

content-related inspection through the Reasonable Network Management provisions.

D. Privacy Concerns.

Inspection of content by the broadband Internet access provider to determine the legality of the content raises strong privacy concerns. As discussed elsewhere in this submission,⁹⁹ the inspection of the content of an Internet communication by a broadband Internet access provider likely would be achieved through the use of Deep Packet Inspection technology.

Because the broadband Internet access provider serves as the initial or last “deliverer” of a user’s content, the broadband Internet access provider is in a position to carry all of a user’s communications, including email, instant messages, VoIP, text messages, video communications, Web browsing activities, data transfers – indeed, all communications sent and received by a user.

Users do not expect that the content of their messages will be opened and inspected by their broadband Internet access providers. Yet, that is exactly what DPI technology does.¹⁰⁰ The Commission should not endorse use of such technology as a means of inspecting content for unlawful material given the

⁹⁹ See Section XIII, *infra*.

¹⁰⁰ For a more detailed analysis of the possible privacy implications of the use of Deep Packet Inspection technology, see Data Foundry *Ex Parte* filing in CC Docket 07-52, *In the Matter of Broadband Industry Practices, “Tiered Internet Service Threatens the Privileged and Confidential Nature of Online Communications,”* October 15, 2007, available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=6519741393>.

tremendous privacy concerns such technology presents, and given the alternative means of handling unlawful content through existing laws and through law enforcement requests.

Should the broadband Internet access providers resort to DPI in an effort to filter unlawful content or unlawfully distributed content, the effects on user privacy will be widespread and destructive. Any attempt to inspect unlawful content or unlawfully distributed content would require the inspection of *all* content. Users would be subject to a comprehensive monitoring regime that surveilles every aspect of their online activities and the content of all of their communications.

By authorizing or deputizing the broadband Internet access providers to engage in indiscriminate content-monitoring and making determinations over the legality of content or the legality of distributed content, the Commission will come dangerously close to violating the Non-delegation Doctrine and the Fourth Amendment. This type of law enforcement function is not the responsibility of private businesses.

E. Allowing Broadband Internet Access Providers to Make Sophisticated Legal Judgments About the Nature of Content Over Their Networks Violates Basic Principles of Network Management.

Network management deals with the technical measures necessary in keeping an Internet service provider's network up and running smoothly. It does not include inspection of content traveling over its systems to make sophisticated legal determinations about the legality of such content.

IX. ENFORCEMENT

The Open Internet Coalition supports the creation of a new, formal complaint process relating to these rules, as well as an informal complaint process. The Coalition does not believe that the Commission's existing rules, such as the rules governing formal complaints under Section 208 of the Act or the rules governing complaints related to cable service, provide a complete, suitable model for new procedural rules for open broadband network complaints.

Because we support a framework to allow for *ex post* enforcement of the rules, rather than a more regulatory *ex ante* framework, the Commission should create a new complaint process that incorporates the following.

1. The complaint process should take into account that the complainant may be an individual user or small business. The Commission should consider establishing an advocate within the FCC's Consumer and Governmental Affairs Bureau in instances in which a complainant does not have the resources to pursue a complaint. In addition, the Consumer and Governmental Affairs Bureau should be chartered to educate consumers regarding their rights to pursue whatever process is adopted by the Commission.
2. Any Internet user, application provider, content provider, or service provider, including a non-profit organization that has as one of its purposes to promote the openness of the Internet, should have standing to file a complaint alleging a violation of the Commission's rules.
3. The complainant bears the initial burden of establishing a *prima facie* case showing a violation of the Commission's rules.¹⁰¹

¹⁰¹ Of course, the OIC's proposed requirements for disclosure under the Transparency rule are necessary so that Internet stakeholders can review the network management practices of broadband Internet access providers and file a

4. If a *prima facie* case has been established, the burden would shift to the broadband Internet access provider to justify why its behavior does not violate one of the rules. The FCC should clarify that it has the right to discovery of any documentation from the broadband Internet access provider needed to ascertain whether a rule has been violated, including, if appropriate, contracts between the broadband Internet access provider and other entities that bear upon a complaint.
5. The Commission shall rule on the complaint within ninety (90) days from the filing.
6. Within ten (10) days of the complaint being filed, the Commission may issue a preliminary injunction against the broadband Internet service provider from starting or continuing to engage in the activity that is the subject of the complaint if the Commission finds that there is (a) a high likelihood of success upon the merits of complaint and (b) a likelihood of irreparable harm in the absence of a preliminary injunction.

