

MASSACHUSETTS  
40 main st, suite 301  
florence, ma 01062  
tel 413.585.1533  
fax 413.585.8904

WASHINGTON  
501 third street nw, suite 875  
washington, dc 20001  
tel 202.265.1490  
fax 202.265.1489



## **BY ELECTRONIC FILING**

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

**October 24, 2008**

**Re: Notice of *Ex Parte* Filing; WC Docket No. 07-52**

Dear Ms. Dortch,

Free Press submits this *ex parte* filing to update the record on particular issues in the Commission's open docket on Broadband Industry Practices, WC Docket No. 07-52. Ongoing developments in the broadband industry have demonstrated a pervasive lack of transparency in the terms and operations of Internet access service, particularly in the undisclosed "network management" activities of providers. Consumers have been, and continue to be, harmed by this lack of transparency, whether it takes the form of secret blocking of their communications or of undisclosed monitoring and tracking of their behavior.

The Commission should immediately release a Notice of Proposed Rulemaking requiring all broadband service providers to disclose in detail any network activities that monitor or interfere with any level of communications by end users to access or share lawful content and applications on the Internet. The Commission has the authority to issue orders requiring disclosure, and the Commission has established a detailed factual record demonstrating the need for disclosure. In fact, the Communications Act goes beyond authorizing the Commission to require disclosure – the Act obligates the Commission to do so. Industry-wide disclosure would promote many Commission broadband policies, and would help guard against future anti-consumer practices.

### **Lack of transparency pervades the broadband industry and harms consumers.**

*NebuAd, Comcast, and other companies refuse to disclose information to their own consumers.*

Since the 2007 NOI, the Commission and public have discovered a few major violations of consumers' information rights; others may yet remain undiscovered. As one example, until reorganization in 2008, a company called NebuAd offered an advertising service to network providers. With this service, NebuAd devices would secretly sit at key places within the network and monitor *all* consumer communications passing through the network by searching deeply within packets for URLs and search terms. The devices would then analyze some or all of that

traffic to identify consumer behavior patterns.<sup>1</sup> NebuAd's technology went even further than information gathering – NebuAd artificially inserted packets of data into the stream of traffic to redirect web browsers to a NebuAd-owned domain for the purpose of placing unsolicited tracking cookies onto the user's computer.<sup>2</sup> Many network providers used NebuAd and similar technology to spy on and attempt to monetize consumer behavior – without disclosing to users the practice and without providing consumers a feasible means to opt-out or to opt-in. Surprised by this once-secret practice, Congress investigated NebuAd's intrusive practices. On July 9, 2008, the Senate Commerce, Science and Transportation Committee held a hearing on targeted advertising at which NebuAd was roundly criticized;<sup>3</sup> the House Telecommunications and Internet Subcommittee held a separate hearing eight days later, which may even have been more harsh on NebuAd's practices.<sup>4</sup> Representatives Baron and Markey also sent a letter to Charter Communications to express their concerns with Charter's trials of NebuAd technology.<sup>5</sup> Congressional attention apparently helped to suspend some similar practices that were beginning to spread, undisclosed, throughout the industry. Nonetheless, because of a lack of disclosure, consumers cannot know whether this type of activity has ceased.<sup>6</sup> Moreover, many carriers may be in a "wait and see" mode, ready and willing to engage in such tracking if Congress, the FCC, and the FTC all fail to act to require disclosure.

The Commission's investigation into Comcast's controversial network practices also demonstrated the lack of proper disclosure to broadband consumers. In 2007, consumers of Comcast cable modem services discovered that Comcast was secretly blocking certain peer-to-peer file transfers, without providing any notice to consumers.<sup>7</sup> Comcast engaged in the practice for over a year without disclosure; after an Oregon engineer discovered the activity, Comcast inaccurately denied the interference for five months. After thorough investigation, the

---

<sup>1</sup> See, e.g., Ryan Singel, *Report: NebuAd Forges Packets, Violates Net Standards*, THREAT LEVEL FROM WIRED.COM, at <http://blog.wired.com/27bstroke6/2008/06/nebuad-forges-g.html>.

<sup>2</sup> See Robb Topolski, Chief Technology Consultant, Free Press and Public Knowledge, *NebuAd and Partner ISPs: Wiretapping, Forgery and Browser Hijacking*, at <http://www.publicknowledge.org/pdf/nebuad-report-20080618.pdf>.

<sup>3</sup> See, e.g., Nate Anderson, *NebuAD CEO defends web tracking, tells Congress it's legal*, ARS TECHNICA, at <http://arstechnica.com/news.ars/post/20080709-nebuad-ceo-defends-web-tracking-tells-congress-its-legal.html> ("Dorgan noted that neither he nor most consumers "have the foggiest idea" about what's being tracked, how long it's maintained, and what it's being used for.").

<sup>4</sup> See, e.g., Grant Gross, *Lawmakers Call on NebuAd to Change Privacy Notification*, PCWORLD, at [http://www.pcmworld.com/businesscenter/article/148555/lawmakers\\_call\\_on\\_nebuad\\_to\\_change\\_privacy\\_notification.html](http://www.pcmworld.com/businesscenter/article/148555/lawmakers_call_on_nebuad_to_change_privacy_notification.html).

