

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 FREE PRESS**

Ben Scott, Policy Director  
Free Press  
501 Third Street, NW  
Suite 875  
Washington, DC 20001  
202-265-1490

April 26, 2010

## SUMMARY

This proceeding was officially launched last October, but the underlying topic has confounded the Commission ever since the first threats to destroy the open Internet were made by SBC CEO Ed Whitacre in 2005. Since that time we have seen the issue mature in specific ways, culminating in this proceeding. In particular, those supporting basic rules of the road to protect the open Internet have been extremely accommodating to industry concerns; for example by stipulating the role for appropriate network management and entertaining the notion of managed services. But if you look at the opponents of openness, it's as if they were stuck in 2005. They continue to use the same false and discredited talking points designed to scare policymakers away from their duty to preserve the successful status quo openness framework that is directly responsible for the Internet economy.

Perhaps nowhere is this made clearer than industry's continued use of their 'solution in search of a problem' rhetoric, despite their plainly stated plans to violate basic openness through pay-to-play and other discriminatory schemes. The hollowness of this rhetoric was made very clear in recent weeks, as it was revealed that two more broadband service providers were caught violating the open Internet principles. DSL provider Windstream was caught using deep packet inspection tools to actively hijack search queries executed through subscribers' web browser toolbars, and cable provider RCN settled a case where they discriminated against peer-to-peer traffic in a manner similar to that used previously by Comcast and Cox Communications. These recent incidents establish that violations of the open Internet are ongoing, and are often secretive and opaque to consumers. If the FCC fails to establish basic rules of the road, we should

certainly expect much more of this kind of behavior from broadband providers, and likely much worse as the industry becomes comfortable in the brave new world of an Internet with no basic rules of the road.

Let there be no doubt, the Internet has become our central communications technology precisely because it exists in an open world, where broadband Internet access service providers have, through the path of regulatory history, been precluded from acting as gatekeepers. The Commission's proposed rules simply seek to preserve this proven-successful dynamic. Therefore, the burden falls on openness opponents to demonstrate the need for a fundamental shift away from the successful status quo; those who favor discrimination have the burden to show why we need to move from an open model to a closed model. As the record in this proceeding makes painfully clear, the forces who favor discrimination and oppose openness failed to meet this burden. They flooded the docket with misdirection, discredited rhetoric and rent-a-PhD studies, but offered nothing to justify the Commission turning its back on 40-plus years of successful Internet policymaking.

As we demonstrated in our initial comments, the proposed rules will promote efficient investment, promote innovation, create jobs, and promote competition. The Commission has proposed a very modest framework, one that preserves the open Internet while also recognizing the need for reasonable network management and creates a space for debate about managed services. But the incumbents rejected this reasonable approach. They instead chose to file comments filled with scare tactics about investment harms, higher prices and unintended consequences, based not in sincere opposition but merely driven by their desire to use their gatekeeper status to protect their dominant positions in

the adjacent video and voice markets. The proposed rules create room for innovation and competition in these traditionally closed markets, and that has created the predictable overreaction from the ISP industry.

With these reply comments, we could have produced hundreds of pages rebutting the misleading, repetitive, and fact-free scare tactics submitted by many industry and astroturf commenters. But since the sole goal of many of these efforts is to distract and drive the debate away from the critical substantive issues in this proceeding, we choose to focus on the most important questions, while rebutting some of the more egregious and common industry talking points.

In the comments below, we remind the commission that in order to give meaning to the proposed rules, the reasonable network management standard must not be unbounded; we remind the Commission of the need for mandatory, two-level disclosure obligations; we reject calls for differential treatment for wireless networks; we remind the Commission of the roots of Section 230(b) and dispel the myth that obligations on access providers are the same thing as ‘regulating the Internet’; we reiterate that congestion and network management should be rare in a market where supply meets demand; we bring further evidence of the lack of competition in our broadband access markets; and we dispel the myth that a discriminatory Internet will lower consumer prices or promote investment.

As this proceeding draws to a close, the fundamental question before policymakers is clear: Who should be trusted with the future of the Internet, these companies who have repeatedly violated open Internet principles, or consumers? Should we trust Verizon's arguments about how Net Neutrality will hurt jobs, while they

simultaneously brag to Wall Street about firing workers even in the face of rising profits? Should we trust AT&T when it says openness principles will lead to higher prices, even as it openly discusses new schemes to gouge customers despite its own declining costs? Should we listen to Time Warner Cable's talking points about how Net Neutrality will harm investment, even as it is boastful of its plans to only rollout 'surgical' investment in next-generation technologies in the limited areas where it faces real competition? Or should we listen and trust in the millions of consumers and small businesses who make the Internet so valuable and such an important part of our economic and social lives?

American consumers need the FCC to act as their champion. They need the Commission to stand up against the powerful phone and cable companies who would rather sacrifice this economic engine for the common good in the shortsighted attempts to protect their legacy closed business models. It is time for the FCC to toss all the tired ISP industry talking points in the dustbin of history and finally move forward with rules to protect the open Internet.

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**REPLY COMMENTS OF FREE PRESS**

Free Press respectfully submits these reply comments in response to the Commission’s *Notice of Proposed Rulemaking* in the above-captioned docket.<sup>1</sup>

In the initial round of filings, thousands of commenters supported the Commission’s efforts to enact rules that will preserve the open Internet and the numerous societal and economic benefits that accompany such a move.<sup>2</sup> The Internet has flourished in an open world, where broadband Internet access services carry traffic under a best-efforts model. The Commission’s proposed rules simply seek to preserve this dynamic. Therefore, a hefty burden should fall on opponents of these efforts to demonstrate the need for a fundamental shift, from an open Internet access service model to a closed model, to occur. Opponents of open Internet rules fail to meet this burden, perhaps because their arguments rely on contradictions and the trite reiteration of stale misinformation. These commenters engage in empty and at times dishonest rhetoric that could not be further from the “informed, fruitful discussion” Chairman Genachowski has

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<sup>1</sup> *Preserving the Open Internet; Broadband Industry Practices*, Notice of Proposed Rulemaking, 24 FCC Rcd 13065 (2009) (hereinafter “*Notice*”).

<sup>2</sup> Free Press highlighted a small subset of the more thoughtful comments coming from individuals on the following Webpage: <http://fccdocket.posterous.com/>.

called for.<sup>3</sup> The Commission need only look to the actual language in the *Notice* to see that the premise for which oppositional commenters base their attacks are nowhere to be found.<sup>4</sup> We encourage the Commission to see through attempts to create an uninformed and fruitless discussion, and to act on behalf of the public to enact rules to preserve the open Internet.

Recent developments further emphasize the immediate need for meaningful rules to protect the open Internet, and send further signals that the intentions of the broadband industry are not above board. Since initial comments were filed in this proceeding, not one but two broadband service providers have been exposed for violations of the proposed nondiscrimination rules. First to enter the public conversation was DSL provider Windstream. Windstream was caught employing deep packet inspection tools to actively hijack search queries executed through subscribers' web browser toolbars, without informing the Commission or even its own customers.<sup>5</sup> The company was quick to assert that the interference was accidental,<sup>6</sup> although this seems difficult as a technical matter. Furthermore, Windstream's intended purposes for using these tools remain unknown. The motives of the second violator, cable provider RCN, are more clear – RCN

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<sup>3</sup> Statement of Julius Genachowski, In the Matter of *Preserving the Open Internet, Broadband Industry Practices*, GN Docket 09-191, WC Docket No. 07-52, Oct. 22, 2009.

<sup>4</sup> For instance, Comments of CenturyLink at 8. “CenturyLink uses spam filters on electronic mail systems to block certain messages... similar measures in the future could be inappropriately challenged as ‘discrimination’.” *Notice* at para. 138 (“For example, blocking spam appears to be a reasonable network management practice”).

<sup>5</sup> Karl Bode, “Windstream Hijacking Firefox Google Toolbar Results,” *DSL Reports*, Apr. 5, 2010.

<sup>6</sup> *Ibid.*

engaged in the exact same behavior for which the Commission excoriated Comcast.<sup>7</sup> This violation was discovered by the general public and many RCN subscribers only through a mailed notice of class action settlement – a settlement in which RCN admits no wrong; subscribers receive no reimbursement for their harm; and aside from attorney fees, RCN’s only noticeable penalty is an injunction to stop discriminating against peer-to-peer traffic for 18 months.<sup>8</sup>

These two most recent incidents belie industry assertions of “only two” violations of open Internet rules, and establish clearly that violations of the open Internet are ongoing. Furthermore, they establish that the Commission and the public both lack any real information on the network management practices in use. For all the industry touts voluntary transparency as a sufficient solution to preserving the open Internet in their initial comments in this proceeding, broadband providers are not practicing what they preach – no substantial voluntary disclosures of network management practices have been given, nothing nearing the level of Comcast’s disclosure as mandated by the Commission in 2008. On top of continued insufficient disclosure, consumers are actively being harmed. Courts, public pressure, and “the market” aren't fixing these problems or providing adequate security to the public. There is and can be no substitute for a regulator willing to act to protect the public interest in the face of demonstrable harm.

**I. Nondiscrimination and Reasonable Network Management Standards Must Be Meaningful, Without Unbounded Loopholes**

The Commission must establish clear and certain rules to prohibit discrimination and permit reasonable network management. These rules must provide guidance to

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<sup>7</sup> Nate Anderson, “Just like Comcast? RCN accused of throttling P2P,” *Ars Technica*, Apr. 20, 2010.

<sup>8</sup> *Ibid.*

future Commissions, and must not leave loopholes or the potential for arbitrary decisions – whether against the consumer or the network operator. The general framework proposed by the Commission is the right one: couple a strong, comprehensive nondiscrimination standard with an exception to permit reasonable network management, provided such network management is needed and not a means to circumvent nondiscrimination rules.

Many commenters in this proceeding support this approach, including the vast majority of technology and public interest commenters.<sup>9</sup> Some network operators also acknowledge that nondiscrimination and reasonable network management present the right framework for accommodating the rights of Internet users and the needs of network operators.<sup>10</sup> For example, WISPA, the Wireless Internet Service Providers Association, suggests that the proper standard to apply to determine reasonable network management is whether the practice constitutes the “least restrictive means” needed to deal with the circumstances of the network at issue.<sup>11</sup> WISPA’s standard adequately protects Internet users and developers while still permitting flexibility for network management, but it is not the only standard that will suffice.

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<sup>9</sup> See e.g. Comments of Netflix, Inc. at 3-4; Comments of Sony Electronics at 1-2; Comments of Vonage at 17-20; Comments of Skype Communications S.A.R.L. (Skype) at 1, 6-7; Comments of the Open Internet Coalition (OIC) at ii; Comments of Access Humboldt, et al. at 2, 7-8 (Public Interest Advocates); Comments of the New Jersey Division of Rate Counsel at 4-5; Comments of the Center for Democracy & Technology at 1-2.