In its order resolving the complaint, the FCC may issue permanent injunctive relief,¹⁰² penalties and damages to an injured party. However,

complaint if those practices will violate an FCC rule and harm the complainant. The ability to file a complaint is directly related to the amount of transparency the Commission requires of broadband Internet access providers. Thus, if a lack of transparency is alleged, the Complainant should be afforded flexibility in the *prima facie* review to continue with the complaint. In addition, the complainant only would need to establish a *prima facie* case that a violation of the non-discrimination rule occurred. Once a *prima facie* case has been made, the broadband Internet access provider would bear the burden of demonstrating that it did not violate the non-discrimination rule or that such discrimination is permitted under the Reasonable Network Management framework.

¹⁰² We anticipate that an order for permanent injunctive relief would be based on the 4-step test affirmed by the Supreme Court in *eBay v. Merc-Exchange*, 547 U.S.

penalties and damages would not be available in cases of first impression to the Commission.

We also urge the Commission to designate the Market Disputes and Resolution Division of the Enforcement Bureau to work collaboratively with other Bureaus and Offices to leverage the FCC's existing streamlined complaint procedures in a manner that delivers swift resolution to claims of discriminatory conduct.

X. THE APPLICATION OF NETWORK NEUTRALITY RULES DOES NOT DEPEND ON THE LEVEL OF COMPETITION.

Fundamentally, this rulemaking is about protecting Internet users' and consumers' abilities to access the Internet. At its core, this rulemaking is about protecting Internet consumers and consumers. Setting aside the exact level of competition in the access market, broadband Internet access providers should be subject to basic rules that preserve users' ability to receive and send information to and from the Internet without interference from the companies that provide the on-ramps and off-ramps to the Internet.

388 (2006), 401 F.3d 1323 (2005). That 4-step test requires the fact-finder to determine: (i) that the complainant suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between complainant and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

That said, it is well known that the broadband Internet access provider market is highly concentrated, and the FCC has recognized a market failure in this space.

Cable and DSL broadband Internet access providers still comprise an effective duopoly in the market for residential broadband service, together accounting for more than 96 percent of the residential high-speed lines according to the most recent FCC statistics.¹⁰³ Thus, cable modem and DSL operators have both the technical capacity and the commercial incentive to control “the Internet to the detriment of consumers.”¹⁰⁴ And, we have seen “significant situations where broadband providers have degraded the data streams of popular lawful services and blocked consumer access to lawful applications....”¹⁰⁵

Another reason to doubt the effectiveness of competition from wireless broadband services is that the two largest wireless broadband providers – Verizon Wireless and AT&T – are affiliated with two of the largest LEC DSL providers. Consequently, these providers are unlikely to deploy wireless

¹⁰³ FCC Wireline Competition Bureau, Industry Analysis and Technology Division, *High-Speed Services for Internet Access: Status as of June 30, 2006*, at Table 3, Chart 6 (Jan. 2007) (“Broadband Statistics”).

¹⁰⁴ FCC, *Broadband Industry Practices*, Notice of Inquiry, 22 F.C.C.R. 7894 (Separate Statement of Comm. Michael J. Copps).

¹⁰⁵ *In the Matter of Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry Practices*, WC Docket No. 07-52 (Separate Statement of Chairman Julius Genachowski).

broadband services that compete and potentially cannibalize their affiliated wireline services.

