

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 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 MICROSOFT CORPORATION

Paula Boyd
Regulatory Counsel
Laura Holloway Carter
Senior Attorney - Regulatory Affairs
MICROSOFT CORP.
1401 Eye Street, NW
Suite 500
Washington, DC 20005

Mace Rosenstein
Gerard J. Waldron
Yaron Dori
Matthew S. DelNero
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401

Counsel to Microsoft Corp.

April 26, 2010

Table of Contents

Introduction and Summary 1

I. THE COMMISSION SHOULD PURSUE AN EFFICIENT, FLEXIBLE
FRAMEWORK DESIGNED TO DETER DISCRIMINATION THAT IS
ANTICOMPETITIVE OR HARMS CONSUMERS. 6

 A. Adopt Enforceable Standards To Protect Consumers’ Rights To Access
 Lawful Content, Applications, and Services; Attach Devices; and Receive
 Reasonable Information About Access Providers’ Practices..... 8

 B. Adopt a Standard Intended to Prohibit Discrimination That Is
 Anticompetitive or Harms Consumers..... 8

 C. Implement an Efficient and Effective Enforcement Mechanism..... 11

II. THE COMMISSION SHOULD ENGAGE IN ONGOING EFFORTS TO
IDENTIFY AND UNDERSTAND KEY DEVELOPMENTS AND TRENDS
THAT AFFECT THE OPEN INTERNET. 14

Conclusion 16

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 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 MICROSOFT CORPORATION

Introduction and Summary

An open Internet is critical to consumer welfare and to the continued growth of the nation’s innovation economy. Indeed, historically “the Internet itself has been fundamentally characterized by unfettered consumer ability to use an unprecedented array of content, services, and applications via an ever-increasing array of products.”¹ The National Broadband Plan recently reaffirmed this bedrock principle, observing that “broadband is a powerful engine for innovation and investment in America in part because the Internet is an open platform, where anyone can communicate and do business with anyone else on a level playing field.”²

Although the actions the Commission takes, or fails to take, in this proceeding will have far reaching consequences for the open Internet, the record reveals often sharp disagreement regarding the need for, and appropriate nature of, regulation as a means to preserve the open Internet. There is a complex tension among the need of broadband Internet access providers (“Access Providers”) to manage their networks in the face of evolving bandwidth-

¹ The Government’s Role in Promoting the Future of the Telecommunications Industry and Broadband Deployment: Hearing before the Senate Committee on Commerce, Science and Transportation (2002) (statement of Craig Mundie, Senior Vice President, Chief Technical Officer, Microsoft Corp.), *at* <http://www.microsoft.com/presspass/exec/craig/10-01telecom.msp>.

² Connecting America: The National Broadband Plan at 58 (2010).

intensive online services and increasing network congestion; the ability of Access Providers and content/application providers to experiment with new technologies and business models; and the role of the Commission to address the risks inherent in an Access Provider's ability to discriminate in the treatment of traffic based upon the operator's economic or other intrinsic interests.

As the Internet ecosystem has continued to evolve and grow over the last several years, with very few exceptions it appears that Access Providers have managed their networks in a reasonable manner without presenting widespread or insurmountable challenges to the open Internet. The fact that policymakers, public interest organizations, and other stakeholders have continued to question and in some cases scrutinize Access Provider practices appears to have helped to foster business standards and network management practices that are consistent with an open Internet. Given, however, that Access Providers are "on-ramps" to the Internet for consumers, businesses, and other users, abuse of the power inherent in this position would harm competition and consumers, thereby impairing social welfare and economic opportunity in the United States. At the same time, the adoption of unnecessary or insufficiently tailored regulations, such as a prohibition on all types of discrimination, could have "the unintended consequence of limiting innovation and investment going forward."³ This risk is of particular concern given the policy objective of encouraging development and deployment of next-generation broadband networks, which, in turn, can beneficially "lead to unanticipated discoveries that will change how people connect, work, learn, play and contribute online."⁴ Thus, the goal, and the challenge, is to develop a policy that allows online services, applications,

³ Comments of Information Technology & Innovation Foundation at 27.

