

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

In the Matter of)
)
Broadband Industry Practices) WC Docket No. 07-52

REPLY COMMENTS OF THE



NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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TABLE OF CONTENTS

INTRODUCTION AND SUMMARY	1
I. THE “NET NEUTRALITY” PROPONENTS FAIL TO ACKNOWLEDGE THE SUBSTANTIAL ADVANCES THAT HAVE BEEN MADE IN THE PAST DECADE	5
II. “NET NEUTRALITY” REGULATION WOULD HINDER THE ABILITY OF BROADBAND PROVIDERS TO MEET CONSUMERS’ NEEDS, WITHOUT PRODUCING ANY TANGIBLE BENEFIT	9
A. “Net Neutrality” Regulation Would Discourage Investment	9
B. “Net Neutrality” Regulation Would Preclude Beneficial Contractual Arrangements	12
C. “Net Neutrality” Regulation Would Not Promote Innovation.....	16
III. ACCEPTABLE USE POLICIES ARE A NECESSARY AND IMPORTANT TOOL FOR MANAGING BROADBAND NETWORKS.....	18
CONCLUSION.....	22

Commission's efforts to understand the workings of the broadband marketplace have been enhanced significantly by a recent report from staff of the Federal Trade Commission (FTC), which also is examining the broadband market and, in particular, the issue of "network neutrality."³ The FTC Staff Report, which was prepared by over a dozen staff members and runs over 160 pages long, is an authoritative treatment of these issues that should serve the Commission well as it begins its own inquiry.

The FTC Staff Report confirms the wisdom of the Commission's deregulatory policy. As the FTC Staff concludes, "[b]ased on what we have learned through our examination of broadband connectivity issues and our experience with antitrust and consumer protection issues more generally, we recommend that policy makers proceed with caution in evaluating proposals to enact regulation in the area of broadband Internet access."⁴

Absolutely nothing in the record before the Commission in this proceeding contradicts the conclusions in the FTC Staff Report or provides any reason to depart from the cautious approach to regulation that the Commission has followed. The FTC found that the proponents of "net neutrality" failed to provide any credible instances of discriminatory conduct by broadband providers.⁵ Given another opportunity in this proceeding to build a factual record, proponents of "network neutrality" regulation once again provide no meaningful evidence that broadband

³ Broadband Connectivity Competition Policy, FTC Staff Report (June 2007) (FTC Staff Report).

⁴ *Id.* at 10 (emphasis added).

⁵ *Id.* at 122 ("[T]here is little evidence to date of consumer harm from anticompetitive practices by [broadband providers] or any other network operators; the allegations of anticompetitive conduct focus mainly on effects that may occur if certain actions, such as exclusive agreements or vertical integration, are undertaken in the future."); *id.* at 160 ("[T]o date we are unaware of any significant market failure or demonstrated consumer harm from conduct by broadband providers.").

providers are blocking or degrading traffic to particular web sites or that they are interfering in any way with any type of application, service or content.⁶

In the absence of any tangible evidence of harm in the marketplace, they instead offer up overheated rhetoric about the broadband “crisis” in America⁷ and speculative theories that purport to demonstrate the need for endless government regulation to protect consumers and content providers, *regardless of the level of broadband competition*.⁸ But none of these claims can be reconciled with the reality of the vibrant marketplace that has developed for broadband services. As documented by NCTA and numerous other parties, hundreds of billions of dollars have been invested in broadband networks, without any regulatory guarantee of a return on that investment.⁹ As a result of these investments, broadband service is being made available to more

⁶ Some parties cite to a paper that purports to provide evidence of discriminatory conduct by broadband providers. *See, e.g.*, Comments of the National Association of Telecommunications Officers and Advisors, *et.al.* at 8, n.17, (NATOA Comments), *citing* John Windhausen, *Good Fences Make Bad Broadband: Preserving an Open Internet through Net Neutrality*, Public Knowledge (Feb. 6, 2006), available at <http://www.publicknowledge.org/pdf/pk-net-neutrality-whitep-20060206.pdf>. Closer inspection reveals that these examples of supposedly discriminatory conduct are largely irrelevant and certainly provide no basis for adopting a comprehensive regulatory scheme. Most of the allegations, including the only two involving cable operators, involve acceptable use provisions in subscriber agreements. We address this topic in Section III below. The only other allegations involve the Madison River case, a speculative concern about changes to the system used for routing toll-free telephone calls, two examples of network equipment that is capable of blocking Skype calls, and three blocking incidents from other countries.

⁷ Consumer Federation of America, *et al.* Comments at 69 (“Our broadband problem is reaching crisis proportions.”) (CFA Comments); Open Internet Coalition Comments at 1 (“The current broadband situation in this country is unacceptable.”).