Most importantly, even if competition among initial broadband Internet access providers existed for users, the Commission more properly should focus on the limitations and unique nature of broadband networks that create an effective “terminating access” market failure and particular incentives that demand government oversight. The terminating access ecosystem is a market failure that the Commission has acknowledged on several occasions.¹⁰⁶

Once an end-user consumer decides on a broadband access provider, other users, content providers, and application providers are forced to transit to the user’s choice of access provider in order to communicate with that user. In effect, the access provider “owns” the user once the user commits to a service.

In the wireless ecosystem, the commercial mobile radio service (“CMRS”) provider has a similar terminating access relationship with its wireless subscriber as a wireline broadband Internet access provider has with its user. Like the

¹⁰⁶ See, e.g., Access Charge Reform, CC Docket No. 96-262; Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1; Transport Rate Structure and Pricing, CC Docket No. 91-213; Usage of the Public Switched Network by Information Service and Internet Access Providers, CC Docket No. 96-263, Notice of Proposed Rulemaking, Third Report and Order and Notice of Inquiry, FCC 96-488, Adopted: December 23, 1996; Released: December 24, 1996, paras. 271 and 278.

Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers, CC Docket No. 96-262, Seventh Report And Order And Further Notice Of Proposed Rulemaking, 16 FCC Rcd 9923, (2001), (“CLEC Access Charge Order”), paras. 10 and 31.

wireline broadband Internet access provider, the CMRS provider potentially controls the gateway to the Internet for the user and controls the gateway from the Internet to that end-user.

This fact compounds the incentive and ability of a broadband provider to distort the adjacent market for wireless devices in unusual and suspect ways. In this regard, there are potentially two market failures in the wireless space, whereas there is only one market failure in the wireline space unlike the wireline network where device attachments are generally permitted. Substantial consumer switching costs between access providers in both the wireline and wireless spaces exacerbate this problem.¹⁰⁷

At bottom, even if there were more competition among access providers, it is sufficient to check on broadband Internet access providers' power to limit users' choices in accessing and or sending content and applications on the Internet.¹⁰⁸

¹⁰⁷ See e.g. Patrick Xavier and Dimitri Ypsilanti, *Switching costs and consumer behavior: implications for telecommunications regulation*, 10 info 13.

¹⁰⁸ The Coalition notes that the U.S. Department of Justice has stated that it is not particularly useful to debate the extent to which the broadband access marketplace is not competitive or oligopolistic –

We do not find it especially helpful to define some abstract notion of whether or not broadband markets are “competitive.” Such a dichotomy makes little sense in the presence of large economies of scale, which preclude having many small suppliers and thus often lead to oligopolistic market structures. The operative question in competition policy is whether there are

Dr. Barbara van Schewick of Stanford Law School points out that network operators have common incentives to discriminate against third parties that are not necessarily addressed by increased competition. In an article assessing the need for network neutrality rules to protect application-level innovation, Professor van Schewick concluded that “a network provider may have the ability and incentive to exclude rival content, applications, or portals from its network” and that such incentives exist even if the network provider faces competition from at least one other network provider.¹⁰⁹

Professor van Schewick is not alone in explaining that competition alone may not address the concern that network operators will discriminate against unaffiliated applications and content. Economist Joseph Farrell of the University of California at Berkeley also has noted that limited competition may not

policy levers that can be used to produce superior outcomes, not whether the market resembles the textbook model of perfect competition. In highly concentrated markets, the policy levers often include: (a) merger control policies; (b) limits on business practices that thwart innovation (e.g., by blocking interconnection); and (c) public policies that affirmatively lower entry barriers facing new entrants and new technologies.

GN Docket No. 09-51, *Ex Parte* Submission of the United States Department of Justice at 11 (Jan. 4, 2010) (emphasis added).