⁴ Connecting America: The National Broadband Plan at 121.

and content to thrive, promotes investment by broadband Internet access providers in next-generation networks, and ensures that consumers ultimately determine which products and services will win or lose in the marketplace.

Microsoft Corporation (“Microsoft”), which has a long-standing interest and involvement in the issue of network neutrality,⁵ believes the Commission can chart a course that harmonizes the interdependent values of innovation and continued evolution of a robust network infrastructure while promoting consumer choice and freedom online. Microsoft therefore proposes a “third way” that would serve the interests of consumers, Access Providers, and online service providers alike by having the FCC take three key steps:

First, adopt the widely-accepted principles that consumers have the right to access and use the content, applications, services and devices of their choosing *and* to receive reasonable information about their Internet access provider’s practices;

Second, adopt a behavioral standard intended to prohibit Access Provider discrimination that is anticompetitive or harms consumers, and bar Access Provider conduct that violates the other core, open Internet principles, such as allowing access to lawful content, applications, and services of the user’s choosing; and

Third, implement an expert and efficient enforcement mechanism to identify and prohibit unlawful forms of discrimination.

⁵ Microsoft has been actively involved in the issue of net neutrality for more than eight years before Congress and at the Commission. Craig Mundie, then Senior Vice President at Microsoft, testified before Congress in 2002 on the importance of ensuring that consumers can continue to have unfettered access to content, applications, and services and to connect devices of their choosing to the Internet. *See supra* note 1. Microsoft’s views have evolved as broadband networks and online services have become more advanced and sophisticated. *See, e.g.*, How Internet Protocol-Enabled Services Are Changing the Face of Communications: A Look at Video and Data Services: Hearing before the H. Subcomm. on Telecommunications and the Internet, Comm. on Energy and Commerce (2005) (statement of Paul Mitchell, Senior Director and General Manager, Microsoft TV Division), <http://www.e-typedesign.co.uk/presspass/exec/mitchell/04-20WrittenTestimony.msp>; Ex Parte Submission of the Coalition of Broadband Users and Innovators, CS Docket No. 02-52, CC Docket Nos. 02-33, 98-10, 95-20, GN Docket No. 00-185 (July 17, 2003); Comments of the High Tech Broadband Coalition (“HTBC”), Appropriate Regulatory Treatment for Broadband Access To the Internet over Cable Facilities, CC Docket No. 02-52 (June 17, 2002), *Ex Parte* Letter of HTBC, CS Docket No. 02-52, GN Docket No. 00-185, CC Docket Nos. 02-33, 95-20 and 98-10 (Aug. 2, 2005).

This framework would achieve a sensible balance by allowing Access Providers the flexibility to not only appropriately manage their networks by distinguishing among different types of traffic but also enter into business arrangements with content providers that are transparent and do not discriminate in a manner that is anticompetitive or harms consumers. It is neither necessary nor appropriate for the Commission to prejudge particular types of behavior through the application of rigid, proscriptive rules. Rather, as described in these reply comments, the Commission should provide a safe harbor for activities that an expert technical advisory group agrees are acceptable and then should allow the marketplace to evolve while providing a backstop enforcement mechanism that is transparent, responsive, expert, and efficient in determining if a particular act of discrimination has crossed the line.

