

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

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

H. Bartow Farr III*
Farr & Taranto
1150 18th Street, N.W.
Washington, D.C. 20036-3850
(202) 775-0184

April 26, 2010

Neal M. Goldberg
Michael S. Schooler
Steven F. Morris
Stephanie L. Poday
National Cable & Telecommunications
Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431

**Counsel for Section VII Only*

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY 1

I. THE COMMISSION SHOULD AFFORD ISPS BROAD DISCRETION AND DEFERENCE IN MANAGING THEIR NETWORKS7

II. THE COMMISSION’S PROPOSED NON-DISCRIMINATION RULE WOULD IMPAIR – NOT PROMOTE – INTERNET INVESTMENT, INNOVATION AND COMPETITION.....11

III. ESPECIALLY IF IT ADOPTS ITS PROPOSED NONDISCRIMINATION RULE, THE COMMISSION MUST INCLUDE A BROAD “MANAGED SERVICES” EXCEPTION.....17

IV. ANY RULES ADOPTED BY THE COMMISSION SHOULD NOT BE LIMITED TO WIRELINE ISPS BUT SHOULD APPLY BROADLY TO COMPETING PROVIDERS OF INTERNET ACCESS AND TRANSPORT AND ENTITIES THAT CONTROL CONSUMER ACCESS TO INTERNET CONTENT AND APPLICATION PROVIDERS22

V. THERE IS NO NEED FOR BURDENSOME TRANSPARENCY MANDATES, WHICH WOULD COME AT SIGNIFICANT COST AND BE COUNTERPRODUCTIVE31

VI. REGULATING BROADBAND INTERNET SERVICES AS TELECOMMUNICATIONS SERVICES” UNDER TITLE II IS UNSUSTAINABLE AS A MATTER OF LAW AND POLICY.....36

VII. THE COMMENTERS SUPPORTING NET NEUTRALITY FAIL TO RESOLVE THE SERIOUS FIRST AMENDMENT CONCERNS RAISED BY THE PROPOSED RULES.....37

CONCLUSION.....44

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

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

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

INTRODUCTION AND SUMMARY

In our initial comments, NCTA urged that the best approach to “preserving the open Internet” was to adhere to the policy that has succeeded not only in preserving the openness of the Internet but in fostering investment, innovation, and an ever-increasing and ever-improving array of services and capabilities at both the edges of and throughout the Internet. That policy of “vigilant restraint” has, since it was first endorsed by Chairman Kennard, recognized the *possibility* that ISPs and others conceivably might engage in anticompetitive conduct at odds with the public policy objectives subsequently embodied in the Commission’s Internet “Policy Statement.” But the Commission wisely recognized that unless and until such conduct became more than a rare and isolated occurrence, the urge to impose a prescriptive, prophylactic regulatory regime on Internet service providers should be avoided.

The predictable costs and effects as well as the inevitable unintended consequences of regulation could, as past Chairmen have explained, upset the balance of the Internet ecosystem in ways that would impede and even reverse the growth, innovation and openness that such regulation was ostensibly aimed at promoting and preserving. Specifically, subjecting the

“reasonableness” of network management to regulatory complaints and review, restricting or prohibiting business arrangements between Internet service providers (ISPs) and content and application providers, and regulating and restricting the ability of ISPs to optimize the value of their service to consumers would threaten investment, impair development of new and differentiated content and application offerings, and discourage rather than encourage more rapid and ubiquitous adoption of broadband throughout the nation. Moreover, these adverse effects would be compounded – and the intended beneficial effects of regulation vitiated – if the regulation were applied only to some and not to all gateways and service providers that stand between consumers and Internet content and applications.

If the initial round of comments proves anything, it is that there has been no pattern of harmful conduct by ISPs that cries out for preventive regulatory intervention or that warrants the risks and costs that would accompany such regulation. Despite the sound and fury generated by network neutrality proponents – and their close scrutiny of ISP behavior for the past decade – the record to date has not added to the two isolated examples cited in the Notice of Proposed Rulemaking (one of which was judged harmful under a standard that the Commission now views as too stringent). Meanwhile, virtually every commenter acknowledges that the Internet has flourished and has produced technological capabilities and innovative content, applications and services beyond what could have been imagined when the Commission first enunciated its approach of vigilant restraint. No party attempts to demonstrate that these developments would in any way have been enhanced or accelerated had regulations like those proposed in the Notice been in place.

Instead, the proponents of regulation contend that even though there may have been virtually no evidence of anticompetitive or harmful conduct in the past, it is somehow *inevitable*

that ISPs *will* pervasively engage in such conduct in the future. To prevent this from occurring, they urge the Commission to adopt what they characterize as “*a very light regulatory regime* that will preclude ISPs from abusing their position as terminating access monopolies and will help ensure more efficient pricing in the IP market.”¹

Do these words sound familiar? More than eight years ago, Chairman Powell warned that they should cause alarm bells to sound:

When someone advocates regulatory regimes for broadband that look like, smell like, feel like common carriage, scream at them! *They will almost always suggest it is just a “light touch.”* Demand to see the size of the hand that is going to lay its finger on the market. Insist on knowing where it all stops. Require they explain who gets to make the key decisions—if it is enlightened regulators, rather than consumers and producers, walk out of the meeting.²

As Chairman Powell predicted, there is nothing “light” about the regulatory regime proposed by the Commission – especially a “nondiscrimination” rule that, as defined by the Commission, would prohibit virtually any commercial relationships between ISPs and content and application providers and would impose the heavy hand of regulation not only on ISPs but on the entire Internet.

While the Commission proposes to permit ISPs to use “reasonable network management” to deal with congestion, harmful and unwanted material transmissions, and other problems that may occur, it would be up to the Commission to decide after-the-fact whether any such management is “reasonable.” An ISP that guesses wrong about what the government ultimately finds “reasonable” could be subject to significant fines and other penalties. This could chill ISPs’ willingness to develop new and potentially more effective solutions for managing their

¹ Free Press Comments at 34 (emphasis added).

² Remarks of Michael K. Powell, Chairman, Federal Communications Commission, at the National Summit on Broadband Deployment, Washington, D.C., October 25, 2001, <http://www.fcc.gov/Speeches/Powell/2001/spmcp110.html> (emphasis added).

networks to address congestion and other legitimate problems such as the ones the Commission identified in the Notice (*e.g.*, fighting spam, viruses, and worm-bots, preventing content piracy and the transmission of child pornography, and participating in law enforcement and national security efforts). And while the Commission has at least forsworn the overly restrictive standard it applied in the *Comcast* network management decision, the Commission should expressly state that ISPs acting in good faith to manage their networks will be given the flexibility to do so and will not be subject to governmental second-guessing.

The proponents of “light” regulation urge the Commission to adopt the narrowest possible definition of “managed services” that would be exempt from the proposed regulations. Instead of narrowly tailored regulations that apply only to ISPs’ “best efforts” Internet service offerings, these parties would extend their rules generally to all Internet services – and even, to some extent, to *non*-Internet services – provided by ISPs over their facilities, requiring ISPs to seek case-by-case permission to provide particular services, such as tele-medicine or educational services, on an unregulated basis.

Moreover, while transparency *principles* in connection with consumer service offerings can effectively achieve the Commission’s objective of preserving the openness of the Internet without inflicting the stifling effects that regulation would impose on continued Internet investment, innovation and growth, transparency *regulations*, as proposed by the Commission and various commenting parties, would be premature and would themselves have counterproductive effects. Collaborative industry efforts to determine the appropriate and most useful content and format of disclosures to consumers are the best way to promote openness and transparency in a manner that keeps up with changing Internet technology and applications.

In any event, if the Commission were to adopt its proposed rules, it would be counterproductive – and arbitrary and capricious – to apply them only to ISPs and not to competing providers of internet access and transport and entities that control consumer access to internet content and application providers. It would be wrong and costly to impose a comprehensive regulatory regime on *any* Internet service providers in the absence of any real threat of anticompetitive and harmful conduct. But to regulate some but not all competitors who pose similar threats – real or hypothetical – to the openness of the Internet would compound the harm by effectively picking winners and losers in the evolving Internet marketplace.

While public policy considerations (as well as the constraints of the First Amendment) already provided compelling reasons to adhere to the Commission’s policy of vigilant restraint, the recent decision of the United States Court of Appeals for the District of Columbia Circuit in *Comcast Corporation v. FCC* additionally narrows the scope of the Commission’s rulemaking authority in this area. In its *Notice of Proposed Rulemaking*, the Commission bases its authority for its proposed rules on many of the same jurisdictional grounds that the Court rejected in its *Comcast* decision.

The Court did not rule out of hand the notion that the Commission might have some “ancillary jurisdiction” over broadband Internet access services, pursuant to its general Title I subject matter jurisdiction over “communication by wire,” to regulate services provided over the Internet. But it made clear that neither that broad grant of subject matter jurisdiction in Title I nor the statements of national policy set forth by Congress in other provisions of the Communications Act, such as Section 230, are sufficient on their own to authorize the Commission to adopt the proposed rules. Rather, the Commission’s ancillary Title I jurisdiction

is limited to rules and regulations that are necessary to fulfill specific statutory responsibilities and authority mandated and delegated in other provisions of the Act.