¹⁰⁹ Towards an Economic Framework for Network Neutrality Regulation, 5 J. on Telecomm. & High Tech. L. 329, 370. Quoted in Comments from Open Internet Coalition to FCC, Broadband Industry Practices, Notice of Inquiry, 9.

necessarily remove the incentives of network operators to discriminate against unaffiliated applications and content.¹¹⁰

To summarize, the number of facilities-based broadband network operators is inherently limited and, as such, these operators share a common incentive to discriminate against independent and unaffiliated applications and content. In such circumstances, competition – whether intermodal or intramodal – may not be sufficient to prevent harmful discrimination that limits consumer choice.

As stated earlier, Internet access providers provide the on-ramps to the Internet. As such, users expect them to provide access to and from the Internet without interference or monitoring. Users have an expectation that they will be able to engage in speech on the Internet without broadband Internet access providers infringing on their abilities to do so. The freedom of speech users have enjoyed is one of the hallmarks of what has made the Internet so successful.

Ensuring that this right goes beyond an analysis of competition in the broadband Internet access provider space, even assuming competition existed and market forces would motivate carriers to treat content neutrally. Any rule that allows broadband Internet access providers to routinely inspect content will

¹¹⁰ Joseph Farrell, *Open Access Arguments: Why Confidence is Misplaced, in Net Neutrality or Net Neutering: Should Broadband Internet Services Be Regulated* 195 (Thomas M. Lenard & Randolph J. May eds., 2006).

effectively destroy expectations of privacy and may affect the legal privileges around such communications.

Finally, even assuming at some point that more competition existed among broadband Internet access providers, the Commission has a duty to prevent fragmentation and balkanization of the Internet by ensuring simple, uniform non-discrimination rules, which will maximize investment and the utility of the Internet.

XI. THE PROPOSED RULES' RELATIONSHIP WITH ANTITRUST LAW

The Telecommunication Act's mandate to protect users goes beyond merely protecting consumers from anticompetitive conduct in the broadband Internet access service market.¹¹¹ Consequently, the Commission has different standards and mandates that are simply not contemplated under antitrust law.

In particular, the importance of protecting "innovation without permission" by start-ups and non-profit entities does not fit neatly within the rubric of competition law, nor does the social, political, and cultural value of the incredible outpouring of free expression and creativity online.

Consequently, the Coalition sees antitrust law as complementary to the Commission's broader responsibilities to protect Internet users and to its specific responsibilities under the Communications Act.

¹¹¹ For example, the Act mandates and imposes a duty to protect the privacy of their own and interconnecting customers. 47 U.S.C. § 222 (2005).

Even if antitrust laws could be applied to address unlawful conduct in the broadband Internet access service market, such litigation is very expensive and very slow. Most users will not have the resources to engage in such litigation. A start-up firm may be out of business before such litigation enters into a discovery schedule.

An Internet or technology start-up firm typically has between 12-18 months to capture a consumer base and succeed in the marketplace. The timetable of antitrust litigation simply is not a practical solution for such firms.¹¹²

Finally, antitrust law requires a plaintiff to prove actual harm. Under the Communications Act, it is sufficient to find the likelihood of harm.¹¹³ This standard gives the Commission more flexibility to anticipate harm in the marketplace or among users in a way that the antitrust laws cannot.

XII. DEEP PACKET INSPECTION AND OTHER NETWORK MANAGEMENT TECHNOLOGY

The proposed rules identify two general reasons why the enactment of rules may be timely. First, the Commission notes that “some conduct is occurring in the marketplace that warrants closer attention... including instances

¹¹² The number of antitrust cases left pending for three years or longer increased from 377 in 2007 to 520 in 2008. James C. Duff, *2008 Annual Report of the Director, Judicial Business of the United States Courts*.

¹¹³ See *Van Dyke Research Corp. v. Xerox Corp.*, 631 F.2d 251, 255 (holding that plaintiff must demonstrate that actual injury arose from antitrust violation in order to recover); *Universal City Studios v. Sony Corp. of Am.*, 659 F.2d 963, 973-74 (holding that proof of actual damages is too great a burden for a copyright claim).

in which Internet access service providers have been blocking or degrading Internet traffic.”¹¹⁴

Second, the Commission noted that it also believed “it is important to provide greater clarity and certainty to Internet users; content, application and service providers; and broadband Internet access service providers regarding the Commission’s approach to safeguarding the open Internet.”¹¹⁵

The Open Internet Coalition submits that there is another reason why the enactment of these rules at this time is warranted, and that has to do with the advancement and marketing of DPI technologies.