The adaptability afforded by the proposed framework is especially important because all the technological, business, social, and political developments that will continue to influence the evolution of the online ecosystem cannot be anticipated today, even in this wide-ranging proceeding. In less than a decade, broadband networks not only have advanced from dial-up to high speed, always-on connections, but also have begun to utilize new technologies, such as deep packet inspection, to help ensure that latency sensitive communications, such as voice and streaming video, are delivered to consumers without disruption. At the same time, service and applications providers have created innovative services at the edge, which have resulted in consumer demand for even faster and more reliable connections. According to a recent report by the Information Technology & Innovation Foundation (“ITIF”), over the next twenty-five years, consumers are expected to depend increasingly on high-bandwidth applications, such as high-definition video, cloud computing services, and real-time collaboration tools, mobile Internet, location-based services, and “smart” systems that allow

consumers to better control and personalize their physical environment.⁶ Microsoft pointed to these trends as well in filings concerning the development of the National Broadband Plan, concluding that “average throughput speeds for broadband connections are not keeping pace with storage capabilities or consumers’ bandwidth needs.”⁷ Microsoft therefore has designed its proposed regulatory framework to ensure that Access Providers and online service providers have the flexibility to employ a variety of techniques to provide a reliable and secure consumer experience as networks and online services continue to evolve.

Of course, the enforcement mechanism itself would have to be sufficiently robust and expert to address practices that are inconsistent with an open Internet. In these reply comments, Microsoft identifies the principal components of a structured enforcement mechanism, including expertise that leverages the Commission’s resources and those of outside consultative bodies, an open and participatory process, and efficiency so that decisions are reached expeditiously and without imposing unnecessary burdens on the parties.

Finally, any new rules designed to protect the open Internet must be consistent with the Commission’s jurisdictional authority. This question was brought into focus by the decision of the U.S. Court of Appeals for the D.C. Circuit in *Comcast Corp. v. FCC*, vacating an order in which the Commission attempted to exercise ancillary authority over an Access Provider’s throttling of certain peer-to-peer traffic.⁸ These reply comments respond to the Notice of Proposed Rulemaking (“NPRM”) and initial comments filed in this proceeding on January 14,

⁶ Robert D. Atkinson, et al., Information Technology & Innovation Foundation, *The Internet Economy 25 Years After .com: Transforming Commerce & Life* at 60–62 (March 2010).

⁷ Comments of Microsoft Corp., GN Docket Nos. 09-51 and 09-137 (Sept. 21, 2009) (citing increased reliance on the cloud computing environment and emerging use online of technologies such as telepresence, 3D imaging, and machine-to-machine communications as trends that are significantly increasing demand for bandwidth).

⁸ *Comcast Corp. v. FCC*, No. 08-1291, Slip Op. (D.C. Cir. April 6, 2010).

2010, and thus do not address the issues raised by the *Comcast* decision; Microsoft takes no position in these comments on the jurisdictional issues raised by the *Comcast* decision and understands that the Commission will consider the jurisdictional issues at a later date.

I. THE COMMISSION SHOULD PURSUE AN EFFICIENT, FLEXIBLE FRAMEWORK DESIGNED TO DETER DISCRIMINATION THAT IS ANTICOMPETITIVE OR HARMS CONSUMERS.

As noted above, there is significant disagreement regarding the degree to which openness will be preserved if Access Providers are allowed complete discretion to discriminate among different types of traffic transmitted on their networks. Each side of this debate asserts — with the support of economic and other expert analysis — that acceptance of the other’s approach would result in decreased network investment and other consumer harms. Commenters such as Free Press, Public Knowledge, Google, and the Center for Democracy and Technology support the NPRM’s proposal to adopt a nondiscrimination rule that would categorically prohibit Access Providers from entering into arrangements with content, application, or service providers for the provision of enhanced or prioritized last-mile access.⁹ A host of other stakeholders, including content creators such as the Motion Picture Association of America (“MPAA”), nonprofit organizations and think tanks such as the ITIF, as well as representatives of the high tech industry, such as the Telecommunications Industry Association, argue that the adoption of rigid anti-discrimination regulations would unfairly and unwisely hamper the development of broadband networks.¹⁰ These latter parties assert, among other concerns, that a rigid nondiscrimination rule would harm consumers by discouraging online service providers from

⁹ See Comments of Free Press at 74–76; Comments of Public Interest Commenters at 31–32, 35–44, 50–51; Comments of Google Inc. at 51–52, 63–64; Comments of the Center for Democracy & Technology at 27–30.