<sup>5</sup> Representatives Edward J. Markey and Joe Barton, Letter to Charter Communications (May 16, 2008), available at [http://markey.house.gov/docs/telecomm/letter\\_charter\\_comm\\_privacy.pdf](http://markey.house.gov/docs/telecomm/letter_charter_comm_privacy.pdf).

<sup>6</sup> See, e.g., Cade Metz, *Hitwise and Compete: the user data ISPs do sell*, THE REGISTER, at [http://www.theregister.co.uk/2008/10/08/hitwise\\_compete\\_and\\_isps/](http://www.theregister.co.uk/2008/10/08/hitwise_compete_and_isps/) (discussing ongoing ISP behavioral marketing activity).

<sup>7</sup> See, e.g., *In re Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. 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 & Does Not Meet an Exception for "Reasonable Network Management,"* WC Docket No. 07-52, Memorandum Opinion and Order, FCC 08-183, at paras. 6-8 (Aug. 20, 2008) (*Comcast Order*). Comcast claimed that its "terms of use" indicated that the service was subject to "rate limitations," but the Commission said that "vague terms" such as these are "of no practical utility" to consumers. *Id.* at para. 53.

Commission held that Comcast's selective targeting of users and applications is a discriminatory practice and "unduly squelches the dynamic benefits of an open and accessible Internet and does not constitute reasonable network management."<sup>8</sup> The Commission commented that, although disclosure would not have made Comcast's unreasonable practices "reasonable," Comcast's failure to disclose its practices compounded the harm, as disclosure of network practices to consumers promotes competitiveness and meaningful consumer choice in the market for network services.<sup>9</sup> Consequently, the Commission ordered Comcast to stop blocking peer-to-peer traffic, and to disclose substantial details of its old practices and the new practices it would adopt which did not block traffic. In that required disclosure, Comcast disclosed many details of its past blocking activity, and many details of its planned future network controls.<sup>10</sup> Comcast also admitted that it had been blocking Internet communications since 2005 – without any notice to consumers or to the Commission.<sup>11</sup> Free Press has filed a letter with the Commission in response to Comcast's disclosure, expressing concern with Comcast's legal interpretation of the Commission's order.<sup>12</sup>

Ironically – and reflecting the poor state of disclosure in the broadband access market – Comcast's required disclosures appear to be far more detailed and clearer than those provided by many broadband providers. The problem of insufficient disclosure extends beyond NebuAd and Comcast – a severe lack of transparency pervades the entire industry. ISP terms of service, the primary method of disclosure of network interference to consumers and to the Commission, are too vague to provide useful information to consumers.<sup>13</sup> For example, in June of 2007, Verizon's terms of service reserved the right to permanently change, limit, or terminate any subscriber's service without notice, while Comcast's terms asserted the right to change a user's upstream or downstream bandwidth limitations without notice, and to monitor the user's usage and content.<sup>14</sup> No details are provided about how or when network providers may interfere with their users' communications over the Internet, either in advance or after the fact. Recently the problem has escalated to statements that border on deceit, as some carriers have begun to prominently advertise their services as "fiber-optic" because portions of the backbone of their network use fiber-optic cables, intending to confuse consumers and misleadingly suggest complete parity with true fiber-to-the-home networks.<sup>15</sup> Proper disclosure of network

---

<sup>8</sup> *Id.* at para. 1; *see also id.* at para. 42 ("This practice is not 'minimally intrusive' but invasive and outright discriminatory.").

<sup>9</sup> *Id.* at para. 52.

<sup>10</sup> Comcast's Network Management Policy, <http://www.comcast.net/terms/network>, Attachment B: Comcast Corporation Description of Planned Network Management Practices, p. 6-9 (Comcast Attachment B).

<sup>11</sup> Comcast's Network Management Policy, <http://www.comcast.net/terms/network>, Attachment A: Comcast Corporation Description of Current Network Management Practices, p. 5 (Comcast Attachment A).

<sup>12</sup> Letter from Ben Scott, Policy Director, Free Press, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-52 (filed Oct. 14, 2008).

<sup>13</sup> *See, e.g.*, Comments of Free Press, WC Docket No. 07-38, at Appendix A (filed June 15, 2007) (analyzing the broad yet vague assertions of intrusive power in the terms of service of AT&T, Verizon, Qwest, Comcast, Time Warner, and HughesNet); *Comcast Order*, FCC 08-183, at para. 53 (saying Comcast's "vague terms are of no practical utility to the average customer").

<sup>14</sup> Comments of Free Press, WC Docket No. 07-38, at Appendix A.

<sup>15</sup> *See, e.g.*, Mike Masnick, *Plenty of Broadband Providers Pretending They're Offering Fiber to the Home*, at <http://www.techdirt.com/articles/20080828/2235542129.shtml>; Karl Bode, *Why Run FTTH When You Can Pretend You Do?*, at <http://www.dslreports.com/shownews/Why-Run-FTTH-When-You-Can-Pretend-You-Do-97296>.

interference and network infrastructure information would go far to alleviate confusion and ambiguity in services, by providing consumers with the facts they need to make informed consumer choices among network access services.