When then-AT&T chairman Ed Whitacre made his infamous statement about charging Internet content providers a fee for users to access content providers’ sites,¹¹⁶ the technology to accomplish Mr. Whitacre’s vision was only in its infancy.

¹¹⁴ *In the Matter of Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry Practices*, WC Docket No. 07-52, Paragraph 50.

¹¹⁵ *Id.*

¹¹⁶ In an interview on the future of his company, Whitacre stated, “Now what [online companies such as Google] would like to do is use my pipes free, but I ain't going to let them do that because we have spent this capital and we have to have a return on it. So there's going to have to be some mechanism for these people who use these pipes to pay for the portion they're using. Why should they be allowed to use my pipes?” “At SBC, It’s All About ‘Scale and Scope,’” *BusinessWeek*, November 7, 2005. This quote is widely acknowledged as igniting a grassroots movement to protect the open Internet from the vision Mr. Whitacre articulated.

Today, DPI technology is widely available and is being actively marketed to broadband Internet access providers as a tool that will allow the providers to view the content of Internet communications and monetize the treatment of such content.

DPI technology involves looking at the content of a communication beyond the header information.¹¹⁷ DPI devices allow a broadband Internet access provider to inspect the entire content of a communication. This technology also allows the access provider to create, modify, or delete packets making up a user's communication—and do so at wire speeds—in order to delay, redirect, copy, or block a communication.

DPI technology was used by Comcast, when the cable company inserted or “forged” reset packets into their customers' communications, which resulted in the finding that Comcast's particular use of DPI measures was not “reasonable network management.”¹¹⁸

¹¹⁷ Deep Packet Inspection devices have the ability of looking at Layer 2 through Layer 7 of the OSI Seven Layer Model.

¹¹⁸ *In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications Broadband Industry Practices and Petition of Free Press et al, for Declaration Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management.”* File No. EB-08-1H-1518 and WC Docket No. 07-52, FCC 08-183. 23 FCC Rec 13028 41, 46, note 217 (rel. August 20, 2008) (“Comcast Order”).

The invasive nature of DPI technology has been well-chronicled by others, and we will not repeat those descriptions here.¹¹⁹

What has changed is how aggressive DPI vendors have been in marketing and selling such technology to broadband Internet access providers, as consumer demand has increased and networks struggle to keep pace. As these DPI electronics begin to populate the providers' networks, it is even more critical that the Commission finalize its rule that prevents the use of such technology to inspect content without express, voluntary "opt-in" consent by users after notice that such consent operates as a waiver of all expectations of privacy, or to discriminate against or in favor of particular content or applications.¹²⁰

¹¹⁹ See, e.g., *What Your Broadband Provider Knows About Your Web Use: Deep Packet Inspection and Communications Laws and Policies: Hearing Before the H. Comm. on Energy and Commerce, Subcomm. on Telecommunications and the Internet*, (2008) (statement of Alissa Cooper, Chief Computer Scientist, Center for Democracy & Technology); M. Chris Riley and Ben Scott, *Free Press, Deep Packet Inspection: The End of the Internet As We Know It?* (March 2009).

¹²⁰ The Commission notes a couple of these DPI vendors, including Procera Networks, which advertises its DPI technology as giving network operators the ability to "monetize your network" by monitoring user traffic on a real-time basis and using "optimization that distinguishes between interactive and downloading traffic." Procera Networks Inc., *White Paper, If You Can See It, You Can Monetize It* at 2-3 (2008), http://www.preoceranetworks.com/images/documents/procera_brochure_web_0620.pdf. Riley and Scott, *supra*, note that Allot, another DPI company, advertises its ability to "reduce the performance of applications with negative influence on revenues (e.g. competitive VoIP services)." Allot Communications. *Pushing the DPI Envelope* (June 2007), available at <http://www.sysob.com/download/AllotServiceGateway.pdf>

Notwithstanding the above, the Coalition notes that unless universally deployed, DPI will not be effective in ensuring priority treatment across the Internet. Broadband Internet access providers only can control the DPI electronics within their network. Once a user's packet leaves its access provider's network, it will travel on a best efforts basis unless all of the other transit providers and terminating access providers include the same DPI electronics with the same protocols.