<sup>10</sup> See Comments of The Wireless Internet Service Providers Association (WISPA) at 1 (“In general, WISPA supports adoption of the Commission’s six proposed network neutrality rules”); Comments of Clearwire at 9 (“Clearwire agrees with the Commission that nondiscrimination is an appropriate principle for this open Internet proceeding”).

<sup>11</sup> Comments of WISPA at 7.

Contrary to some commenters, an approach of nondiscrimination and reasonable network management does not exceed the obligations of common carriers under Title II. The lesser proposed alternatives from industry – where industry is willing to suggest any; some refuse to admit that any rules would be acceptable – leave loopholes, and fail to protect and preserve the open Internet. The industry’s proposed standards would allow network operators to engage in harmful anti-consumer, anti-innovation, or anti-competitive activity.

The Commission must strive to establish clear rules, without loopholes or ambiguities, to protect and preserve the open Internet, and to provide clarity to network operators, application and device developers, and Internet users.

**A. Prohibiting Discrimination, Subject to Reasonable Network Management, Offers a Meaningful Standard Without Loopholes and Allows for Any Socially Desirable Discrimination Without Excessive Burden on Service Providers**

The Commission’s basic framework, a general prohibition on discrimination coupled with an exception for reasonable network management, can adequately balance the need for clarity and flexibility for network operators and strong, loophole-free protections for users – provided the terms are defined properly.

Many commenters support the proposed rule on nondiscrimination.<sup>12</sup> By and large, organizations and groups most likely to suffer from the effects of discrimination supported the proposal. Internet developers and users seek to ensure that any discriminatory actions harmful to them would be encompassed by the rule, so that the details and context of the discrimination would be taken seriously by the Commission in

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<sup>12</sup> See e.g. Comments of OIC at 15-17; Comments of Google at 57-63; Comments of New Jersey Division of Rate Counsel at 4-5.

the course of evaluating the conduct against a reasonable network management standard. A clear nondiscrimination rule, as proposed, would provide strong, loophole-free consumer protections by lowering the barrier for establishing a prima facie case of violation for those Internet users least informed about the internal operations and practices of the network.

In contrast to the clarity of the proposed nondiscrimination rule, many commenters note that the proposed definition of “reasonable network management” is excessively vague.<sup>13</sup> Some commenters would prefer to see the definition extended to include specific permitted practices.<sup>14</sup> Some note the difficulty of defining *ex ante* any specific practices as acceptable or unacceptable in all circumstances.<sup>15</sup> Others express concerns over the possibility of frequent litigation.<sup>16</sup> Industry and public interest groups alike express concerns over the lack of any specific standard in the proposed definition.

A clear standard for reasonable network management, such as a “purpose” and “means”-based standard,<sup>17</sup> would go far to alleviate these concerns. Such a standard would allow socially beneficial discrimination by design, to the extent that such exists, and still prevent loopholes and bad behavior by ensuring that the discrimination was in fact beneficial in specific contexts. Any network operator capable of credibly arguing that a discriminatory technique was in fact appropriate under the circumstances would survive FCC scrutiny. The standard would focus on those network operators who, like

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<sup>13</sup> Texas PUC 6; CTIA at 35; Comments of Free Press at 82 (“The Commission’s proposed definition is circular, ambiguous, and incomplete, and without further definition will create loopholes and result in future errors in policymaking.”).

<sup>14</sup> See *e.g.* Comments of American Cable Association (ACA) at 10-11.

<sup>15</sup> See *e.g.* Comments of Free Press at 86-91.

<sup>16</sup> See *e.g.* Comments of T-Mobile at 2-3, 15-16.

<sup>17</sup> See *e.g.* Comments of OIC at 41.

Comcast, took unnecessary steps that actively harmed some forms of communication without corresponding benefit.<sup>18</sup>

Some commenters eschew any attempts to propose or negotiate for a standard for reasonable network management, insisting that any restrictions whatsoever placed on the ability of a network operator to manage a network would “have unintended and harmful consequences.”<sup>19</sup> These assertions are generally based on straw man arguments that an explicit framework to permit reasonable network management would not, in fact, permit reasonable network management, and would result in out-of-control congestion, widespread virus attacks and spam, and other doomsday scenarios.<sup>20</sup> The Commission should set aside such obstructionist misdirection and focus on identifying clear, yet flexible standards for reasonable network management adequate to protect Internet users and developers for the present and future.

In the final nondiscrimination and reasonable network management framework, the Commission must not grant a universal exception for prioritization, as some providers request.<sup>21</sup> Under circumstances where a network operator can show that prioritization is the proper means to deal with congestion or other legitimate performance problems, a general reasonable network management exception can and should allow such prioritization. But prioritization is not needed *a priori* in all networks and

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<sup>18</sup> See Comcast Order at paras. 51-52.

<sup>19</sup> Comments of Verizon at 81.

<sup>20</sup> *Ibid* at 81-83.

<sup>21</sup> See *e.g. ibid* at 48 (“Network providers also need the flexibility to be able to improve the customer experience through quality of service measures such as prioritization of latency-sensitive traffic.”).

circumstances.<sup>22</sup> Many commenters in initial filings emphasized this point.<sup>23</sup> Even the Wall Street Journal has noted the variety of powerful network management techniques that do not involve prioritization of traffic.<sup>24</sup> A balanced approach – one that allows nondiscriminatory traffic management at all times, and more intrusive management techniques like prioritization under a standard of reasonableness – is more than adequate to permit socially desirable discrimination without tying the hands of network operators.

**B. A Framework of Non-Discrimination and Reasonable Network Management Does Not Exceed the Protections of Title II**

Some commenters assert that the proposed open Internet rules would place greater limitations on broadband service providers than the regulatory obligations associated with Title II.<sup>25</sup> Many of these commenters tackle a straw man opponent, such as the idea that open Internet rules would permit only one type of service to be sold to consumers,<sup>26</sup> though no proponent has ever supported such an interpretation. Others note that the language of a proposed nondiscrimination rule more closely resembles the

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<sup>22</sup> See M. Chris Riley and Robb Topolski, “The Hidden Harms of Application Bias” (Nov. 2009), *available at* [http://www.freepress.net/files/The\\_Hidden\\_Harms\\_of\\_Application\\_Bias.pdf](http://www.freepress.net/files/The_Hidden_Harms_of_Application_Bias.pdf). Contrary to the misinterpretation of this source by WCAI, Comments of WCAI at 5-6, this paper argues that the right solution to congestion is neither infinite capacity expansions nor always-on prioritization – it is a framework of ongoing investment in capacity coupled with nondiscriminatory network management policies, backstopped where demonstrably needed with proportional discriminatory (but reasonable) network management, including prioritization.

<sup>23</sup> See *e.g.* Comments of OIC at 33-35.

<sup>24</sup> Niraj Sheth, “Carriers Try Software to Handle Data Flood,” *Wall Street Journal*, Feb. 2, 2010, *at* <http://online.wsj.com/article/SB10001424052748704343104575033742491521742.html>.

<sup>25</sup> See *e.g.* Comments of WCAI at 10-11.

<sup>26</sup> See Comments of CWA at 14-15 (arguing that the proposed rule would prohibit all forms of Quality of Service and Content Delivery Networks).

interconnection standard of Title II and not the common carrier standard,<sup>27</sup> failing to note that the proposed language also includes an exception for “reasonable network management.” These commenters universally misinterpret any logical relationship that may be found between Title II and the proposed rules.

The language used in Title II varies widely by context. Some of the most broadly applicable provisions of Title II use the language “unjust or unreasonable” to classify unlawful practices.<sup>28</sup> Other, more targeted provisions, use “discrimination” without any qualifiers to indicate unlawful behavior.<sup>29</sup> The pro-consumer protections of Title II include all of these provisions together, some with “unjust or unreasonable” qualifiers, and some without. So the existence of syntactic qualifiers on some provisions of Title II does not automatically render a limited set of principles without such qualifiers inherently more comprehensive. Furthermore, the FCC asserts that the “reasonable network management” exception makes the resulting construct almost identical.<sup>30</sup> Mere word choice cannot substitute for analysis of the merits of various rule options.

More meaningful comparisons lie below the language, in the substance of Title II itself. In practice, the qualifier of unjust and unreasonable practices in common carriage works to preserve the ability of service providers to charge different prices for some

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<sup>27</sup> See Comments of Time Warner Cable at 62-63.

<sup>28</sup> See *e.g.* 47 U.S.C. § 201(b) (“any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful”); 47 U.S.C. § 202(a) (“It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services”).

<sup>29</sup> See *e.g.* 47 U.S.C. § 251(c)(3) (“The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements”); 47 U.S.C. § 252(d) (“the just and reasonable rate for the interconnection of facilities and equipment... shall be... nondiscriminatory”).

<sup>30</sup> *Notice* at para. 110.

different contexts, such as usage at different times of day, or prices for specific users such as newspapers or government agencies. Proposals for preserving the open Internet, being focused primarily on discriminatory network management and only secondarily on pricing practices, would retain these abilities. Network operators would still be permitted to provide bulk discounts and time of day pricing, including metered pricing or service plans that differ based on maximum bandwidth or guaranteed minimum bandwidth. Similarly, network operators would still be permitted to provide discounts for newspapers, governments, and education institutions.

What the Notice proposes, and many commenters support,<sup>31</sup> is a restriction on pricing and routing policies that specifically target portions of a communication – the use of individual applications or protocols, or communication with individual recipients, that would generate higher or lower costs. The proposed rules would effectively presume that such practices are unjust or unreasonable forms of discrimination, as they are not generally necessary (or even valuable) to deal with the problems of network congestion or to provide the advertised service (access to the Internet), yet they constitute discrimination against some forms of communication. The function of the “unjust or unreasonable” qualifier would remain intact, in that the network operator would retain the opportunity to demonstrate that under specific network circumstances, discriminatory pricing or other behavior is in fact reasonable, according to a pre-defined standard of reasonable network management, even where it is not generally held to be reasonable. Viewed in this light, these language shell games are not driven by any form of a principled argument over Title II or other legal constructs – their purpose is to find a way

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<sup>31</sup> See *e.g.* Comments of Google at 63-64.

to have certain categories of discriminatory activity permitted by default, without having to discuss the substance or merits of the activities. The Commission should disregard such discussions as immaterial and evaluate instead the merits of the discriminatory practices themselves.

