

**BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.**

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

REPLY COMMENTS OF BRIGHT HOUSE NETWORKS

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EXECUTIVE SUMMARY

Proponents of broadband Internet regulation claim that every form of network management and every claim of “discrimination” in handling traffic may be challenged and must be presumed unlawful unless the network operator proves a public benefit and a management technique as narrowly drawn as possible. There is no record to support such a rule or such presumptions. Instead, the record is that subscribers are being given better and better access to the Internet. Bright House Networks is constantly improving the consumers’ Internet experience to meet competition from DSL, FiOS, and increasingly-popular wireless data cards. Speculation about what might happen if these competing broadband providers stopped being competitive and began to deny consumers the Internet product they want is as flimsy as the speculation of “open access” advocates that was rejected years ago. The Commission’s choice of vigilant self-restraint was rewarded with huge network investment by MSOs and telcos, intensified competition and an explosion of new services.

The Commission recently weighed far weightier evidence that local authorities were actually delaying and impeding wireless service facility siting applications, delaying the potential benefits of wireless broadband availability, job creation, improved education, advances in telemedicine, energy independence and enhanced public safety. Yet the Commission found that record to justify only a “balanced” rule establishing a right for a challenger to present and prove its case in court—without presumptions that the de facto denial or delay was unreasonable. Network providers need the flexibility to adapt to changing demands. There is no basis for the government to dictate network management techniques, particularly through artificial presumptions. If there is to be any net neutrality rule, the burden of proof must remain on the

challengers, for there is no basis to support any presumption that network management is unlawful or unfair.

What evidence there is of actual misconduct is by gatekeepers who reside on the other side of the Internet—by companies like Google, which controls 70 percent of the search market but which the proposed rules propose to exempt and favor. Google favors its own services at or near the top of its search results, bypasses the algorithms it uses to rank the services of others, “tweaks” the algorithms it uses to rank its competitors, and reserves broad rights to demote web sites, all out of sight of average consumers who have no way to know if their Internet experiences have been manipulated by Google. If opportunity and record justify a rule, it should apply to Google, and not to the competing providers of Internet access on whom Google seeks to heap unfavorable regulatory presumptions.

Rule proponents are asking for radical intervention in the Internet and permanent cost shifting. A broad prohibition on any payment from the “edge” to a broadband provider would operate as a complete barrier to consensual arrangements that promote efficiency and are beneficial to consumers, such as paid peering, CDN collocation, and IP multicast. The prohibition would further entrench those who actually dominate the Internet, preventing partnerships with new entrants who cannot afford to replicate Google’s infrastructure of preference—its server farms, CDNs and OpenEdge platform. Even those who grudgingly concede that networks might need management say that management that is reasonable to handle peak loads or congestion cannot be a permanent answer. They propose that broadband providers should be required to keep investing infinite capital for an ever expanding capacity, and recover all costs from the very consumers for whom it is a national priority to deliver more affordable broadband. This approach would be a radical (and illegal) departure from Congressional

directive on how to achieve investment. It would also upend—without record basis—prior Commission reasoning about network investment. The Commission removed common carriage obligations from broadband because common carrier “regulations constrain technological advances and deter broadband infrastructure” and are out of step with “fast-paced technological changes and new consumer demands.” There is no basis for a 180 degree reversal.

Some comments suggest that the FCC deal with innovative managed IP services through further rulemaking or in waivers, but to apply “neutrality” rules to them all in the meantime. New service launches reflect sensitive alignments of creativity, capital, markets, and speed to execute on an idea. Consider what would happen to innovators trying to bring value to consumers quickly (and as first mover) if they had to pass first through an FCC process. When launched, some critics said “Facebook is the new AOL,” because it operates within its own domain and does not welcome Google crawlers or search. Yet, it has come to serve over 400 million enthusiastic users, and has driven Google to launch a competing social network. Imagine “what would Google do” had it been able to delay a Facebook waiver at the Commission. Twitter also launched without giving itself over to Google search. If Twitter had to pass a regulatory gauntlet at the speed of typical FCC waivers, there would have been no information flowing out of Tehran protests. In fact, it was because Twitter and Facebook were allowed to launch on their own terms that each has been able to obtain critical financing (and continuing economic viability), through payments from the edge. To preserve such a platform for innovation, the Commission should not extend any regulation to IP managed services.

Bright House Networks continues to support practices by all providers of Internet access to provide reasonable, consumer-oriented disclosure of their network management practices. It does not agree that “disclosure” rules should be turned into multiple engineering treatises in

different forms to different groups. Even the strongest advocates of disclosure do not practice what they are preaching to the Commission. Web sites, for example, are particularly interested in how Google will rank their pages and what Google considers abuse, but Google does not disclose that detail. The far better path for handling B2B communication is through engineering forums. This practical path is what led Canada, Japan, and Europe to reject the burdensome disclosure obligations that some proponents seek to introduce to the United States.

If the Commission concludes that it must adopt consumer protections for broadband access, it would be arbitrary to exempt wireless while regulating wireline. Wireless—not wireline—has the record of repeatedly blocking and restricting video and voice access. The Commission has documented the rapid rise of wireless access, and today, approximately 1 in 4 data card consumers are relying on their wireless data cards as their sole home Internet connection. If there are to be neutrality protections, these consumers deserve no less protection from wireless providers.

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REPLY COMMENTS OF BRIGHT HOUSE NETWORKS

Bright House Networks, LLC hereby submits its reply to comments submitted in the Notice of Proposed Rulemaking in the above-captioned proceedings.¹ Bright House Networks is the country’s seventh largest MSO, and a full-service communications provider in Florida, Alabama, California, Indiana, and Michigan, with approximately 2.4 million customers. In each of its operating divisions, Bright House Networks offers advanced digital video, high speed data, facilities-based competitive voice services and high-capacity business class services.