What is more likely, if the Commission does not take action, is that the widespread deployment of such electronics would create a hodgepodge of different providers looking at users' content and making different decisions about how to treat such content. In essence, this would lead to a totally inefficient Internet system, totally contrary to the way the Internet was designed to work and what has made the Internet so successful. At best, such deployment would create balkanized portions of the Internet that treats traffic differently depending on the kind of DPI technology employed and the protocols such technology employs.

In addition, integration of DPI electronics either in access or long-haul network elements necessarily will introduce another point of failure into a system that was originally designed to route around failed interconnection points.

Certainly, DPI is simply a technology, and as such it is a neutral tool. DPI technology can be useful for such things as stopping denial of service attacks or

alleviating other network security issues. Consequently, the OIC is not advocating that the DPI technology be banned or that the network should not continue to incorporate advancements in technology. But once deployed, DPI can be used in harmful ways and therefore requires careful scrutiny and appropriate government oversight. This is especially important given that DPI vendors largely market their products not for network security issues but for providing monetization opportunities by discriminating against or for certain traffic. That is one critical reason why the enactment of non-discrimination rules is timely and important. Deployment of DPI threatens to jeopardize the foundational precept of the Internet, upon which prior governmental policy decisions rested – that all bits are treated equally in a best effort to reach their destination.

XIII. DEFINITION AND APPLICATION OF RULES TO BROADBAND INTERNET ACCESS PROVIDERS

The Open Internet Coalition believes the proposed rules should apply to facilities-based, last-mile, broadband Internet access providers. The Coalition supports the proposed definition of broadband Internet access service, but respectfully suggests the deletion “communication” from the definition. This change will help eliminate any ambiguity over whether the rules apply to both Internet access providers that may be classified as information service providers and the basic transmission services provided by telecommunications service providers.

The Coalition urges the Commission to clarify, however, that those networks that do *not* serve the general public, should continue to operate according to the needs of the owners of those networks. Colleges and universities, research institutions, and private corporations often operate private intra-net networks to support proprietary, non-public content, services, and applications.

In addition, it is understandable that the Commission's proposal would exclude "establishments that acquire broadband Internet access service from a facilities-based provider to enable their patrons or customers to access the Internet from their respective establishments."¹²¹ End users such as coffee shops and public libraries should be free to decide how they use their broadband services. This is consistent with the "end-to-end" principle on which the Internet was founded; control over the traffic should rest with the end user, not the public network operator.

XIV. THE RULES SHOULD APPLY TO BROADBAND INTERNET ACCESS PROVIDERS AND SHOULD NOT APPLY TO INTERNET USERS, INCLUDING CONTENT AND APPLICATION PROVIDERS.

The Commission has a robust docket on issues relating to network neutrality and openness on the Internet.¹²² And it has been widely understood

¹²¹ See *In the Matter of Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry Practices*, WC Docket No. 07-52, Paragraph 55.

¹²² The Commission has compiled dockets in regards to a unanimous policy statement, a notice of inquiry on broadband industry practices, several petitions for rulemaking, conditions for major communications industry mergers,

that the issue of network neutrality relates to broadband Internet access providers' networks, not to Internet users, application providers, and content providers that rely on Internet access providers to engage the Internet. Indeed, it is telling that only one commenter suggested that the *Internet Policy Statement* be read as embodying obligations binding on content, applications, and service providers in addition to broadband Internet access providers.¹²³

Indeed it is ironic that our Coalition often is accused by AT&T and others of seeking to regulate the Internet.¹²⁴ Nothing can be further from the truth. Since the outset of the engagement at the Commission, in Congress, and elsewhere, the Open Internet Coalition has urged policymakers to establish rules that would not apply to the Internet, but rather to the entities that provide users with access to the Internet. This position underscores the policy of protecting the very tenet of what has made the Internet such a strong foundation for economic growth, commerce, and speech.

spectrum auction rules, and enforcement against Comcast and other service providers.