¹⁰ Comments of the Motion Picture Association of America, Inc. at 15–20; Comments of the Information Technology & Innovation Foundation at 17–18, 23–24; Comments of the Telecommunications Industry Association at ii, 23–27.

developing innovative, but bandwidth-intensive, applications that require a highly-reliable connection that cannot be guaranteed absent expedited delivery services.¹¹

Yet there is a “third way.” The Commission need not take either the “all” or “nothing” approach to promoting an open Internet. Microsoft believes the Commission can embrace a harmonizing approach that would serve equally the ultimate interests of consumers, online service providers, and Access Providers alike. This framework would consist of three complementary elements:

First, the adoption of core Internet principles: (a) the right to access lawful content, applications, and services of the user’s choosing, (b) the right to attach lawful devices of the consumer’s choosing to the network, and (c) the right to receive reasonable information about the Access Provider’s practices;

Second, the adoption of a behavioral standard intended to prohibit Access Provider discrimination that is anticompetitive or harms consumers, and bar Access Provider conduct that violates the other core, open Internet principles, such as allowing access to lawful content, applications, and services of the user’s choosing; and

Third, the implementation of an expert and efficient enforcement mechanism to identify and prohibit unlawful discrimination.

This framework, as described in more detail below, presents an alternative *both* to the NPRM’s proposed categorical prohibition of all forms of “discrimination,” together with calls by some commenters for an overly regulatory regime establishing rigid definitions of concepts such as “reasonable network management,” *and* to the wholly “hands off” approach favored by other commenters.¹²

¹¹ See Comments of the Information Technology & Innovation Foundation at 24.

¹² Compare Comments of Amazon.com at 3 (recommending that “reasonable network management” be defined narrowly to cover only non-commercial “housekeeping activities”), *and* Comments of American Cable Association at 10, Appendix (requesting that the FCC specify practices that are expressly permitted), *with* Comments of the U.S. Chamber of Commerce at 1–8 (opposing the “imposition of a whole new regulatory regime on broadband Internet access service providers”).

A. Adopt Enforceable Standards To Protect Consumers' Rights To Access Lawful Content, Applications, and Services; Attach Devices; and Receive Reasonable Information About Access Providers' Practices.

The record reflects broad agreement on the importance and propriety of adopting the first (right to access content), second (right to access applications and services), third (right to attach devices), and sixth (transparency) open Internet principles described in the NPRM. The consensus around these principles evidences widespread acceptance, so adopting them would not alter significantly the dynamic among Access Providers, online service providers, and users.

Microsoft has been a strong supporter of these core principles, which are at the foundation of consumer choice on the Internet, for more than eight years.¹³ As a participant in the High Tech Broadband Coalition, Microsoft urged the FCC to apply these principles to DSL and cable modem providers.¹⁴ Today Microsoft urges the Commission, consistent with its jurisdictional authority, to adopt these principles as enforceable standards to ensure that consumer welfare is protected as the nation's innovation economy continues to grow.

B. Adopt a Standard Intended to Prohibit Discrimination That Is Anticompetitive or Harms Consumers.

The NPRM proposes categorically to prohibit an Access Provider from “discriminating against, or in favor of, any content, application, or service.”¹⁵ Microsoft agrees with commenters expressing concern that, although well-intentioned, categorical prohibitions, especially with respect to “nondiscrimination,” pose significant risks to innovation in the online

¹³ See *supra* note 5.

¹⁴ See, e.g., *Ex Parte* Letter of the High Tech Broadband Coalition, CS Docket No. 02-52, GN Docket No. 00-185, CC Docket Nos. 02-33, 95-20 and 98-10 (Aug. 2, 2005), at <http://fjallfoss.fcc.gov/ecfs/document/view?id=6518123343>.