The recent decision by the D.C. Circuit to circumscribe the Commission’s authority over Internet service should serve as sufficient answer to those Comments proposing radical broadband Internet regulation.² Bright House understands that many will continue to advocate for such regulation, regardless of statutory limitations. Those limitations have been well described by the D.C. Circuit and by recent critiques of efforts to “reclassify” broadband in a

¹ *Preserving the Open Internet; Broadband Industry Practices*, Notice of Proposed Rulemaking, FCC 09-93, 24 FCC Rcd. 13065 (2009) (hereinafter “*Notice*”). The reply date was most recently extended by Order, DA 10-607, April 7, 2010.

² *Comcast Corporation v. FCC*, No. 08-1291 (D.C. Circuit, April 6, 2010).

supposed workaround of those statutory limits.³ The purpose of this Reply is to address the merits, and to explain why such radical regulatory approaches are unnecessary to preserve free and open Internet, unsupported in the record, and will disserve consumers.

I. THE EVIDENCE OFFERED DOES NOT SUPPORT PRESUMPTIONS AGAINST NETWORK MANAGEMENT

Proponents claim that every form of network management and every claim of “discrimination” in handling traffic may be challenged and must be presumed unlawful unless the network operator proves to the contrary. Once challenged, they believe that any challenged practice may survive regulatory scrutiny only if there is a detailed record of public benefit and the network management technique is as narrowly drawn as possible.⁴ This approach is upside down: there is no detailed record to support the proposed rules, let alone presumptions against management.

In the voluminous record on which the proposed rules are supposed to be based, what speaks most clearly is what is not there. There is no evidence of market abuse. Of the billions of bytes of daily Internet traffic, the entire record cites exactly two cases, one ancient, and both rapidly resolved.⁵ There is no evidence of market domination; indeed, there is not even a definition of a market that the proposed rules are to be addressing. There is copious evidence

³ Joint Letter to Julius Genachowski, Chairman, by the National Cable & Telecommunications Association, CTIA, United States Telecom Association, Telecommunications Industry Association, Independent Telephone and Telecommunications Alliance, Verizon, AT&T, Time Warner Cable, and Qwest, GN Docket No. 09-191 (February 22, 2010).

⁴ Comments of Free Press at 5, 75, 83-84; Comments of Google Inc. at 62, 72.

⁵ *Madison River Commc'ns*, Order, DA 05-543, 20 FCC Rcd. 4295 (2005) (resolved in less than a month); *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, Memorandum Opinion and Order, 23 FCC Rcd. 13028 (2008) (resolved by agreement between Comcast and BitTorrent well before the Commission acted on the petition challenging Comcast's network management practices), *appeal pending*, *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir. oral argument held Jan. 8, 2010).

that subscribers are being given better and better access to the Internet, from both wired and wireless providers, rather than being blocked from choice or competition.⁶ According to the latest reports, even the entire *cable industry* provides Internet service to fewer than 40 million of the 126 million homes passed by broadband; DSL runs a close second.⁷ The Commission's most recent report documents the rapid rise in 2008 of wireless access.⁸ More recent figures show that wireless data card users are increasingly relying upon their data cards as their sole home Internet connection, refuting every claim that consumers are "locked in" to any one provider.⁹

What is offered to support regulation is speculation: speculation about what might happen if these competing providers of high speed internet access had and exercised the power to deny consumers the Internet product they want. But speculation is not the "data" on which the Commission has committed to base its rulemakings.¹⁰ Speculation has been proven grossly

⁶ *High-Speed Services for Internet Access: Status as of December 31, 2008*, Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, Feb. 2010, at 30, 32 (hereinafter "February 2010 FCC Broadband Report") (maps illustrating the number of providers of fixed and mobile high-speed connections by census tract); *see also* Ex Parte Submission of the U. S. Department of Justice, at 6, GN Docket No. 09-51 (Jan. 4, 2010) ("[I]n the case of broadband services, it is clear that the market is shifting generally in the direction of faster speeds and additional mobility.").

⁷ February 2010 FCC Broadband Report at 7 (reporting that cable accounts for 46 percent of 86 million residential broadband connections); National Cable & Telecommunications Association ("NCTA"), *Industry Data*, available at <http://www.ncta.com/Statistics.aspx> (125.7 million "homes passed by cable video service").

⁸ February 2010 FCC Broadband Report at 7 (noting that, by year end 2008, wireless broadband had grown to 18 percent of the market from less than 2 percent in 2005).

⁹ *See, e.g.*, Comments of Skype Communications S.A.R.L. at 12 (hereinafter "Skype Comments"). Nielson Co., *Cord-Cutting Frontiers: Mobile Data Cards At Home*, Aug. 19, 2008, http://blog.nielson.com/nielsenwire/online_mobile/cord-cutting-frontiers-mobile-data-cards-at-home/ (reporting that 59 percent of mobile data card users surveyed were "considering swapping their . . . wired internet service for exclusive data card use"). According to the most recent information available to Bright House, by the end of 2009, 24 percent of data card users made the swap, relying exclusively on their data cards for home Internet access. The FCC's most recent data also reflect this trend as wireless plans that allow for broadband Internet access have grown from just 2 percent to 18 percent of all residential connections over a period of only three years. *See* February 2010 FCC Broadband Report at 7.

¹⁰ *Notice* ¶ 16 ("We are particularly interested in fact-based answers to the questions we pose and strongly encourage commenters to provide relevant data . . ."); *see also* *The Commission's Cable Horizontal and Vertical Ownership Limits*, Fourth Report and Order and FNPRM, FCC 07-219, 23 FCC Rcd. 2134 ¶ 14 (2008) (noting that

wrong in the past. Ten years ago “open access” advocates predicted that Internet access would languish without mandated access to cable and telephone broadband facilities. A short time later, Amazon.com warned that “economic incentives” would lead ISPs “to impair access to select Internet Content,” dramatically degrading the defining qualities of the Internet.¹¹ Yahoo! followed the same theme, predicting seven years ago that without new rules, there is “little question” that cable broadband providers would have the “incentive” and “opportunity” to discriminate against unaffiliated content.¹² In 2006, Jeff Chester went as far as to predict that incumbent telephone and cable companies would “charge a fee for virtually everything we do online” and that “this push for corporate control” would threaten “civil rights, economic justice, the environment and fair elections.”¹³ Time has proven these dire predictions false, and the Commission’s choice of vigilant self-restraint was rewarded with huge network investment by MSOs and telcos, intensified competition and an explosion of new services.

