

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

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

REPLY COMMENTS OF COMPTTEL

COMPTTEL, through undersigned counsel, hereby submits these reply comments in the above captioned proceedings.¹ Subsequent to the filing of initial comments, the D.C. Circuit Court of Appeals issued its decision in *Comcast Corporation v. Federal Communications Commission*, 2010 U.S. App. Lexis 7039 (D.C. Cir. 2010). That decision has led various pundits to proclaim that the Commission has no jurisdiction to regulate “the Internet” and no jurisdiction to adopt regulations to preserve the open Internet. Clearly, these are both gross overstatements of the Court’s ruling. As an initial matter, the decision did not even address regulation of “the Internet.” More importantly, the Court vacated the Commission’s Memorandum Opinion and Order in the Comcast complaint case² not on the grounds that the Commission has no jurisdiction to adopt net neutrality regulations, but on the grounds that the Commission failed to

¹ COMPTTEL’s initial Comments focused on the Commission’s non-discrimination requirement set forth in Section 8.13 of the proposed rules. COMPTTEL stands by those comments and again urges the Commission to make sure that any nondiscrimination rules it adopts allow open networks, such as the Internet, and innovation-based private, managed networks, to mutually coexist on the same physical network under a regulatory regime that maximizes the efficacy of both.

² *In the Matter of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, File No. EB-08-IH-1518, Memorandum Opinion and Order, FCC 08-183 (rel. Aug. 20, 2008).

tie its Title I ancillary jurisdiction to regulate ISP's network management practices to the effective performance of any of its statutorily mandated responsibilities.³

The Commission May Act Under Title I

In *National Cable & Telecommunications Association v. Brand X Internet Services, Inc.*, 545 U.S. 967, 976 (2005) ("*Brand X*"), the Supreme Court confirmed that while ISPs are not subject to mandatory common carrier regulation under Title II of the Communications Act, the Commission has jurisdiction to impose regulatory obligations on ISPs under its Title I ancillary jurisdiction to regulate interstate and foreign communications. The D.C. Circuit reiterated in the *Comcast* decision that Internet access services constitute interstate and foreign communications by wire or radio and that the Commission has general jurisdiction over those communications under Title I.⁴ This is true regardless of whether the Internet access service is classified as a telecommunications or information service. To withstand judicial review, the Commission must demonstrate that any net neutrality regulations it adopts pursuant to Title I are reasonably ancillary to the effective performance of its statutorily mandated responsibilities.

Section 152(a) of the Communications Act gives the Commission sweeping jurisdiction over all interstate and foreign communications by wire or radio. 47 U.S.C. §152(a). Section 152(a) specifically applies to cable operators and the facilities used by cable operators to provide wire communications. Section 154(i) authorizes the Commission to perform any and all acts, make such rules and regulations and issue such orders as may be necessary in the execution of its functions. 47 U.S.C. §154(i). Adopting regulations to preserve the Open Internet are reasonably ancillary to the effective performance of the Commission's statutorily mandated

³ *Comcast Corporation v. Federal Communications Commission*, Slip Opinion at 36.

⁴ *Comcast* Slip Op. at 7-8.

responsibilities under Section 201(b) of the Act. 47 U.S.C. §201(b). The proposed rules define “broadband Internet access” as “Internet Protocol data transmission between an end user and the Internet,”⁵ in other words, the transmission facility that connects the end user to the Internet. “Broadband Internet access service” in turn is defined as “Any communication service by wire or radio that provides broadband Internet access directly to the public.”⁶

Section 201(b) provides that all charges, practices, classifications and regulations for and in connection with interstate and foreign communication by wire or radio shall be just and reasonable. This provision lies at the heart of the Commission’s consumer protection responsibilities. The Commission’s proposed net neutrality rules are reasonably ancillary to the effective performance of its responsibility to ensure that the charges, practices and classifications that facilities-based ISPs apply in connection with broadband Internet access services are just and reasonable. Subject to reasonable network management, the practices that are prohibited – *i.e.*, preventing users from sending or receiving lawful content of their choice, running lawful applications or using lawful services of their choice and connecting to and using lawful devices that do not harm the network; and depriving users of competition among network providers, application providers, service providers and content providers⁷ -- are practices that would deprive broadband Internet access service users of free and unfettered access to the services, content and applications of their choosing and should be deemed unreasonable per se.⁸

⁵ *In the Matter of Preserving the Open Internet*, GN Docket No. 09-91, Notice of Proposed Rulemaking, FCC 09-93 (rel. Oct. 22, 2009), at Appendix A, Section 8.3.

⁶ *Id.*

⁷ *Id.* at Sections 8.5, 8.7, 8.9, 8.11.