In our initial comments in this proceeding, which were submitted while judicial review of the *Comcast* order was still pending, NCTA argued that, wholly apart from jurisdictional issues, it would be unnecessary and wholly at odds with the policy objectives of fostering Internet growth, innovation and openness to impose the Commission's proposed regulatory regime on Internet service providers. It's still the case that if the Commission were nevertheless to adopt rules in this proceeding, such rules should in any event be far less restrictive and more targeted at their intended objective than those proposed in the Notice and by the most vocal proponents of regulation. But in light of the Court's decision, even such narrowly targeted rules can survive only to the extent that they are clearly and directly linked and "ancillary" to specific mandates in the Communications Act.

It would also be especially wrong, costly and counterproductive to seek to regulate ISPs (and other providers of Internet communications services) under Title II of the Act. As NCTA has shown, in a joint letter submitted by several trade associations and member companies, neither the law nor sound public policy warrants the layering of a Title II regulatory framework on the flourishing Internet marketplace. The Court left room for the Commission to find Title I jurisdiction to adopt regulations that are shown to be ancillary to specific statutory responsibilities. To the extent that the Commission takes on the heavy burden of justifying the regulation of broadband services, rules that are more narrowly targeted at such responsibilities would be more likely to be sustained, although both the statutory and constitutional barriers remain significant.

I. THE COMMISSION SHOULD AFFORD ISPs BROAD DISCRETION AND DEFERENCE IN MANAGING THEIR NETWORKS

While proposing to codify and add to the principles of its Internet Policy Statement, the Commission also proposes to import the Policy Statement's proviso that each of the principles is "subject to reasonable network management." In its *Comcast* decision, as discussed in our initial comments, the Commission adopted a "strict scrutiny" standard that effectively presumed that network management would be deemed unreasonable for purposes of the four principles unless "there is a tight fit between its chosen practices and a significant goal" and unless the practices "further a critically important interest" and are "narrowly or carefully tailored to serve that interest."³

In now proposing to jettison the "strict scrutiny" standard that it applied in the *Comcast* decision, the Commission appears to recognize what the proponents of net neutrality do not. It now recognizes that there is no basis for presuming that any network management technique that treats the bits and bytes of different applications differently must be anticompetitive or otherwise harmful to consumers. And, by proposing to establish a residual category of "other" reasonable justifications for network management, along with specific justifications such as preventing congestion and preventing the transmission of pirated and other unlawful material, the Commission recognizes that it is impossible to identify in advance the network management issues and problems that may arise as the Internet continues to develop.

Even rules that would subject network management tools to a more permissive but still restrictive and uncertain standard of potential liability would unduly constrain and hamper ISPs'

³ *In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* Memorandum Opinion & Order, 23 FCC Rcd 13028, 13055-56 (2008) ("*Comcast Network Management Order*").

ability to ensure a smooth and optimal Internet experience for their customers. But if the Commission nevertheless adopts network management rules (which we continue to urge it not to do), it should incorporate this open-minded exception that gives substantial deference to an ISP's good faith determinations of what is necessary and reasonable.⁴ This is a position shared not only by ISPs but also by other commenting parties with technical expertise and interests in optimizing bandwidth usage to maximize consumer satisfaction with broadband Internet service.⁵

Free Press, along with the self-styled "Public Interest Commenters" urge instead that the Commission retain the "strict scrutiny" standard and permit network management only in the narrowest of circumstances. The "light" regulation that Free Press endorses would, for example, require the Commission "to ensure investment keeps pace with customer's *[sic]* usage. In this environment, *providers have no justification for interference occurring outside of the brief periods of congestion before further investment is necessary.*"⁶ Similarly, Public Interest Commenters suggest that network management should be deemed unreasonable and impermissible if the congestion or other problem to which it is addressed could be solved by expanding available capacity:

[N]etwork management practices *should never be used as a substitute for deployment of facilities and expansion of capacity.* For this reason, the Commission should also consider whether network investment or economic action alone might address the same need for the network management practice claimed by the broadband Internet access service provider. If this is the case, *or if permitting the practice will deter subsequent network investment or economic*

⁴ NCTA Comments at 29.

⁵ *See, e.g.*, Cisco Systems Inc. Comments at 3-8; Alliance for Telecommunications Industry Solutions Comments at 3-4; Ericsson Inc. Comments at 7-10; Level 3 Communications Comments at 14.

⁶ Free Press Comments at 42-43 (emphasis added).

approaches, the practice should not be deemed [reasonable network management].⁷

The net neutrality proponents' notion that consumers will always be better off if ISPs invest in more facilities and capacity than if they first seek to make more efficient use of available capacity flies in the face of economics and common sense. Who exactly is supposed to pay for this uneconomic investment? Since, under the proposal they support, ISPs would not be *allowed* to receive any compensation from those who impose the costs on the network, virtually all revenues will have to be obtained from the ISPs' customers. The net neutrality proponents must assume that consumers would gladly pay higher broadband rates for their ISPs to deploy new facilities rather than adopt techniques to manage congestion on their existing networks. Given the connection between affordability and adoption identified in the National Broadband Plan, such a suggestion is irresponsible and plainly contrary to the public interest.

ISPs have, of course, heavily invested in network upgrades when warranted. Cable operators and telephone companies have made massive investments in recent years in new facilities and system upgrades that have dramatically increased the value of their video, voice, telephone and Internet service to consumers. But in many cases, consumer value can be maximized more efficiently with network management tools. As Cisco Systems, Inc. points out:

Proponents of "net neutrality" often suggest that there is only one appropriate way to manage limited network resources – by adding capacity. But this is no solution at all. Providers *will* need to enhance capacity, and have spent billions of dollars doing so. However, reliance on new capacity alone to solve current bandwidth limitations would impose huge and unnecessary costs on consumers. Indeed, studies suggest that this approach would increase the cost of broadband access *between \$100 and \$400 per subscriber per month*.⁸

⁷ Public Interest Commenters at 40-41 (emphasis added).

⁸ Cisco Systems, Inc. Comments at 10 (emphasis added).

Network management tools are, in many circumstances, wholly sufficient to deal with congestion and meet consumers' needs – and to do so much more efficiently. As Cisco explains, its own research “suggests that use of network management and quality of service can provide a 2.5 times increase in bandwidth on existing networks.” Moreover, “[s]olutions demanding exclusive resort to massive capacity enhancements fail to recognize that consumers only want and need *some* traffic to be subject to expedited handling; e-mail messages, web browsers, and similar applications are simply not affected by a microsecond's delay in nearly the same way that a video or gaming application may be.”⁹

Alcatel-Lucent similarly points out that, historically, “Internet access service on wireline networks addressed the non-guaranteed service quality of ‘best effort’ Internet by over provisioning bandwidth – that is, by building the network with bandwidth capacity to adequately address anticipated peak usage times.”¹⁰ But today,

with rapidly increasing bandwidth demands, network capacities can no longer be over provisioned with reasonable economics for the network provider. Therefore, *active network management has become imperative for both wired and wireless networks in order to ensure an optimal experience for the vast majorities. . . .* [T]his may mean limiting the peak information rate (“PIR”) for an HSI subscriber to ensure fair usage of the bandwidth among subscribers, *or in some cases even rate-limiting particular types of traffic that have a disproportionate impact on other users.*¹¹

There is, in sum, simply no basis for a presumption against – much less a prohibition of – the use of network management tools in lieu of imposing the costs of such “massive capacity enhancements” on ISPs and consumers – especially when the Commission is rightly seeking

⁹ *Id.* at 11.

¹⁰ Alcatel-Lucent Comments at 10.

¹¹ *Id.* (emphasis added).

ways to promote more rapid adoption of broadband service by keeping it as affordable as possible.

II. THE COMMISSION'S PROPOSED NON-DISCRIMINATION RULE WOULD IMPAIR – NOT PROMOTE – INTERNET INVESTMENT, INNOVATION AND COMPETITION

While the costs and harm to consumers of subjecting the use of network management tools to possible liability might at least be mitigated by adopting a permissive and deferential standard that presumes the reasonableness of network management techniques, the adoption of a non-discrimination requirement – especially as proposed by the Commission – would severely constrain Internet investment and innovation and impair the value of Internet service to consumers. As many commenting parties have explained, “best efforts” delivery is now, and is likely to remain, perfectly sufficient for the vast majority of Internet content and applications. But, increasingly, some services require customized and specialized treatment by the network to ensure a level of quality that is not required and is of little or no value to other content or application providers.

The Commission’s proposed rule would prohibit ISPs and content and application providers from entering into agreements to guarantee such customized treatment and quality of service. The proponents of such a rule argue that providing such “discriminatory” treatment will necessarily have the effect of degrading all other Internet content and applications, that it will increase the costs and barriers to entry for new start-up and innovative services, and that consumers will be better off if ISPs are required to provide the identical level of service to all content and application providers and to be compensated only by their end-user customers. *None* of these arguments are valid.

Free Press asserts, as if it were obvious, that “the routing of IP data is a zero-sum game: If a router speeds up one set of bits, by definition, all other bits are slowed down” and “the

corresponding degradation in non-prioritized content could be substantial enough to devalue the utility of the broadband connection itself.”¹² But this is not true. It is quite possible for an ISP to build or customize a portion of its facilities to provide the specialized treatment that certain applications may require or wish to pay for without in any way degrading or diminishing the speed, quality and value of other applications that rely on best efforts delivery.