What evidence there is of actual misconduct is by gatekeepers who reside on the other side of the Internet—by companies like Google, whom the proposed rules propose to exempt and favor. Even after the successful introduction of Bing, by year end 2009, Google’s share of the U.S. search market still exceeds 65 percent of all searches,¹⁴ a share by a single company that is

“courts had remanded several media ownership rules, requiring that the Commission more firmly base its rules on empirical data and record evidence”).

¹¹ Ex Parte Letter of Paul E. Misener, VP, Global Public Policy, Amazon.com, WC Docket No. 02-52, at 3 (Dec. 2, 2002).

¹² Progress & Freedom Found., *Net Neutrality or Net Neutering: Should Broadband Internet Services Be Regulated?*, Progress on Point, Nov. 2003, at 10, available at <http://www.pff.org/issues-pubs/pops/pop10.22netneutrality.pdf>.

¹³ Jeff Chester, *The End of the Internet?*, The Nation, Feb. 1, 2006, available at <http://www.thenation.com/doc/20060213/chester>.

¹⁴ *comScore Releases January 2010 U.S. Search Engine Rankings*, comScore, Inc., Feb. 11, 2010, available at http://www.comscore.com/Press_Events/Press_Releases/2010/2/comScore_Releases_January_2010_U.S._Search_Engine_Rankings. Google’s dominance is even more pronounced in Europe, where Google’s share of the online search and advertising market exceeds 90 percent, and the European Commission and French regulators are

larger than the collective share of MVPD subscribers by all cable companies combined. What Google has done with that dominance goes well beyond speculation. “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. . . . The preferential placement of Google Maps helped it unseat MapQuest from its position as America’s leading online mapping service virtually overnight.”¹⁵ Google “tweaks” its algorithms to defeat efforts to associate particular search terms with a particular individual.¹⁶ It initially removed a controversial image of Michelle Obama, and then restored the image accompanied with an advertorial disclaimer. The disclaimer explained “Individual citizens and public interest groups do periodically urge us to remove particular links or otherwise adjust search results.” It chose not to do so, but cautioned that “Google reserves the right to address such requests individually” Its “Webmaster Guidelines” warns against the most common forms of deceptive or manipulative behavior, but adds: “Google may respond negatively to other misleading practices not listed here It's not safe to assume that just

currently investigating Google for possible anti-competitive conduct. Issue Statement, *ICOMP Welcomes Yahoo!/Microsoft Agreement While Expressing Continued Concern over State of Competition in Online Markets*, Initiative for a Competitive Online Marketplace, Feb. 19, 2010, available at <http://www.icomp.org/~icompps/pdfs/ICOMPstatementMY.pdf>.

¹⁵ Adam Raff, *Search, but You May Not Find*, Op-Ed, N.Y. Times, Dec. 28, 2009, available at http://www.nytimes.com/2009/12/28/opinion/28raff.html?_r=1&scp=1&sq=Seach%20but%20you%20may%20not%20find&st=cse.

¹⁶ Charles Arthur, Technology Blog, *Inside the Michelle Obama image fight: why Google won't tweak results*, The Guardian, Nov. 25, 2009, available at <http://www.guardian.co.uk/technology/blog/2009/nov/25/michelle-obama-google-results>; Jacqui Cheng, *Google defuses Googlebombs*, arstechnica, Jan. 26, 2007, available at <http://arstechnica.com/old/content/2007/01/8714.ars>.

because a specific deceptive technique isn't included on this page, Google approves of it.”¹⁷ Sometimes, Google’s practices bubble up into public display, such as when it recently blocked calls on Google Voice, or mined private Gmail address books to speed the creation of its own social network in competition with Facebook.¹⁸ But for the most part, its “tweaking” or elimination of search results is performed out of sight of average consumers, who have no way to know if their Internet experiences have been manipulated by their search provider. If the record reveals a dominant gatekeeper for the web with the opportunity and record of gatekeeping, it is Google, and not the competing providers of Internet access on whom Google seeks to heap unfavorable regulatory presumptions.

Presumptions must be based on something other than speculation.¹⁹ In this docket, proponents have sought to resurrect and apply (by a different name) the very “strict scrutiny” standard disclaimed by the Commission.²⁰ Under such presumptions, challenges may be launched to every evolving form of network management, and to every evolving business model for services outside of residential best efforts Internet, with no need for the challenger to carry

¹⁷ Google, Webmaster Guidelines, *available at* <http://google.com/support/webmasters/bin/answer.py?hl=en&answer=35769>.

¹⁸ Miguel Helft, *With Buzz, Google Plunges Into Social Networking*, N.Y. Times, Feb. 9, 2010, *available at* <http://www.nytimes.com/2010/02/10/technology/internet/10social.html>; Miguel Helft, *Critics Say Google Invades Privacy With New Service*, N.Y. Times, Feb. 12, 2010, *available at* <http://www.nytimes.com/2010/02/13/technology/internet/13google.html>.

¹⁹ A presumption is “an inference as to the existence of one fact from the existence of some other fact founded upon a previous experience of their connection.” Bryan A. Garner, *Black’s Law Dictionary*, at 1305 (9th ed. 2009) (*citing* William P. Richardson, *The Law of Evidence* § 53, at 25 (3d ed. 1928)). “Presumptions of law must rest upon facts established by direct evidence, and . . . cannot be based upon or inferred from other presumptions.” Robert T. Kimbrough, *Summary of American Law*, § 11:3 (Lawyers Co-operative Publ’g Co. 1974). Proponents of the rules in this proceeding have fallen far short of establishing evidence of “previous experience” connecting the fact that an ISP manages its network to anticompetitive conduct.