¹⁵ Preserving the Open Internet, Broadband Industry Practices, *Notice of Proposed Rulemaking*, FCC 09-93, GN Docket No. 09-191, WC Docket No. 07-52 at ¶ 104 (Oct. 22, 2009) (“NPRM”).

ecosystem and thus would ultimately harm consumers.¹⁶ Such a categorical prohibition on discrimination should not be adopted and would be especially inappropriate during this crucial period of systemic evolution, where the underlying communications infrastructure is rapidly advancing from circuit switched to digital and IP technology and new online services and business models are emerging. As the National Broadband Plan correctly observes:

“Increasingly, broadband is not a discrete, complementary communications service. Instead, it is a platform over which multiple IP-based services — including voice, data, and video — converge.”¹⁷ With this transition underway, it is important that Access Providers have the flexibility to evaluate and adapt to the fluid technical and operational characteristics of the Internet.¹⁸

Microsoft believes that a focus on discrimination that is anticompetitive or harms consumers would accomplish the Commission’s goals and still provide Access Providers the flexibility necessary to develop businesses models and innovative services that are in their infancy, or have yet to be developed. Enabling Access Providers to pursue new business models is essential to creating the incentives for continued investment in network infrastructure and to meeting the goal of universal broadband.¹⁹

There appears to be a growing consensus that certain forms of differential treatment should be permitted. For example, some commenters recognize that appropriate

¹⁶ See e.g., Comments of Cisco at 5-6, Comments of AT&T Corp. at 103-140, Comments of Independent Telephone & Telecommunications Association (ITTA) at 16, Comments of Qwest Communications, Inc. at 30-48, Comments of Qualcomm Inc. at 25-26, Comments of Wireless Communications Association Int’l, Inc. at 8-10, Comments of Verizon/Verizon Wireless at 66-69.

¹⁷ Connecting America: The National Broadband Plan at 59.

¹⁸ See *supra* note 16.

¹⁹ See *supra* note 7.

network management practices include blocking access or quarantining end-user devices that are technically compromised or are operating unlawfully on the network.²⁰ Similarly, an Access Provider's decision to enter into quality of service agreements with online service providers for last mile transit may serve the public interest if they are not anticompetitive or harmful to consumers.²¹

Accordingly, rules adopted in this proceeding could be premised on an evolving safe harbor in which the FCC includes practices deemed acceptable by a technical advisory group of industry experts. Microsoft anticipates the safe harbor would change over time due to the nascent nature of many IP services and business models. Thus, as industry experts coalesce around appropriate practices, the safe harbor would evolve with the marketplace.

In conjunction with the safe harbor, the Commission should establish standards intended to ensure that other last-mile service enhancements and tiers of service, either to consumers or to online service providers, are permitted only if they are transparent and do not discriminate in a manner that is anticompetitive or harms consumers. These categories of discriminatory network management practices pose the greatest threat to an open Internet. A standard based on this principle would not prohibit an Access Provider from offering different levels of services to entities that depend upon the network to serve end users. Rather, this approach would afford Access Providers the necessary flexibility to serve a wide range of entities, from multinational enterprises, to small businesses, to residential customers, so long as they do so in a manner that is not anticompetitive or harmful to consumers. Accordingly, the

²⁰ See, e.g., Comments of the Fiber-to-the-Home Council at 26-27.

²¹ See, e.g., Comments of the Information Technology Industry Council ("ITI") at 7-8 (advising that the Commission assist Access Providers by providing examples of presumptively network management practices, such as "the use of schedulers and timers to address overall limitations of a network's capacity and the need to ensure quality of service, including for managed services").

FCC should afford Access Providers the flexibility to offer last-mile service enhancements and tiers of service to content, application, and service providers, as well as to consumers, in a way that does not disrupt but actually enhances competition in the online marketplace.

Finally, to the extent the FCC is considering imposing net neutrality regulations on wireless broadband Internet access services, it should carefully consider the unique nature of wireless networks, including the spectrum-dependent nature of wireless usage.²² Microsoft suggests that it may be appropriate for the Commission to conduct a further inquiry into the nature of wireless networks and the impact of open Internet rules on those networks.