Where speed is the issue, for example, imagine that a county constructs additional “express” lanes on a highway for use by ambulances and public safety vehicles to permit them to reach their destinations more quickly and reliably than might at times be possible on the existing four-lane highway. There is no reason why construction of the additional lanes would be expected to degrade or diminish the speeds with which drivers reach their destinations on the existing lanes. On the contrary, the construction of the extra lanes would *reduce* traffic on the existing highway and would therefore *improve* speeds and performance for those continuing to use that road – not a zero-sum game but a win-win for those who need higher speeds and those who do not.

Or consider – in the days of “snail mail” – the Post Office’s offering of “air mail,” “special handling,” and “special delivery” to customers who needed expedited or customized processing and delivery of their letters and packages. It would have been massively expensive and inefficient, in those early days of air transportation, to send all mail by air, or to hand stamp all envelopes or deliver each piece of mail separately as soon as it arrived – especially since, for most mail, the urgency and marginal value of such expedited delivery was low. Acquiring just enough air transport, and hiring just enough additional employees, to meet the needs and demands of those willing to pay for expedited delivery or special handling made more sense and

¹² *Id.* at 18-19.

did not adversely affect service for those who relied upon surface mail. Eventually, as the costs of air transportation came down relative to alternative modes of delivery, the distinction between air mail and surface mail became obsolete and air mail became routine for all customers.

Cable operators are *regularly* “adding lanes” of increased Internet access capacity.¹³ If, along with such expansion, some capacity is used for “prioritized” delivery to end-users, it in no way follows that the content and applications that continue to rely on “best efforts” delivery will be materially “slowed down,” as Free Press contends. Moreover, many of those applications and services will not need or benefit from the same higher speeds, QoS, or other customization that others might need and value. Forcing ISPs to provide the same “best efforts” service to all and prohibiting them from offering prioritization, customization or QoS guarantees would result in diminished investment, inefficient investment, and higher prices to consumers – results wholly at odds with the goals of the National Broadband Plan and the public interest. Meanwhile, the quality of “best efforts” continues to improve, so that (just as yesterday’s “air mail” is today’s regular first-class mail) today’s guaranteed QoS becomes tomorrow’s “best efforts” service.¹⁴

While Google, Free Press and others contend that the only delivery service that ISPs should be allowed to make available to content and application providers is a free, “best efforts” service, barring ISPs from offering different levels of service will almost certainly *diminish* social welfare. Those content and application providers who do not need, or would not purchase, any customized services even if they were available would still have “best efforts” service

¹³ See, e.g., Time Warner Cable, Inc. Comments at 17; Comcast Corporation Comments at 8; Cox Communications, Inc. Comments at 13-14; Bright House Networks Comments at 3; Charter Communications Comments at 6-7.

¹⁴ For example, when cable operators first began providing Internet service, a common opinion among Internet engineers was that “best efforts” Internet delivery would likely be insufficient to support an “over-the-top” Internet telephone service. This is one reason why cable operators designed their voice service such that its packets never touch the public Internet. Yet today, as a result of cable operators’ continual upgrading of their traffic compatibilities, hundreds of millions of consumers make phone calls over the Internet using services like Skype and Vonage.

available to them at no charge. But any content and application providers whose services would be more valuable to consumers (or *only* valuable to consumers) if they had customized or prioritized delivery would be prevented from acquiring such higher-quality delivery, to their detriment and the detriment of consumers.

Moreover, barring ISPs from offering any customized services to content and application providers would impose an additional harm on content and application providers – including the very start-ups and less established providers that the proponents of the prohibition purport to want to help. As noted in our initial comments, some of the largest and most richly funded content and application providers, such as Google, have the resources to construct their own facilities for ensuring that their services reach consumers with greater speed or higher quality than others on the best efforts Internet by placing edge servers within the networks of major ISPs.¹⁵ Prohibiting other content and application providers from obtaining their own customized or prioritized treatment from ISPs simply “preserves [this] more fundamental inequality” between them and the Googles of the world.¹⁶

Content delivery networks (CDNs) provide an alternative means of obtaining customized or expedited delivery for those content and application services that can afford them. As George Ou, Policy Director of Digital Society, explains in his comments, “CDN services (at similar commitment levels) are almost always going to be more expensive than just transit bandwidth costs alone, but CDN providers argue that it may still be cheaper overall because a business doesn’t need to build out their own server and data center infrastructure or hire engineers to

¹⁵ See NCTA Comments at 36.

¹⁶ *Id.* quoting Richard Bennett, *Google’s Political Head-Fake*, S.F. Chron., July 9, 2008, available at http://articles.sfgate.com/2008-07-09/opinion/17172352_1_google-ceo-eric-schmidt-google-yahoo-net-neutrality.

design, build, and operate the network.”¹⁷ Competition, however, is hardly thriving in the CDN marketplace. One company, Akamai, currently controls the lion’s share of the market – an estimated 60% – while the market share of the current runner up, Limelight, is estimated as “between 10% to 15%.”¹⁸

ISPs have the potential to introduce sustainable competition into this marketplace. As George Ou points out, “broadband providers are trying to get into the CDN market as well. . . . The nice thing about having the broadband providers compete in the CDN market is that it puts pricing pressure on the few dominant CDN providers like Limelight and Akamai.”¹⁹ But the proposed rules would prohibit ISPs from providing such services to content and application providers, which would, in turn, “*eliminate competition* in the CDN market” and “produce[] the opposite effect intended by the NPRM.”²⁰

In addition to offering competitive CDN services, ISPs can today offer content and application providers “paid peering” – the ability specifically to reach the ISP’s customers more economically than via transit service or a CDN’s service:

Instead of paying \$3 to \$9 per Mbps per month for transit connectivity, [content and application service] providers can directly peer with the broadband network they’re trying to deliver content to and only pay \$1 to \$3 per Mbps per month. These Paid Peering services only offer specific connectivity to the broadband provider’s network and not global connectivity, but it offloads the traffic that would have had to go over the more expensive transit service and therefore saves the CAS provider money. So a CAS provider would simultaneously use their transit service to reach destinations that they don’t directly peer with and they would use the Paid Peering services to reach specific destinations.²¹

¹⁷ George Ou Comments at 3.

¹⁸ See “60% Market Share And Piercing Vision Make Akamai Technologies A Tech Stock Survivor With Massive Potential, According To Industry Expert,” *The Wall Street Transcript*, February 3, 2010, <http://www.twst.com/yagoo/KerryRiceInternetServicesTWO.html>.

¹⁹ *Id.*

²⁰ *Id.* (emphasis added).

²¹ *Id.* at 4.

This, too, would appear to be prohibited by the Commission’s proposed rule. And once again the principal beneficiaries of prohibiting ISPs from providing such services would not be the content and application service providers who might want such an alternative or consumers who would benefit from a more competitive and less costly means for obtaining those services that need or desire more rapid or customized delivery. The beneficiaries would again be the dominant content and application services that have their own transport facilities – such as Google – and the dominant CDNs that would be protected from competition. As one observer has explained,

*If you were Google, strategically, why would you want paid peering illegal?
Killing Paid Peering will increase Google competitors’ cost, and decrease
Google competitors’ performance. . . .*

Paid Peering enables Google’s competitors to get access to Comcast eyeballs for around the same price as transit (\$1-\$3 instead of \$2-\$9/Mbps). Paid Peering provides better performance than Internet Transit, since the traffic takes a less circuitous route. . . . Therefore, Paid Peering allows Google competitors to more easily compete with Google on performance and price without having to reach Google scale.²²

Or, as George Ou points out,

Internet “hyper giants” like Google don’t care for Paid Peering because they have such a large private Internet infrastructure and they account for 7% of all Internet traffic. That leverage allows them to negotiate free peering agreements with many ISPs and the elimination of Paid Peering products would only give them more leverage to negotiate free peering agreements with the few ISPs that are holding out for Paid Peering agreements, and it would simultaneously restrain their smaller competitors in the CAS provider market who can’t possibly negotiate free peering deals which would ensure Google’s dominance.²³

²² “Paid Peering and Net Neutrality,” *Ask DrPeering*, Nov. 5, 2009, http://drpeering.net/a/Ask_DrPeering/Entries/2009/11/5_Paid_Peering_and_Net_Neutrality.html.

²³ George Ou Comments at 4 (footnote omitted).

Proponents of “net neutrality” claim that a nondiscrimination rule is necessary to prevent ISPs from thwarting competition, openness and innovation on the Internet and from inappropriately “picking winners and losers.” But the odd nondiscrimination rule that the Commission has proposed and that many of the proponents of regulation support will do nothing to promote these objectives. To the contrary, prohibiting ISPs from entering into service agreements with content and application providers will itself reduce and thwart competition by eliminating ISPs as competitive providers of CDN and paid peering services. Eliminating competitive pressure from ISPs will keep prices for CDN services higher, raising barriers to entry by new, innovative content and application services, and eliminating paid peering will preserve the dominance of content and application providers with their own large, private infrastructures. In adopting such a rule, the Commission would, indeed, be picking winners and losers – and consumers and potential new competitors would be the losers.