## **II. Mandatory, Two-Level Disclosure is Needed**

Commenters generally agree with the principle of transparency. Where opinions differ is on the merits or need for rules to mandate transparency in standard forms. By and large, industry commenters express the belief that voluntary mechanisms will suffice – but no ISP has yet come forth with meaningful voluntary disclosure of its network management practices. Industry also argues that substantial disclosure will prove confusing to consumers. As with other industry comments in this proceeding, industry comments on transparency offer little more than the suggestion “trust us”, with vague assertions of doomsday to follow from any Commission rulemaking, often premised on straw man versions of the proposed open Internet rules.

The Commission can and should create two-level disclosure rules, requiring public disclosure of both general and detailed information on network management practices, to provide clarity and security to Internet users and to developers of Internet content, applications, and services.

### **A. Disclosure Rules Will Not Impose Undue Burden or Harm**

Internet service providers offer a litany of reasons why the Commission should not require standardized disclosure of interference with network use. For example, Qwest suggests that disclosure could be anticompetitive,<sup>32</sup> although common sense says

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<sup>32</sup> Comments of Qwest at 18-19.

that transparency inspires greater competition. Many industry commenters say that disclosure would “burden” consumers with too much information,<sup>33</sup> though proposed two-part rules would offer disclosure for casual and expert consumers alike. Some say that disclosure would enable workarounds of network management practices, but fail to provide compelling examples.<sup>34</sup> Many commenters assert that providing disclosure would be too burdensome on the providers,<sup>35</sup> even while others insist that they will voluntarily provide sufficient disclosure,<sup>36</sup> a seeming contradiction. Some say that network management practices change frequently, thus creating too great a burden to keep disclosures updated,<sup>37</sup> basing their criticism on straw man versions of disclosure rules rather than realistic rules that would take such changes into account, for example by encouraging the disclosure of small ranges of threshold or trigger values for network management practices. Contrary to some, imposing rules to require disclosure will not constrain competition or “innovation” in disclosure methods<sup>38</sup> – disclosure rules would serve as a minimum, not a maximum, and network operators could (theoretically) choose to compete and innovate to provide even more disclosure than required by the FCC.

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<sup>33</sup> See e.g. Comments of Qwest at 16-18; Comments of Sprint at 15-17.

<sup>34</sup> See e.g. Comments of T-Mobile at 38; Comments of MetroPCS at 64. Savvy users who are capable of engineering workarounds for network management practices are likely also capable of identifying such practices in the first place. Disclosure rules benefit other users merely seeking to use their Internet services in a way that experiences minimal disruptions.

<sup>35</sup> See e.g. Comments of T-Mobile at 37.

<sup>36</sup> See e.g. Comments of AT&T at 188-190 (“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.... providers on their own are doing precisely what the Commission might hope to achieve”).

<sup>37</sup> See e.g. Comments of T-Mobile at 30; Comments of Cricket at 24.

<sup>38</sup> Comments of Verizon at 49.

Disclosure rules would not be unduly harmful to network operators. Disclosure rules would not seriously limit the ability of a service provider to protect network security, nor would mandatory disclosure entail the public display of “critical internal details” of network infrastructure.<sup>39</sup> In fact, as many commenters note, they are likely to be very helpful for Internet users, developers, and network operators alike.

**B. The Commission Should Require Public Disclosure of Network Management Practices to be Provided at Two Different Levels of Granularity, Without Any Reasonable Network Management Exception**

Thorough and standardized disclosure of network management practices benefits the entire Internet ecosystem. Consumers benefit by knowing about any limitations that will affect their use of the service.<sup>40</sup> Developers of Internet content, applications, and services benefit by understanding the network’s limitations, so they can design their products to be efficient in operation and resource consumption, and to offer a seamless and problem-free user experience.<sup>41</sup> Even network operators benefit, by creating a transparent and open marketplace that leads to a greater chance of meaningful competition, increased investment, and more positive user experiences.<sup>42</sup>

Many industry commenters insist that no new laws are needed. Some say that other bodies of law, such as general consumer protection at the Federal Trade Commission, suffice to protect consumers.<sup>43</sup> Others say that voluntary industry

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<sup>39</sup> See Comments of OIC at 91-92.

<sup>40</sup> See e.g. Comments of Public Interest Advocates at 7.

<sup>41</sup> See e.g. Comments of Google at 66-67.

<sup>42</sup> See e.g. Comments of CDT at 31.

<sup>43</sup> Comments of Verizon at 130-32.

disclosure is sufficient.<sup>44</sup> Some engage in revisionist history – such as Verizon’s assertion that Comcast terminated its blocking practices once they were disclosed,<sup>45</sup> which fails to acknowledge that neither disclosure nor termination preceded formal FCC investigation of Comcast’s behavior. Some say that rules should be passed only as “a last resort.”<sup>46</sup> These industry commenters fail to acknowledge demonstrable problems with past undisclosed practices by Internet service providers,<sup>47</sup> and fail to offer any confidence that existing measures will somehow prevent such behavior from occurring in the future when they did not in the past. By and large, voluntary industry disclosure mechanisms fail to provide sufficient information, and despite frequent criticisms of these methods, their disclosures have not been improved upon.

The Commission should require additional transparency to remedy current substantial gaps in industry disclosures. The Commission should establish standards for two levels of disclosures: a high-level disclosure intended to convey the most essential details of any network management practices that interfere with user communications on the Internet, and a precise and granular disclosure that can provide detailed information to users and developers of the ways in which such interference is carried out.<sup>48</sup>

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<sup>44</sup> See e.g. Comments of USTA at 52.

<sup>45</sup> Comments of Verizon at 50. In both the cited examples of Comcast and Madison River, increased transparency – without an empowered and active Commission – would certainly not have sufficed to prevent the misbehavior.

<sup>46</sup> Comments of NCTA at 6.

<sup>47</sup> See Comcast Order, para. 53 (“Comcast’s claim that it has always disclosed its network management practices to its customers is simply untrue.... Comcast’s first reaction to allegations of discriminatory treatment was not honesty, but at best misdirection and obfuscation.”).

<sup>48</sup> Comments of Free Press at 112-18.

Commission rules should require disclosure of any and all interference with a user's service through network management practices. In particular, the Commission should not limit its disclosure rules to only those practices clearly visible to the consumer.<sup>49</sup> Contrary to arguments of industry,<sup>50</sup> substantially more detail can prove useful to consumers. The line between consumer and application developer is rapidly blurring – all consumers, not just registered developers or other professionals, should have a right to detailed, public information on any interference with their Internet services.

Additionally, as many commenters noted, disclosure rules *must not* have an exception for “reasonable network management.”<sup>51</sup> Disclosure is the primary tool for consumers to understand how and why the behavior of an Internet service provider is harming them – and the primary source of information on which to base a complaint for violation of nondiscrimination or other open Internet rules. If disclosure rules are given a “reasonable network management” exception, network operators will invent security or “confidential business information” rationales to hide any and all potentially harmful behavior from the eyes of the public, rendering the very purpose of the disclosure rules immaterial and substantially increasing the difficulty of enforcement.

### **III. Wireless Networks Need Not – and Should Not – Be Treated Differently in Open Internet Rules**

The Commission should apply open Internet rules to all network technologies, including mobile wireless networks. An even playing field will ensure maximum

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<sup>49</sup> See e.g. Comments of AT&T at 13, 188.

<sup>50</sup> See e.g. Comments of Cricket at 24.

<sup>51</sup> See e.g. Comments of CDT at 31-32; Comments of EFF at 6, 23-25; Comments of Texas PUC at 8.

innovation and maximum investment throughout the network. Reasonable network management and other mechanisms are adequate for service providers to deal with congestion and other problems that may arise. As NCTA noted in initial comments, beyond handling specific details of particular networks operated by broadband Internet access service providers, “there is no basis for differentiating among specific broadband Internet access technologies – current or future – with respect to the applicability of any rules ultimately adopted.”<sup>52</sup>

About at least one of its assertions, Sprint is right – transition from voice-based networks to IP-based networks does make this a “pivotal moment” for mobile wireless networks.<sup>53</sup> Contrary to Sprint’s other assertions, though, this moment *reinforces* the need for technology-neutral open Internet rules, because it increases the convergence of devices and usage patterns. Future mobile wireless networks will more closely resemble fixed networks, from the perspective of the consumer.<sup>54</sup> As a result, any differences in the regulatory paradigms will likely translate into different network operator behavior, triggering frustration and broken expectations when some applications work through Wi-Fi to a home network, but stop working or are deliberately throttled when the device is connected to a mobile network. Consumers and developers need regulatory parity to prevent confusion and frustration in a future of converged Internet models.

The right solution, as the Commission has proposed, is to extend the same open Internet protections to all broadband networks, whether fixed or mobile, regardless of the

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<sup>52</sup> Comments of NCTA at 46.

<sup>53</sup> Comments of Sprint at 3.

<sup>54</sup> This increasing resemblance does not, however, translate into any substitutability between the networks for purposes of market analysis. In fact, as service providers have noted, these services do not function as substitutes. *See infra* pp. 45-49.

level of competition. Reasonable network management, on all networks, serves as a safeguard to allow any and all legitimate means to deal with real technical differences in the networks.

**A. Mobile Wireless Network Operators Have Multiple Non-Discriminatory Options for Managing Congestion and Other Network Issues**

In practice, rules to preserve the open Internet would not overly hamper wireless network operators seeking to deal with congestion, security problems, and other legitimate network management needs. Concerns over supposed negative effects are based on strawmen versions of rules that no advocate has supported, or on unrealistic hypotheticals and imagined future rulemaking proceedings.<sup>55</sup> Nondiscrimination does not mean any network management. The Commission is well able to craft rules that distinguish between legitimate, reasonable network management and harmful discrimination, as other commenters acknowledge.<sup>56</sup>

Many techniques for dealing with congestion in wireless networks would not trigger a violation of nondiscrimination rules at all. For example, one commenter suggests that wireless carriers can offer guaranteed data rate service tiers without violating nondiscrimination rules, provided the tiers do not restrict or differentiate any usage of applications.<sup>57</sup> Wireless carriers can perform rate-limiting techniques on

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<sup>55</sup> See e.g. Comments of CTIA at 31 (“preemptive U.S. net neutrality regulation could start a landslide of international Internet regulation aimed at controlling the global network”).

<sup>56</sup> See generally Comments of WISPA (supporting the Commission’s proceeding, and offering standards to define reasonable network management in a way that clearly delineates beneficial activity).