C. Implement an Efficient and Effective Enforcement Mechanism.

It is essential that a framework to delineate appropriate and inappropriate types of discrimination be supported by an agile and efficient enforcement regime. An expedient enforcement mechanism will be critical to the proper functioning of the marketplace while also protecting a consumer's fundamental right to access lawful content, applications, and services, attach lawful devices of the consumer's choosing to the network, and to receive reasonable information about the Access Provider's practices. Such an enforcement mechanism will avoid the unintended consequences of overly-proscriptive rules — such as reduced investment in broadband networks — while ensuring that the Internet continues to thrive and remains open to innovation and that consumer choice is preserved.

There is ample record support for use of a structured enforcement mechanism to implement open Internet protections. For example, the Information Technology Industry

²² See, e.g., Letter from Christopher Guttman-McCabe, CTIA-The Wireless Association®, to Chairman Julius Genachowski, and Commissioners Michael J. Copps, Robert M. McDowell, Mignon Clyburn, and Meredith Attwell Baker, GN Docket No. 09-51 (filed April 21, 2010) (describing applications that have a disproportionate impact on wireless network capacity).

Council notes that “case-by-case review should be the principal means by which the FCC identifies conduct deemed to be inconsistent with the principles adopted in this proceeding By relying on a case-by-case application of the principles to identify rule violations, the FCC preserves the flexibility to consider [broadband Internet access provider] conduct in light of future circumstances that should inform its judgments.”²³ Likewise, Corning Inc. explains that “[t]he Commission must maintain the flexibility to apply any new regulations adopted in this proceeding on a case-by-case basis because the Internet industry is constantly evolving.”²⁴

An enforcement-based approach to protecting the open Internet is consistent with the NPRM’s preference to take a “case-by-case approach” that uses “individual adjudications” to resolve complaints about violations of open Internet regulations.²⁵ Specifically, Microsoft recommends that the enforcement framework be organized around the following principles:

- **Expert.** As the Commission demonstrated in the National Broadband Plan, the online ecosystem is complex and multi-dimensional. Enforcement of new open Internet policies and regulations will therefore require leveraging the deep technical expertise within the agency and creating a process for gathering input and data from outside experts. Already, the Commission has a solid foundation to build on, and Congress should ensure that the Commission has any additional resources that may be necessary to stay abreast of changing network dynamics. The Commission should convene a technical advisory group as a means of receiving expert input to help inform reasoned decision-making about what forms of discrimination may be anticompetitive or harm consumers.²⁶ Industry experts can provide the Commission with valuable information on network management practices and developments in network infrastructure and technology.
- **Flexible.** The enforcement mechanism need not take a “one-size-fits-all” approach to adjudicating the lawfulness of network practices. Particularly where the complaining party and Access Provider are amenable, the enforcement mechanism should allow for less formal, alternative dispute resolution processes.

²³ Comments of ITI at 5. *See also* Comments of Comcast at 51 and Comments of Corning Inc. at 15,

²⁴ Comments of Corning Inc. at 14.

²⁵ NPRM at ¶ 134.

²⁶ *See* Comments of Google and Verizon at 5.

- **Efficient.** Decisions should be reached within a reasonable timeframe — 90 days from when a complaint is filed — and without unnecessary burden on the parties, including consumers. Reasonably speedy evidence gathering and decision-making will provide clarity to industry at the same time that it protects consumers from ongoing abuses. Lengthy delays, in contrast, could prove harmful to the development of the Internet ecosystem by delaying the development and market entry of nascent services and depriving consumers of innovative new services and applications.
- **Accessible.** This Commission has fostered new levels of accessibility so that the public may understand, navigate, and benefit from agency processes. Indeed, in this very proceeding the Commission has used social media tools, streaming video, and the openinternet.gov website to facilitate the public’s access to the rulemaking process. The enforcement mechanism likewise should use technology to ensure that any aggrieved party, including consumers, may seek and obtain redress without difficulty and as appropriate.
- **Open and Participatory.** Subject to protections that may be necessary to prevent disclosure of trade secrets or other sensitive information about a company’s network or services, the process for determining the lawfulness of network practices should be open and participatory. Members of the public should have an opportunity to provide timely input on whether a given discriminatory practice is unlawful.