III. ESPECIALLY IF IT ADOPTS ITS PROPOSED NONDISCRIMINATION RULE, THE COMMISSION MUST INCLUDE A BROAD “MANAGED SERVICES” EXCEPTION

From the outset, we have maintained that there is no pattern of conduct and no imminent threat that justifies abandoning the policy of vigilant restraint and creating a regime for government regulation of the Internet. But at the very least, any rules should be carefully crafted and narrowly tailored to address anticompetitive conduct that is harmful to consumers – not efficient, pro-competitive business activities that are likely to enhance consumer welfare. The Commission has appropriately recognized that even if it were to adopt its proposed rules, there are a range of “managed services” provided by ISPs that should be excluded from the rules’ coverage.

In our initial comments, we identified several such categories. We maintained that, as a threshold matter, non-Internet-based services provided by cable and telephone companies (such as, for example, cable television service and telephone service) should not under any circumstances be subject to any rules adopted in this proceeding, even if they are provided over the same facilities as Internet access service and even if they use IP protocol. Second, we argued that ISPs may offer their customers a range of Internet-based services separate from, and in addition to, Internet access, and these services should similarly be outside the scope of the proposed rules. Finally, there may be unique services offered by third parties over the Internet that require some unique form of customization or Quality of Service (“QoS”) guarantees other than what is available to them with best efforts delivery. To prohibit ISPs from providing such services even at nondiscriminatory prices, terms and conditions for any application that needs it, as the proposed rules would appear to do, would simply foreclose the availability of such unique services. Classifying such services as “managed services” is necessary in order to ensure the very openness and innovation that the rules are intended to promote.

The best way to deal with this issue would be to treat as outside the scope of its rules any services offered by an ISP other than its best efforts Internet access service. Verizon provides a useful summary and rationale for this approach:

[R]ather than trying to define or predetermine a fixed category of “permissible” services in some static or artificial way, the Commission should make clear that any provider that offers traditional Internet access that allows consumers to access any lawful content and applications also is free to offer consumers the option of purchasing any and all additional services that the provider chooses to provide: that will give consumers additional choices and allow market forces to determine which services best meet consumer demand. And it is certainly a preferable alternative to having the Commission be in the business of trying to identify or define permissible “managed services.”²⁴

²⁴ Verizon Comments at 80.

Many of the major proponents of government regulation, however, take a different view. They would have the Commission adopt its proposed nondiscrimination rule barring ISPs from accepting compensation to provide any prioritization, customization or QoS to any third-party content or application provider and put off to another day any determination of whether certain categories of services should be classified as “managed services” or otherwise exempted from the rule. Ultimately, they would apparently have the Commission decide on a case-by-case basis whether any particular application or content is or is not worthy of classification as a “managed service.”

It is evident from their comments that the pro-regulation commenters view the “managed services” concept as a very narrow exception that would leave most Internet services – indeed, most Internet *and non-Internet* services offered over an ISP’s facilities – subject to the new rules. Thus, according to Public Interest Commenters, “Some of the services that the Commission recognizes as ‘managed services,’ *while not themselves Internet services*, are delivered over the same pipe as broadband Internet access. . . . It is possible for a broadband Internet access service provider to run afoul of the proposed open Internet rules by allowing managed services to interfere with its Internet offering.” Specifically, “a provider of broadband Internet access would violate the rule against nondiscrimination if it allowed a managed service to dynamically ‘borrow’ bandwidth from its broadband Internet offering, thereby reducing the quality of service available to Internet applications in favor of its own.”

Indeed, Public Interest Commenters go so far as to suggest that it should be deemed a violation of the rules for an ISP to “discriminate against its broadband capacity in favor of investing in managed services, where it faces less competition.” In other words, so-called “net neutrality,” as they see it, extends to restricting cable operators and telephone companies from

investing in their non-Internet cable and telephone services if such investment is somehow arguably at the expense of their Internet access service.

Cable operators have invested hundreds of billions of dollars to provide state-of-the-art multichannel video programming services, telephone services and the ever more robust high-speed Internet services that have made possible the rich array of content and applications now available on the Internet. The suggestion that the government should dictate the allocation of their future investments and should restrict their right and ability to maximize the value and attractiveness to consumers of their video programming and telephone offerings belies any pretense that “net neutrality” is only “light” regulation of the “on-ramp” to the Internet. Its proponents go far beyond merely prohibiting ISPs from blocking content and applications, and even beyond restricting the right of content and application providers to negotiate for any customization and QoS guarantees they may desire or require in designing and offering services to consumers. The scope of their proposed regulations extends apparently even to non-Internet cable and phone services.

As a legal matter, of course, the Commission has no authority to restrict cable operators’ allocation of investment resources to their cable television service.²⁵ And any such restriction would directly and impermissibly infringe cable operators’ protected speech under the First Amendment.²⁶ But even if this were not the case, the notion that the public interest would be

²⁵ In particular, Section 621(c) of the Communications Act provides that “[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.” 47 U.S.C. § 541(c). Prohibiting the operator of a cable system from restricting or reducing the use of bandwidth for Internet service in order to make more bandwidth available for the provision of cable service would be a type of common carrier or utility regulation barred by this provision. Regulating the amount of facilities investment to be used for various services is the hallmark of utility regulation and, as such, would be expressly outside the scope of the Commission’s authority.

²⁶ See, e.g., *infra* at note 71.

best served by a rule imposing on cable operators some sort of investment parity *among their own services* would make no sense and would be wholly unwarranted.

If the Commission adopts any rules in this proceeding, it should make clear that in no circumstances do those rules restrict or regulate any *non-Internet* services offered by ISPs (such as cable or telephone service), whether or not they are offered on the same facilities and whether or not the services have their own dedicated and inviolable bandwidth. Moreover, even the proponents of regulation concede that some services that *are* provided over the Internet are nevertheless different from, and should be treated differently than, the Internet access services generally offered ISPs and by content and application providers.

As several parties have pointed out, however, it is impossible to identify in advance all the services that fit within this category of Internet-based services that may require customization or QoS guarantees in order to be valuable to consumers and promote the public interest. The Commission should not make ISPs and application providers guess whether a particular service they may be contemplating would or would not strike the Commission as worthy of special treatment as a “managed service.” Such uncertainty could delay or deter the development of such services and would certainly impair the ability of developers to access investment capital. Moreover, identifying “managed services” on an *ad hoc*, case-by-case basis would not only be unduly burdensome for the Commission. Absent well defined standards, distinguishing among content and application services would also raise serious First Amendment problems.

That’s why, if there were to be any rules adopted in this proceeding, the best approach would be the one described above: As long as an ISP offers consumers an Internet access service that, subject to reasonable network management, provides access to all content and

applications, any other services offered to consumers should be outside the scope of any rules adopted in this proceeding.

IV. ANY RULES ADOPTED BY THE COMMISSION SHOULD NOT BE LIMITED TO WIRELINE ISPs BUT SHOULD APPLY BROADLY TO COMPETING PROVIDERS OF INTERNET ACCESS AND TRANSPORT AND ENTITIES THAT CONTROL CONSUMER ACCESS TO INTERNET CONTENT AND APPLICATION PROVIDERS

The proponents of regulation have gone to great lengths to portray their proposed rules as regulating only the “on-ramps” to the Internet and not the Internet itself.²⁷ But this is simply not the case. First, characterizing the facilities of ISPs that are used to process and transmit content between consumer households as somehow not part of the “Internet” is a departure from common usage and understanding of the term. Here’s how the Commission described the Internet when it adopted its Policy Statement on 2006:

The Internet is “the international computer network of both Federal and non-Federal interoperable packet switched data networks.” 47 U.S.C. § 230(f)(1). The Internet is also described as “the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information.” 47 U.S.C. § 231(e)(3). The Supreme Court has described the Internet as a “network of interconnected computers.” *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 125 S. Ct. 2688, slip op. at 2 (2005) (*NCTA v. Brand X*); see also *Reno v. ACLU*, 521 U.S. 844, 849-50 (1997). No single entity controls the Internet; rather it is a “worldwide mesh or matrix of hundreds of thousands of networks, owned and operated by hundreds of thousands of people.” John S. Quarterman & Peter H. Salus, *How the Internet Works*, <http://www.mids.org/works.html> (visited Dec. 17, 2003) (quoted at *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4869 n.23 (2004) (*IP-Enabled Services NPRM*)).²⁸

²⁷ See, e.g., “Broadband blur,” *Susan Crawford Blog*, March 29, 2010, <http://scrawford.net/blog/broadband-blur/1328/>.

²⁸ *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, Policy Statement, 20 FCC Rcd 14986, 14987 n.1 (2005) (“*Policy Statement*”).

That “network of interconnected computers” includes, of course, the computers in the homes of consumers, which are connected to the ISPs’ facilities. Those computers can and are used to access material located on other computers that are connected to ISPs’ facilities, and they are used as servers uploading content to other connected computers. Just because the proposed rules restrict only the manner in which ISPs’ facilities may be used and operated and do not apply to other Internet facilities and service providers hardly means that they would not be “regulating the Internet.”