⁸ Open Internet Coalition Comments at 8-9 (“facilities competition in the market for broadband Internet access is inherently limited quantitatively, and may never be a sufficient check on the power of network operators to limit consumer choice.”) (emphasis added); Google Comments at 16 (“competition may even increase the likelihood that existing broadband providers will exercise market power to exclude or discriminate against competitors”) (emphasis in original).

⁹ NCTA Comments at 1; Verizon Comments at 9; *see also* Comments of the National Cable & Telecommunications Association, GN Docket No. 07-45 (filed May 16, 2007) at 6-7 (NCTA Section 706 Comments).

people,¹⁰ from more providers,¹¹ at higher speeds,¹² and lower prices¹³ than ever before. As the FTC concluded, “there is evidence that [the market] is moving in the right direction.”¹⁴

In addition to debunking claims of a broadband deployment crisis, NCTA and others have demonstrated that any fears about the ability of application and content providers to survive in a deregulated broadband marketplace are divorced from reality.¹⁵ Despite the dire predictions of the “net neutrality” proponents, application and content providers unquestionably have flourished in the broadband market. As noted by AT&T, companies such as YouTube, Vonage, MySpace, and Skype have grown from obscure start-up companies to household names notwithstanding (or because of) the Commission’s deregulatory policy for broadband Internet access. And Google, which continues to advocate regulation of others, has thrived in the absence of regulation and is now one of the biggest and most respected companies in the world.¹⁶

In the face of this phenomenal growth in the broadband market, and the utter absence of evidence that harmful discriminatory conduct has occurred (or will occur), there is no reason for the Commission to turn the clock back and attempt to achieve through regulation what the market already is providing. The record compiled by NCTA and others makes clear that

¹⁰ NCTA Comments at 2; Verizon Comments at 9; *see also* FTC Staff Report at 101 (“Broadband deployment and penetration both have increased dramatically since 2000”).

¹¹ NCTA Comments at 2; Verizon Comments at 7-8; *see also* FTC Staff Report at 105 (“[T]here are national trends that appear to show an increasing number of competitive alternatives across all markets.”); *see also* NCTA Section 706 Comments at 11-14.

¹² NCTA Comments at 26-27; Verizon Comments at 6-7.

¹³ National Association of State Utility Consumer Advocates (NASUCA) Comments at 21; Verizon Comments at 5-6; *see also* FTC Staff Report at 101.

¹⁴ FTC Staff Report at 155-56 (“Specifically, there is evidence at least on a national scale that: (1) consumer demand for broadband is growing quickly; (2) access speeds are increasing; (3) prices (particularly speed-adjusted or quality-adjusted prices) are falling; and (4) new entrants, deploying Wi-Fi, WiMAX, and other broadband technologies, are poised to challenge the incumbent cable and telephone companies.”).

¹⁵ NCTA Comments at 7; AT&T Comments at 2, 21.

¹⁶ AT&T Comments at 2.

regulation will discourage investment and interfere with the ability of broadband providers to meet the needs of consumers.¹⁷ As the FTC Staff Report warned, “[i]ndustry-wide regulatory schemes – particularly those imposing general, one-size-fits-all restraints on business conduct – may well have adverse effects on consumer welfare, despite the good intentions of their proponents. Even if regulation does not have adverse effects on consumer welfare in the short term, it may nonetheless be welfare-reducing in the long term, particularly in terms of product and service innovation.”¹⁸ The bottom line, as confirmed by the authoritative analysis of the FTC Staff Report, is that the Commission has embarked on the right path for American consumers and there is no reason for it to change course now.

I. THE “NET NEUTRALITY” PROPONENTS FAIL TO ACKNOWLEDGE THE SUBSTANTIAL ADVANCES THAT HAVE BEEN MADE IN THE PAST DECADE

Over the last five years, the Commission has established a deregulatory policy with respect to providers of broadband Internet access. Starting with the *Cable Modem Order* in 2002, the Commission has issued a series of orders finding that Title II common carrier regulation does not apply to the provision of broadband Internet access service.¹⁹ In these decisions, the Commission consistently has articulated a policy that relies on the marketplace,

¹⁷ NCTA Comments at 5; Time Warner Comments at 13-14; U.S Chamber of Commerce Comments at 5-6 (“[N]ow is not the time to introduce a policy that would inflict regulatory uncertainty, stifle investment, slow the development of new technologies, and inhibit U.S. economic development and competitiveness.”).

¹⁸ FTC Staff Report at 11.