<sup>57</sup> Comments of New America Foundation, Columbia Telecommunications Corporation, Consumers Union, Media Access Project, and Public Knowledge (NAF/CTC) at 44.

individual users who exceed pre-established usage thresholds, taking into account the users' individual service plans, without discriminating on the basis of application or content.<sup>58</sup> Furthermore, “over-the-air” access layer technologies in wireless networks inherently limit the ability of any individual user to “hog” the shared network capacity.<sup>59</sup> These and other techniques are sufficient to convince at least some wireless network operators that they are perfectly capable of operating under open Internet rules.<sup>60</sup>

**B. Proper Reasonable Network Management Adequately Takes Network Limitations Into Account**

Reasonable network management provides further safeguards to enable operators to deal with any limitations associated with wireless networks. Supporters of open Internet rules also support the ability of network operators (no matter the technology) to engage in reasonable network management to deal with problems that arise.

In initial comments, opinions vary widely as to the appropriate standard for determining reasonable network management. Many comments follow a general two-part standard that identifies the purpose of the management to determine whether that purpose is beneficial for the public at large or whether it is harmful, and then, if the purpose is beneficial, examines whether the methods in use are reasonable in light of that purpose.<sup>61</sup> This standard resembles the interpretations of reasonable network management used in Canada and Japan.<sup>62</sup> Various thresholds were suggested for language for each part of this standard. At the strong end of proposals, a group of

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<sup>58</sup> *See ibid* at 48.

<sup>59</sup> *Ibid* at 55.

<sup>60</sup> *See* Comments of WISPA.

<sup>61</sup> *See e.g.* Comments of OIC at 41.

<sup>62</sup> *See* Comments of Free Press at 91-93.

wireless network operators stated that the proper interpretation of reasonable network management should be limited to “the least restrictive means necessary.”<sup>63</sup> But all proposed standards inherently acknowledge the limitations of the network involved, and means that may be inappropriate to manage congestion on a fiber optic network may very well be appropriate on a wireless network, given the inherently different technical features. None of the proposed standards for reasonable network management would tie the hands of wireless network operators or prevent them from dealing with legitimate congestion and security problems.

Some commenters imagine even more egregious negative repercussions of preserving an open Internet. MetroPCS in particular seems concerned that open Internet rules would force the wireless industry to adopt universal metered billing.<sup>64</sup> This assertion is somewhat odd in an environment in which every other wireless service provider seems to want to shift to metered data billing. But more importantly, the bevy of nondiscriminatory and reasonable network management methods available to deal with congestion and other problems belie such misleading arguments.

### **C. Separate Regulatory Treatment for Title II/III Services Renders Many Concerns Misplaced**

The most significant technical distinction between mobile wireless and low-capacity fixed broadband such as DSL is shared and inseparable capacity between voice and data services. However, this distinction does not in any way justify differential policy treatment for Internet access services offered over these networks. Wireless

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<sup>63</sup> Comments of WISPA at 7.

<sup>64</sup> Comments of MetroPCS at 49-51. MetroPCS goes even further, saying that such a result would constitute “rate regulation” and would be unlawful under the Communications Act.

industry commenters argue that network operators must protect voice services from interference, which are particularly prone to latency.<sup>65</sup> The basis of their argument lies in this shared capacity. And, even though congestion management methods allow broadband Internet access services to coexist with voice and video on cable networks as well as wireless, the specific technical problems faced by the network operators may be so different as to justify different network management methods.

However, CTIA's argument is misplaced. Voice services on mobile wireless networks are not Internet access services, nor are they offered over Internet access services, but instead are regulated as telecommunications services under Title III. As a result, the proposed open Internet rules would not apply to network management related to these services. Other consumer protection rules embodied in Title II and incorporated into Title III would continue to apply.

#### **D. The Wireless Market is Far From Perfect**

As many commenters have noted, even in a hypothetical competitive market, rules to protect the open Internet are essential.<sup>66</sup> That said, the fixed broadband market poses widely recognized problems with competition. And, although consumers have nominally more choices of service provider, the mobile wireless market is far from competitive.<sup>67</sup> And wireless users are suffering as a result – service prices are excessively high, and service quality is low, because many providers have been reducing their investments as a percentage of revenue and pocketing substantial operating profits

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<sup>65</sup> See e.g. Comments of CTIA at 40.

<sup>66</sup> See, e.g. Comments of Free Press at 45-53.

<sup>67</sup> See e.g. Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, and Public Knowledge, WT Docket No. 09-66 (June 15, 2009).

despite a weak economy.<sup>68</sup> Wireless users continue to face hidden penalties and fees, and unexpected limitations on their services.<sup>69</sup> In the current climate, commenters arguing for the FCC to continue “hands-off” policies for wireless services are actively closing their eyes to real consumer problems.<sup>70</sup>

Additionally, contrary to the arguments of some commenters, demonstrable performance problems with the wireless market are not, yet, driven by an active “spectrum crisis.”<sup>71</sup> Although eventually more spectrum for broadband will be valuable, and the Commission is right to start the process of finding more spectrum now, the current quality problems of the wireless market result from poor competitive incentives and poor business decisions, not a shortage of spectrum. Weak competitive pressure leads to reduced investment in technology and backhaul upgrades. For example, MetroPCS is wrong in pointing to AT&T’s problems at CES as an example of the need for more spectrum.<sup>72</sup> AT&T’s spectrum resources substantially exceed those of most of its competitors. Instead, these problems arose because AT&T’s 3G network was underinvested and did not come close to meeting known capacity needs, particularly given the advance knowledge of likely demand to be placed by iPhone users.<sup>73</sup> By contrast, T-Mobile – which faces substantially more pressure due to its lack of control

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<sup>68</sup> See e.g. Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, the New America Foundation, and Public Knowledge, WT Docket No. 09-66, at Appendix (Sept. 30, 2009).

<sup>69</sup> The Commission appears poised to remedy many of the transparency issues, but has not yet proposed new rules.

<sup>70</sup> See, e.g. Comments of MetroPCS at 19-24.

<sup>71</sup> See e.g. Comments of MetroPCS at 36.

<sup>72</sup> Comments of MetroPCS at 37-38.

<sup>73</sup> See e.g. Adam Lynn, “AT&T’s Non-Existent Network,” *Free Press*, at <http://www.freepress.net/node/74721>.

over backhaul networks and its lack of access to the most popular devices – has invested in HSPA+ deployment at a much more aggressive pace,<sup>74</sup> while AT&T spends its resources on Luke Wilson for commercials critiquing Verizon’s 3G network maps.<sup>75</sup>

Ultimately, regardless of any disagreements over the merits, industry arguments premised on wireless competition seem lodged against a fundamental contradiction. Rules to protect an open Internet are unneeded because the wireless market is so competitive that it will deliver an open Internet without rules; yet, rules to protect an open Internet would be harmful because wireless providers must have the ability to close off the open Internet to ensure adequate service and to compete, because of the problems of congestion and high usage. But this perverse combination of assertions is necessary to justify the continued existence of practices that are antithetical to consumer choice. MetroPCS, in particular, appears to be striving to defend a business model based on promises to consumers that the company is unable or unwilling to meet. MetroPCS seeks to avoid a switch to metered billing for wireless data services, because the distinguishing feature of their business model is a low-cost promise of unlimited usage.<sup>76</sup> MetroPCS could continue to support such a promise under open Internet rules by engaging in nondiscriminatory usage-based throttling practices. But such practices would prevent MetroPCS from giving its own services a discriminatory advantage,<sup>77</sup> and deliberately

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<sup>74</sup> Tony Bradley, “T-Mobile Seeks ‘Fastest 3G’ Crown with HSPA+”, *PCWorld*, at [http://www.pcworld.com/businesscenter/article/192283/tmobile\\_seeks\\_fastest\\_3g\\_crown\\_with\\_hspa.html](http://www.pcworld.com/businesscenter/article/192283/tmobile_seeks_fastest_3g_crown_with_hspa.html).

<sup>75</sup> Chris Matyszczyk, “AT&T fights back at Verizon with, um, Luke Wilson,” *CNET News*, at [http://news.cnet.com/8301-17852\\_3-10401289-71.html](http://news.cnet.com/8301-17852_3-10401289-71.html).

<sup>76</sup> Comments of MetroPCS at 49.

<sup>77</sup> *Ibid* at 60.

interfering with users who choose and use services not offered by MetroPCS,<sup>78</sup> as MetroPCS appears to want to do. MetroPCS's desire for discriminatory business models is not only unnecessary and harmful to consumers, it is also unsustainable.<sup>79</sup> The Commission must prevent companies like MetroPCS from promising their consumers unlimited Internet usage, and then controlling consumer choice and forcing the use of MetroPCS services through discriminatory practices, all in the name of mythical wireless competition.

**E. Wireless Devices Can And Should be Separated From Wireless Services**

Many commenters supported the FCC's proposed open device rule to allow attachment of any non-harmful devices.<sup>80</sup> Commenters note that the rule would promote consumer choice, competition, and innovation.<sup>81</sup> As with wired networks, innovation and consumer choice and growth are maximized when electronics suppliers compete to sell directly to consumers the most powerful and least expensive devices, which can then be connected to any broadband network. The objective of wireless network policy should be to bring about that same goal.

From the consumer's perspective, the consumer buys a phone, a netbook, or another wireless connected device – perhaps sold by a wireless service provider and purchased along with a subscription, but that does not change the consumer's perceptions of the device. The device is the consumer's property, and the consumer can equip the

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<sup>78</sup> *Ibid* at 70.

<sup>79</sup> *See* Comments of Free Press at 15-23 (identifying potential discriminatory business models, and the severe limits on any potential sources of additional revenue).

<sup>80</sup> *See* Comments of Google at 82; Comments of OIC at 36-39; Comments of Skype at 4, 7; Comments of Vonage at 30-31.

<sup>81</sup> *See e.g.* Comments of Vonage at 31.

device with a headset, a case, an extra battery, or other accessories. The consumer can engrave a name into the device's body, or even throw the device away, and the service provider should not have any legal ability to control this behavior. The consumer cannot physically modify the device to run on different spectrum or at different power levels, but that's not because of a rule of the service provider – that's because of FCC rules on interference.

Wireless service providers, on the other hand, seems to have a confused impression of this relationship. CTIA, for example, spends pages engaging in a creative exegesis of old FCC rules for radio transmitters, seemingly arguing that the wireless device is not owned by the consumer but merely licensed.<sup>82</sup> To the extent these rules have meaningful application to cell phones, FCC processes designed to ensure that a device operates on a network without causing harm would seem more than adequate. Open device attachment rules would not in any way eliminate the role already played by the FCC in working with device manufacturers to ensure that devices are safe for use in their intended spectrum ranges.

Verizon makes similarly bizarre arguments, contending that the lines between devices and networks are “blurring”<sup>83</sup> – in fact, Verizon goes so far as to argue any rules creating “separate categories of ‘devices,’ ‘applications,’ ‘content,’ and ‘networks’ that are subject to different obligations” would somehow harm Internet innovation.<sup>84</sup> Verizon seems to go even further than CTIA, implying that not only is the device best controlled by the network operator and not the consumer, but so should be every application used on

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<sup>82</sup> Comments of CTIA at 42-44.

