and content providers, even where no bottleneck exists. And, the rules cannot be sustained on the basis of more general government interests like “diversity” or “parity” without either stripping the concept of diversity of any coherent meaning or overturning decades of settled law establishing that the government cannot seek to prevent certain speakers from gaining influence at the expense of others.

**a) The “Bottleneck” Interest.**

The must-carry law was justified in large part “by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television.” *Turner I*, 512 U.S. at 661. *See also Turner II*, 520 U.S. at 197 (“cable operators possess a local monopoly over cable households. Only one percent of communities are served by more than one cable system.”) But that blanket finding cannot be made with respect to Internet providers. Bottleneck power for system providers has essentially vanished in many markets, especially markets with a high number of users. *See* page 13, *supra*. And, by the Commission’s own admission, it will be disappearing in many additional markets, as new forms of technology become available. *See Notice* ¶ 154 (“our choices for accessing the Internet continue to increase”); ¶ 155 (“alternative platforms for accessing the Internet have flourished, unleashing tremendous innovation and investment”).

The Commission, in fact, openly acknowledges that its proposed rules are not limited to markets in which a bottleneck for Internet service still remains, but are meant to apply even “where there is effective competition in the Internet access market . . . .” *Notice* ¶ 68. That fact is significant for several reasons. First of all, and most basically, it means that the rules, as written, cannot possibly be defended as a properly tailored response to a *lack of* “effective

competition” in markets for Internet service. If the Commission believes that it can justify its rules on the basis of specific harm in noncompetitive markets, then it should draft rules to address that problem and nothing more. A one-size-fits-all solution, however, “burdens substantially more speech than necessary to further those interests.” *Turner II*, 520 U.S. at 189.

The fact that the rules make no distinction between competitive and noncompetitive markets also raises questions about what the government’s regulatory interest actually is. Just as “[e]xemptions from an otherwise legitimate regulation of a medium of speech . . . may diminish the credibility of the government’s rationale for restricting speech in the first place,” *City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994), a mismatch between a strikingly overinclusive regulation and a narrow asserted government interest may indicate that the government’s real purpose is something else. After all, if the interest behind the Commission’s proposed rules were truly to prevent exploitation of bottleneck power by service providers, then the rules would apply only where that threat legitimately existed. And the Commission’s explanation for applying the rules even to competitive markets brings into focus a much different issue: that, merely by charging fees for carriage – even fees set by competitive factors – service providers might reduce the incentive of content providers to innovate and, in some indeterminate number of instances, “drive some content, application, and service providers from the market.” *Notice* ¶ 69. That expressed concern about reducing the number of possible speakers suggests that the Commission is really acting to promote a separate and distinct interest in assuring maximum “diversity” on the Internet.<sup>76</sup>

In any event, quite apart from the proposed rules’ overbreadth, any attempt to justify them by claiming a “lack of competition” would face another severe hurdle: the fact that the

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<sup>76</sup> We address the interest in assuring maximum “diversity” in the Internet market at pages 59-62, *infra*.

Commission cannot point to any significant evidence that the narrower class of service providers with “market power” (*Notice* ¶¶ 70 & 71), or even “vertically integrated” service providers with “market power” (*Notice* ¶ 72), pose a genuine anticompetitive threat to the Internet. Unlike the circumstances in the must-carry case – where Congress had before it a record “about scores of adverse carriage decisions against broadcast stations,” *see Turner II*, 520 U.S. at 202 – examples of improper blocking or favoritism by service providers are notably lacking. *See Notice* ¶ 50 and n. 113. This absence of a sufficient record – itself a reason not to adopt the rules at this time – also makes the rules highly vulnerable under the First Amendment. Rules based upon little more than predictive judgments are, by their nature, prophylactic, and “[b]road prophylactic rules in the area of free expression are suspect.” *NAACP v. Button*, 371 U.S. 415, 438 (1963). It is particularly important, therefore, that regulation of that kind “address what is in fact a serious problem.” *Edenfield v. Fane*, 507 U.S. 761, 776 (1993).

Finally, we note that the Commission appears to have paid serious attention only to one half of the competitive equation. While it has theorized about the possibility of harmful profit-seeking activities by service providers and content providers, *see Notice* ¶¶ 67-73, the Commission has largely disregarded the financial incentives that both service providers and content providers have to meet the needs of their audiences, whether in competitive markets or not. Any showing of “real, not merely conjectural harms,” *Turner I*, 512 U.S. at 664, however, must rest on a balanced evaluation of *all* incentives facing participants in the speech marketplace, not just on one-sided speculation that service and content providers might conduct their businesses in economically inefficient ways. *See, e.g., United States v. Playboy Entertainment Group, Inc.*, 592 U.S. 803, 822 (2000) (“Government must present more than anecdote and supposition”). That more complete analysis has not been made here.