¹⁹ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (treating cable modem service as a Title I information service); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Order*) (treating DSL service as a Title I information service); *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006) (treating broadband over power line (BPL) as a Title I information service); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (treating wireless broadband Internet access as a Title I information service).

rather than regulation, to meet the needs of consumers. As the Commission stated, “we seek to adopt a comprehensive policy that ensures, consistent with the Act in general and section 706 specifically, that broadband Internet access services are available to all Americans and that undue regulation does not constrain incentives to invest in and deploy the infrastructure needed to deliver [these] services.”²⁰

According to the proponents of “net neutrality,” the Commission’s deregulatory approach has been an abject failure. First, “a sector that was vital to innovation, adaptation and adoption in the digital information age, Internet Service Providers, was devastated by the decision to allow cable operators to discriminate and exclude.”²¹ Then, in the absence of regulation, the “cozy duopoly” of cable operators and telephone companies “have dribbled out capacity in small increments at high prices.”²² As a result, “[t]hree decades of global leadership have been transformed into a decade of decline by the abandonment of the commitment to open communications networks.”²³

Fortunately, this harrowing tale of regulatory failure is pure fiction that completely misrepresents the developments of the last decade. As NCTA and others explained in their initial comments, the Commission’s deregulatory policies have produced massive investment in broadband facilities and created an environment that has enabled application providers to

²⁰ *Wireline Broadband Order*, 20 FCC Rcd at 14878, ¶ 45.

²¹ CFA Comments at 11. It appears that the 1990’s, when dial-up access was the height of technology, were the glory days of the Internet for many of the “net neutrality” advocates. *Id.* at 66 (“In contrast to the dial-up Internet, which witnessed a steady flow of innovations . . . the body of potential innovators and customer care providers in the broadband market has shrunk.”); Google Comments at 6 (“With some 8,000 online ISPs competing in the dial-up market, consumer choice became the ultimate bulwark against potential discriminatory practices by the underlying telecommunications carriers.”). As we explain below, this nostalgia for the pre-broadband era is completely unwarranted.

²² CFA Comments at 11.

²³ *Id.* at 12.

flourish. Cable operators, who were never regulated under the Title II regime that applied to dial-up services, have made broadband service available to 94 percent of American households.²⁴ The penetration of those services continues to grow, as do the transmission speeds.²⁵ Telephone companies, who had lagged behind in their deployment of broadband service, are now catching up.²⁶ In sum, “[b]roadband deployment and penetration have both increased dramatically since 2000.”²⁷

Not only do the “net neutrality” proponents misrepresent the significant progress that has been made in rolling out broadband services across America, they also fail to recognize that broadband providers have strong incentives, without prodding via regulation, to make their service attractive to consumers. Because of the significant investment that is needed to provide broadband services, broadband providers have every incentive to win as many customers as possible. As a result, competition between cable operators and telephone companies is quite intense, with both sets of providers “investing heavily in their networks and competing aggressively on price and quality.”²⁸ The entry of additional facilities-based competitors – wireless and satellite, among others – will only serve to increase these trends.²⁹

Because of the competition among broadband providers, no single provider is in a position to alienate customers by denying them access to content and applications, even those

²⁴ NCTA Comments at 1.

²⁵ *Id.* at 2, 26-27; *see also* NCTA Section 706 Comments at 8, 10.

²⁶ NCTA Section 706 Comments at 10 (“Once consumer demand for cable modem service became evident, the telephone companies entered the marketplace with their own DSL service.”).

²⁷ FTC Staff Report at 101.

²⁸ Verizon Comments at 55.

²⁹ *See, e.g.*, Satellite Industry Association Comments at 4 (new satellite services “will provide increased access to a wide array of broadband services in the near future, leading to increased consumer choice and lower prices for services and equipment.”).

that compete with the provider's own services. As Verizon explains, "broadband providers have a strong market incentive to allow their customers to access all lawful content and applications available on the Internet – and to maximize the diversity of those applications and content – because doing so increases the value of the providers' networks and of the access services that they sell."³⁰ The FTC Staff Report reached a similar conclusion, finding that "as long as consumers have one or more alternatives to which they can turn, it is difficult to imagine them accepting the blockage or elimination of content that is important to them."³¹ The fact that there are no credible allegations that broadband providers have blocked or degraded service or otherwise interfered with innovation by content or application providers is ample evidence that the market is working.

In the face of all this investment and innovation, the fondness of the "net neutrality" proponents for the pre-broadband dial-up era borders on the ridiculous. While consumers may have been able to choose from among a large selection of dial-up ISPs, those ISPs all relied on the same underlying facilities and they all offered services at speeds that paled in comparison to even the slowest cable modem. Downloading text was painfully slow, and downloading video in any form was simply not an option in this environment. It was only with the incentives provided by deregulation that cable operators, and then telephone companies, were able to make the necessary investments to roll out broadband service on a wide scale. While dial-up continues to meet the needs of some consumers,³² the 64 million consumers who have switched to broadband

³⁰ Verizon Comments at 31.

³¹ FTC Staff Report at 157.