<sup>83</sup> Comments of Verizon at 13.

<sup>84</sup> *Ibid* at 14.

that device, and every content accessed through the applications running on the device that connects to the network. This sweeping assertion of control over the entire ecosystem is not only strikingly anti-consumer, it is nonsensical. The markets, technologies, environments, incentive structures, regulatory histories, and almost every other aspect of devices, applications, content, and networks are distinct. Although convergence creates competition between some applications, such as Voice over Internet Protocol or over-the-top video, and some network services, such as traditional voice or cable television, that doesn't create a slippery slope towards a world where Facebook status messages can or should operate under the same regulatory treatment as fiber optic networks.

Nor is the device “an integrated part of the network service” as argued by Verizon.<sup>85</sup> This argument is belied later in the same paragraph, with statements that “Verizon and other operators permit users to attach independent, technically compatible devices to their networks.”<sup>86</sup> In fact, Verizon has made some strides towards the goal of independent device attachment through its Open Development Initiative.<sup>87</sup>

The obstacle lies in the processes of device certification. As one commenter noted, devices currently undergo three separate phases of certification – first, certification either as GSM or CDMA devices to verify that the device will work on standard GSM or CDMA networks; second, certification by the FCC to ensure that the device will not cause harmful interference; and third, certification by an individual network operator to

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<sup>85</sup> *Ibid* at 63.

<sup>86</sup> *Ibid*.

<sup>87</sup> See Verizon Wireless Open Development, “Frequently Asked Questions,” at <https://www22.verizon.com/opendev/faq.aspx>.

ensure compliance with any unique features of the network.<sup>88</sup> In practice, many of the network-specific requirements currently in place are unnecessary – one commenter referred to them as “overbroad and anti-competitive.”<sup>89</sup> Moves by industry to use standards in network design, and to apply only those requirements that are widely accepted rather than those that are parochial, could greatly streamline device certification and create a ready path towards truly independent and interoperable devices and networks.<sup>90</sup>

None of these changes would prevent network operators from designing devices to be specifically optimized for an individual network. Nor would these changes in any way hamper the ability of a network operator to sell a bundle of device and service. Sprint is wrong in asserting that open device rules would transform the relationship between the service provider and the consumer;<sup>91</sup> for most wireless users, nothing would be any different. But if a consumer chooses an independent third-party device, not specifically designed for the network but that can connect without harm, the network operator should not stand in the way. Sprint would not be obligated to provide support for the device, any more than Comcast or AT&T would be required to provide support for an Internet subscriber who uses a Linux-based computer to connect to the Internet. Any marginal friction that can result from the use of a third party device should not outweigh the benefits of increased consumer choice and innovation, not on wireless any more than on wired. After all, it would be unthinkable to allow Comcast to prevent the

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<sup>88</sup> Comments of NAF/CTC at 26-29.

<sup>89</sup> Comments of Vonage at 30-31.

<sup>90</sup> *See* Comments of NAF/CTC at 29-36.

<sup>91</sup> Comments of Sprint at 29-32.

use of Linux computers with its cable modem service, solely because Comcast does not train its customer service employees with knowledge of Linux.

Sprint's suggestion that device certification be performed by an industry-led process, similar to CableCARD, provides an ideal example of what the Commission must *not* do in designing and implementing open device rules.<sup>92</sup> Although many of the difficulties that arose from CableCARD are particular to that technology, the fundamental obstacle is the same: When industry strives to avoid the imposition of a regulatory obligation, placing the same industry in control of ensuring that the regulatory obligation is carried out is unwise. Wireless network operators in this proceeding have raised their disinclination towards open device connection rules, and instead have shown a very clear desire to control devices that connect to their networks. If left in charge of device approval processes, they will invariably extend this desire into the process, ensuring that open device rules will be rendered meaningless through nearly insurmountable barriers for third party device manufacturers.

#### **IV. Opponents of Open Internet Rules Ignore Realities of Law, Technology, Business, and Economics.**

Free Press declines in these reply comments to respond to many of the other misleading, repetitive, and argumentative tactics of industry and astroturf commenters, as the sole goal of many of these efforts is to distract and drive the debate away from the critical substantive issues in this proceeding, which we do address above. Nonetheless, we believe highlighting a subset of these arguments, put in the appropriate context, will prove illustrative for the Commission and this proceeding. Specifically, we will target comments that attempt to conflate the Internet with broadband Internet access services;

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<sup>92</sup> Comments of Sprint at 32-33.

comments that attempt to mislead the Commission as to the nature and role of reasonable network management; comments that create doomsday scenarios for jobs or investment should the Commission have the hubris to interfere; and comments that argue, despite overwhelming evidence to the contrary, that the market for broadband services is competitive.

**A. Applying Rules to Internet Access Service Providers is Not the Same Thing As, and Does Not Necessitate, ‘Regulating the Internet’**

Many opponents of open Internet protections seek to defeat the Commission’s proposal by, perversely, attempting to expand the scope of the protections. These commenters contend that the lines are “blurring” between Internet access service and applications and services operating at the edge of the network.<sup>93</sup> Asserting that the lines are “blurring” is an attempt to say that the Commission cannot fairly place consumer protections on broadband Internet *access* service without extending all proposed rules to the Internet. Such arguments are hardly new, but in previous proceedings they have been asserted by only a few self-interested businesses.<sup>94</sup> In this proceeding, however, virtually every large provider has adopted these misleading arguments.<sup>95</sup> This spin is similarly employed with the industry’s misleading, and constant, references to Section 230 of the Communications Act.<sup>96</sup>

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<sup>93</sup> See Comments of AT&T Inc at 20.

<sup>94</sup> See e.g. Comments of AT&T Inc, In the Matter of *Broadband Industry Practices*, WC Docket No. 07-52, pp. 85-92 (June 15, 2007).

<sup>95</sup> See e.g. Comments of AT&T Inc at 196-207; Comments of Comcast Corporation at 29-37; Comments of Time Warner Cable at 73-98; Comments of Verizon and Verizon Wireless at 36-39; Comments of The United States Telecom Association at 36-37; Comments of the National Cable and Telecommunications Association at 45-49.

<sup>96</sup> See Reply Comments of Free Press, In the Matter of *A National Broadband Plan for Our Future*, GN Docket No. 09-51, pp. 7-13. Comments of AT&T Inc at 19. See also

These arguments are counterproductive, ignoring both the legal history and the very technology of network communications. They deny the past three decades of policymaking, which relied on a meaningful distinction between “common carrier transmission services [and] those services which depend on common carrier services in the transmission of information.”<sup>97</sup> We see no need to repeat this history in great detail here, nor to explain the fundamental technical differences between laying wires to consumer’s homes and building a website which hosts content on a server.<sup>98</sup> The Commission acknowledged the clear distinctions that exist between these areas in the *Notice*.<sup>99</sup>

Commenters conflating “the Internet” and “Internet access service” concoct a laundry list of “non-neutral business practices” from Internet application and content providers to justify their requested extensions of the proposed rules.<sup>100</sup> Certainly, these industries are not perfect, and there are areas in which some form of additional government oversight may be warranted. If industry commenters would like to ask the Commission to directly “regulate the Internet,” the appropriate course would be to file a petition with the Commission to begin such a process, coupled with a detailed argument as to how the Commission would have jurisdiction to engage in such regulation.

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§ 509 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), (*1996 Act*), reproduced in the notes under 47 U.S.C. § 230 of the Communications Act.

<sup>97</sup> *Amendment of Section 64.702 of the Commission’s Rules and Regulations* (Computer II), 77 FCC 2d 384 (1980), para. 86.

<sup>98</sup> Many commenters spend considerable time pointing to content delivery networks (CDNs). Akamai, one of the largest CDNs, explained to the Commission “Akamai does not serve end user consumers directly...end users access Akamai servers via last-mile broadband Internet access services and facilities owned by entities other than Akamai, such as cablecos or ILECs.” Comments of Akamai Technologies, Inc at 6-7.

<sup>99</sup> See e.g. *Notice* at para. 26-27, 47.

<sup>100</sup> See e.g. Comments of Time Warner Cable at 77, 73-93.

However, we note that such actions would likely go against the intention of Congress when they stated “[i]t is the policy of United States...to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”<sup>101</sup> Where broadband Internet access service is a problematic, consolidated, and concentrated market, the businesses that offer the applications and service that comprise “the Internet” still face a “vibrant and competitive free market,” and despite the commercial interests of broadband service providers in co-opting this proceeding, the better course for the Commission in regulating applications and services is caution.

**B. Constant Network Management Is a Symptom of Underinvestment in the Network**

Another consistent theme of industry comments in this proceeding concerns the meaning and significance of “reasonable network management.” Aside from combating malicious activities, reasonable network management, as the term is used in this proceeding, is employed when a network is considered to be in a congested state.<sup>102</sup> The appropriate long-term, stable response to congestion is network improvements, or perhaps more accurately, network maintenance. The Commission has recognized in other proceedings that service providers can anticipate increasing demand, and that growth can be “adequately managed through feasible facility improvements.”<sup>103</sup> Furthermore, absent

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<sup>101</sup> 47 U.S.C. § 230(b)(2).

<sup>102</sup> How an operator defines a congested state is also a critical component of congestion management policy. *See* Comments of Free Press at 38-43.

<sup>103</sup> *Service Rules for the 698–746, 747–762 and 777–792 MHz Bands; Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones; Biennial Regulatory Review –Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services; Former*

congestion, a broadband network operates harmoniously, and operators should be prevented from interfering with legitimate traffic.<sup>104</sup> Thus, the crux of this proceeding rests on the relatively narrow issue of what practices are to be allowed in the interim period, when substantial congestion first occurs until network maintenance can be reasonably performed.<sup>105</sup>

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*Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010*, WT Docket Nos. 06-169, 06-150, 03-264, 01-309, 96-86, CC Docket No. 94-102, PS Docket No. 06-229, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 8064, 8153 (2007).

<sup>104</sup> While AT&T made numerous arguments that failed to recognize this, at one point within their 255 page comments, they noted that “[s]ince congestion tends to be sporadic and momentary, the division of traffic into these classes of service has little or no effect on any class the vast majority of the time.” Comments of AT&T Corp. at 67.