*Congress, the Commission, and consumers all recognize the harms of insufficient transparency.*

Three years ago, in the Notice of Proposed Rulemaking issued with its Wireline Broadband Order, the Commission sought to establish a framework for consumer protection to ensure that consumers of broadband services would continue to receive similar protections in the Communications Act as those given to consumers of traditional phone services.<sup>16</sup> The Commission's proposition was prescient; because of information asymmetries, competition for broadband access services – even if far more robust than in the present market – cannot function without disclosure of information needed to reveal consumer preferences. Indeed, as the Commission and Members of Congress have noted, consumers have suffered significant harm by the activities of some network providers who have blocked, impeded and/or monitored their customers' Internet traffic without informing those customers or the general public.<sup>17</sup> Congress and the FCC have expended significant resources to investigate the consumer harms resulting from undisclosed blocking by Comcast and insufficiently disclosed monitoring and traffic manipulation by NebuAd. Faced with vague terms of service and recalcitrant service providers, consumers and the Commission bear a heavy burden to continue to investigate rapidly changing and potentially harmful network interference and monitoring. Robust disclosure would reduce this burden and would promote marketplace solutions better reflecting consumer choice.

Consumers have spoken out against the broadband providers' harmful practices – the record for the Broadband Industry Practices docket contains over 50,000 comments, reflecting a wide range of opinions from industry, the public interest sector, and an unprecedented number of consumer submissions detailing concerns. Furthermore, the record reveals near-unanimous support for increased disclosure of “meaningful information” concerning network controls – from states,<sup>18</sup> public interest groups,<sup>19</sup> trade associations,<sup>20</sup> technology companies,<sup>21</sup> and even

---

<sup>16</sup> *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. §160(c) with regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era*, WC Docket No. 04-242, 05-271, CC Docket Nos. 95-20, 98-10, 01-337, 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Order*), *petitions for review denied, Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

<sup>17</sup> *See, e.g., Comcast Order*, FCC 08-183, at paras. 1, 41-53; Representatives Edward J. Markey and Joe Barton, Letter to Charter Communications (May 16, 2008), *available at* [http://markey.house.gov/docs/telecomm/letter\\_charter\\_comm\\_privacy.pdf](http://markey.house.gov/docs/telecomm/letter_charter_comm_privacy.pdf).

<sup>18</sup> *See, e.g., Reply Comments of NASUCA*, WC Docket No. 07-52, at 3-4 (filed Feb. 28, 2008) (“If the Commission does nothing else in this proceeding, it should mandate that network providers disclose their network management practices to their customers, especially when the practice may adversely affect any end-use customer’s usage.”); *Reply Comments of New Jersey Rate Counsel*, WC Docket No. 07-52, at 11 (filed Feb. 28, 2008) (“Rate

some carriers.<sup>22</sup> For example, the Telecommunications Industry Association observes “the market will function best if users are made aware of the capabilities and limitations associated with competing broadband offerings,”<sup>23</sup> and “current disclosure practices are uneven and often insufficient.”<sup>24</sup> AT&T notes “disclosure of network-usage restrictions” can “give [consumers] the information they need to make informed decisions among alternative providers.”<sup>25</sup>

*Meaningful information is needed to remedy consumer harms and competitive distortions.*

The consumer harms and economic distortions that arise from a lack of transparency in the broadband access market can be fixed. Comcast, under direct order of the FCC, has supplied detailed information to its customers and to the Commission, without requesting any confidential treatment for the information. Comcast has demonstrated that providers can disclose clear, basic, yet valuable information on infrastructure and on methods and thresholds for network controls. Accurate and meaningful information is necessary to protect consumer rights to an open Internet, assure consumers of the privacy of their communications, reduce costs to innovate for applications providers, and to promote competition among network providers.<sup>26</sup> Providers must

---

Counsel reiterates its recommendation that the Commission require plain language disclosures from ISPs – before traffic degradation occurs.”).

<sup>19</sup> Reply Comments of EFF, WC Docket No. 07-52, at 3-8 (filed Feb. 28, 2008); Reply Comments of CDT, WC Docket No. 07-52, at 8-11 (filed Feb. 28, 2008) (proposing that providers disclose general network management policies, including “criteria used to target traffic for management,” and that providers feature those disclosures on the provider’s public website and in the Terms of Service); Comments of American Homeowners Grassroots Alliance, WC Docket No. 07-52, at 3 (filed Feb. 12, 2008) (“Because different network providers will use different tools to assure the efficiency of their networks, it is essential that consumers understand the practical impact of network management practices on their uses of the network.”).

<sup>20</sup> Reply Comments of NCTA, WC Docket No. 07-52, at 11 (filed Feb. 28, 2008) (“Nobody in this proceeding quarrels with the notion that Internet service providers should inform their customers of any limitations that materially restrict their ability to access and use Internet content and applications.”); Reply Comments of CTIA, WC Docket No. 07-52, at 7 (filed Feb. 28, 2008) (“CTIA therefore supports carrier efforts to inform consumers about the limits, if any, of their broadband use. Enabling consumers to make an informed choice of wireless broadband provider is an important goal.”); Further Comments of WCA, WC Docket No. 07-52, at 2 (filed Feb. 13, 2008); Comments of the U.S. Chamber of Commerce, WC Docket No. 07-52, at 5 (filed Feb. 13, 2008); Comments of NTCA, WC Docket No. 07-52, at 7 (filed Feb. 13, 2008).