In any event, as NCTA pointed out in its initial comments, the nondiscrimination rule proposed by the Commission would not simply regulate ISPs. It would also effectively regulate – and affect the services provided by – content and application providers. A rule that prevents ISPs from “discriminating” and from accepting compensation from any content or application providers for prioritization, customization or QoS guarantees also effectively prohibits content and application providers from purchasing such services – services that they might want or need in order to make their application work or to compete effectively in the Internet marketplace. A rule that applies only to ISPs and not to other Internet entities that may offer similar services artificially skews competition throughout the Internet marketplace.

The ostensible purpose of regulating ISPs is that they may have the ability and incentive not only to favor certain content and application providers over others but, in so doing, to prevent the disfavored providers from competing effectively and diminish incentives for new competitors to develop and offer new services. But the artificial distinction between Internet “on ramps” and other Internet services and facilities obscures the fact that many other service and facility providers in the Internet ecosystem have at least as great an incentive and ability as ISPs to inflict the same potential harm.

Consider, for example, the providers of content delivery systems (“CDNs”), such as Akamai Technologies, Inc. In its comments, Akamai notes that “[b]y accelerating the delivery of information from its customers to end users over the Internet, Akamai’s content delivery services improve the online experiences of its customers’ end users, many of whom are individual consumers. . . . End users do not pay Akamai for these services. Instead, enterprises with websites that serve end users pay Akamai to optimize and accelerate the delivery of their content and applications.”²⁹

That, of course, is precisely what cable operators and other ISPs would be prohibited from offering under the proposed rules. Yet, as Akamai is quick to point out, “because Akamai is not a provider of broadband Internet access service as defined in the *Proposed Rules*, its services should not be subject to such rules.”³⁰ Why this should be the case is hard to discern.

If a CDN is permitted to charge application and content providers to provide speedier or otherwise enhanced delivery to end users, why would this not have the same supposedly harmful effect on those who either cannot afford to pay, or are denied the opportunity to purchase equivalent services at equivalent prices, terms and conditions, as if an ISP were permitted to charge for prioritization? Akamai suggests that it “competes with numerous other unregulated Internet firms in providing these types of services.”³¹ But, in fact, as discussed above, the CDN marketplace is highly concentrated. Two companies have approximately 70-75% of CDN business, and Akamai has the lion’s share with 60%.³²

²⁹ Akamai Comments at 6.

³⁰ *Id.* at 4.

³¹ *Id.* at 6.

³² *See* p. 16, *supra*.

Those companies do not currently provide content or applications that compete with Internet content and application providers and may have no anticompetitive motive for favoring certain content and applications over others. But the rule proposed by the Commission and urged by its supporters is not restricted to such anticompetitive conduct. It would prohibit ISPs from offering prioritization or customization for a fee to *any* content or application service – regardless of whether the service was affiliated with the ISP or the conduct was anticompetitive.

As comments of its proponents make clear, such a rule is meant to ensure that no content or application provider is delivered with greater speed or quality of service than any other simply because it can afford to pay for such enhanced delivery. If that’s the concern, applying the rule only to ISPs – which, as discussed above, typically can provide CDN and paid peering services at a more affordable price than CDNs and can exert competitive pressure on the prices of the concentrated CDN marketplace – without extending such a restriction to CDNs makes no sense.

Meanwhile, as discussed in our initial comments, some Internet application providers – in particular, search and browser applications – serve as principal gateways to content and applications on the Internet for far more consumers than are served by any ISP. And, unlike pure transport providers like Akamai and Limelight, these entities *do* also have content and applications on the Internet that they might have incentives to favor. The obvious example is Google.

In its own comments, Google pretends not to recognize the role that its search engine plays in routing consumers to particular content and applications – and in rendering other content and applications virtually invisible and unused. Arguing that any rules should apply only to ISPs and not to any other Internet applications or services, it portrays itself as just another innovative “over-the-top” content provider that should remain immune from regulation:

A commercial marketplace free from regulation allows entrepreneurs and innovators to focus on developing new online services, content and applications. . . . A vibrant *small-business applications marketplace* also creates high-paying jobs and enhances the leadership and exports of America’s technology services. FCC incursion into this unregulated marketplace, by contrast, would raise uncertainty for investors and perversely tilt the advantage toward ownership consolidation and vertical integration of broadband platforms with application providers.³³

Whatever the arguments are for regulating or not regulating the “small-business applications marketplace,” that is hardly the marketplace in which Google operates. Virtually all Internet users rely on search engines regularly, and Google’s search application is used far more than any other. According to Nielsen, there were 10.2 *billion* web searches by United States Internet users in January 2010, and Google was used for 66.3 *percent* – 6.8 billion – of those searches. The next most frequently used search engine was Yahoo, with only 14.5% of all searches.³⁴

³³ Google Comments at 86-87 (footnotes omitted) (emphasis added). While Google argues that the Commission “has ample authority under the Communications Act” – in particular, ancillary jurisdiction under Title I – to regulate ISPs in order to ensure that ISPs do not unfairly interfere with the ability of content and application providers to reach consumers, it claims that the Commission has no authority at all to prevent Google from imposing similar harm. *See* Google Comments at 83-85. Time Warner Cable has, however, explained why “if the Commission has jurisdiction over broadband Internet access service providers at all, there is no bar to reaching all major players in the Internet ecosystem, and it must do so for its framework to have any validity.” Time Warner Cable Comments at 98.

³⁴ “U.S. Web Searches Top 10.2 Billion in January,” *nielsenwire*, Feb. 12, 2010, http://blog.nielsen.com/nielsenwire/online_mobile/u-s-web-searches-top-10-2-billion-in-january/.

Top 10 Search Providers for January 2010, Ranked by Searches (U.S.)			
Rank	Provider	Searches (000)	Share of Searches
	All Search	10,272,099	100.0%
1	Google Search	6,805,424	66.3%
2	Yahoo! Search	1,488,476	14.5%
3	MSN/Windows Live/Bing Search	1,116,546	10.9%
4	AOL Search	251,762	2.5%
5	Ask.com Search	194,161	1.9%
6	My Web Search	112,356	1.1%
7	Comcast Search	59,608	0.6%
8	Yellow Pages Search	35,101	0.3%
9	NexTag Search	34,736	0.3%
10	BizRate Search	20,123	0.2%

Source: The Nielsen Company

Does this give Google the *ability* to affect the competitive viability of content and application providers on the Internet? In our initial comments, we showed how failure to appear in a Google search or appearing far down in the ranking of websites for a particular search can be the death penalty for a website or business.³⁵

Does Google also have the *incentive* to use its rankings to anticompetitive effect? Proponents of regulating ISPs argue that because cable operators and telephone companies also provide their own video programming and telephone services, they might block or discriminate against Internet-based providers of competing video and telephone services. But Google also provides an ever-expanding array of services that it might have incentives to favor with its dominant search application. And while the threat of anticompetitive favoritism by ISPs remains hypothetical, it appears, as we pointed out in our comments, that Google's search engine is

³⁵ See NCTA Comments at 48-49.

already structured to favor “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.”³⁶

Proponents of regulating ISPs also worry that ISPs might block content and application providers from reaching consumers at all unless the providers paid a fee for such access. With respect to cable operators, that’s a red herring. Cable operators have never suggested, much less required, that content or application providers pay a toll simply to ensure “best efforts” delivery to an ISP’s customers.

But if the Commission and the proponents of regulation are worried about the potential effects on Internet content and application providers of any such hypothetical tolls, they should be at least as worried about Google. As Tom Glocer, CEO of Thomson Reuters, has explained,

“What everyone’s waiting to see is whether ‘Do no evil’ is true to the credo, their real inner core, or is it just a convenient sort of ‘Don’t worry, Don’t worry’ – until they’ve built up such an amazing personal database about all of our habits and they then go to the *New York Times* and say, ‘By the way, if you want the search engine to include your content, you’re going to have to start paying us.’ . . . They’ve created with software a narrow strait through which most people need to pass to do an activity that is at the root of much of what we do on the Web. . . . The fear is that an increasing number of businesses depend on Google to get their eyeballs. At a certain point, Google can flip their business from being a utility” to a gatekeeper that charges for access.³⁷

Moreover, as Google continually expands into new businesses and services, it increasingly competes with ISPs. Its video programming service, YouTube, is no longer simply a platform for the display of home videos; Google is paying established program networks to

³⁶ Adam Raff, *Search, But You May Not Find*, N.Y. Times, Dec. 28, 2009, at A27, available at <http://www.nytimes.com/2009/12/28/opinion/28raff.html?scp=2&sq=google%20&st=cse>, quoted in NCTA Comments at 48.

³⁷ K. Auletta, *Googled* 292 (2009), quoting Tom Glocer (ellipses in original).

display their programming. It is providing telephone service via Google Voice. And, of course, it is an established and powerful competitor in the sale of advertising.