All of these features of the enforcement mechanism, moreover, will be supported by the transparency principle, which, as noted above, has widespread support in the record. Information about how traffic is being treated will enable consumers and businesses to detect and seek redress for network practices that may be unlawful, and will assist the Commission in providing efficient and effective enforcement. Disclosure will have its own benefit, leading to self policing.

Finally, the enforcement framework also should provide a pre-clearance mechanism so that the Access Provider at its option can obtain Commission guidance regarding presumptively permissible conduct. Doing so could further delimit a safe harbor and thereby avoid confusion that may inhibit network investment. The experience of the Canadian Radio-television and Telecommunications Commission (“CRTC”) may be instructive. In its October 2009 framework for evaluating the lawfulness of network management practices, the CRTC established a process whereby a party that believes that a network management practice is

unlawful may file a complaint “establishing that a [network management practice] discriminates or results in a preference or disadvantage” and describing the rationale and evidence for concluding that the preference or disadvantage is unlawful.²⁷ The burden then shifts to the Access Provider to establish that “any such discrimination, preference or disadvantage meets the requirement of the framework.”²⁸ CRTC also provided a mechanism by which Access Providers could obtain prior approval for a given practice, and it reserved the right to initiate an enforcement investigation on its own motion. Microsoft encourages the Commission to study the CRTC approach and to consider it when developing an enforcement mechanism that is expert, flexible, accessible, efficient, and participatory.

II. THE COMMISSION SHOULD ENGAGE IN ONGOING EFFORTS TO IDENTIFY AND UNDERSTAND KEY DEVELOPMENTS AND TRENDS THAT AFFECT THE OPEN INTERNET.

Broadband Internet access providers make up only one set of actors in the online ecosystem. As the Commission implements and manages a flexible open Internet framework, it also must pay attention to and understand key trends across the ecosystem, some of the most important of which were highlighted by commenters responding to a question in the NPRM about the relationship of Internet openness principles to content, applications, and services.²⁹

Although the Commission has limited authority to *regulate* in the area of IP-based services,³⁰ the Commission nevertheless can, and should, take steps to *identify* trends that may prevent the open Internet from flourishing. The record demonstrates that Access Providers may

²⁷ Canadian Radio-television and Telecommunications Comm., File No. 8646-C12-200815400, Telecom Regulatory Policy CRTC 2009-657 at ¶ 48 (2009), at <http://www.crtc.gc.ca/eng/archive/2009/2009-657.htm>.

²⁸ *Id.*

²⁹ NPRM at ¶ 101.

³⁰ *See, e.g.*, Comments of the Voice on the Net Coalition at 4.

not be the only entities with the potential ability to determine marketplace winners and losers, so the FCC must ensure that it is prepared to identify trends that could harm the proper functioning of an open Internet.³¹ By ensuring it has a more sophisticated understanding of the health of the rest of the online ecosystem, the Commission can make better and more informed decisions with respect to those areas over which it may have jurisdiction.

³¹ See *e.g.*, Comments of OPASTCO at 2-3, Comments of Verizon/Verizon Wireless at 36-39, and Comments of NCTA at 45.

Conclusion

Microsoft urges the Commission to chart a course forward, as proposed herein, that provides the flexibility necessary to foster innovation and investment while preserving the fundamentally open nature of the Internet.

Respectfully submitted,



Paula Boyd
Regulatory Counsel
Laura Holloway Carter
Senior Attorney - Regulatory Affairs
MICROSOFT CORP.
1401 Eye Street, NW
Suite 500
Washington, DC 20005

Mace Rosenstein
Gerard J. Waldron
Yaron Dori
Matthew S. DelNero
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
(202) 662-6000

Counsel to Microsoft Corp.

April 26, 2010