²⁰ *Notice* ¶ 137 (“We believe that this standard is unnecessarily restrictive in the context of a rule that generally prohibits discrimination subject to a flexible category of reasonable network management.”).

any burden of proof, let alone one demonstrating consumer harm or anticompetitive intent. The evidence cannot support such presumptions.

A good point of comparison is how the Commission recently weighed the evidence that local authorities were delaying and limiting wireless service facility siting applications. There, as in this docket, the Commission noted the potential benefits of wireless broadband to broadband availability, job creation, improved education, advances in telemedicine, energy independence and enhanced public safety.²¹ The evidence of active impediments to broadband deployment included more than 3,300 pending personal wireless service facility siting applications before local jurisdictions, 760 of which were pending more than one year and 180 were pending more than three years. The evidence included hundreds more submitted by individual carriers.²² The Commission found that record to justify only a “balanced” rule establishing a right for a challenger to present and prove its case in court against the local impediment to broadband—without presumptions that the *de facto* denial or delay was unreasonable. The Commission specifically rejected any presumption that a court should grant an injunction, holding that facility siting is complex, and that the court must consider all the specific facts in the case before making assumptions about remedies.

We reject the Petition’s proposals that we go farther and either deem an application granted when a State or local government has failed to act within a defined timeframe or adopt a presumption that the court should issue an injunction granting the application. . . . [T]he case law does not establish that an injunction granting the application is always or presumptively appropriate when a “failure to act” occurs. To the contrary, in those cases where courts have issued such injunctions upon finding a failure to act within a reasonable time, they have done so only after examining all the facts in the

²¹ *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, FCC 09-99, 24 FCC Rcd. 13994, 14029-30, 14031 (2009), Statements of Chairman Julius Genachowski and Commissioner Michael J. Copps.

²² *Id.* ¶ 33.

case. While we agree that injunctions granting applications may be appropriate in many cases, the proposals in personal wireless service facility siting applications and the surrounding circumstances can vary greatly. It is therefore important for courts to consider the specific facts of individual applications and adopt remedies based on those facts.²³

In this docket, the evidence supposedly justifying an automatic presumption against network practices is of only two instances: one is ancient, one involved management techniques with imperceptible delays in transport, and both were rapidly resolved under existing regulatory structures.²⁴ If there is to be any procedure for challenging network management techniques, the rule must be narrowly drawn, and the burden of proof must remain on the challengers, for there is no basis to support any presumption that network management is unlawful or unfair.²⁵

II. THE RULES WOULD HARM CONSUMERS BY CONSTRAINING INNOVATION AND HAMPERING INVESTMENT

While support for the rules is framed as protection for the consumer, for the Internet, and for innovation, proponents are really asking for radical intervention in the Internet and permanent cost shifting. First, they ask for a broad prohibition on any payment from the “edge” to a

²³ *Id.* ¶ 39 (internal citations omitted).

²⁴ *Madison River Commc’ns LLC*, Order, 20 FCC Rcd. 4295 (2005) (resolved in less than a month); *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, Memorandum Opinion and Order, 23 FCC Rcd. 13028 (2008) (resolved by agreement between Comcast and BitTorrent well before the Commission acted on the petition challenging Comcast’s network management practices), *appeal pending*, *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir. oral argument held Jan. 8, 2010).

²⁵ Under evidence rules, “[p]resumptions are rules of law attaching to *proven evidentiary facts* certain procedural consequences as to the opponent’s duty to come forward with other evidence.” *Legille v. Dann*, 544 F.2d 1, 5 (D.C. Cir. 1976) (emphasis added). The Notice acknowledges, and the record in this proceeding establishes, that network management practices play an important role in ensuring quality Internet service. Requiring challengers of a specific practice to prove its harmful nature is therefore fair and efficient. Antitrust law recognizes this, providing a useful analog here. It places the burden of proof on the challengers of purportedly anticompetitive conduct. *See, e.g., KLM Royal Dutch Airlines v. Amber Air Int’l, Ltd.*, No. 89 C 4953, 1992 WL 281409, at *9 (N.D. Ill. Oct. 5, 1992) (“The burden of proof is on the antitrust plaintiff . . . to put forth sufficient evidence to establish the validity of its market data.”) (*citing A.A. Poultry Farms v. Rose Acre*, 881 F.2d 1396, 1399 (7th Cir. 1988)). Whether applied to the Internet or to antitrust, placing the burden of proof on the challengers allows companies greater breathing room to innovate.

broadband provider.²⁶ As many parties have noted, this would operate as a complete barrier to consensual arrangements that promote efficiency and are beneficial to consumers, such as paid peering, CDN collocation, and IP multicast.²⁷ It would also entrench the preferences that have been built into the Internet by those who actually dominate the Internet, such as Google's server farms, CDNs or the OpenEdge platform, and insulate them from competition by businesses that need partners to challenge Google. Second, they ask that even bandwidth management that is reasonable to handle peak loads, congestion, or other facts of life for networks cannot be a permanent answer.²⁸ According to this view, once a broadband ISP starts offering service, that ISP must increase capacity at the ISP (and consumer) expense, rather than manage its capacity (and investments) more efficiently.²⁹

There appears to be no limit on that proposal: once the ISP provides a better-than-narrowband connection with private investment, it falls into a regulatory requirement to keep investing infinite capital for an ever expanding connection. It is not a monopoly carrier with a guaranteed rate of return. Yet it must invest, and it may not pursue any opportunity to participate in the two-sided Internet market. Instead, it must recover all costs from the very consumers for whom it is a national priority to deliver more affordable broadband.

²⁶ See Google Comments at 62-63; Free Press Comments at 75.