The prospect that Google *might* engage in anticompetitive conduct against cable operators, telephone companies or any other entities offering competitive services should not warrant regulatory intervention. The antitrust laws already serve as an effective first remedy for any such conduct. But what would be especially unwarranted and anticompetitive would be to impose regulatory constraints on *ISPs* because of the hypothetical harm that *they* might inflict on the Internet while failing to impose similar constraints on Google and other entities that have no less ability and incentive to inflict the very same prospective harm. That *would* be picking winners and losers –and it would be arbitrary and capricious, as well.³⁸

As discussed in our initial comments, the Commission has rightly proposed that any proposed rules should apply to wireless as well as wireline providers of Internet access. Not surprisingly, wireless providers, in their comments, argue that such rules should apply, if at all, only to their wireline competitors. That surely would constitute picking winners and losers, too. And it would be wholly unjustified.

The comments of CTIA – The Wireless Association identify a number of reasons why wireless ISPs are supposedly different from wireline ISPs and should not be subject to the proposed rules. But many of these reasons apply equally to wireline and wireless ISPs: “The

³⁸ Observers of the Internet have long recognized that there are entities in the Internet ecosystem that may actually have more incentive and means than broadband ISPs to act as Internet “gatekeepers.” For example, Professor Lawrence Lessig touched on this notion in his *Amicus Curiae* brief in the 2000 D.C. Circuit case, *United States v. Microsoft Corp.*, which addressed allegations that Microsoft unlawfully tied its web browser to its Windows operating system. Professor Lessig observed that “software can be a more effective technique for strategic bundling than contract or ‘technology.’” Brief of Professor Lawrence Lessig as Amicus Curiae Supporting Petitioner, *United States v. Microsoft Corp.*, No. 98-1232, at 26 (D.C. Cir. Feb. 1, 2000), available at <http://www.lessig.org/content/testimony/ab/ab.pdf>. Specifically, “[b]ecause of the complexity of modern software products, it is often easy to hide the actual functioning of a software routine. Thus, to the extent there is an incentive for strategic behavior, it is easier to hide that behavior in code than it is in either contract or technology.” *Id.* at 27.

wireless industry is an innovation, investment and job leader within the United States.”³⁹ So, too, the cable industry. “The risk is real, but where is the harm that needs to be addressed? . . . [I]ndeed, prior calls for applying net neutrality regulations to the wireless industry were accompanied by dramatic prophecies of mischief and harm that have never materialized”⁴⁰ Exactly the case with respect to wireline ISPs. “Adoption of such rules would reverse, without justification, the Commission’s longstanding and highly successful deregulatory policies with regard to wireless broadband.”⁴¹ Substitute “wireline” for “wireless,” and it’s equally true. “[W]hether measured on a national or local level, providers face competitive pressure that acts as a control on behavior. Wireless service providers are regulated by their customers.”⁴² As are wireline ISPs.

These are all good reasons not to regulate *any* ISPs. But they are not reasons to exclude wireless ISPs from the scope of any rules.

The other distinctions identified by CTIA are largely immaterial: “[W]ireless networks stand alone in their reliance on limited spectrum resources. . . . [W]ireless networks are unique in that their customers are mobile. . . . [W]ireless service is unique in that the CPE, the wireless handset, actually is directly linked to the network.”⁴³ Wireline ISPs, of course, also have limited capacity that requires management of congestion. And while the network management needs and requirements of wireless ISPs may, in some respects and circumstances, differ from those of wireline ISPs, the proposed rules include an exception in all cases for “reasonable network

³⁹ Comments of CTIA – The Wireless Association at i.

⁴⁰ *Id.* at i-ii.

⁴¹ *Id.* at i.

⁴² *Id.* at ii.

⁴³ *Id.*

management” – an exception that can take into account any differences in those management needs.

But choosing not to regulate one set of competitors at all would simply *ensure* an unfair and anticompetitive outcome. It would give an artificial advantage to wireless providers in determining how best to manage their networks, market and design their services, and receive compensation for their services in the manner that is most attractive to consumers for reasons that have nothing to do with marketplace efficiency and superiority. The Commission is right to have recognized that adopting rules for wireline ISPs alone while exempting wireless providers is not a viable alternative.

V. THERE IS NO NEED FOR BURDENSOME TRANSPARENCY MANDATES, WHICH WOULD COME AT SIGNIFICANT COST AND BE COUNTERPRODUCTIVE

NCTA’s comments demonstrated that it would be premature, unnecessary, and counterproductive for the Commission to impose a burdensome disclosure requirement – or, indeed, any prophylactic rules to ensure openness – given that a vibrant broadband marketplace now exists and that voluntary disclosures and collaborative efforts are working.⁴⁴ Moreover, we cautioned that:

A rule requiring general, one-size-fits-all disclosure of network management techniques should be a last resort, where there is reason to believe that voluntary disclosures to consumers and the Internet community, along with ongoing discussions among ISPs and application providers to enable the development of new products, are not sufficient to foster and preserve a vibrant, innovative Internet marketplace for consumers and for service providers.⁴⁵

This position is reinforced by the comments filed in the proceeding.

⁴⁴ See NCTA Comments at 45.

⁴⁵ *Id.* at 44-45.

The record is replete with statements demonstrating the vibrancy of the broadband marketplace – in the words of Free Press, “the Internet is an open platform for innovation, speech and commerce.”⁴⁶ Google explains that “today’s largest Internet applications providers, including Google, formerly were small start-ups and are now major employers and contributors to the U.S. economy. Consumer electronics, computers and other devices, especially those fostering mobility and convergence (voice, data and video), are all growing because of the Internet.”⁴⁷ Media Access Project states “The Internet is an open and interactive medium, facilitating communication by anyone to and from everyone. It is a medium that supports and enhances the free expression of citizens and serves as a vehicle for democratic governance and economic activities.”⁴⁸ Other than to cite hypothetical scenarios, the record does not support contentions that the present disclosure practices of broadband providers are hindering innovation in the broadband space. This strongly suggests that the information provided by broadband providers today is satisfactory.⁴⁹

Moreover, the record demonstrates that the cable industry is committed to, and benefits from, transparency. For example, Cox explains that it supports transparency and “has a strong incentive to cultivate positive relationships with its customers throughout their subscription period to maintain an informed and satisfied customer base.”⁵⁰ Similarly, Charter explains that “Internet service providers already provide substantial and relevant information in response to

⁴⁶ Free Press Comments at 9.

⁴⁷ Google Comments at 6.

⁴⁸ Media Access Project, on behalf of Access Humboldt, *et al.* Comments at 4.

⁴⁹ *See* NCTA Comments at 42; *see also* T-Mobile Comments at 39 (explaining that content developers already have the information they need in order to develop successful products for use over providers’ networks).

⁵⁰ Cox Comments at 9.

customer expectations and market competition.”⁵¹ Comcast provides examples of how it is continually “innovating in consumer transparency and disclosure.”⁵² Noting that it supports and practices transparency, Time Warner Cable (“TWC”) reports that it provides “clear and conspicuous disclosures to consumers regarding its acceptable use policies and the impact of its network management practices, and it will continue to do so as its business practices evolve.”⁵³ TWC also observes that, “[a]lthough the NPRM appears to presume that such practices are the exception to the rule, TWC’s practices are far from unique The threat of consumer backlash along with the protections provided by existing consumer protection laws create strong incentives to provide complete and accurate disclosures regarding network management practices.”⁵⁴ As TWC explains, the cable industry “already achieves the goal behind the NPRM’s proposed disclosure requirement of ‘allow[ing] users to make informed purchasing and usage decisions,’ thereby obviating the need for any further disclosure requirements.”⁵⁵

Several voluntary efforts are currently underway to improve broadband service disclosures. For example, NCTA has been working with our member companies in an attempt to develop a common set of measurement standards that could be endorsed by the cable industry.⁵⁶ In addition, the cable industry has expressed interest in working with other segments of the

⁵¹ Charter Comments at 22.

⁵² Comcast Comments at 8-9 (noting that it offers a “‘network management’ webpage that has been commended for its clarity and openness” and that it has recently deployed “a first-in-the industry whole-house bandwidth consumption meter”); *see also* Ryan Singel, *Comcast Rolls Out Broadband Meters Coast to Coast*, *Wired.com*, Apr. 1, 2010 (reporting that Comcast broadband subscribers “can now keep track of their data usage to make sure they don’t go over their 250GB a month data allowance, thanks to bandwidth meters deployed to customers nationwide”), available at <http://www.wired.com/epicenter/2010/04/comcast-broadband-meters/>.

⁵³ TWC Comments at 98-99.

⁵⁴ TWC Comments at 98-99.

⁵⁵ *Id.* at 99.

⁵⁶ *See* Letter from Neal Goldberg, Vice President and General Counsel, NCTA, to Joel Gurin, Chief, Consumer & Governmental Affairs Bureau, FCC (Mar. 26, 2010) available at <http://fjallfoss.fcc.gov/ecfs/comment/view?id=6015544131>.

industry and consumer groups in addressing these issues.⁵⁷ We would also look forward to participating in the Broadband Measurement Advisory Council recommended in *Connecting America: The National Broadband Plan* (the “Broadband Plan” or the “Plan”).⁵⁸

These key factors – the vibrancy of the marketplace coupled with existing voluntary disclosures – demonstrate that further mandates would be premature. Moreover, as acknowledged in the *Broadband Plan*, there remain “gaps in the FCC’s understanding” about “the information provided to consumers regarding – and consumers’ understanding of – broadband speed, performance, pricing, and service terms and conditions.”⁵⁹ As noted in the Plan, such “critical” information “has implications for transparency issues.”⁶⁰ Clearly, the Commission should not proceed with regulation until it has a full understanding of what additional transparency measures are needed.