<sup>105</sup> Congestion has occurred throughout the Internet’s history. Expanding network capacity has been the primary response. As we said in our initial comments if such a response is no longer economically feasible, based on traffic increases, “both network and financial data” must be presented to “illustrate such a claim”. See Comments of Free Press at 37. Directly contradicting the position of network operators was Time Warner Cable’s recent investor call where the company stated, “our residential revenue mix continues to shift in the direction of higher margin businesses meaning more HSD [high-speed data] and phone relative to video”. In other words, more people are signing up for broadband compared to cable service and Time Warner Cable is seeing their profit margins *increase* as a result. The company went on to state “[o]ur residential HSD subscriber mix continues to shift towards our premium tier products with Turbo accounting for almost 70% of our residential net adds in the quarter.” Time Warner Cable, Q4 2009 Earnings Call Transcript, *Seeking Alpha*, Jan. 28, 2010. This should be expected given that the actual costs of Internet bandwidth are declining on the order of “5 to 10 percent a year.” Saul Hansell, “The Cost of Downloading All Those Videos,” *New York Times Bits Blog*, April 20, 2009. For Comcast, the direct operating expenses for broadband are declining year over year from \$586 million in 2007 (about 8.9 percent of broadband revenues) to \$513 million in 2009 (about 6.7 percent of broadband revenues). This decline in expenses came as Comcast added nearly 2.5 million broadband customers between 2007 and 2009. See Comcast Corporation, Trending Schedule, Fourth Quarter 2009. Time Warner Cable saw broadband expenses decline from \$164 million (about 4.4 percent of broadband revenues) to \$132 million in 2009 (about 2.9 percent of broadband revenues). Time Warner Cable added about 1.4 million broadband customers in this same

Conducting permanent congestion management creates an incentive to reduce investment. Without congestion, latency sensitive traffic does not suffer from quality degradation; quality of service is only relevant in a congested network. Allowing providers unbounded freedom to interfere with traffic, and to generate revenue from such interference, creates incentives to *reduce* network investment in order for their traffic interference to become a worthwhile add-on purchase and an additional revenue stream.<sup>106</sup> Opponents of open Internet rules speak widely of incentives to invest, yet fail to overcome this marked *disincentive*. While preventing reasonable network management would have an adverse affect on customers during the temporary windows of network congestion, a much more grim result would occur if the Commission allows for ongoing manipulation by companies whose equipment is installed industry-wide, all under the guise of mitigating congestion.<sup>107</sup>

### **C. Common-Sense Rules of the Road to Protect the Open Internet Will Not Bring About Broadband Armageddon.**

The Commission is no stranger to doomsday predictions by industries that the Commission proposes to take action against on behalf of consumers. It comes as no surprise to see phone and cable companies continuing this long-standing industry practice here. These companies allege the same dire results they've threatened of so many times

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time period. *See* Time Warner Cable, 2009 Trending Schedule. Furthermore, for 2009, Time Warner Cable stated these “high-speed data costs decreased primarily due to a decrease in per-subscriber connectivity costs, partially offset by growth in subscribers and usage per subscriber.” Time Warner Cable, 2009 SEC Form 10-K, p. 60 (filed Feb. 19, 2010) [emphasis added]. Indeed, AT&T noted the “low marginal costs” of offering broadband service. *See* Comments of AT&T at 117, n. 217. Placing this burden of proof on operators closely aligns with the regulatory policy of the Canadian Radio-television and Telecommunications Commission. *See* Comments of Free Press at 84, n. 142.

<sup>106</sup> *See* Comments of Free Press at 22, 29-30, 143-144.

<sup>107</sup> *Ibid* at 141-151.

before. Negative consequences were similarly alleged when the Commission proposed putting open Internet conditions on the BellSouth-AT&T merger,<sup>108</sup> and when the Commission took action against Comcast's blocking.<sup>109</sup> These allegations include stifling innovation,<sup>110</sup> hurting network investment,<sup>111</sup> foreclosing new business models,<sup>112</sup> and increasing the price of broadband.<sup>113</sup>

These claims are belied by the actions of the investment community. Numerous Wall Street analysts reacted to the FCC's efforts with a yawn, given the belief that broadband service providers were, for the most part, already in compliance with the proposed rules.<sup>114</sup> Net neutrality was far from a prevalent topic during recent quarterly investor calls.<sup>115</sup> Any future revenue potential that could be affected by these rules is contemplated only in so far as the broadband duopoly "can use their dominance in last-mile and local broadband access" in order to "claim more of the economic value that has flowed to edge providers."<sup>116</sup> In other words, analysts do indeed consider the reverse effects of this market power – damaging the potential of edge investment and innovation. In fact, investments analysts are nearly universal in their call for Commission action,

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<sup>108</sup> *Ibid* at 163-164.

<sup>109</sup> *Ibid* at 160-163.

<sup>110</sup> *See e.g.* Comments of United States Telecommunications Association at 2.

<sup>111</sup> *See e.g.* Comments of AT&T, Inc. at 10.

<sup>112</sup> *See e.g.* Comments of Verizon and Verizon Wireless at 6.

<sup>113</sup> *See e.g.* Comments of Time Warner Cable at 57.

<sup>114</sup> *See e.g.* Josh Wein, "Major ISPs already Said to Follow Network Neutrality Rules," *Communications Daily*, Feb. 23, 2010.

<sup>115</sup> Between the four largest residential service providers by subscribers, the term "Net Neutrality" came up only on Time Warner Cable's 4<sup>th</sup> quarter call and it was due to a financial analyst's question. *See infra* at p. 44.

<sup>116</sup> Robert C. Atkinson, "Network Neutrality: History Will Repeat Itself," Columbia Institute for Tele-Information (CITI), Communications & Strategies, No. 68, p. 68, 4th Quarter 2007 (citing Stifel Nicolaus, "Net Neutrality: Value Chain Tug of War," March 2006).

hoping for “regulatory certainty in order for the capital markets to respond with investment.”<sup>117</sup> A letter supporting the Commission’s efforts sent by many prominent venture capitalists further bolstered this fact.<sup>118</sup> The *Notice* aptly points to a filing from AT&T just six years ago, which stated “[i]f there is even a serious risk that such access can be blocked by the entities that control the last mile network facilities necessary for Internet access, the capital markets will not fully fund IP-enabled services.”<sup>119</sup>

Aside from the contrasting indications provided by financial experts, the behavior demonstrated by industry goes against their own doomsday assertions.

For instance, Qwest offers one of many overarching predictions, stating “the Commission must recognize the strong possibility that *any* prescriptive regulatory intervention will prevent development and deployment of a host of products and services, existing and yet-to-be-imagined.”<sup>120</sup> Of course, Qwest recently applied for \$350 million

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<sup>117</sup> Patton Boggs, “FCC Begins Series of Broadband Capital Formation Hearings,” *TechComm Industry Update*, Oct. 9, 2009. *See also* Federal Communications Commission, “FCC Hearing on Capital Formation in the Broadband Sector,” Oct. 1, 2009.

<sup>118</sup> Ex Parte Letter from Devendra T. Kumar, Counsel to the Open Internet Coalition to Marlene Dortch, Federal Communications Commission, In the Matter of *Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52 (Nov. 24, 2009). *See also* Krishna Jayakar, Amit Schejter, Richard Taylor, “Small business and broadband: Key drivers for economic recovery,” Allen Leinwand, “Why Startups and Web Innovation Need Net Neutrality,” *BusinessWeek*, Dec. 6, 2009; Allen Leinwand, “Why Startups and Web Innovation Need Net Neutrality,” *BusinessWeek*, Dec. 6, 2009.

<sup>119</sup> *Notice* at 63 n. 144. While some may question associating the filings of the legacy AT&T with those of the present day, the company has also engaged in such an exercise. *See e.g.* Comments of AT&T Inc., In the Matter of *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and other Customer Information; Petition for Rulemaking to Enhance Security and Authentication Standards for Access to Customer Proprietary Network Information*, CC Docket No. 96-115, RM-11277, p. 20 (April 28, 2006).

<sup>120</sup> Comments of Qwest Communications at 2. [emphasis added]

of government money that includes strong language mandating non-discrimination.<sup>121</sup> As we pointed out in our initial comments, Qwest had previously warned that applying these rules “would create chaos” and result in “regulatory balkanization.”<sup>122</sup> Apparently this “chaos” and the prevention of “a host of products and services” now align with the company’s business plans.

Not to be outdone, Time Warner Cable makes the oft-repeated claim that Net Neutrality will “force[] consumers to bear all network costs” resulting “in significantly increased prices for broadband services.”<sup>123</sup> We addressed this confounding logic in our initial comments.<sup>124</sup> The flawed reasoning here asserts that this will occur because the FCC has prevented network operators from extracting some of the network costs from websites. Of course, website owners already pay considerable sums for connections, amounts that go directly to network operators.<sup>125</sup> The Commission would be right to wonder why rules that preserve the current status quo of the Internet would harm this system, or what these current payments go towards if not the costs of the networks. If the industry wishes to present a serious case supporting doomsday price increases as a result of preserving the status quo, the industry should begin by examining indicators of strong

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<sup>121</sup> Joan Engebretson, “Qwest seeks broadband stimulus grant,” *Connected Planet*, March 25, 2010. *Notice* at para. 45.

<sup>122</sup> Comments of Free Press at 160.

<sup>123</sup> Comments of Time Warner Cable at 57.

<sup>124</sup> Comments of Free Press at 30-34.

<sup>125</sup> *Ibid* at 30.

current financial health of large broadband providers, including quarterly dividends,<sup>126</sup> stock buy back programs,<sup>127</sup> mergers and acquisitions,<sup>128</sup> and free cash flow.<sup>129</sup>

Doomsday predictions of cost increases also do not align with the industry's current assertions of falling prices. Given that these hypothetical ancillary business models are not currently in existence, the logical conclusion must be that consumers are currently "forced" to bear all network costs, and must be suffering greatly. Yet Time Warner Cable, in the same filing, repeatedly congratulates itself after claiming their broadband prices are falling.<sup>130</sup> Given the importance of these illusive business plans to future capital for investment, it is strange that Time Warner Cable's financial outlook included no mention of these business plans or the hope they offer for improvements from the present, (not very) gloomy days.<sup>131</sup>

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<sup>126</sup> For instance, AT&T is "the highest dividend yielding DOW company." *See* AT&T Inc., Q1 2009 Earnings Call Transcript, Seeking Alpha, April 22, 2009.

<sup>127</sup> *See e.g.* Comcast Corporation, "Comcast Increases Dividend 40%; Intends to Complete Current \$3.6 Billion Stock Repurchase Plan Within 36 Months," Press Release, Dec. 3, 2009.

<sup>128</sup> *See e.g.* Tim Arango, "G.E. Makes It Official – It Will Sell NBC to Comcast," *New York Times*, Dec. 3, 2009.