³² Pew Internet and American Life Project, Home Broadband Adoption 2007 (June 2007) at 2 ("Among adults with a home Internet connection, 70% go online using a high-speed connection, versus 23% who use dial-up."), available at http://www.pewinternet.org/pdfs/PIP_Broadband%202007.pdf.

service are testament to the fact that today's broadband world is a vast improvement over the dial-up world.³³

II. "NET NEUTRALITY" REGULATION WOULD HINDER THE ABILITY OF BROADBAND PROVIDERS TO MEET CONSUMERS' NEEDS, WITHOUT PRODUCING ANY TANGIBLE BENEFIT

Among the most significant findings in the FTC Staff Report is that regulation of broadband services could have "adverse and unintended" consequences.³⁴ The record in this proceeding confirms that conclusion. As explained below, there are numerous ways in which regulation would substantially interfere with a market that is working to meet the needs of consumers. As FTC Chairman Deborah Platt Majoras recently explained, the appropriate response from a regulator in these circumstances is "caution, caution, caution."³⁵

A. "Net Neutrality" Regulation Would Discourage Investment

One of the few points on which there is near unanimity is that consumer demand for video uploading and downloading capability will continue to increase and that substantial additional network investment will be needed if broadband providers are to continue to meet that demand.³⁶ As NCTA explained in its comments, cable operators have a long history of investing in their networks and they will continue to do so.³⁷ But network upgrades are expensive and they

³³ Federal Communications Commission, High-Speed Services for Internet Access: Status as of June 30, 2006 (Industry Analysis and Technology Division, Wireline Competition Bureau) (rel. Jan. 2007), Table 1.

³⁴ FTC Staff Report at 159.

³⁵ The FTC: Working for Consumers in the On-Line World, Keynote Address of Deborah Platt Majoras, Chairman, Federal Trade Commission, before the Federal Communications Bar Association Annual Meeting (June 27, 2007) at 13, available at <http://www.ftc.gov/speeches/majoras/070627fcba.pdf>.

³⁶ CFA Comments at 15-20 (arguing that all consumers should be able to upload and download high-quality video); Verizon Comments at 44 ("[C]ontinued large investments in network infrastructure are needed to process traffic generated by new bandwidth-intensive services like streaming video."); AT&T Comments at 76 (Recovering costs solely from subscribers "will become increasingly unsustainable as networks invest billions to accommodate the network demands imposed specifically by bandwidth-intensive applications and content that are used extensively by limited subsets of subscribers.").

³⁷ NCTA Comments at 32.

will not be undertaken unless there is an expectation that they will generate positive returns.³⁸ Consequently, broadband providers need the flexibility to consider new business models and new network management practices that may improve the business case for new network investments.³⁹

Because “net neutrality” regulation would limit the flexibility of broadband providers to pursue such options, it would discourage new investment from taking place. While some parties attempt to demonstrate that regulation actually would increase the amount of investment, their claims do not withstand scrutiny. Google, for example, asserts that “neutrality is an indispensable component to accelerating broadband deployment” and broadband providers “can make considerable money from putting improvements into the network itself, rather than merely profiting from traffic congestion.”⁴⁰ Although Google acknowledges that broadband providers have every incentive to make rational business decisions, in this case it insists that broadband providers have not done so and that they need “a change in mindset, a recognition that open markets can be hugely profitable markets.”⁴¹

The problem with Google’s analysis, like the rest of its “net neutrality” advocacy, is that it fails sufficiently to acknowledge real world considerations. The primary support Google

³⁸ As AT&T explains, analogies to the world of regulated utilities are inapt because no regulatory body is promising a guaranteed rate of return on broadband investments. Consequently, as in other competitive markets, these high-risk investments only can be made when they generate sufficient revenue for investors. AT&T Comments at 71-72; *see also* BT Americas Comments at 13-14 (“[D]eploying higher capacity access and core bandwidth to cope with increasing traffic needs is expensive, and hence there are real resource costs that need to be recouped.”).

³⁹ As John Kneuer, the head of the National Telecommunications and Information Administration, acknowledged in recent statements, the business case for additional network investment is far from certain, a view that is echoed by Wall Street analysts. *See* NCTA Comments at 31, n.74; *see also* BT Americas Comments at 14 (“The various stakeholders must be allowed to experiment with commercial models that best meet the interests of all participants in the Internet ecosystem.”).

⁴⁰ Google Comments at 4.

⁴¹ *Id.* at 30.

provides for its theory that it would be more profitable for network providers to accede to its “network neutrality” position is a reference to a University of Florida economic study.⁴² But that study is entirely theoretical; it is completely devoid of any real world numbers. The only real world example that is offered is British Telecom, the incumbent telephone company in England, which underwent structural separation of its retail and wholesale businesses.⁴³ The Commission has never required such a radical approach with respect to cable operators or wireless providers, and it has found that the costs of structural separation (between local and long distance operations) outweigh the benefits with respect to telecommunications carriers.⁴⁴ Google’s endorsement of such an extreme measure with respect to broadband providers suggests that its agenda may go well beyond adoption of nondiscrimination requirements.