<sup>21</sup> Reply Comments of Cisco, WC Docket No. 07-52, at 5 (filed Feb. 28, 2008) (“To that end, broadband network operators should provide consumers with notice of their network management practices. This notice should provide clear and meaningful information for consumers, including what traffic can be affected, under what conditions, and for how long.”); Comments of Vonage, WC Docket No. 07-52, at 5 (filed Feb. 13, 2008) (“At minimum, the Commission should require operators to disclose to their customers circumstances in which bandwidth provided may not equal advertised speeds.”).

<sup>22</sup> Comments of AT&T, WC Docket No. 07-52, at 32 (filed Feb. 13, 2008) (“In particular, a broadband network operator can and should tell consumers, at an appropriate level of detail, about any material restrictions or limitations on their broadband Internet service.”).

<sup>23</sup> Comments of TIA, WC Docket No. 07-52, at 21 (filed Feb. 13, 2008).

<sup>24</sup> *Id.* at 22.

<sup>25</sup> Reply Comments of AT&T, WC Docket No. 07-52, at 14 (filed Feb. 28, 2008).

<sup>26</sup> See, e.g., *Truth-in-Billing and Billing Format*, CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492, 7494, para. 2 (1999) (“The proper functioning of competitive markets, however, is predicated on consumers having access to accurate, meaningful information in a format that they can understand. Unless consumers are adequately informed about the service choices available to them and are able to

particularly disclose network controls that use unproven techniques not in compliance with established Internet standards and customs, which may significantly hinder or even prevent consumers from connecting with their chosen destinations, operating their chosen applications, or accessing their chosen content.<sup>27</sup> In fact, the Commission has emphasized that disclosure is integral to the concept of reasonable network management,<sup>28</sup> as secret, non-standard techniques could not be presumed reasonable. Requiring disclosure of network interference is a proper, narrow regulatory response across markets with arguably limited competition and severe information asymmetries.<sup>29</sup>

Disclosure must be technology-neutral and industry-wide, as this transparency is needed to ensure competition among different platforms without giving any platform an unfair advantage. Transparency problems and potentially discriminatory network interference are present in DSL, cable, and wireless industries.<sup>30</sup> Requiring one segment of the industry to disclose, and waiving that requirement for others, would result in consumer harm and reduced consumer choice, and would distort the market.

**The Commission has the authority, the experience, and the obligation to address this harm.**

*The Commission has ancillary authority to require disclosure.*

The Commission has clear authority to require disclosure of network interference through Title I ancillary jurisdiction. The Supreme Court has specifically recognized the Commission's ancillary jurisdiction to impose regulations on broadband access,<sup>31</sup> and the Commission's Comcast order established that regulation of network interference is ancillary to numerous provisions of the Communications Act.<sup>32</sup> Requiring disclosure of network interference is ancillary to section 230 of the Act, as the Commission cannot enforce federal policy to preserve and promote the open Internet without being able to monitor practices by service providers that may unfairly restrict open Internet communications.<sup>33</sup> Requiring disclosure to consumers is ancillary also to section 706, as meaningful disclosure improves consumer choice in the market

---

differentiate among those choices, they are unlikely to be able fully to take advantage of the benefits of competitive forces.”).

<sup>27</sup> See, e.g., Reply Comments of EFF, WC Docket No. 07-52, at 4 (filed Feb. 28, 2008).

<sup>28</sup> “A hallmark of whether something is reasonable is whether a provider is willing to disclose to its customers what it is doing.” *Comcast Order*, FCC 08-183, at para. 53.

<sup>29</sup> The Commission has spoken before about the value of industry-wide information collection. See, e.g., *Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering*, WC Docket No. 08-190, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 08-203, at para. 1 (Sept. 6, 2008).

<sup>30</sup> See, e.g., Letter from S. Derek Turner, Research Director, Free Press, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 07-45 (filed Aug. 8, 2007) (describing how practices of all major wireless carriers violate the FCC's four Internet policy principles); Comments of Free Press, RM-11361 (filed Apr. 30, 2007) (discussing the existence of anti-consumer practices in the wireless industry, and the need for FCC regulation); Ex Parte Letter from the *Ad Hoc* Public Interest Spectrum Coalition, WT Docket No. 06-150, PS Docket No. 06-229, WT Docket No. 05-211, WT Docket No. 96-86 (filed Apr. 5, 2007) (identifying significant problems with the market for wireless broadband services).

<sup>31</sup> *National Cable & Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 996 (2005).

<sup>32</sup> *Comcast Order*, FCC 08-183, at paras. 13-21.