There are other potential concerns with moving forward too quickly with disclosure mandates. For example, there is the potential danger of disclosing too much and providing a road-map to those who seek to harm consumers by, for example, degrading the quality of broadband service, and exposing consumers to privacy violations and other dangers such as spam, viruses, and other malware.⁶¹ Furthermore, too much disclosure risks that consumers

⁵⁷ See, e.g., Reply Comments of the National Cable & Telecommunications Association, CG Docket No. 09-158, CC Docket No. 98-170, & WC Docket No. 04-36 (filed Oct. 28, 14, 2009) at 6.

⁵⁸ Federal Communications Commission, *Connecting America: The National Broadband Plan* 45 (2010) (the “Broadband Plan” or the “Plan”).

⁵⁹ Plan at 64, n.53.

⁶⁰ *Id.*

⁶¹ See, e.g., TWC Comments at 102 (“As many parties have explained, providing bad actors a roadmap of how to engage in denial-of-service attacks and similar harm at a minimum would endanger service quality, risk exposing subscribers to the potential theft of personal data and other harms, and potentially even jeopardize public safety and national security.”); Charter Comments at 20 (“Disclosure of certain information could give purveyors of spam, viruses, worms and other malware the ability to circumvent legitimate network security measures that consumers depend on to protect personal computers and to benefit from broadband Internet access.”); TIA Comments at 31 (noting that it is “critical for the security of all network users that any requirement to disclose information concerning network management practices be tempered by the need to

could become more confused and/or experience “information overload” and tune out completely.⁶²

The record demonstrates that this is not the time for extreme disclosure mandates. However, “if there is an issue in the Internet ecosystem about transparency and disclosures, it makes no sense to impose a new duty on broadband ISPs alone.”⁶³ Such mandates must cover other important players in the broadband ecosystem like content and application providers.⁶⁴ As Comcast explains, “[i]t is becoming increasingly clear that the practices of Internet content, application, and service providers have as much to do with the openness and security of the Internet as broadband ISPs’ practices do.”⁶⁵

If disclosures are mandated, the Commission should work with various groups, including industry representatives, to establish what types of disclosures are effective and necessary. Such

maintain security against the malicious attacks, malware, phishing, spam, and other threats that network providers must fight on a continuous basis” and warning that “[a]ttackers can and will use any detail provided under regulatory disclosure in their attempts to breach network security measures”) (internal citations omitted).

⁶² See, e.g., Charter Comments at 20, n.51 (explaining that “[n]umerous academic studies and experts have concluded that there is a limit to the amount of information consumers are able to beneficially process”); SureWest Comments at 42-43 (“For information to be useful to the vast majority of customers, it cannot be so extensive or so detailed that customers other than technical experts would get lost or give up attempting to read it. Certain detailed protocols of network management would not be of any use to subscribers, and thus providing extensive descriptions of such protocols would not only not be necessary for subscribers, but would be affirmatively harmful.”); Qwest Comments at 16 (“A highly detailed or strict information mandate could well produce an overload of information that will only serve to confuse consumers.”); Bright House Comments at 10 (“[D]isclosure requirements should not become a recipe for . . . consumers to be overwhelmed by information overload . . .”).

⁶³ Comcast Comments at 47.

⁶⁴ See NCTA Comments at 44-45; TWC Comments at 98-99 (“if the Commission has jurisdiction over broadband Internet access service providers at all, there is no bar to reaching all major players in the Internet ecosystem, and it must do so for its framework to have any validity If the Commission nevertheless determines that rules are required to ensure adequate disclosures, such transparency requirements should apply to all entities in the Internet ecosystem”); Communications Workers of America Comments at 23 (a transparency rule “would fail to achieve its open Internet goal of ensuring informed subscribers if large and dominant application providers remained free to engage in the very same type of undisclosed content preferences and prioritizations that the proposed rule would require broadband Internet access providers to disclose”); see also Qwest Comments at 10-11; AT&T Comments at 195-96.

⁶⁵ Comcast Comments at 46, n.157 (“This is especially true as such providers begin to offer services similar to those offered by broadband ISPs – e.g., DNS services that determine where and how traffic is routed.”).

an approach is supported by the record.⁶⁶ CCIA opines that allowing industry experts to evaluate these issues would provide “more certainty, while also preserving greater flexibility to respond to technological innovations.”⁶⁷

To best serve the interests of consumers and the continued health of the broadband marketplace, the Commission should refrain from adopting mandated disclosures and, as Verizon summarizes, “facilitate the development of industry standards, self-regulatory codes, and best practices to promote transparency – practices that should apply to all providers throughout the Internet ecosystem.”⁶⁸

VI. REGULATING BROADBAND INTERNET SERVICES AS TELECOMMUNICATIONS SERVICES” UNDER TITLE II IS UNSUSTAINABLE AS A MATTER OF LAW AND POLICY

By the time that initial comments in this proceeding were due, there was already ample reason to anticipate that the United States Court of Appeals for the District of Columbia Circuit would reject the particular bases on which the Commission had sought to justify ancillary jurisdiction “to regulate the network practices of facilities-based broadband Internet access service providers” under Title I of the Communications Act – which, as noted above, is precisely what has now occurred. Accordingly, some of the proponents of regulation urged the Commission to reverse its longstanding refusal to regulate the Internet and rule that the provision of broadband Internet access is a “telecommunications service” subject to Title II. The

⁶⁶ See, e.g., Computer & Communications Industry Ass’n (“CCIA”) Comments at 34 (urging the Commission to “designate a dedicated technical advisory group to be the initial arbiter of how much and what information must be disclosed”); Netflix Comments at 8-9 (“[T]he Commission should not limit its rules to specific disclosure requirements, but instead should establish an expert working group tasked with determining, on a periodic basis, the type of information to be disclosed to consumers and the manner of such disclosure.”).

⁶⁷ CCIA Comments at 34.

⁶⁸ Verizon Comments at 131.

Commission twice specifically rejected that interpretation of its statutory mandate, and the Supreme Court upheld the Commission's determination.

The Title II path urged by the proponents of Internet regulation would lead the Commission into an untenable regulatory and policy thicket that would only frustrate and stifle the innovation, investment and rapid growth that have characterized the Internet since the arrival of broadband service. The reasons why this is so are set forth at length in a letter jointly submitted in this proceeding by NCTA, CTIA – The Wireless Association, the United States Telecom Association, the Telecommunications Industry Association, the Independent Telephone and Telecommunications Alliance, Verizon, AT&T, Time Warner Cable and Qwest.⁶⁹ We reaffirm the arguments set forth in that letter, which we incorporate by reference in these comments, and we strongly urge the Commission to reject this path.

VII. THE COMMENTERS SUPPORTING NET NEUTRALITY FAIL TO RESOLVE THE SERIOUS FIRST AMENDMENT CONCERNS RAISED BY THE PROPOSED RULES

Those parties filing comments in support of net neutrality have, for the most part, said little about the First Amendment. To the extent that commenters try to defend the constitutionality of the proposed rules at all, their arguments tend to fall into two categories: *first*, they claim that that the rules pose no First Amendment problems because they promote First Amendment values (*see, e.g.*, Public Interest Advocates [Access Humboldt *et al.*] at 3-5); and, *second*, they contend that Internet service providers generally have no First Amendment rights because “the mere act of routing data packets is not itself inherently expressive” (Free Press at 137). Neither of these arguments stands up to scrutiny.

⁶⁹ Ex Parte Letter to Chairman Genachowski from Kyle E. McSarrow, Steve Largent, Walter B. McCormick, Jr., Grant Seiffert, Curt Stamp, Thomas J. Tauke, James W. Cicconi, Gail MacKinnon, and Steve Davis (Feb. 22, 2010).

Contrary to what the Public Interest Advocates appear to believe, the First Amendment is not a grant of power to the Federal Government to control private speech. Although the Public Interest Advocates assert that the proposed rules “help[] to fulfill the mandate of the First Amendment, which states that the government should seek to promote the public’s right to have access to diverse and varied social, political, and artistic expression,” Public Interest Advocates at 3, that is not at all what the First Amendment says. As relevant here, its text says quite plainly that “Congress shall make no law . . . abridging the freedom of speech, or of the press,” language that by its terms is a strict *limitation* on government, not a broad authorization for the Government to regulate private speech in order to promote its own concepts of diversity and variety. Whatever the First Amendment may be, it is not a “mandate” for the Government to oversee private marketplaces for speech.