In addition, Google’s theory ignores completely the considerable costs associated with a mandatory neutrality requirement. Imposing regulation on cable operators and other broadband providers that have never been subject to regulation undoubtedly would discourage new investment. As we discuss in greater detail below, compliance and litigation costs of a regulated “net neutrality” regime could be substantial for broadband providers and the uncertainty created by such a regime would have a chilling effect on potentially innovative business arrangements. As the FTC Staff Report found, “prohibitions on certain business conduct, such as vertical integration into content and applications or the offering of prioritization services by broadband

⁴² *Id.*, citing Hsing Kenneth Cheng, Subhajyoti Bandyopadhyay, and Hong Guo, *The Debate on Net Neutrality: A Policy Perspective*, University of Florida (2007).

⁴³ Google Comments at 30-31.

⁴⁴ *See, e.g., Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission’s Dominant Carrier Rules As They Apply After Section 272 Sunsets*, WC Docket No. 05-333, Memorandum Opinion and Order, 22 FCC Rcd 5207, 5213, ¶ 9 (2007) (finding that structural separation denies a company economies of scale and scope and makes it a less effective competitor).

providers, may not have immediate effects on consumer welfare, but could result in a long-term decline in investment and innovation in broadband networks.”⁴⁵

B. “Net Neutrality” Regulation Would Preclude Beneficial Contractual Arrangements

As NCTA explained in its comments, one of the most significant problems with “net neutrality” is that it is difficult to define and impossible to apply.⁴⁶ The record confirms that this is the case. There is no consensus among the various net neutrality proponents as to what problem needs to be solved, nor is there any consensus as to what type of regulation would solve it.

For example, some consumer groups continue to advocate regulation that apparently would preclude any type of discrimination in the routing of traffic.⁴⁷ Such a rule would prohibit numerous practices that plainly are beneficial to consumers, such as prioritizing latency-sensitive applications and blocking spam and other harmful traffic.⁴⁸ As AT&T demonstrates, any proposal to ban all discrimination in traffic management is “so detached from reality that it collapses of its own weight.”⁴⁹

⁴⁵ FTC Staff Report at 160. As explained by AT&T, to the extent that broadband access service becomes a “dumb pipe” service under a “net neutrality” regime, broadband providers would face all the considerable risk associated with network investments, but without the upside potential associated with product differentiation. AT&T Comments at 72.

⁴⁶ NCTA Comments at 9-19.

⁴⁷ CFA Comments at 3-4 (“[I]t is vitally important to restore the principle of nondiscrimination on open communications networks.”); *id.* at 9 (“[P]olicymakers should reconsider and reverse the decision to allow proprietary discrimination to undermine the open architecture of the digital communications platform.”).

⁴⁸ AT&T Comments at 43, 52.

⁴⁹ *Id.* at 53.

Even under the more limited forms of regulation advocated by some parties, application of a nondiscrimination requirement would be tremendously problematic for broadband providers. Google, for example, concedes that many traffic management practices are perfectly legitimate and likely to be beneficial to consumers.⁵⁰ Rather than prohibit all discriminatory practices, Google would permit prioritization of particular types of traffic, as long as all providers of that type of traffic were able to obtain prioritization on the same terms. For example, Google suggests that it would be acceptable if a broadband provider prioritized all streaming video traffic.⁵¹ Others make similar arguments, suggesting that the “net neutrality” condition agreed to by AT&T in connection with the BellSouth merger offers a workable nondiscrimination requirement.⁵²

The problem with these types of proposals is that the Internet does not lend itself to the type of line-drawing that is needed to enforce a nondiscrimination requirement. As NCTA explained, any form of nondiscrimination requirement, including the AT&T/BellSouth neutrality condition, would not give broadband providers sufficient clarity as to what is permissible and what is prohibited.⁵³ With respect to Google’s suggestion that it would be acceptable to prioritize all streaming video, for example, NCTA explained in its comments that there are numerous types of video services available on the Internet.⁵⁴ In the face of a

⁵⁰ Google Comments at 22 (“Google does not dispute that the broadband providers should have the ability to manage their networks, as well as engage in a broad array of business practices.”); *see also* NATOA Comments at 9 (“it must be acknowledged that some ‘discrimination’ by network operators is necessary for the safe and efficient functioning of their systems.”).

⁵¹ Google Comments at 22.

⁵² *Id.* at 38; Open Internet Coalition Comments at 14-15.

⁵³ NCTA Comments at 14-19.

⁵⁴ *Id.* at 18.

“nondiscrimination” requirement, any attempt to prioritize some video services undoubtedly would invite scrutiny and litigation from other types of video service providers.