¹²³ See Letter from Robert W. Quinn, Jr., Senior Vice President Federal Regulatory, AT&T Services, inc., to Sharon Gillett, Chief, Wireline Competition Bureau, WC Docket Nos. 07-135, 07-52, at 2-3 (filed September 25, 2009).

¹²⁴ AT&T and other broadband providers funneled millions of dollars through lobbying organizations such as "Hands Off the Internet" to spread the message that network neutrality constitutes dangerous government intervention of the Internet. See e.g. Ellen Sheng, *Companies Weigh In With Net Neutrality "Consumer Groups,"* Dow Jones Newswire Service, August 23, 2006.

The Commission and the vast majority of stakeholders always have understood that the *Internet Policy Statement* applies to broadband Internet access providers. In this proceeding, the Commission notes that the *Internet Policy Statement* was originally drafted “to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers.”¹²⁵ The Coalition believes it would be unlawful for the Commission to apply these rules to Internet content and application providers.¹²⁶

The same day that the *Internet Policy Statement* was approved, then-Chairman Kevin Martin and Commissioner Copps noted the *Internet Policy Statement’s* applicability to broadband Internet access providers.¹²⁷

Perhaps most telling, as the Commission noted in this proceeding, the *Internet Policy Statement* was placed in five already-opened dockets dealing with issues relating to Internet access providers, but it was not placed in the

¹²⁵ *In the Matter of Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry Practices*, WC Docket No. 07-52, Footnote 223, citing 20 FCC Rcd at 14988, para.4.

¹²⁶ At this time, the OIC will not go into a detailed legal analysis of the FCC’s lack of authority to regulate Internet application and content providers. For further discussion on this, however, see Frieden, *Why the FCC’s Proposed Openness Principles Cannot and Should Not Apply to Internet Application and Content Providers*.

¹²⁷ *In the Matter of Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry Practices*, WC Docket No. 07-52, Footnote 223, citing 20 FCC Rcd at 14988, para.4.

docket most likely to address content, applications, and services – the *IP-Enabled Services* docket.¹²⁸

The Commission also noted in the proposed rules that in the *Comcast Network Management Practices Order*, the *Internet Policy Statement* was “part-and-parcel” of the decision to deregulate broadband Internet access service.¹²⁹

Finally, we note that a broadband Internet access provider’s control of the physical layer gives such provider a unique ability to control higher layers, such as content and applications, which are not replicable by the content and application providers traveling over the physical layers.

XV. TRANSPARENCY AND DISCLOSURE

A. Robust Disclosure Is Important to the Internet Ecosystem.

Network operators currently do not provide adequate disclosure to consumers or application providers to allow them to make informed decisions about where to allocate their resources and how to design their applications.

¹²⁸ *Id.*, citing *Internet Policy Statement* 20 FCC rcd at 14986 (identify six proceedings in five dockets: *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33; *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*; *1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20, 98-10; *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185; *InternetOver Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52.)

¹²⁹ *Id.*, citing 23 FCC Rcd at 13047, para. 34.

That there is very little transparency concerning network management issues is illustrated by broadband Internet access providers' broad terms of service, which generally allow the providers change their terms without prior notice to customers or to the public. Even when broadband Internet access providers disclose information to the public, it is far less granular and complete than necessary to achieve the minimum level of transparency needed by users and applications providers.

The Internet is a cooperative of hundreds of private and public networks agreeing to interoperate in a compatible manner. Therefore, robust disclosure only goes so far in solving problems; applications developers and network operators simply cannot catalog the hundreds of potential variances from agreed-upon Internet standards that network operators might create.