**b) The “Diversity” Interest.**

The proposed rules also cannot be justified by a government interest in assuring “diversity” on the Internet. Although the Commission repeatedly talks in terms of preserving or promoting “an open Internet,” *see, e.g., Notice* ¶¶ 2, 10, 49, 50, it paradoxically seeks to achieve that “openness” by imposing wide-scale government control over a private marketplace. *See Notice* ¶ 95 (rules seek “to further . . . interest in encouraging freedom of expression”). To support that sort of government takeover, the Commission must at least establish a sound basis for concluding that “diversity” on the Internet will be lost unless the government is the ultimate arbiter of who shall speak and how they shall do it. It has not met that burden.

The first problem with allowing the government to mandate Internet “diversity” or “openness” for its own sake is that the interest is far too vaguely defined. Although the Supreme Court has occasionally used expansive language to describe a government interest in having a multiplicity of speakers, *see, e.g., Turner I*, 512 U.S. at 663 (“assuring that the public has access to a multiplicity of information sources is a government purpose of the highest order, for it promotes values central to the First Amendment”), the Court’s application of that principle has actually been limited to quite particularized circumstances. In *Associated Press*, for example, while the Court said that the First Amendment “rests upon the assumption that the widest possible dissemination of information from diverse or antagonistic sources is essential to the welfare of the public,” 326 U.S. at 20, it made that observation, not in the general context of announcing an unbounded government power to regulate private speech in the interests of diversity, but in the more specific context of rejecting a claim that the government could not enforce the Sherman Act, a law of general applicability, against First Amendment speakers. *See id.* Likewise, in *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (plurality

opinion), a plurality of the Court relied on the same “diverse and antagonistic sources” language to uphold Commission action with respect to carriage of broadcast signals by cable systems, but expressly noted that “the goals specified are within the Commission’s mandate for the regulation of television broadcasting.” 406 U.S. at 668.

The Court’s decisions in the must-carry cases built upon that narrow body of authority, relying on *Associated Press* and *Midwest Video*, as well as two other broadcasting cases, *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981), and *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978), as a basis for recognizing a government interest in protecting diversity. *See* 512 U.S. at 663-64. The *Turner* cases, of course, involved concerns about *both* anticompetitive conduct (abuse of a bottleneck) *and* possible harm to over-the-air broadcasting (the loss of broadcast stations as a result of non-carriage). Not surprisingly, therefore, the Court, in discussing the government’s justifications for the must-carry law, repeatedly referred to its interests in restraining the exercise of monopoly power by cable systems and in preserving a diverse array of broadcast stations. *See, e.g., Turner II*, 520 U.S. at 197 (noting “support for [Congress’] conclusion that cable operators had considerable and growing market power over local video programming markets”); *id.* at 197 (“cable operators possess a local monopoly over cable households”); *id.* at 193 (congressional purpose “to prevent any significant reduction in the multiplicity of broadcast programming sources available to noncable households”); *id.* at 194 (“Congress has an independent interest in preserving a multiplicity of broadcasters to ensure that all households have access to information and entertainment on an equal footing with those who subscribe to cable”). *See also Hurley*, 515 U.S. at 577 (discussing *Turner I* and noting “government’s interest in limiting monopolistic

autonomy to allow for the survival of broadcasters who might otherwise be silenced and consequently destroyed”).

The Commission’s proposed rules, however, appear to rest upon a very different proposition: that the federal government has a freestanding power – divorced from any connection to either broadcasting or anticompetitive behavior – to prohibit private decisions about speech that might reduce the number of potential speakers on the Internet. But this would be an unheard of government power under the First Amendment. If the government were free to regulate private speech in order to assure the greatest possible number of speakers, without having to show bottleneck abuse or a violation of the antitrust laws, it would presumably be entitled to insist upon open and neutral access to *any* medium for the dissemination of speech – whether newspapers, magazines, bookstores, or theatres – just by demonstrating that the exercise of editorial discretion would exclude some speakers (as editorial decisions necessarily do). The existence of such open-ended authority seems hard to fathom. The Supreme Court has routinely been hostile to government-imposed rights of access, *see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), as well as to government-compelled subsidies of private speech, *see, e.g., United States v. United Foods, Inc.*, 533 U.S. 405 (2001), and the remarkable breadth of the Commission’s rules here would only make the constitutional problems more daunting.