²⁷ Comments of AT&T Inc. at 69-73; Comments of Comcast Corporation at 38-41; Comments of Charter Communications at 24; Comments of the Telecom Manufacturer Coalition at 2-7.

²⁸ Google Comments at 6 (“[N]etwork management techniques to address congestion should not become permanent solutions to network capacity issues.”).

²⁹ See, e.g., Free Press, Notice of Ex Parte (filed Feb. 19, 2010) at 2 (“The Internet has performed well without [network management] when network gatekeepers respond to growth in usage by adding capacity.”).

There should be no misunderstanding that this would be radical regulatory intervention in the Internet. The Internet—which federal policy directs to remain unfettered by regulation³⁰—is not a collection of content server farms: it is defined by law as the network of interoperable packet switched data networks.³¹ This proposed regulatory approach would impose new compulsory investment, compulsory transport for third parties, and a prohibition on consensual contracts.

This would be a radical departure not only from Congressional directive in how to achieve investment,³² but from prior Commission reasoning about network investment.³³ When the Commission removed common carriage obligations from DSL, it did so because common carrier “regulations constrain technological advances and deter broadband infrastructure investment by creating disincentives to the deployment of facilities capable of providing innovative broadband Internet access services.”³⁴ It also found that common carrier regulatory models for broadband services were out of step with “fast-paced technological changes and new

³⁰ 47 U.S.C. § 230(b)(2) (“It 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.”).

³¹ 47 U.S.C. § 230(f)(1) (“The term ‘Internet’ means the international computer network of both Federal and non-Federal interoperable packet switched data networks.”).

³² See Section 706, Pub. L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157 (“The Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”).

³³ See, e.g., *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling, 17 FCC Rcd. 4798 ¶ 38 (2002), *aff’d*, *National Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (intermediate history omitted) (“[W]e believe broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market. In this regard, we seek to remove regulatory uncertainty that in itself may discourage investment and innovation. And we consider how best to limit unnecessary and unduly burdensome regulatory costs.”) (internal quotation omitted).

³⁴ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and NPRM, FCC 05-150, 20 FCC Rcd. 14853 ¶ 19 (2005) (hereinafter “Wireline Broadband Order”), *aff’d*, *Time Warner Telecom v. FCC*, 507 F.3d 205 (3d Cir. 2007).

consumer demands [that] are causing a rapid evolution in the marketplace for these services,” and left wireline broadband carriers “constrained in their ability to respond to these changes in an efficient, effective, or timely manner as a result of the limitations imposed by these regulations.”³⁵

The record shows that the additional costs of an access mandate diminish a carrier’s incentive and ability to invest in and deploy broadband infrastructure investment. We find this negative impact on deployment and innovation particularly troubling in view of Congress’ clear and express policy goal of ensuring broadband deployment, and its directive that we remove barriers to that deployment, if possible, consistent with our other obligations under the Act. It is precisely this negative impact on broadband infrastructure that led the Commission to eliminate other broadband-related regulation over the past two years.³⁶

There is nothing in the record on which to reverse this reasoning. As we detailed in our comments, in Bright House Networks’ experience broadband has been nurtured, funded and constantly upgraded not because of step-by-step increases in government regulation or mandatory investment rules, but because the cable industry was released from restrictive rules and micromanagement and allowed to respond to competitive market forces.³⁷ Broadband speeds and VOIP competition took off as the Commission released these services from legacy franchise, carrier, cable, and telephony regulation. Bright House Networks has constantly improved the consumers’ Internet experience to meet competition from DSL, FiOS, and increasingly-popular wireless data cards.³⁸ Our incentives are to improve service across all

³⁵ Wireline Broadband Order ¶¶ 19, 65.

³⁶ Wireline Broadband Order ¶ 44 (internal citation omitted).

³⁷ Comments of Bright House Networks at 2.

³⁸ *Id.* at 3.

categories, not to rob the Internet to favor other offerings.³⁹ Network providers need the flexibility to adapt to changing demands. There is no basis for the government to dictate network management techniques or network investment requirements. Indeed, to do so despite clear Congressional direction, and to reverse course after attracting investment with promises to free broadband from legacy carrier rules, would contravene the Communications Act,⁴⁰ constitute a physical and regulatory taking,⁴¹ and violate the First Amendment rights of cable operators.⁴²

³⁹ See *id.* at 14. See also Charter Comments at ii (“Nothing in the existing legal or market environment provides incentives for [a broadband service provider] to starve investment in its broadband plant to favor managed or specialized services over the traditional residential end-to-end network or to discriminate against online video content.”).

⁴⁰ 47 U.S.C. § 230(b)-(d); Wireline Broadband Order ¶ 77 (“Through section 706, [the Communications Act] provide[s] the Commission with a specific mandate to encourage broadband deployment, generally, and to promote and preserve a freely competitive Internet market, specifically. Indeed, Congress mandated that the Commission encourage broadband capability without regard to any transmission media or technology and remove barriers to infrastructure investment.”) (internal citations and quotation marks omitted.).

⁴¹ The imposition of rules that preclude efficient use of investor-owned network capacity, that purport to commandeer additional spectrum from other (Constitutionally-protected) uses, that would even insist on additional capital investment with no assurance for providing a return, and that would do so to assure the free use of broadband infrastructure by third parties, would constitute a taking. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982).