<sup>129</sup> *See e.g.* AT&T Inc., Q4 2009 Earnings Call Transcript, *Seeking Alpha*, Jan. 28, 2010. ("Cash flow continues to be strong, with 2009 cash from operations and free cash flow up substantially over 2008")

<sup>130</sup> Comments of Time Warner Cable at 7, 11, 27. As has become common, operators fail to note that their average revenue per user has stayed the same over time. Something they boast about to investors. *See* Comment of Free Press, In the Matter of *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, A National Broadband Plan for Our Future*, GN Docket Nos. 09-137, 09-51, p. 48-49 ("*Free Press 706 Comments*").

<sup>131</sup> *See* Time Warner Cable Inc., Q4 2009 Earnings Call Transcript, *Seeking Alpha*, Jan. 28, 2010.

In Time Warner Cable's recent quarterly call, CEO Glenn Britt was directly asked by an analyst, "Do you think you can get to a point where you are potentially charging application providers...?" He responded, "I don't know. That really is the issue that originally net neutrality was about. There are a bunch of people who would be against that."<sup>132</sup> The CEO's nonchalant dismissal of the issue strikes a strong contrast to the company's vehement policy filing. Furthermore, the CEO called the Commission's ongoing process "very healthy," with no mention about how the Commission was poised to artificially "increase[] prices for broadband services" nor any other of the company's dire predictions.<sup>133</sup>

Finally, Time Warner Cable has already implemented price increases prior to any foreclosure of these business plans.<sup>134</sup> Time Warner Cable also sought to levy additional price increases on customers by implementing a cap and meter regime that appeared to be completely divorced from actual costs.<sup>135</sup> As we demonstrate below, and repeatedly throughout our filings, the lack of competition is the looming threat for price increases and declining network investment, not the proposal by the Commission to prevent broadband operators from blackmailing websites.

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<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> See e.g. Phillip Dampier, "Time Warner Cable Announces Another Road Runner Price Increase for Some - \$4 More an Month for "Standalone" Service," *Stop the Cap!*, March 17, 2010. See also Time Warner Cable's "Standard" and "Turbo" tiers increasing \$3 between 2008 and 2009. Letter from Matthew A. Brill, Counsel to Time Warner Cable Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, In the Matter of *A National Broadband Plan for Our Future*, GN Docket No. 09-51, at 3, Table 2 (filed Oct. 29, 2009).

<sup>135</sup> See e.g. Saul Hansell, "Time Warner Cable Profits Will Grow With Broadband Caps," *New York Times Bits Blog*, April 8, 2009; Nate Anderson, "The price-gouging premiums of Time Warner Cable's data caps," *Ars Technica*, April 9, 2009.

The Commission should ignore these doomsday predictions. It is disappointing, though not unexpected, that opponents would rely on such hand waving, given the critical economic and social importance surrounding this proceeding.

**D. Despite Contradictory and Factually Inaccurate Assertions, the Broadband Market Remains a Duopoly**

Free Press has filed comments before the Commission over many years in a range of proceedings related to broadband Internet access. As a non-profit, unbiased public interest organization, our incentive is solely to assist the Commission in protecting consumers and enabling competition to create a healthy market. Along with many others, we have offered an endless stream of evidence illustrating that the market for broadband is a duopoly.<sup>136</sup> Yet the industry continues to point to their own delusions of competition where they believe it suits their best interest. Regardless of market developments, the industry will claim that rampant competition in their industry exists and that consumers are already being well served. Still, in other proceedings, where alleging competitive problems would be to their benefit, each industry regularly complains to the Commission that another is attempting to thwart competition.<sup>137</sup>

With respect to broadband services in particular, industry commenters appear to have adopted the strategy of ongoing self-contradiction. Network operators state to

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<sup>136</sup> See e.g. Comments of Free Press at 49-51.

<sup>137</sup> See e.g. Letter from William H. Johnson, Assistant General Counsel, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, In the Matter of *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, Development of Competition and Diversity/Sunset of Exclusive Contract Prohibition*, MB Docket Nos. 07-198, 07-29 (Jan. 13, 2010). See also Letter from Daniel L. Brenner, NCTA, to Marlene H. Dortch, Federal Communications Commission, In the Matter of *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245 (Nov. 14, 2008).

investors that the broadband industry is limited to two competitors. While we highlight some of the more egregious statements, listening to recent quarterly calls reveals nary a mention of the competitive threats posed by satellite, fixed wireless, Wi-Fi hot spots, mobile wireless or broadband over power line, the alleged competitors creating an effective broadband market.

In particular, despite industry arguments to the Commission (but not their promises to investors), mobile wireless, the industry's current favorite shadow competitor, shows no indication of becoming a substitute. Verizon tells the Commission "the roll-out of 4G will provide a competitive option to wireline broadband for many consumers."<sup>138</sup> Meanwhile, eight days before those comments were submitted, Verizon's CEO told investors "[i]n the early years, [DSL] is not substitutable [with wireless broadband]; it's sort of additive. Five to six years out, there's going to be some substitutability."<sup>139</sup> And even that prediction is questionable.<sup>140</sup> While these statements

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<sup>138</sup> Comments of Verizon & Verizon Wireless at 30. Ironically, Verizon recently filed a CD with the Commission to demonstrate the "vigorous competition among broadband Internet access service providers." The CD contained examples of advertising, which Verizon admits demonstrates "the head-to-head rivalry between telephone companies and cable operators." See Ex Parte Letter from Brian Rice, Executive Director, Federal Regulatory Affairs, Verizon to Marlene H. Dortch, Federal Communications Commission, In the Matter of *Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191, WC Docket 07-52 (Jan. 28, 2010).

<sup>139</sup> Ed Gubbins, "Verizon fights for 40% FiOS penetration, two-day deployment," *Connected Planet*, Jan. 6, 2010.

<sup>140</sup> While in five to six years wireless may be able to accomplish the speeds consumers expect today, it is widely assumed that consumer's expectations for residential broadband speed will be far higher. Indeed, when attempting to convince the Commission not to apply Net Neutrality rules to wireless, Verizon readily admits that "[a]lthough 4G wireless technologies, such as LTE and Wi-MAX, will substantially improve those speeds, they will still lag behind the speeds available using next-generation wireline networks." See Comments of Verizon and Verizon Wireless, In the Matter of *A National Broadband Plan for Our Future*, GN Docket No. 09-51, p. 105.

illustrate double-speak admirably, *neither* accounts for Verizon telling the Commission for many years that “3G mobile wireless” was a competitor to wireline broadband.<sup>141</sup>

Wireless provider Clearwire similarly does not stand as a true competitor to broadband services, given its many corporate ties. Qwest claims that it is “obvious” that WiMax provider, Clearwire, “is a substitute for current wired broadband services.”<sup>142</sup> First, it is worth noting that Qwest has recently announced a fiber backhaul program, which will primarily benefit those wireless operators without their own backhaul networks (like Clearwire).<sup>143</sup> The result of such a move is to prevent Clearwire from being a complete competitor to Qwest, being dependent on Qwest’s broadband services to provide end-user offerings. Second, Clearwire has stated that they are focused on their wholesale business, which includes Comcast and Time Warner Cable.<sup>144</sup> This is due to the wholesalers “existing combined base of over 100 million users.”<sup>145</sup> Indeed, Comcast recently noted the wireless product they offer through Clearwire “is sold in conjunction

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<sup>141</sup> See e.g. Comments of Verizon, In the Matter of *Availability of Advanced Telecommunications Capability in the United States*, GN Docket No. 04-54, p. 13; Comments of Verizon and Verizon Wireless, In the Matter of *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, p. 1.

<sup>142</sup> Comments of Qwest Communications International Inc at Appendix, p. 16.

<sup>143</sup> Kevin Fitchard, “4G World: Qwest investing in fiber to cell site,” *Connected Planet*, Sept. 16, 2009.

<sup>144</sup> “As I mentioned on our last earnings call our wholesale partners comprise the largest channel for us to access customers, representing an existing combined base of over 100 million users.” See Clearwire Corporation, Q4 2009 Earnings Call Transcript, *Seeking Alpha*, Feb. 24, 2010.

<sup>145</sup> *Ibid.*

with our high speed data products.”<sup>146</sup> Similarly, when asked by financial analysts about their wireless product, Time Warner Cable’s executive responded, “whether it will be possibly cannibalistic, we don’t think so...we actually think they will be complementary.”<sup>147</sup> Cox, which intends to build its own LTE network, has a similar view.<sup>148</sup> Many wireless offerings are thus bound to wireline broadband offerings from local cable and phone companies, rendering these offerings extremely unlikely to become products that compete with broadband revenues from the same companies’ wireline networks.

The Omnibus Broadband Initiative’s (OBI) research shed further light on the market for broadband Internet access services. Specifically, the National Broadband Plan (“the Plan”) found that “approximately 96% of the population has at most two wireline

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<sup>146</sup> They went on to state that this “makes a lot of sense for the consumer”. See Comcast Corporation, Q4 2009 Earnings Call Transcript, Feb. 3, 2010.

<sup>147</sup> A more complete transcription of this response provides further insight:

Now, whether it will be possibly cannibalistic, we don’t think so. Remember back earlier in our conversation today, we already saw consumers leaning towards the higher end of the speed tiers. So net adds were coming in on the much higher end of the speed tiers, either turbo, 70% of adds are turbo or I think there will be interest in DOCSIS 3.0. So we actually think they will be complementary. So in the home people are going to want these blazing fast speeds that cannot be delivered wirelessly. Now our wireless product has some pretty attractive speeds as well, some of the fastest that are out there. 6 down. But we think it will be complementary. We don’t think of wireless as an incremental product bundle, we actually think of it as an extension of the existing products. It turns Roadrunner into Roadrunner mobile. And we are gonna sell it as a bundle and an extension of the product set. We don’t think its gonna be cannibalistic. We think it will be incremental.

Remarks of Landell Hobbs, Chief Operating Officer, Time Warner Cable, Morgan Stanley Technology, Media & Telecom Conference, March 1, 2010 (comments made at approximately one hour and 16 minutes).

<sup>148</sup> Mike Dano, “Cox details LTE tests, but highlights limitations,” *Fierce Wireless*, Feb. 18, 2010 (“Stephen Bye, Cox’s vice president of wireless services, described wireless as “complementary” to the MSO’s wired network and explained that LTE will never handle the traffic loads that fully wired Internet users generate”).

providers.”<sup>149</sup> Furthermore, the OBI estimate that only 2 percent of homes have wireless home broadband, an estimate that includes fixed wireless, mobile wireless and satellite service.<sup>150</sup>

As to the outlook for competition in the future, the Plan concluded, “in areas that include 75% of the population, consumers will likely have only one service provider (cable companies DOCSIS 3.0-enabled infrastructure) that can offer very high peak download speeds.”<sup>151</sup> We made a similar observation in our initial comments.<sup>152</sup> Consumers are increasingly subscribing to higher speeds,<sup>153</sup> and these consumers are disproportionately signing up for cable modem service.<sup>154</sup> This trend leads to many consumers having just a *single option* for the speeds they seek. The result of only one option is even more reductions in investment and service upgrades. An executive at Time Warner Cable recently observed: “The reason we are being surgical is that, by and large, I compete against DSL in my footprint. And I’m very successful against DSL. My

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<sup>149</sup> Federal Communications Commission, *Connecting America: The National Broadband Plan*, Omnibus Broadband Initiative, March 16, 2010, p. 37 (“*National Broadband Plan*”).