Furthermore, stretched to the extreme of “no voice should be disfavored or excluded,” the notion of diversity loses any real meaning. As the Commission itself acknowledges, there are vast numbers of speakers on the Internet. *See Notice* ¶ 17 (Internet “reaches more than 1.6 billion people worldwide”); ¶ 95 (“anyone who posts a comment on a blog is ‘sending’ content”). By any rational standard, therefore, the Internet is “diverse” – indeed, more diverse than any other medium of speech – and will remain so, regardless of whether the Commission

implements its rules or not. As the D.C. Circuit recently pointed out, it makes little sense to treat diversity as a limitless concept, given that “[e]verything else being equal, each additional ‘voice’ may be said to enhance diversity.” *Time Warner*, 240 F.3d at 1135. The Court of Appeals thus pointedly observed: “at some point, surely, the marginal value of such an increment in ‘diversity’ would not qualify as an ‘important’ governmental interest.” *Id.*

We doubt, therefore, whether the Commission could properly defend the proposed rules on “diversity” grounds, even if it were able to show that private decisions about carriage would result in fewer Internet speakers. But, in any event, the Commission has not demonstrated any such thing. The history of the Internet reveals that it has been a powerful force for *increasing* the number of Internet speakers – all without direct regulation by the government – and the supposed threat to continued growth is conjectural in the extreme. Thus, diversity on the Internet is not in any “genuine jeopardy.” *Turner I*, 512 U.S. at 665.

**c) The “Parity” Interest.**

The Commission’s continual references to an “open” Internet – as well as the Commission’s proposed rule barring preferences in the provision of Internet access, even by agreement – raise the possibility that the government’s real interest is not in promoting “diversity” as such, but in dictating “parity,” that is, in assuring that all Internet speakers are on equal footing. Even if that is the case, however, it would not save the rules from constitutional infirmity. Although the idea of “parity” is marginally more comprehensible than a more-is-always-better concept of diversity, it suffers from a separate, and fatal, flaw: it is not a legitimate government interest. Under the First Amendment, it is not the business of government to level the playing field so that speakers with inherent advantages cannot benefit from them.

The Supreme Court set forth that fundamental principle more than three decades ago, stating that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .” *Buckley*, 424 U.S. at 48-49. The Court thus has repeatedly struck down government attempts to neutralize the advantages held by certain speakers – usually, greater resources – in the face of government arguments that those advantages, unless curbed, will distort a marketplace for speech. *See Davis*, 128 S.Ct. at 2773; *Meyer v. Grant*, 486 U.S. 414, 426 (1988); *Buckley*, 424 U.S. at 48-49. In *Davis*, for example, the Court specifically applied the *Buckley* principle to invalidate a federal law aimed at offsetting the wealth of self-financing congressional candidates, stating that “the interest ‘in equalizing the relative ability of individuals and groups to influence the outcome of elections’ cannot support a cap on expenditures for ‘express advocacy of the election or defeat of candidates’ . . . .” *Davis*, 128 S.Ct at 2773, quoting *Buckley*, 424 U.S. at 48-49. Indeed, the Court remarked that the government’s argument to the contrary “ha[d] ominous implications.” *Id.*

The proposed rules are incompatible with that basic principle. By its plain language, the nondiscrimination rule prevents content providers from expending funds in order to gain a favored position for their speech. *See Notice* ¶ 104. And the Commission makes absolutely clear that it intends the rule to do just what its terms would indicate: that is, make sure that system providers cannot give more desirable treatment either to their “own affiliates and partners,” *Notice* ¶ 58, or, more broadly, to other “content and application providers for a fee.” *Notice* ¶ 58. Thus, the Commission’s nondiscrimination rule serves to mandate equality for all content providers, deliberately impeding those speakers that would be willing to pay for better access to their desired audiences.

That enforced parity is simply not a legitimate goal for the Commission to pursue. Under the principle established in *Buckley*, the government is not free to impose restrictions on speech out of a fear that, if the speech is left in private hands, some speakers will prevail at the expense of others. As we have said, *see* pages 60-61, *supra*, the government may address bottleneck conditions and other anticompetitive activities, but it may not exert an independent power to guarantee “neutral” opportunities for all potential speakers. The proposed rules thus would violate the First Amendment.

### **CONCLUSION**

For the foregoing reasons, the Commission should adhere to its successful policy of “vigilant restraint” and refrain from regulating the provision of Internet access services. That policy has enabled the very flourishing of Internet innovation, investment and openness that the Commission seeks to stimulate and preserve. Reversing course and imposing an unnecessary and burdensome regulatory regime would only impede and undermine these policy goals and harm consumers.

Respectfully submitted,

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