⁴² The cable industry’s massive investment in broadband capacity has certainly helped to build a platform for expressive freedom, but it should not be forgotten that the First Amendment is a limitation on action by the government against protected speakers like cable operators, and not a basis for promoting the voice of some speakers at the expense of others. The proposed rules would eliminate editorial discretion, constrain ISPs’ ability to tailor their offerings to specific groups, impose increased costs and burdens on ISPs’ means of communication, preclude new speakers from paying for enhanced capabilities they may want to obtain in order to make their voices heard in the face of far larger and dominant speakers, and require that broadband providers shift private capacity currently used for their media business to public carrier traffic. The Commission has no record to sustain such rules. This lack of evidence is fatal, because if the government proposes to limit speech to remedy harms, then even under an intermediate standard of scrutiny “[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 Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). Because such harm has not been established, the proposed rules fail for not “advanc[ing] important governmental interests unrelated to the suppression of free speech,” and the Commission cannot establish that they “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*). See also *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 822 (2000) (“Where first amendment rights are at stake, the Government must present more than anecdote and supposition.”). See also *Comcast Cablevision of Broward County, Inc. v. Broward County, Fla.*, 124 F. Supp. 2d 685, 690-93 (S.D. Fla. 2000) (broadband Internet service provider was a speaker under the First Amendment); Comcast Comments at 29; AT&T Comments at 235-36; Verizon Comments at 111-19; Comments of Time Warner Cable Inc. at 44-50.

III. MANAGED SERVICES SHOULD CONTINUE TO HAVE THE RIGHT OF EXPERIMENTATION AND GROWTH

Our initial comments took issue with suggestions that any rules designed for residential best efforts Internet service could reach other evolving services, and illustrated the extraordinary consumer benefits that can develop in research and trading, banking and finance, cloud computing and security, priority government services, and more if IP managed services are given room for experimentation and growth.⁴³ Since then, even more examples have emerged of network providers working cooperatively with content and service providers in order to provide consumers with optimized managed services. For example, Verizon Wireless worked with Skype to optimize the delivery of Skype voice traffic, and AT&T Wireless collaborated with Sling Media to optimize the delivery of Sling Media to the iPhone, while conserving 3G wireless spectrum.⁴⁴

Rather than challenging the benefits that can develop in IP services, some comments propose a feint: they suggest that the FCC consider such services through further rulemaking or in waivers, but to apply “neutrality” rules to them all in the meantime.⁴⁵ This is a prescription for disaster. No one at the edge of the net or elsewhere could effectively innovate and bring value to consumers quickly or as first mover if they had to pass first through an FCC waiver process.

⁴³ Bright House Comments at 12.

⁴⁴ Roger Cheng, *Verizon Opens Its Network to Skype Calling Service*, Wall Street Journal, February 16, 2010, available at <http://online.wsj.com/article/SB10001424052748704804204575069382953903508.html>; Todd Spangler, *AT&T Reverses Ban On Sling via 3G*, Multichannel News, February 8, 2010, available at http://www.multichannel.com/article/448036-AT_T_Reverses_Ban_On_Sling_via_3G.php. It is quite possible that as Netflix continues its shift from distribution of DVDs by physical mail (at its own expense) to using broadband networks (financed by others), it can also enter into arrangements that optimize the consumption of network capacity.

⁴⁵ Google Comments at 76-77; Free Press Comments at 111-12; Comments of Public Knowledge, et al. (“Public Interest Commenters”) at 32.

Consider, for example, what would have become of Facebook had it needed an FCC waiver to launch. Launches reflect sensitive alignments of creativity, capital, markets, and speed to execute on an idea. Facebook was launched amidst a debate over “openness,” because it operates within its own domain and does not welcome Google crawlers or search. Some critics said “Facebook is the new AOL.”⁴⁶ And yet, it has come to serve over 400 million enthusiastic users,⁴⁷ and has driven Google to launch a competing social network. Imagine what Google would have done had it been able to oppose a Facebook waiver at the Commission.

Or suppose that Twitter, which also launched without giving itself over to Google search, needed an advance rulemaking or waiver. Evolution waited more than a year for a “navigation device” waiver that allowed cable operators to put low-cost digital-to-analog boxes in homes and launch a cornucopia of new services in the recovered spectrum.⁴⁸ Hollywood is still waiting after nearly two years for a “selectable output” waiver to bring new theatrical window movies securely to consumers in their homes.⁴⁹ If Twitter had to await the same process, there would have been no information flowing out of Tehran protests, and probably no Twitter at all.

In fact, it was because Twitter and Facebook were allowed to launch on their own terms that each has been able to obtain critical financing (and continuing economic viability), through payments from the edge.⁵⁰

⁴⁶ Richard MacManus, *How Open Is Facebook, Really?*, ReadWriteWeb.com, July 17, 2007, available at http://www.readwriteweb.com/archives/how_open_is_facebook_really.php.

⁴⁷ Statistics, Facebook Press Room, available at <http://www.facebook.com/press/info.php?statistics>.

⁴⁸ *Evolution Broadband, LLC's Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules; Implementation of Section 304 of the Telecommunications Act of 1996*, Memorandum Opinion and Order, FCC 09-46, 24 FCC Rcd. 7890 (2009).

⁴⁹ See Public Notice, *MPAA Files Petition for Waiver of the Prohibition on the Use of Selectable Output Controls (47 C.F.R. § 76.1903)*, MB Docket No. 08-82, DA 08-1081 (June 5, 2008).

⁵⁰ Technology Blog, The Guardian, *Has Twitter found a business model?*, available at <http://www.guardian.co.uk/technology/blog/2009/dec/22/twitter-profit/print> (“The reports suggesting that Twitter is

The Commission has previously held that delays incident to FCC regulatory waivers and clearances also undermine innovation and investment among broadband providers. In evaluating the impact of *Computer III* filing procedures on broadband innovation, the Commission learned that such requirements “prevent[ed] [broadband providers] from altering business priorities in response to changing market demands, imped[ed] their ability to take advantage of business opportunities due to ‘time to market’ issues, and provid[ed] competitors with advance notice of innovative service enhancements, thus eliminating any potential wireline broadband competitive advantage *vis-à-vis* cable modem or other platform providers.”⁵¹ The “inherent regulatory delay that occurs through the network change disclosure process, the web posting requirements, and tariffing requirements, which a BOC must comply with before making *any* change to its network that enhances or upgrades its Internet access services” presented serious obstacles to new offerings.⁵² One provider explained “that it frequently must deny requests for new Internet access service capabilities because the process to accommodate them under existing *Computer Inquiry* regulations is prohibitively expensive.”⁵³ The Commission concluded: “We find that these costs, inefficiencies, and delays are significant and substantially impede network development,” and that by eliminating these barriers, it could promote “the growth and development of entirely new broadband platforms” and “the flexibility to respond more rapidly and effectively to new consumer demands.”⁵⁴ All of these recent conclusions point to one

profitable are based on the fact that the San Francisco startup signed lucrative deals with Microsoft and Google, in which the two technology megacorps get access to its data for use in their search engines. . . . (Facebook also has a similar deal in place, though it is not clear how much money is changing hands there).”)