Even if it were feasible to determine easily whether a particular practice is discriminatory, deciding whether that discrimination is harmful or beneficial to consumers is extremely difficult. The FTC Staff Report stated that “it is impossible to determine in the abstract whether allowing content and applications providers (or even end users) to pay broadband providers for prioritized data transmission will be beneficial or harmful to consumer welfare.”⁵⁵ Echoing that statement, AT&T explains that a nondiscrimination requirement “would inevitably produce ‘false positives’ – an antitrust term for subtly erroneous decisions that hold firms liable for engaging in types of aggressive conduct that may seem anticompetitive at first blush but, on balance, actually improve consumer welfare.”⁵⁶

As a number of parties explain, many of the “net neutrality” proposals are far more onerous than the nondiscrimination requirements applicable to regulated telecommunications carriers.⁵⁷ Under Title II, the Commission and the courts have recognized that substantial flexibility is warranted with respect to retail and wholesale services where providers face competition and do not impose charges by tariff.⁵⁸ To impose even more burdensome

⁵⁵ FTC Staff Report at 7.

⁵⁶ AT&T Comments at 84.

⁵⁷ *Id.* at 79-80, n.213.

⁵⁸ *See, e.g., Orloff v. FCC*, 352 F.3d 415, 421 (D.C. Cir. 2003) (affirming FCC decision that it was not unreasonably discriminatory for Verizon Wireless to offer more favorable terms to customers that seek concessions, *i.e.*, to engage in “haggling,” which is “a normal feature of many competitive markets” that “allows customers to get the full benefits of competition by playing competitors against each other.”); *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, WT Docket No. 01-316, Declaratory Ruling, 17 FCC Rcd 13192, 13195, ¶ 7 (“In a detariffed, deregulated environment such as this one, [wireless and long distance] carriers are free to arrange whatever compensation arrangement they like for the exchange of traffic.”).

requirements on broadband providers, some of whom have never been subject to this type of regulation, is completely unjustified.

The harm that would result from imposing a nondiscrimination requirement is significant. The record confirms that a nondiscrimination requirement would be used to second guess every decision made by a broadband provider. Between the disclosure obligations⁵⁹ and enforcement procedures⁶⁰ that have been proposed by some parties, any and all business or technical practices would be subject to challenge. Some parties even suggest that this intrusive regime should extend to government review of equipment and software purchases.⁶¹ Such a requirement would create a significant drain on resources and it would substantially limit the willingness of parties to even discuss business arrangements that might be beneficial to consumers. Given the complete absence of evidence of any “market failure or demonstrated consumer harm . . . policy makers should be wary of enacting regulation solely to prevent prospective harm to consumer welfare, particularly given the indeterminate effects on such welfare of potential conduct by broadband providers.”⁶²

⁵⁹ Open Internet Coalition Comments at 13 (proposing semi-annual reporting of network management practices and complaints); Google Comments at 34-35 (proposing semi-annual reporting requirements); Center for Democracy and Technology (CDT) Comments, Appendix (listing dozens of practices that may involve differential treatment and therefore require further investigation by regulators).

⁶⁰ Google Comments at 40-42.

⁶¹ CDT, for example, suggests that the Commission review not just network management *practices*, but also network management *capabilities*. See CDT Comments at 7 (“In sum, current prioritization or discrimination practices in the broadband marketplace may not tell the full story. CDT believes it could be useful to focus as well on *what capabilities are being built into modern broadband networks*; for example, are new routers offering new functions for prioritizing, classifying, or inspecting network traffic.”) (emphasis in original).

⁶² FTC Staff Report at 160.

C. “Net Neutrality” Regulation Would Not Promote Innovation

Many of the “net neutrality” proponents argue that nondiscrimination requirements are needed so that innovation at the “edge” of the network is not hampered.⁶³ Significantly, none of these parties provide a single example of any cable operators interfering in any way with innovation by any content, application, or service provider. Indeed, it is abundantly clear that innovation at the “edge” is flourishing and that the broadband investments that have been made under the Commission’s deregulatory policies have promoted that innovation.⁶⁴

Not only do the “net neutrality” advocates fail to explain how regulation could lead to more innovation, they also fail to address concerns that it will undermine innovation. As the FTC Staff concluded, “even the most carefully considered legislation is likely to have unforeseen effects. In the broadband Internet context, regulation that nominally seeks to protect innovation in content and applications . . . actually could erect barriers to new content and applications that require higher quality data transmission.”⁶⁵ For example, while many “net neutrality” proponents concede that network management practices are legitimate and serve the needs of consumers, they fail to recognize that the regulation they propose would make it more difficult

⁶³ Google Comments at 3-4; Open Internet Coalition Comments at 4-5.

⁶⁴ Furthermore, as explained by AT&T, “edge” providers such as Google and Akamai increasingly are building extensive fiber-based IP networks that are just as important to the operation of the Internet as the access networks of the major broadband providers. AT&T Comments at 15-20. As NCTA and AT&T both argued, to the extent the Commission is considering regulation of access networks, it also should be considering regulation of other Internet infrastructure providers. *See* NCTA Comments at 21; AT&T Comments at 90 (“Our central point is that the Commission could not responsibly consider imposing ‘nondiscrimination’ obligations on access or backbone networks but not on companies like Google and many others that exert equivalent or greater structural influences on the capabilities and performance of the Internet.”).