Further, application providers lack adequate tools to design applications that can efficiently interoperate with every type of bandwidth constraint or possible bit-manipulation techniques that may be used by broadband Internet access providers.

Consequently, as discussed above, a strict non-discrimination rule is vital to ensure that the Internet continues to be an optimal, open platform for innovation and speech. Preservation of this openness also is the reason that any network management practice must be narrowly tailored to address a legitimate purpose.

The Commission should require broadband Internet service providers to

disclose –

- any service that inspects content of Internet traffic, including, but not limited to, DPI technology and any service at Layer 3 that does more than read and process basic addressing information;
- that such inspection of user content may operate as a waiver of the user's reasonable expectation of privacy;
- any and all limits imposed on or direct changes made to a customer's upstream or downstream traffic, including but not limited to, blocking traffic, delaying traffic, deprioritizing or prioritizing traffic, reordering traffic, redirecting traffic, discriminating for or against certain traffic, or inserting traffic into the stream;
- technical details of the methods used;
- exact details of all thresholds, including but not limited to, time-of-day or exact levels of congestion or bandwidth consumption, that triggers any network interference, as well as effects on the networks as a result of the chosen thresholds, such as percentage of users affected and the duration of time that those users are affected;
- exact details of thresholds that trigger a cessation of network interference;
- whether and to what extent users' activities and communications are monitored, and how that information is used and stored, and with whom it is shared;
- the type and nature of data collected, including but not limited to, dates, times, durations, Web or other Internet addresses, TCP packet content or IP headers;

- prior notice to users of any meaningful changes in terms of service that relate to one of the above-referenced matters;
- differences on how pipes are being allocated, especially if bandwidth is allocated dynamically;
- amount of capacity dedicated to Internet traffic, and if capacity is shared, how it is shared.

The above information should be collected by the Commission on a periodic and ongoing basis. The Commission should make public as much of the data as possible.¹³⁰

B. Disclosure Should Be Made Available to the Entire Internet Ecosystem.

As stated earlier, disclosure is important. There is no meaningful distinction, however, between different kinds of end-users (*i.e.*, consumers, content providers, or applications providers). For instance, today's graduate school student end-user may be working on an application for a school project that may become tomorrow's must-have application.

Currently, broadband Internet service providers do not make any network information available outside their terms of service. The proposed disclosure requirements would give consumers, as well as edge content and application

¹³⁰ The Open Internet Coalition supports the *ex parte* filing of Free Press on this subject. Ben Scott and Chris Riley, Notice of *Ex Parte* Filing; WC Docket No. 07-52 (October 24, 2008).

providers, information regarding the network and network management practices. Such disclosure is not a novel approach – it would be analogous to the comparably efficient interconnection (“CEI”) and open network architecture (“ONA”) rules. As the Commission understood when it adopted those rules, disclosure rules not only provide information to participants in the Internet marketplace, allowing them to make informed decision, but also help ensure that broadband access providers comply with the underlying open Internet principles.¹³¹

C. Traffic Management Practices Should Be Made Available 30 Days Before Implementation.

Broadband Internet access providers’ traffic management techniques should be made available to the public 30 days prior to being implemented. In addition, any meaningful change to an Internet access providers’ traffic management technique should be made available 30 days prior to implementation. In cases where it is not feasible to post such information 30 days prior to implementation (for example, because of exigent circumstances), the broadband Internet access provider should disclose practices as soon as reasonably possible and explain why it was not able to provide 30 days notice. The disclosures should be made online, in clear and conspicuous language to all

¹³¹ See 47 C.F.R. §§ 51.325-51.335. See also 47 U.S.C. § 251(c)(5) (requiring incumbent local exchange carriers to provide public notice of changes “in the information necessary for the transmission and routing of services using that local exchange carrier’s facilities or networks, as well as any of the other changes that would affect the interoperability of those facilities and networks.”).