⁵¹ Wireline Broadband Order ¶ 71.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* ¶ 79.

conclusion: if the Commission wishes to promote innovation in broadband, it must reject claims to subject “managed services” to network neutrality regulations, or to subject the launch of such services to the delays inherent in further rulemaking or waivers.⁵⁵

IV. INTRUSIVE DISCLOSURE REQUIREMENTS ARE UNNECESSARY AND UNDERMINE BROADER TRANSPARENCY GOALS

In its initial comments, Bright House Networks agreed that all providers of Internet access should provide reasonable, consumer-oriented disclosure of their network management practices. Certain comments have sought to transform consumer disclosures into obligations to disclose detailed information on management practices, including such items as “interoperability and application interface” information.⁵⁶ Others assert that ISPs should be required to make multiple disclosures in different forms, including detailed technical disclosures that would allow “knowledgeable professionals—including game developers, as well as computer programmers and engineers—[to] access detailed information necessary for compatible technological developments in their fields.”⁵⁷

Bright House supports transparency, but such an intrusive regulatory approach actually undermines the dialogue that should be underway. Even the strongest advocates of full disclosure do not practice what they preach to the Commission. Web sites, for example, are particularly interested in how Google will rank their pages and what Google considers abuse.

⁵⁵ As we explained in our initial comments, it would also be unlawful under the Communications Act, and the First and Fifth Amendments to the U.S. Constitution to subject managed services to such restraints. Bright House Comments at 15-16.

⁵⁶ Comments of the Software & Information Industry Association at 8. *See also* Comments of the Independent Film & Television Alliance at 16 (ISPs should be required to disclose “any private cross industry agreements that affect or are likely to affect delivery and access to content and applications.”); Comments of Adam Candeub and Daniel John McCartney at 4-7 (“[T]he rules should make broadband providers disclose their (1) internal traffic management policies by reference to the standard architecture, [Differentiated Services]; and (2) external interconnection agreements by participating in a public registry.”).

⁵⁷ Comments of The Digital Education Coalition at 12-13.

But the Google Webmaster guidelines only go so far: the “quality guidelines” that describe what may cause a site to be removed from Google search results illustrate some troublesome practices, but leaves the discretion to Google: “These quality guidelines cover the most common forms of deceptive or manipulative behavior, but *Google may respond negatively to other misleading practices not listed here* (e.g. tricking users by registering misspellings of well-known websites). It's not safe to assume that just because a specific deceptive technique isn't included on this page, Google approves of it. Webmasters who spend their energies upholding the spirit of the basic principles will provide a much better user experience and subsequently enjoy better ranking than those who spend their time looking for loopholes they can exploit.”⁵⁸ They even warn web pages not to “test” Google, because such tests “consume computing resources,” which Google seeks to manage.⁵⁹

The far better path for handling B2B communication is through engineering forums. There are already forums where engineering groups discuss these matters, and these are by far the preferable forums. Engineering forums composed of experts with appropriate technical expertise would be substantially better positioned than the Commission to develop best practices and standards, and even to resolve technical disputes centered on specific management practices. Stakeholders on both sides of the net neutrality debate agree in principle on the importance of expert groups to the Internet ecosystem.⁶⁰

⁵⁸ Google, Webmaster Guidelines, *available at* <http://www.google.com/support/webmasters/bin/answer.py?answer=35769#3> (“If you determine that your site doesn't meet these guidelines, you can modify your site so that it does and then submit your site for reconsideration.”).

⁵⁹ *Id.* (“Don't use unauthorized computer programs to submit pages, check rankings, etc. Such programs consume computing resources and violate our Terms of Service.”).

⁶⁰ *See, e.g.*, Google and Verizon Joint Submission to the FCC on the Open Internet (Jan. 14, 2010); Comments of Massachusetts Institute of Technology Professors David Clark, William Lehr, and Steve Bauer at 16 (suggesting that a group called the W3C Consortium is an example of such a forum for stakeholders to reach agreement).

This practical path, we suggest, is what led Japan to reject the burdensome disclosure obligations that some proponents seek to introduce to the United States. Four Japanese industry groups established a working group to study “packet shaping” techniques and best practices. Their work resulted in agreed upon best practices that include consumer disclosure obligations. The Japanese guidelines acknowledge that non-end users have an interest in an ISP’s network management practices, and meet those interests by recommending that a broadband provider provide its end-user disclosure “on its tariffs and websites.”⁶¹

Canada’s and the European Union’s approaches are similar to Japan’s, calling for network management information to be posted on ISP providers’ company websites⁶² and in customers’ contracts.⁶³ The Canadian Radio-television Telecommunications Commission acknowledged the importance of allowing network management issues to be sorted out in engineering groups such as the Internet Engineering Task Force.⁶⁴ Commenters in the European Union’s review of its telecommunications regulatory framework consistently asked that “bureaucratic intervention” should be avoided in favor of relying on private “standardisation

⁶¹ Japan Internet Providers Association, Telecommunications Carriers Association, Telecom Services Association, Japan Cable and Telecommunications Association, *Guidelines for Packet Shaping*, May, 2008, available at http://www.jaipa.or.jp/other/bandwidth/guidelines_e.pdf. Japan’s guideline was informed by an earlier government-sponsored report: *Report on Network Neutrality*, Working Group on Network Neutrality, Ministry of Internal Affairs and Communications, Japan, at 29-31 (Sept. 2007), available at http://www.soumu.go.jp/main_sosiki/joho_tsusin/eng/pdf/070900_1.pdf (noting that establishing bandwidth control guidelines should be accomplished with “participation from diverse parties” and “overly explicit [guidelines] may inhibit service competition”).