⁶⁵ FTC Staff Report at 160; *see also* BT Americas Comments at 13 (“The problem with freezing the Internet as only a ‘best efforts’ network is that it does not allow the Internet to evolve into the next generation of Internet able to fully meet the demands of prioritized service or quality of service that are already demanded by users of today’s Internet applications and content.”).

for broadband providers to implement these beneficial practices.⁶⁶ No matter how artfully drafted, the purpose of net neutrality regulation is to prohibit or restrict the use of certain practices by broadband providers. But as AT&T explains, “[n]etwork engineers need all the tools in their toolbox to satisfy consumer demands for secure and high-quality services in this increasingly convergent environment. The government can meddle with the contents of that toolbox only at the peril of the consumers those engineers wish to serve.”⁶⁷

To the extent that regulation would imperil the ability of broadband providers to limit network congestion, consumers and content providers undoubtedly would be harmed. As NCTA explained in its comments, congestion on broadband networks is a constant source of concern because they all rely to some degree on facilities that are shared among many customers. If broadband providers are denied the ability to manage traffic on their networks, high-bandwidth uses, such as video, will not perform as well as they otherwise might, and even low-bandwidth uses, such as e-mail, may be degraded. Conversely, if broadband providers are able to manage their networks in a manner that ensures the quality of service needed for high-bandwidth services, it is more likely that innovation will take place for applications and services that depend on that quality of service. As the FTC Staff Report concluded, “[p]rioritization may thus improve [broadband providers’] profitability and enable greater investment and innovation in network quality and expansion. Prioritization also could improve certain content and applications providers’ profitability, facilitating growth and innovation by such providers.”⁶⁸

⁶⁶ For example, content providers express concern that “net neutrality” regulation would interfere with the development of tools that may be useful in dealing with content piracy. *See* NBC Universal Comments at 8 (supporting use of bandwidth management tools); MPAA Comments at 5-6 (expressing concern that regulation not inhibit development and deployment of technologies to better identify traffic).

⁶⁷ AT&T Comments at 5.

⁶⁸ FTC Staff Report at 96.

III. ACCEPTABLE USE POLICIES ARE A NECESSARY AND IMPORTANT TOOL FOR MANAGING BROADBAND NETWORKS

Cable operators must employ a variety of measures to reduce congestion on their networks, so that consumers can reap the many benefits broadband has to offer. For example, as NCTA explained in its comments, cable operators employ acceptable use policies to help anticipate traffic patterns and periods of peak demand.⁶⁹ The comments of certain groups take issue with acceptable use policies, asserting that they “not only place severe restrictions on customer usage, but assert a disconcerting level of control over their customer’s online service.”⁷⁰ They criticize the policies put in place by a number of broadband providers, including Comcast and Time Warner Cable.

These complaints miss the mark. The subscriber agreements used by broadband providers set forth the particulars of the service that is being provided, including the customer’s obligation to use the service in the manner in which it is intended to be used. Given the shared nature of broadband networks, it would be irresponsible for a broadband provider *not* to take steps to monitor the traffic on its network and reserve the ability to address subscriber conduct that is harmful to the network or to the shared services it provides. Yet these commenters apparently would have the Commission strip broadband providers of all control over networks they have spent billions of dollars to construct. Even apart from the devastating impact on investment incentives that would result from such a policy, it would lead to clogged networks that degrade the user experience and leave consumers vulnerable to frequent service outages.

⁶⁹ NCTA Comments at 33.

⁷⁰ CFA Comments at 96; Comments of Data Foundry, Attachment A (asserting that cable operators’ terms of service violate the Commission’s *Broadband Policy Statement*).

While these commenters fault broadband providers for retaining the right to manage Internet transmissions or terminate a subscriber's account, there can be no credible argument that network owners should stand by idly in the face of viruses, worms, denial-of-service attacks, spam, or other "malware." Moreover, a small minority of subscribers may consume so much bandwidth that the ensuing congestion, if unmitigated, may significantly impair the ability of others to surf the web, check their e-mail, upload photos, or otherwise enjoy the benefits of their broadband service. A broadband provider must retain flexibility to respond to such excessive consumption, congestion and service degradation, particularly in extreme cases.⁷¹

Cable operators' reservation of rights to address uses of their networks is entirely consistent with the Commission's *Broadband Policy Statement*. That document expressly states that consumers' entitlements to access Internet content and use online applications and services are subject to "reasonable network management" by broadband providers.⁷² Chairman Martin likewise observed that consumers' ability to access Internet content is "[s]ubject, of course, to the bandwidth limits and quality of service terms of the particular Internet access service plan that they have chosen to purchase."⁷³

⁷¹ See, e.g., Alfred E. Kahn, *Network Neutrality*, AEI-Brookings Joint Center for Regulatory Studies 4 (Mar. 2007) ("The only way to avoid unacceptable congestion and degradation of service is to give operators the ability to manage traffic on their networks, expediting some data (phone calls, streaming video, or remote medical monitoring, diagnoses and treatment) over less time-sensitive data (such as ordinary e-mail)."); David Farber *et al.*, *Hold Off On Net Neutrality*, WASH. POST at A19 (Jan. 19, 2007) ("When traffic surges beyond the ability of the network to carry it, something is going to be delayed. When choosing what gets delayed, it makes sense to allow a network to favor traffic from, say, a patient's heart monitor over traffic delivering a music download.").