<sup>33</sup> 47 U.S.C. § 230(b).

for services, resulting in increased competition and spurring investment in and deployment of broadband networks.<sup>34</sup> Because disclosure helps to ensure consumers' right to an open Internet under the principles outlined in the Internet Policy Statement, requiring disclosure would also be ancillary to several provisions providing the FCC Title I authority to adjudicate the complaints against Comcast.<sup>35</sup> In ensuring broadband competition, openness, and consumer awareness of monitoring, the Commission is on perhaps its most solid jurisdictional footing.

*The Commission has developed an extensive record through multiple rulemakings.*

The FCC has consistently recognized the need for limited regulation to protect consumers and ensure the transparency necessary for any functional market. In the 2005 *Wireline Broadband Order*, the Commission deregulated broadband access over wireline facilities, eliminating Title II and Computer II safeguards and announcing the intention to exercise ancillary authority where necessary to protect consumers.<sup>36</sup> The Commission informed carriers and the public that it would monitor the market for broadband access and would take action when needed in response to consumer harms.<sup>37</sup> Additionally, the Commission issued a consumer protection Notice of Proposed Rulemaking to “develop a framework for consumer protection in the broadband age.”<sup>38</sup> The NPRM stated that the Commission should use its ancillary jurisdiction to establish technology-neutral consumer protection measures.<sup>39</sup> Among other goals, the NPRM proposed extending to broadband Internet providers existing regulations for CPNI, slamming, and truth-in-billing, and creating new regulations to require notification of network outages.<sup>40</sup>

As with the 2005 *Wireline Broadband* order, in 2006 and 2007 the Commission reclassified broadband access over powerlines and over wireless networks as information services. In doing so, the Commission reiterated the importance of ensuring adequate consumer protections across all platforms, regardless of technology.<sup>41</sup> The Commission's classifications sought to preserve competition and technological neutrality across platforms,<sup>42</sup> an impossible task without sufficient disclosure to enable effective consumer choice among the competing platforms. Similarly, in the 2002 Declaratory Ruling and NPRM that classified cable modem

---

<sup>34</sup> 47 U.S.C. § 157 nt.

<sup>35</sup> *Comcast Order*, FCC 08-183, at paras. 13-21.

<sup>36</sup> *Wireline Broadband Order*, 20 FCC Rcd at 14853.

<sup>37</sup> *Id.* at 14929, para. 145 (“Significantly, through review of consumer complaints and other relevant information, we will monitor all consumer-related problems arising in this market and take appropriate enforcement action where necessary.”).

<sup>38</sup> *Id.* at 14929-30, para. 146.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 14929-33, paras. 146-54.

<sup>41</sup> *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5925, para. 70 (2007) (*Wireless Broadband Order*).

<sup>42</sup> *See id.* at 5921, para. 55; *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281, 13293 (2006) (statement of Kevin Martin, Chairman) (“I believe that it is the Commission's responsibility to help ensure technological and competitive neutrality in communications markets.”).

service as an information service, the Commission noted the importance of promoting competition across multiple platforms.<sup>43</sup>

Seeking to ensure competition and consumer protections in the deregulated market for broadband services, the FCC sought information on disclosure of network controls in 2007, in its broadband industry practices Notice of Inquiry.<sup>44</sup> The Commission sought comment on whether and how network providers treat packets differently and whether or not providers adequately disclose these practices to customers or to application developers.<sup>45</sup> The NOI was intended to provide the Commission with better information to act to protect consumers and better information to promote competition in the market for broadband Internet access service.<sup>46</sup>

Implicit in the Commission's requests for information across these dockets is the understanding that network providers control most of the relevant information about their networks. Users cannot easily determine the technology used for network control or deep packet inspection – or even detect when it is occurring.<sup>47</sup> Networks are complex, and perceived effects on Internet traffic can come from several sources, including the application providers or other networks interconnected with the retail access network. In the absence of proper disclosure, consumers may be left with the false impression that electronic equipment or software is to blame for an altered user experience that is actually caused by the network operator.<sup>48</sup>

*The Commission must act, now, to protect consumers and fulfill its duties under the Act.*

In its orders deregulating broadband access, the Commission consistently maintained that it will monitor the broadband market to ensure consumers have adequate protections and adequate information concerning their services, and will act when needed. The time is now for the Commission to act, to take the initial step to fulfill its promise from 2005, and the goals of the Communications Act, to ensure adequate consumer protection in the market for broadband Internet access services. In particular, additional protections are necessary to ensure that consumers have sufficient information to make meaningful choices among broadband service

---

<sup>43</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd 4798, 4840, para. 73 (2002) (citing sections 706 and 230 of the Communications Act to support the importance of promoting competition).

<sup>44</sup> *Broadband Industry Practices*, WC Docket No. 07-52, Notice of Inquiry, 22 FCC Rcd 7894 (2007) (*Broadband Industry Practices Notice*).

<sup>45</sup> *Broadband Industry Practices Notice*, 22 FCC Rcd at 7896-98, paras. 8-11.

<sup>46</sup> Chairman Martin's statement made this point clear: "[W]e seek comment on how broadband providers are managing their Internet traffic, whether certain traffic is prioritized, and whether our policies should distinguish between content providers that charge end users for access to content and those that do not. Gathering this information will allow us to better monitor this market." *Broadband Industry Practices Notice*, 22 FCC Rcd at 7901 (statement of Kevin Martin, Chairman).