⁶² Telecom Regulatory Policy CRTC 2009-657, Review of the Internet traffic management practices of Internet service providers, October 21, 2009.

⁶³ Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services, ¶ 14 (hereinafter “Directive 136”).

⁶⁴ Telecom Public Notice CRTC 2008-19, Notice of consultation and hearing, Review of the Internet traffic management practices of Internet service providers, ¶ 9, Nov. 20, 2008.

bodies” to develop standards, and the EU appears to have agreed.⁶⁵ The EU recognized the growing “competitive dynamics” in European “electronic communications” markets and concluded that it is “essential that *ex ante* regulatory obligations only be imposed where there is no effective and sustainable competition.”⁶⁶ The Commission should follow suit here, allowing the competitive market to check ISPs’ behavior and leaving standards development to those best suited to do such work, private engineering forums.

V. THE RECORD DOES NOT SUPPORT EXEMPTING WIRELESS

Many comments suggest that whatever the Commission does with respect to wireline broadband providers, it should exempt wireless, because wireless faces complex issues of finite spectrum, interconnection, interfaces with multiple hardware devices, and rapid innovation. All of these issues are faced as well by wireline broadband providers, and provide no basis for exempting or postponing rules for wireless. The Commission’s most recently released data for the year ending 2008 shows the rapid rise of wireless access.⁶⁷ Today, approximately 1 in 4 data card consumers are relying on their wireless data cards as their sole home Internet connection.⁶⁸

⁶⁵ Contribution to the Commission’s Communication on the forthcoming review of the EU regulatory framework for electronic communications and services, Deutsche Telekom, Oct. 27, 2006, at 19 (“Wherever certain quality requirements . . . are necessary, they will be dealt with by the relevant standardisation bodies in a well-established process. Further bureaucratic intervention in the planning scope of network operators should be avoided as any quality of service should be regarded as a result of market competition.”); *see also* CEEP’s Contribution to the Communication of the European Commission on the Review of the EU Regulatory Framework, October 2006, at 6; ETP Position regarding the Commission’s proposals for review of the EU regulatory framework for electronic communications and services, including revision of the Recommendation on relevant markets, 2006, at 10; Directive 136 ¶ 9.

⁶⁶ Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorization of electronic communications networks and services, ¶ 5.

⁶⁷ 2010 FCC Broadband Report at 7 (reporting that by the end of 2008, 86 million subscribers had mobile devices “capable of transmitting data at speeds above 200 kbps”) (emphasis added). *See also* footnote 5, *supra* (reporting that wireless’s market share has grown from less than 2 percent in 2005 to 18 percent by the end of 2008).

⁶⁸ *See* footnote 7, *supra* (discussing growth of wireless and increased use of mobile data cards).

While the record in this docket does not show problems with wireline access, it does show repeated blocking and restricting of video and voice access in wireless.⁶⁹ If the Commission concludes that it must adopt consumer protections for broadband access, it would be arbitrary to apply those protections to wireline providers with no record of restricting access, while exempting wireless providers who have that record. It would also violate one of the Commission's cardinal rules of technology neutrality to handicap one form of Internet access while favoring another.⁷⁰

CONCLUSION

Thousands of comments were filed in response to the *Notice*, but they support one conclusion better than any other: there is no evidence of market failure or of harm to broadband consumers. Where the Commission requested data, it received speculation. The comments reveal that the current system is working. The comments establish that the Commission's wise approach in sparing information services from regulation produced a vibrant and competitive market in which consumers are able to access the services of their choice, entrepreneurs are free to innovate, and network owners invest. The proposed rules jeopardize this trend by injecting

⁶⁹ See, e.g., Comments of Sling Media, Inc. at 5 (claiming its service was blocked by AT&T); Comments of ColorOfChange.org (claiming that Verizon blocked text messages sent by the pro-choice group NARAL); Kevin J. O'Brien, *Skype in a Struggle to Be Heard on Mobile Phones*, N.Y. Times, Feb. 17, 2010, <http://www.nytimes.com/2010/02/18/technology/18voip.html> (reporting that Skype's CEO "could tick off the names of mobile phone operators that block his company's service. But . . . it is quicker to name those that allow it, no strings attached," because there are only two of them, one in Europe and one in the United States.); Erica Ogg, *Apple blocks Google Voice app for iPhone*, CNET, July 28, 2009, http://news.cnet.com/8301-13579_3-10297618-37.html.

⁷⁰ See *Biennial Regulatory Review*, Third Report and Order, FCC 08-85, 23 FCC Rcd. 5319 ¶ 13 (2008) ("[T]he Commission seeks to promulgate rules that are 'technology neutral' because we believe that ideally it is in the public interest for competing telecommunications technologies to succeed or fail in the marketplace on the basis of their merits . . . and not primarily because of government regulation."). See also *Burlington N. & Santa Fe Ry. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005); *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996) ("A long line of precedent has established that an agency action is arbitrary when the agency offered insufficient reasons for treating similar situations differently."); *Airmark Corp. v. FAA*, 758 F.2d 685, 692 (D.C. Cir. 1985) (vacating agency orders on exemptions from noise regulations because treatment of similarly situated entities was "grossly inconsistent and patently arbitrary").

regulatory uncertainty into investment decisions and by foreclosing beneficial future business models.

If any rules are adopted, they should apply equally to market participants at the edge and the core, to wireless and wired. The comments demonstrate that the lines between the edge and the core are disappearing as companies on the edge accumulate massive amounts of infrastructure and ISPs develop numerous applications and services. The *Notice's* approach of focusing the impact of regulation on ISPs will therefore be both unfair to all stakeholders and detrimental to consumers.

Respectfully submitted,

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