⁸ All of the prohibited practices are subject to reasonable network management practices. As Commissioner McDowell stated in a Keynote Address to the Free State Foundation, “keeping

Similarly, the Commission's proposed transparency obligation -- requiring Internet access service providers to disclose such information concerning network management and other practices as is reasonably required for users and content, application and service providers to know what they are getting⁹ -- is a just and reasonable requirement that will allow end users as well as content, application and service providers to make informed decisions about the services they are purchasing.

The Commission commenced rulemaking proceedings five¹⁰ and eight years¹¹ ago, respectively, to determine, *inter alia*, whether it should exercise its ancillary authority under Title I to impose certain regulatory obligations, including consumer protection, truth-in-billing, universal service contribution, network outage or multiple ISP access requirements, on wireline or cable modem Internet access service providers. Those rulemaking proceedings remain unresolved. The Commission should not let this proceeding meet the same unfortunate fate. It should exercise its ancillary jurisdiction under Title I to adopt net neutrality rules to further the effective exercise of its statutory responsibilities under Section 201(b).

in the hands of consumers that power to choose among products and services in a fast-changing and competitive free market should be the FCC's prime directive when it comes to crafting our National Broadband Plan and examining proposed rules governing Internet management. "Commissioner Robert M. McDowell, "The Best Broadband Plan For America: First, Do No Harm," Free State Foundation Keynote, National Press Club (Jan. 29, 2009) at 3.

⁹ NPRM, Appendix A, at Section 8.13.

¹⁰ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, WC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005).

¹¹ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, WC Docket No. 02-33, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities et al*, GN Docket No. 00-185, CS Docket No. 02-25, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 (2002).

The Commission May Also Act Pursuant To Title II

In the alternative to exercising ancillary jurisdiction under Title I, the Commission could reverse its prior determination that broadband Internet access service is an information service with no separate telecommunications service component and proceed under Title II. Beginning with the *Cable Modem Declaratory Ruling* in 2002,¹² the Commission backtracked on years of precedent holding that the transmission component of enhanced or information services is a telecommunications service subject to Title II of the Act that must be made available on a stand-alone basis to competing telecommunications and information service providers. While the Courts have upheld the Commission's decisions to classify Internet access service as an information service without a separate telecommunications service component,¹³ the Commission's interpretation is not mandated by statute. In *Brand X*, the Supreme Court deferred to the Commission's interpretation that broadband cable modem service is an integrated offering that does not involve a separate telecommunications offering, reasoning, consistent with *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984), that a federal court must accept an agency's construction of an ambiguous statute even if the agency's reading is not the best construction.¹⁴ Indeed, as Justice Scalia stated in his *Brand X* dissent, the

¹² *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities et al*, GN Docket No. 00-185, CS Docket No. 02-25, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 (2002); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, WC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service As an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007).

¹³ *Brand X; Time Warner Telecom v. FCC*, 507 F. 3d 205 (3rd Cir. 2007).

¹⁴ *Brand X*, 545 U.S. at 980-981.

Commission concocted “a whole new regime of regulation (or of free-market competition)’ under the guise of statutory construction.”¹⁵

To clearly reestablish jurisdiction to impose net neutrality requirements on the transmission component of broadband Internet access service, the Commission should revisit its determination that the transmission component is not a telecommunications service subject to Title II regulation. As the Supreme Court made clear in upholding the Commission’s reversal of course in *Brand X*, an agency is free to change/reverse policy so long as it adequately explains its reasons for doing so.¹⁶

According to the National Broadband Plan, approximately 65% of American households subscribe to broadband Internet access service.¹⁷ Many of the Plan’s recommendations to address barriers to broadband adoption and utilization involve measures to make broadband service more affordable through government intervention or the use of government funds.¹⁸ Reinstating the right of broadband and information service providers to access the telecommunications transmission component of broadband Internet access service on a wholesale basis will spark competition and provide consumers an alternative to the cable/ILEC duopoly. Duopoly market conditions produce higher prices and the entry of additional competitors usually leads to lower rates.¹⁹ The Commission should encourage competition as a

¹⁵ *Id.* at 1005.

¹⁶ *Id.* at 981-982.

¹⁷ National Broadband Plan at 167.

¹⁸ *Id.*

¹⁹ *See e.g.*, U.S. General Accounting Office, *Subscriber Rates and Competition in the Cable Television Industry*, Testimony of Mark L. Goldstein, Director Physical Infrastructure Issues, Before the Committee on Commerce, Science and Transportation, U.S. Senate, GAO-04-262T (Mar. 2004).

means of making broadband rates more affordable. Proceeding under Title II and reinstating the right of competing broadband and information service providers to access the last mile telecommunications transmission component of incumbent providers will have the added benefit making broadband more affordable without investment of government funds.

CONCLUSION

For the foregoing reasons, the Commission has at least two sound legal bases for exercising jurisdiction to adopt regulations to preserve the Open Internet.

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Respectfully submitted,

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