<sup>47</sup> See, e.g., Letter from Marvin Ammori, General Counsel, Free Press, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-52, Residual Issues Memorandum at 14, n.43 (June 12, 2008) (describing the complex methods that may allow users to detect provider interference).

<sup>48</sup> See, e.g., Eric Bangeman, *Comcast traffic blocking: even more apps, groupware clients affected*, ARS TECHNICA (Oct. 21, 2007), at <http://arstechnica.com/news.ars/post/20071021-comcast-traffic-blocking-even-more-apps-groupware-clients-affected.html>.



providers, and to enable the Commission to continue to defend consumers' rights to an open Internet.<sup>49</sup> Although the Commission has recently reaffirmed its intention to make network neutrality policy through adjudication until a rulemaking may be necessary,<sup>50</sup> the Commission clearly has sufficient information now to proceed on *disclosure* through a rulemaking rather than adjudication.

Disclosure need not proceed on a case-by-case basis, but can and should be required industry-wide. The Commission adopted a case-by-case approach for network interference in its Comcast order because broadband practices are novel and dynamic, because networks are complex and varied, and because broad rules may not comport with statutory obligations to preserve a competitive market for services. For those same three reasons, disclosure ought to be regulated through broad, industry-wide rules. First, unlike network interference, rules requiring disclosure are not novel or dynamic. Disclosure requirements pervade markets with information asymmetries, from the legal profession to financial markets to embedded advertising.<sup>51</sup> Disclosure requirements are a familiar and well-established regulatory response from the Commission. The Commission also has specific experience in this area, through past records on transparency in the broadband access services market.<sup>52</sup> Second, although rules on network interference may apply differently to networks of different constructions, disclosure rules apply equally to all types, and do not in any way constrain the development of new and complex networks. Finally, disclosure rules do not hinder a competitive market – in fact, quite the opposite. Disclosure rules are necessary to preserve competition, as consumers must have enough information about the management of their services to make meaningful choices.

Furthermore, disclosure *should not* proceed on a case-by-case basis, as industry-wide disclosure is needed to protect consumers. Failing to require industry-wide disclosure of network controls will render the Commission powerless to monitor the network effectively to protect against unreasonable network interference and other consumer harms. Disclosure requirements are needed to support the Commission's ongoing adjudications of violations and reduce the immense burdens on consumers and consumer groups pursuing such adjudications to clarify and vindicate consumers' right to an open Internet.

---

<sup>49</sup> The Commission went through an identical process in the application of its truth-in-billing rules to wireless carriers. *In the Matter of Truth-in-Billing and Billing Format, National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing*, CC Docket No. 98-170, CG Docket No. 04-208, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 6448 (2005) (*Wireless Truth-in-Billing Order*). When the Commission first adopted rules for truth-in-billing in 1999, CMRS providers were exempt from the rules and were subject only to lesser "principles" because the record did not indicate a need for rules. By 2005, the Commission had received 18,000 complaints about wireless carrier practices, and chose to extend the rules to CMRS providers in response. *Id.* at para. 16.

<sup>50</sup> *Comcast Order*, FCC 08-183 at para. 29.

<sup>51</sup> The Commission recently issued a Notice of Inquiry and Notice of Proposed Rulemaking into sponsorship identification rules for embedded advertising, to protect transparency in media and to protect the consumers' right to know the true source of television content. *Sponsorship Identification Rules and Embedded Advertising*, MB Docket No. 08-90, Notice of Inquiry and Notice of Proposed Rulemaking, FCC 08-155 (June 26, 2008).

<sup>52</sup> See, e.g., *Wireline Broadband Order*, 20 FCC Rcd at 14932-33, paras. 152-53 (seeking comment on whether or not to extend truth-in-billing rules to broadband services providers in order to increase transparency of billing practices).

Last, but not least, requiring disclosure is necessary to fulfill the Commission's statutory obligations under sections 706 and 256 of the Act. Section 706 requires the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."<sup>53</sup> As identified by Congress, the Commission shall encourage deployment by promoting competition and infrastructure investment. Industry-wide disclosure enables consumers to make informed decisions in the market for broadband access services, and therefore promotes competition. Moreover, disclosure encourages providers to invest in infrastructure to compete over the substance of their services, as revealed (for perhaps the first time) by disclosed network interference and infrastructure information, rather than hiding poor services behind snappy television advertising and empty rhetoric.<sup>54</sup> Section 256 requires the Commission to oversee the interconnection of telecommunications networks in order to "promote nondiscriminatory accessibility by the broadest number of users."<sup>55</sup> The Commission cannot implement this policy in an industry with insufficient disclosure, as it is impossible for consumers or the Commission to know which providers engage in discriminatory behavior.