⁷² *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Policy Statement, 20 FCC Rcd 14986, 14988, ¶ 5 n.15 (2005) (*Broadband Policy Statement*).

⁷³ FCC News Release, *Chairman Kevin J. Martin Comments on Commission Policy Statement*, n.1 (Aug. 5, 2005).

A broad array of commenters agree that, far from compromising the vibrancy of the Internet, reasonable network management is essential to its preservation. Indeed, many parties that *support* “net neutrality” regulation recognize the folly of seeking to prohibit network management through acceptable use policies. For example, state and local government organizations that favor a “nondiscrimination” mandate readily concede that “some ‘discrimination’ by network operators is necessary for the safe and efficient functioning of their systems.”⁷⁴ Similarly, although Google argues for the imposition of common carrier regulation on broadband providers, it “does not dispute that the broadband providers should have the ability to manage their networks” or that “[m]ost known network management techniques will create few if any competitive and discrimination issues.”⁷⁵ Google could hardly argue otherwise, as its terms of service contain some of the same types of provisions that cable operators include in their subscriber agreements.⁷⁶ While NCTA emphatically disagrees with these parties regarding the wisdom of regulating the Internet, the key point is that there is broad recognition even among

⁷⁴ NATOA Comments at 9; *see also id.* at 7 (“This ability to play ‘traffic cop’ helps the network ensure that a few users do not slow service for others.”).

⁷⁵ Google Comments at 22.

⁷⁶ Google’s Terms of Service are available at <http://www.google.com/accounts/TOS>. Below are some representative provisions:

4.5 You acknowledge and agree that while Google may not currently have set a fixed upper limit on the number of transmissions you may send or receive through the Services or on the amount of storage space used for the provision of any Service, such fixed upper limits may be set by Google at any time, at Google’s discretion.

5.3 You agree not to access (or attempt to access) any of the Services by any means other than through the interface that is provided by Google, unless you have been specifically allowed to do so in a separate agreement with Google. You specifically agree not to access (or attempt to access) any of the Services through any automated means (including use of scripts or web crawlers) and shall ensure that you comply with the instructions set out in any robots.txt file present on the Services.

5.4 You agree that you will not engage in any activity that interferes with or disrupts the Services (or the servers and networks which are connected to the Services).

5.5 Unless you have been specifically permitted to do so in a separate agreement with Google, you agree that you will not reproduce, duplicate, copy, sell, trade or resell the Services for any purpose.

proponents of regulation that network management is not only unobjectionable but vital to maintaining a robust Internet.

Finally, the argument that cable operators restrict the ability of their subscribers to access video over the Internet completely mischaracterizes their policies.⁷⁷ For example, Comcast and Time Warner Cable together serve nearly 20 million broadband customers and offer them access to all the rich content that the Internet has to offer, including video. The overwhelming majority of these subscribers use their residential high-speed Internet service as intended, which includes downloading and sharing video, photos, and other rich media.

Neither Comcast nor Time Warner Cable monitors specific customer activities on the Internet. They monitor aggregate usage to identify patterns of bandwidth consumption that far exceed the use of a residential service, and they constantly seek to develop means of relieving congestion at times of peak demand, including steps to mitigate potential congestion or degradation of service caused by a tiny minority of users. In rare instances, customers may be notified of their excessive use, which would include, for example, the equivalent of sending 256,000 photos a month, or sending 13 million emails every month. Under these circumstances, many cable operators' policies include the option of proactively contacting the customer to address the issue, including by offering a more appropriate commercial-grade service.

⁷⁷ See CFA Comments at 95 (asserting that Comcast “unreasonably discriminate[s] against consumers who adopt video technologies offered by the Internet”).

CONCLUSION

The proponents of net neutrality regulation have failed to make their case. Given yet another opportunity to provide evidence that broadband providers are blocking, degrading, or otherwise discriminating against application or content providers, they once again have come up empty. Rather than provide real world examples of problems, the best they can do is speculate about the harm that will result if regulators fail to actively regulate the Internet. But as NCTA explains in these comments, even these theories fail to hold up to scrutiny.

While the arguments for regulation prove to be insubstantial, the arguments against it are not. The record in this proceeding makes clear that regulation will have damaging consequences – it will reduce investment; it will deter beneficial contractual arrangements; and it will make it more difficult for broadband providers to meet the needs of their customers. The record here, like the report of the FTC Staff, confirms that the Commission is on the right track and that it should continue with its existing deregulatory policy for broadband Internet access services.

Respectfully submitted,

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