The Public Interest Advocates are similarly off the mark in arguing that “the Supreme Court has unanimously embraced a robust view of the affirmative duty of government to facilitate speech, pointing to the public’s ‘collective right to have the [electronic media] function consistently with the ends and purposes of the First Amendment.’” Public Interest Advocates at 3, quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 376, 390 (1969) (material in brackets supplied by Public Interest Advocates). The *Red Lion* decision, of course, involved regulation of broadcasting – an instance where the Federal Government has a unique degree of authority over speech, given broadcast licensees’ use of the scarce public airwaves – and the Court was careful to limit its reasoning to that context. Although the parenthetical language inserted by the Public Interest Advocates (“[electronic media]”) would seem to suggest a sweeping government power to control electronic speech, the Court did not, in fact, endorse extensive authority over “electronic media” generally but rather focused only on government regulation of a very specific

“medium,” *i.e.*, “radio.” The Court thus prefaced the passage quoted by the Public Interest Advocates with the observation that “the people as a whole retain their interest in free speech *by radio*,” 395 U.S. at 390 (emphasis added), which in turn provided the basis for the Court to declare the people’s “collective right” to have *that* medium – not electronic media generally – utilized in ways that advance the “ends and purposes of the First Amendment.” Then, twenty-five years later, in the first *Turner Broadcasting* case, the Court expressly refused to extend the *Red Lion* analysis to other electronic media, rejecting the Government’s argument that regulation of the cable industry should be judged by the same lenient standards applicable to broadcast regulation. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 639-40 (1994) (*Turner I*); *see also Citizens United v. FCC*, 130 S. Ct. 876, 890 (2010) (“any effort by the Judiciary to decide which means of communication are to be preferred for the particular kind of message and speaker would raise questions as to the courts’ own lawful authority”).

Apart from broadcasting, the Court has recognized one other context in which the Government may affirmatively regulate speech in order to advance First Amendment “interests”: where anticompetitive activity has threatened a private marketplace for speech. *See, e.g., Associated Press v. United States*, 326 U.S. 1, 20 (1945). We have already explained in our initial comments that the Commission cannot justify the proposed rules on this basis – there is robust and increasing competition in many markets for Internet service (*see* NCTA Comments at 13, 56-58) – and we will not repeat those points here. It is sufficient to say that, apart from these narrowly defined circumstances, the Supreme Court has not recognized an inherent government power to regulate private speech in what the Government thinks to be the public interest. And that lack of endorsement is anything but surprising, given the fundamental First Amendment principle that the public itself, not the Government, should decide what is to be heard. *See*

Leathers v. Medlock, 499 U.S. 439, 448-49 (1991) (“the constitutional right of free expression is . . . intended to remove government restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely in the hands of each of us”) (internal quotation marks omitted).

Free Press takes a different First Amendment tack. According to its comments, the proposed rules do not raise any real First Amendment concerns because Internet service providers “may not invoke First Amendment protections for practices, such as Internet traffic management, that do not constitute speech.” Free Press at 134. As a constitutional defense of the proposed rules, however, that argument falls short on several grounds.

To begin with, Free Press simply ignores the speech interests of *content providers*. Free Press concedes that the First Amendment protects all entities that “function as speakers,” Free Press at 134, and that class necessarily includes all providers of content for the Internet, whether those providers actually create the content themselves or furnish a platform for the content of others. Yet, the rules impose serious restrictions on content providers’ speech. By prohibiting content providers from paying for enhanced access to their intended audiences, the proposed rules have a direct, and quite intentional, impact on their ability to present material in the most effective and advantageous manner. Free Press does not even acknowledge that First Amendment problem, let alone provide an answer for it.

Even with respect to Internet service providers, moreover, Free Press’s arguments are incorrect. Although Free Press insists that “the mere act of routing data packets is not itself inherently expressive,” Free Press at 137, that assertion misses the point. The Commission’s proposed rules do not seek to regulate “the mere act of routing data packets” – that is, the physical activity of transmission – but to dictate the antecedent speaker-based and content-based

choices about which data packets to carry and how best to present the speech that they embody. To that end, the rules specifically prohibit Internet service providers from declining to carry any “lawful content,” *Notice* ¶ 92, and also from giving preferences to any “lawful content, application, and service” (unless they do so without charge). *Notice* ¶ 104. Those decisions by service providers are, on their face, decisions about speech itself, and thus entitled to the protection of the First Amendment.

Free Press makes a similar mistake in contending that “Internet access providers cannot credibly claim that a non-discrimination principle compels them to speak,” Free Press at 138, because “[m]anagement of online traffic is not speech.” Free Press at 138. Again, that position is simply inconsistent with the proposed rules themselves. The stated intent of the Commission’s non-discrimination rule is to mandate certain decisions about speech: that is, the non-discrimination rule specifically aims to force Internet service providers to treat all speech equally, even if the providers would otherwise elect to accord priority to speech of their own choosing. *See Notice* ¶ 106. It may be debated whether this kind of government control over speech-based decisions should be subject to strict scrutiny, *see Turner I*, 512 U.S. at 653-57, but it is fanciful to claim that such control would be subject to no First Amendment scrutiny at all.⁷⁰ And, as we have previously argued, *see NCTA Comments* at 53-64, the Commission cannot justify the proposed rules under even a more forgiving standard of review.

The Free Press argument also proves too much. The same “it’s-just-transmission” argument could be made, of course, about providers of cable service, given the fact that cable

⁷⁰ The Public Interest Commenters would carry matters a step further, seeking to prohibit Internet service providers from “allow[ing] a managed service to dynamically ‘borrow’ bandwidth from its broadband Internet offering, thereby reducing the quality of services available to Internet applications in favor of its own.” Public Interest Commenters at 34. But that proposal would run head-on into the basic principle that government efforts to enforce parity in a private speech marketplace are inherently suspect under the First Amendment. *See NCTA Comments* at 62-64.

operators ultimately deliver the speech that they have chosen to offer to their customers. Yet, the Supreme Court has made clear that, “by exercising editorial discretion over which stations or programs to include in their repertoire,” *Turner I*, 512 U.S. at 636, cable operators, along with cable programmers, are engaged in the business of “communicat[ing] messages on a wide variety of topics and in a wide variety of formats.” *Id.* That same principle applies to decisions by Internet service providers about what content to offer. And, while the Court in *Turner I* did not address decisions about *how* the chosen speech was to be presented, it seems self-evident that government attempts to dictate cable operators’ choices about presentation of material – for example, whether to offer a specific channel in high-definition format – would likewise be subject to searching review under the First Amendment.

Free Press bases much of its position on an assertion that Internet service providers have not historically exercised editorial control over the speech that they provide to their customers. Free Press at 139-40. But there are several problems with that argument. First of all, if Free Press means to suggest that Internet service providers have always been just passive conduits, and nothing more, the suggestion is not accurate. Service providers have often taken steps to protect their customers from unlawful material and material that, while not necessarily unlawful, is unwanted. *Notice* ¶ 137. Indeed, the Commission openly acknowledges that fact: the proposed rules expressly contemplate that Internet service providers will continue to make decisions about whether to offer certain kinds of speech, provided that the Commission finds those decisions to be acceptable. *Id.*

In any event, the exercise of prior editorial discretion by Internet service providers is essentially irrelevant to the First Amendment analysis. Expressing its concerns about the impact of new technology, *Notice* ¶ 57, the Commission has declared its intention to prevent service

providers from exercising editorial discretion *in the future*, and that is enough to subject its regulations to First Amendment scrutiny. Free Press cites no authority for the notion that a speaker forfeits its First Amendment rights if it has not previously engaged in the protected activity, nor would such a principle make sense. For example, the Government plainly could not order an Internet website – one that had traditionally posted content from all contributors without filtering – to continue its pre-existing practice permanently, even though the website wanted to change the mix of material in order to supply a more interesting product to its audience. By the same token, the Commission’s proposed rules threaten the First Amendment rights of Internet service providers to tailor their offerings to their customers, regardless of the practices that they have followed in the past.

Finally, we note that proponents of net neutrality cannot, at one and the same time, a) insist that it is essential for the Commission to control decisions by Internet service providers about speech that they deliver and b) maintain that Internet service providers do not make decisions about speech that they deliver.⁷¹ Were the second point correct, there would be no justification for these particular rules at all, whether analyzed under First Amendment standards or otherwise. The Commission thus cannot play both ends against the middle: if it wishes to dictate the speech that Internet service providers may offer, then it must accept the First Amendment scrutiny that goes with government efforts to control a private marketplace for speech. And, that is a scrutiny that the proposed rules cannot pass.

⁷¹ Free Press attempts to make a similar point in reverse, accusing Internet service providers of trying to “have it both ways.” Free Press at 140. But, as the discussion in the text shows, there is, in fact, no inconsistency at all between an argument that, as a result of private choices, a practice has previously been rare or even non-existent and a simultaneous argument that the Government cannot intrude on private decision-making by attempting to ban that practice in the future. It is a basic purpose of the First Amendment to leave such decisions in private hands. See page 44, *supra*.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in NCTA’s initial comments (and the reasons set forth previously by Chairman Kennard and Chairman Powell, as discussed in our comments), we again urge the Commission to adhere to its successful policy of “vigilant restraint” and refrain from regulating the provision of Internet access services.

Respectfully submitted,

/s/ Neal M. Goldberg

H. Bartow Farr III*
Farr & Taranto
1150 18th Street, N.W.
Washington, D.C. 20036-3850
(202) 775-0184

Neal M. Goldberg
Michael S. Schooler
Steven F. Morris
Stephanie L. Poday
National Cable & Telecommunications
Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431
(202) 222-2445

April 26, 2010

**Counsel for Part VII Only*