### **Network operators must disclose all practices that interfere with use of the Internet.**

*Comcast and AT&T have established that substantial disclosure is possible.*

Strong starting points for an industry-wide disclosure policy have already been offered by large carriers such as Comcast and AT&T.<sup>56</sup> In particular, Comcast's disclosure of its "future practices" demonstrated that network providers can disclose meaningful, reasonably precise details to consumers about their network controls, without needing to maintain confidentiality over the disclosed information.<sup>57</sup> For example, Comcast disclosed its planned techniques to determine when to throttle traffic, a two-part system triggered by congestion at the local CMTS port and high usage by an individual subscriber.<sup>58</sup> Comcast disclosed that it would throttle all of a subscriber's packets, regardless of application or protocol, by prioritizing all non-throttled

---

<sup>53</sup> 47 U.S.C. § 157 nt.

<sup>54</sup> The telecommunications industry as a whole spent \$9 billion in advertising in 2007, *TNS Media Intelligence*, at <http://www.tns-mi.com/news/03252008.htm>. AT&T and Verizon were the 2<sup>nd</sup> and 3<sup>rd</sup> highest spending companies in all industries in 2007, each spending over \$2 billion. *Id.* Comcast spends \$350 million or more in advertising each year, *see Berlin Takes Comcast Business Services*, ADWEEK, at [http://www.adweek.com/aw/eresearch/article\\_display.jsp?vnu\\_content\\_id=1003670375](http://www.adweek.com/aw/eresearch/article_display.jsp?vnu_content_id=1003670375), including at least \$20 million on its award-winning "Slowskys" advertising campaign for Comcast Internet access service, *see Comcast "The Slowskys"*, at [http://s3.amazonaws.com/effie\\_assets/2007/1897/2007\\_1897\\_pdf\\_1.pdf](http://s3.amazonaws.com/effie_assets/2007/1897/2007_1897_pdf_1.pdf).

<sup>55</sup> 47 U.S.C. § 256.

<sup>56</sup> Comcast's Network Management Policy, <http://www.comcast.net/terms/network>, Attachment B: Comcast Corporation Description of Planned Network Management Practices; Testimony of Robert W. Quinn, Jr., AT&T, at the FCC Public En Banc Hearing at Carnegie Mellon University on Broadband and the Digital Future (July 21, 2008), *available at* <http://attpublicpolicy.centralcast.net/2008/07/fcc-testimony.php> (Quinn July 21 Testimony); Letter from James W. Cicconi, Senior Executive Vice President, External & Legislative Affairs, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-52, Attach. at 2 (Sept. 11, 2008) (presenting revised terms of service to explain impacts on Internet service that may arise from heavy bandwidth use, and promising to maintain a minimum service capability speed).

<sup>57</sup> Comcast's Network Management Policy, <http://www.comcast.net/terms/network>, Attachment B: Comcast Corporation Description of Planned Network Management Practices, p. 6-9 (Comcast Attachment B).

<sup>58</sup> *Id.* at 6-7.

packets ahead of so-called “Best Efforts” packets.<sup>59</sup> Comcast also provided the specific initial thresholds that it would use, in all markets, to determine the level of congestion at the CMTS port and the level of usage by a subscriber that would trigger throttling.<sup>60</sup> Though Free Press has noted the unfortunate insufficiency of some of the elements of Comcast’s disclosure,<sup>61</sup> Comcast has demonstrated that disclosure of detailed information on network infrastructure and control is in fact realistic.

Similarly, AT&T has demonstrated that providers can take steps to demonstrate to consumers a minimum level of service.<sup>62</sup> AT&T has declared that their network is shared, and that this reduces their costs but worsens congestion.<sup>63</sup> AT&T has promised to inform customers of “any limitations on the amount of usage that may apply to a customer’s service plan.”<sup>64</sup> AT&T maintains and discloses a minimum service capability level of upstream and downstream bandwidth for Internet communications, a level below which AT&T will not throttle users.<sup>65</sup> AT&T has shown that all providers can make a greater effort to inform their consumers as to the realistic speeds of service.

These disclosures should be treated as a minimum floor for industry-wide, ongoing, disclosure of network interference and infrastructure information. All providers of broadband Internet access, regardless of technology, can and should disclose information about all network controls that interfere with or manipulate any Internet communications between consumers and the content of their choice, without maintaining confidentiality over the disclosure.

*Service providers should disclose network interference, monitoring, and certain infrastructure information.*

The Commission should require network providers to disclose information needed by consumers to make meaningful choices among providers, and needed by the Commission to

---

<sup>59</sup> *Id.* at 11-12.

<sup>60</sup> *Id.* at 8-9.

<sup>61</sup> Letter from Ben Scott, Policy Director, Free Press, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-52 (filed Oct. 14, 2008).

<sup>62</sup> AT&T’s Terms of Service, as filed in an *Ex Parte* letter with the FCC, promise their consumers that throttling will not lower a consumer’s service speed limitations below their subscribed service tier. Letter from James W. Cicconi, Senior Executive Vice President, External & Legislative Affairs, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-52, Attach. at 2 (Sept. 11, 2008) (“While this performance optimization process will prevent some customers from obtaining the maximum downstream speed capability, service capability speed will not be set lower than the service tier you have purchased.”).

<sup>63</sup> Quinn July 21 Testimony.