<sup>150</sup> This study went on to note “Although some may be using their mobile broadband connection as their principle home access means, those saying they use mobile broadband were as likely as the average to say they use DSL, cable modem service and other wireline means such as fiber. As with mobile Internet use, mobile broadband is mainly a supplementary broadband access pathway.” John Horrigan, “Broadband Adoption and Use in America,” OBI Working Paper Series No. 1, Federal Communications Commission, p. 15, 24.

<sup>151</sup> *National Broadband Plan* at 42.

<sup>152</sup> Comments of Free Press at 53.

<sup>153</sup> See e.g. Time Warner Cable, Q4 2009 Earnings Call Transcript, *Seeking Alpha*, Jan. 28, 2010 (“Our residential HSD subscriber mix continues to shift towards our premium tier products with Turbo accounting for almost 70% of our residential net adds in the quarter”).

<sup>154</sup> See e.g. Ed Gubbins, “Comcast broadband growth beats all Bells combined,” *Connected Planet*, Nov. 4, 2009.

existing Roadrunner product is a better fundamental product when I am competing against DSL and taking share. So there I'm successful and product is working fine."<sup>155</sup> Comcast, who has in large part already made these upgrades, recently told investors "[d]eploying wideband [DOCSIS 3.0] gives us significant capacity to deliver higher Internet speeds that continue to differentiate our broadband product. It provides us an additional speed advantage, particularly in the 85% of the country without fiber based competition."<sup>156</sup> Being the only high-speed option also permits cable operators to charge consumers in excess of \$100 per month for higher speeds,<sup>157</sup> even though the upgrade costs to provide these speeds for a pre-existing plant are minimal.<sup>158</sup>

These potentials for abuse are translating in practice into higher prices. As Commissioner Clyburn recently stated "An apparent lack of meaningful competition in the broadband ecosystem has consumers in the crosshairs, giving the handful of providers the power to raise rates - even on those who can least afford it –seemingly at will."<sup>159</sup> A rash of rate increases have hit consumers in recent months.<sup>160</sup> They have come from both

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<sup>155</sup> Remarks of Landell Hobbs, Chief Operating Officer, Time Warner Cable, Morgan Stanley Technology, Media & Telecom Conference, March 1, 2010 (comments made at approximately one hour and 26 minutes).

<sup>156</sup> Comcast Corporation, Q4 2009 Earnings Call Transcript, *Seeking Alpha*, Jan. 28, 2010.

<sup>157</sup> *Free Press 706 Comments* at 51.

<sup>158</sup> Comcast recently stated their upgrade to DOCSIS 3.0 would cost \$500 million. Comcast passes 51.233 million homes. This means the cost per home passed is a mere \$9.76. This figure aligns with other public estimates. *See* Comcast Corporation, Trending Schedule, Fourth Quarter 2009. *See also* Jeff Baumgartner, "Charter Talks Docsis Costs," *Light Reading*, Sept. 11, 2008.

<sup>159</sup> Statement of Commissioner Mignon L. Clyburn, In the Matter of *A National Broadband Plan for Our Future*, GN Docket No. 09-51, March 16, 2010.

<sup>160</sup> This is in stark contrast to the assertions of network operators. For instance, CenturyLink states, "Today's Internet broadband access services are cheap" and "costs are artificially low" Comments of CenturyLink at 12.

phone and cable companies.<sup>161</sup> Meanwhile, those with networks capable of higher speeds say they aren't focusing on reducing price at all<sup>162</sup> or that they can raise rates whenever they like.<sup>163</sup> In Comcast's recent quarterly call, a financial analyst noted that "in Europe we're seeing some operators use DOCSIS 3.0 to not really price it at a massive premium, but use it as a strategy to gain more share in broadband" and inquired whether Comcast had similar plans.<sup>164</sup> Comcast's CEO responded "I would not anticipate a major move in terms of collapsing prices or anything like that."<sup>165</sup> Clearly, the current level of competition is not providing the needed market discipline. As Commissioner Clyburn notes, "[w]hen prices rise across the industry, and where there are only a limited number of players in the game, we have to ask ourselves whether there is any meaningful competition in the marketplace."<sup>166</sup>

Consumers find themselves charged too much for too little, facing a limited choice between their local phone and cable company. Meanwhile, the role broadband Internet access in our culture continues to migrate from a luxury to a necessity. The market power that exists due to the present duopoly, with a looming monopoly of high-

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<sup>161</sup> See e.g. Ed Gubbins, "Broadband price hikes to overshadow video, analyst says," *Connected Planet*, Jan. 4, 2010; Todd Spangler, "AT&T Hiking U-Verse TV, Internet, Voice Rates," *Multichannel News*, Dec. 21, 2009; Karl Bode, "AT&T Increasing DSL Prices," *DSL Reports*, March 4, 2010; Todd Spangler, "Comcast Hiking Cable-Modem Fee to \$5 From \$3 Monthly Nationwide," Sept. 15, 2009; Karl Bode, "New Comcast TV, Broadband, Phone Price Hikes April First," *DSL Reports*, March 9, 2010.

<sup>162</sup> See *Free Press 706 Comments* at 48-52.

<sup>163</sup> Remarks of Landell Hobbs, Chief Operating Officer, Time Warner Cable, Morgan Stanley Technology, Media & Telecom Conference, March 1, 2010 (comments made at approximately one hour and 4 minutes).

<sup>164</sup> Comcast Corporation, Q4 2009 Earnings Call Transcript, *Seeking Alpha*, Feb. 3, 2010.

<sup>165</sup> *Ibid.*

<sup>166</sup> Matthew Lasar, "FCC Commissioner rips ISPs on broadband prices, competition," *Ars Technica*, March 11, 2010.

speed service on the horizon, raises a host of issues, not the least of which is exacerbating the concerns at issue in this proceeding. It is unfortunate that industry incumbents refuse to acknowledge the existence of a concentrated market for broadband, and work constructively with the Commission to achieve meaningful and efficient solutions, but instead attempt to revive debate about a topic that is well settled.

**E. A Case Study in Why You Should Follow The Footnotes: The Entire Premise of the ‘National Organizations’ Assertion that Paid Prioritization Will Result in the Lowering of Retail Broadband Prices is Based on Old Paper that Began With the Single, Unsupported Assumption that Net Neutrality Will Raise Prices.**

We encourage the Commission to always follow the footnotes in comments, especially those that are cited as ‘evidence’ to support claims central to the policy question at hand. Case in point in the instant proceeding is the claim made by the ‘National Organizations’ that non-discrimination rules will result in higher prices for retail broadband services than would otherwise be charged if paid prioritization were permitted. Specifically, the National Organizations said, “studies show that allowing broadband providers to charge for enhanced or prioritized services would result in significant discounts in the price of broadband for consumers, with some estimates showing that end-users would save \$5 to \$10 per month.”

In our initial comments we noted several important aspects to this debate routinely ignored by supporters of a discriminatory Internet: that paid prioritization for third parties is unlikely to be a substantial revenue generator and that the ISPs opposition to openness were driven more by the desire to protect legacy vertical voice and video market positions; and that all available historical evidence suggests that if any such additional revenue streams were developed, that the market structure is such that these revenues would not be returned to customers in the form of price reductions. However,

the National Organizations seem to believe there are “studies” that specifically show paid prioritization would save end-users “\$5 to \$10 per month” -- some 15 to 25 percent of the current average monthly price. If this were true, it would be stunning, as such a revenue stream would absolutely dwarf the size of other proxy-priority deliver markets like local caching.

But, if one follows the footnotes, the shell game is quickly revealed. This finding is nothing more than a mere initial assumption that such savings would result. In making this claim, the National Organizations cites collections of essays edited by industry-funded “American Consumer Institute.”<sup>167</sup> But this citation is not the original source of this \$5 to \$10 savings estimate. ACI in turn cites a September 2006 paper by Bell-company funded economist Gregory Sidak.<sup>168</sup> In Sidak’s paper, he doesn’t “find” empirically such as savings -- *he assumes it at the beginning!* This initial assumption was based on this reasoning alone: “Such a subsidy is small in comparison to Google’s proposal for a 100 percent subsidy of the end-user fee for access to its broadband wireless network in San Francisco.” Thus, Sidak assumes that because Google had thoughts in 2005 (since abandoned) about putting up a free 1Mbps ad-laden Wi-Fi network in San Francisco, that the market for paid-prioritization (something completely different) would result in discounts of 14 to 28 percent for customers of ISPs who sell prioritization services.

It is stunning how flawed such a line of reasoning is, but it is even more stunning that anyone would try to use such far-flung reasoning to convince the Commission that

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<sup>167</sup> See Comments of the National Organizations, at note 66.

<sup>168</sup> Gregory Sidak, “A Consumer-Welfare Approach to Network Neutrality Regulation of the Internet,” *Journal of Competition Law and Economics*, Vol. 2, No. 3. September 2006.

paid prioritization would harm consumers, particularly minority consumers. Much of the National Organization's comments are predicated on this completely flawed assumption, and should be viewed through the lens of the supposed facts used to support their arguments of potential harms.

## **II. Conclusion**

With this proceeding, the Commission aims to establish firm and strict nondiscriminatory interconnection obligations on broadband Internet access service providers. Such obligations merely preserve the successful status quo of openness in the face of an increasingly consolidated ISP industry that has plainly stated its intentions to profit from discrimination.

We strongly endorse the Commission's efforts, and have in this proceeding along with others, offered evidence that these rules will promote efficient investment, promote innovation, create jobs, and promote competition. The case for discrimination offered by industry and their financial beneficiaries has been shown to be nothing more than empty rhetoric and fact-free scare tactics. We urge the Commission to reject this cynical approach and move quickly to preserve and promote the open Internet.

Respectfully Submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
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Adam Lynn  
Policy Coordinator

M. Chris Riley  
Policy Counsel

S. Derek Turner  
Research Director

April 26, 2010

Free Press  
501 Third Street, NW  
Suite 875  
Washington, DC 2001  
202-265-1490