<sup>64</sup> *Id.*

<sup>65</sup> The Commission has considered collecting similar information before, including information pertaining to the “actual speed” of Internet connections. *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriberhip Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriberhip*, WC Docket No. 07-38, Notice of Proposed Rulemaking, 22 FCC Rcd 7760, 7770, para. 21. Free Press and other organizations have proposed that the Commission collect contention ratios as another alternative. Further Reply Comments of Consumers Union, Consumer Federation of America, Free Press and Public Knowledge, WC Docket No. 07-38, at 14-18 (filed Sept. 1, 2008).

protect consumers' rights to an open Internet and to promote competition. In particular, the Commission ought to require that providers disclose, both to consumers and the Commission:

1. The specific problem or issue requiring the network interference, including evidence to demonstrate the existence of congestion or other problems that mandate interference;
2. Any and all limits imposed on or direct changes made to a customer's upstream or downstream traffic, such as blocking traffic, delaying traffic, deprioritizing or prioritizing traffic, reordering traffic, redirecting traffic, discriminating for or against certain traffic, or inserting traffic into the stream;<sup>66</sup>
3. Technical details of the methods used;
4. Exact details of all thresholds, such as time of day or exact levels of congestion or bandwidth consumption, that trigger any network interference, as well as the effects in the network as a result of the chosen thresholds, such as a general percentage of users affected and the duration of effect for those users; and
5. Exact details of thresholds that trigger a cessation of network interference.

Similarly, providers should disclose whether and to what extent users' activities and communications are monitored; how that information is used and stored; and with whom it is shared. As with network interference, customers need and deserve information on monitoring of services to make intelligent choices when choosing a service provider and while conducting business and personal affairs over the service. Providers should disclose:

1. The specific purpose(s) of the monitoring, such as internal advertising, quality checks as part of scheduled preventive maintenance, or sale to outside marketers;
2. The type and nature of the data collected, such as dates, times, durations, web or other Internet addresses, TCP packet contents, or IP headers;
3. Whether and how users may see their own monitored data or challenge errors in the data;
4. Information on the storage, release, or destruction of data, such as the duration of storage, any guaranteed security requirements, and audits of security on buyers of data; and
5. A list of all parties with access to any of the collected data, including all third parties who bought or accessed the data, what data was shared with them, and under what conditions.

In addition to traffic manipulation and monitoring practices, providers should disclose whether and to what extent Internet access service shares network resources with other services. In particular, all providers should disclose sufficient infrastructure information to enable consumers to determine if congestion is the result of massive overloading of the network by the provider to avoid the expense of infrastructure investment. Without this information, consumers cannot make effective choices in the market, the Commission cannot effectively promote competition, and providers will continue to have incentives to play hide-the-ball rather than invest in infrastructure. Disclosure should include:

1. The number of users located on a shared Internet connection, including users of non-Internet services such as VoIP using the same connection;

---

<sup>66</sup> Any provider must disclose any restrictions on specific applications or ports that can be used to send or receive data. This includes the complete disclosure of any "firewalls" built into the network or into the device, if the firewall is mandated by the network provider.

2. The total upload and download capacity of the shared Internet connection;
3. The amount of upstream and downstream spectrum used for broadband service;
4. The total amount of spectrum available for all services;
5. The times of day when the network has been congested recently; and
6. The peak utilization of each link in the network during times of congestion.<sup>67</sup>

*Providers should report to the Commission and directly to the public.*

The Commission should collect network information periodically, either as an attachment to Form 477 or through some other similar process. The collected information should not be subject to any confidential treatment, as confidentiality is unnecessary and would limit the Commission's ability to promote competition by creating transparency in the market for broadband access services. To further promote competition and transparency, providers should publish information on network control methods and monitoring practices on a consumer-focused website, updated in real time as network methods change. The website should be simple and straightforward, and should be linked directly from the provider's homepage.

Similarly, service providers should inform consumers in advance and directly about any changes the provider will make to their terms of service. The Commission should consider requiring providers to send electronic mail updates to their consumers, using the consumer's preferred contact address, to announce and highlight the specific changes to their terms of service, including in particular any changes to the provider's network interference, rather than relying on consumers to check websites

Both consumers and the Commission ought to evaluate and challenge, if needed, the sufficiency of the disclosure and the substance of the network interference, to ensure that consumers have the information they need to choose services, and to ensure that consumers' rights to an open Internet are adequately protected.

## **Conclusion**

To promote competition in the market for broadband Internet access services, to promote investment in broadband infrastructure, to enable consumers to pursue their preferences in a transparent market, to protect consumers' democratic rights to an open Internet, and to fulfill the Commission's statutory obligations under the Communications Act, the Commission must act now to require providers of broadband Internet access services, regardless of technology, to disclose network interference, monitoring, and infrastructure information to consumers and to the Commission.

---

<sup>67</sup> For cable modem service providers who also provide cable television service, disclosure of much of this information is already mandatory through the FCC's Form 325. 47 C.F.R. § 1.1705.

Respectfully submitted,

Free Press

A handwritten signature in black ink, appearing to read 'B. Scott', with a long horizontal stroke extending to the right.

Ben Scott  
Policy Director, Free Press

Chris Riley  
Policy Counsel, Free Press

501 Third St NW, Suite 875  
Washington, DC 20001  
202-265-1490