

Before the
Federal Communications Commission
Washington, D.C. 20554

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



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I. INTRODUCTION AND SUMMARY.

In response to the Commission's stated goal of preserving a truly open broadband Internet through regulation, ACA's Comments demonstrate why, to achieve that goal, the Commission must extend the scope of those regulations to all participants in the broadband Internet experience. This includes providers of broadband content, applications, services, and devices. Failure to do so would result in an increasingly *closed* Internet, with powerful providers of content, applications, services and devices denying access to entire classes of users. ACA's Comments also request several refinements to the proposed regulations to reduce ambiguity, minimize unintended consequences, and provide all stakeholders with clear guidance.¹ These include:

- Providing additional clarification on reasonable network management practices;
- Adjusting proposed Section 8.9 to add the concept of "technical compatibility";
- Clarifying that the regulations do not create common carrier or "open access" obligations;
- Clarifying that the regulations do not prevent broadband providers from offering a wide range of differently priced service and services levels;
- Limiting transparency obligations to posting network management practices and policies on a broadband provider's website, and a reasonableness standard should govern the substance of disclosures.
- Exempting specialized and managed services; and
- Enforcing network neutrality regulations under established formal and informal complaint procedures.²

ACA files these Reply Comments to highlight the record's ample support for ACA's analysis and proposals.

ACA recognizes that the recent opinion of the United States Circuit Court of Appeals for the

¹ *In the Matter of Preserving the Open Internet, Broadband Industry Practices*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 (2009) ("*Net Neutrality NPRM*"), Comments of the American Cable Association at 3 (filed Jan. 14, 2010) ("*ACA Comments*").

² *ACA Comments* at 9-20.

District of Columbia calls into question the Commission's authority to promulgate some or all of the regulations proposed in the *Net Neutrality NPRM*.³ At this time, ACA takes no position on the Commission's legal authority in this proceeding.

II. THE RECORD SUPPORTS THE NEED TO EXTEND ANY NETWORK NEUTRALITY REGULATIONS TO ALL BROADBAND CONTENT, APPLICATION, SERVICE, AND DEVICE PROVIDERS.

As shown in this section, the record contains ample support for extending any regulations to providers of broadband content, applications, services, and devices. Only by extending this nondiscrimination principal to *all* broadband participants can the Commission foster a truly free and open Internet. Failure to do so will result in wholesale arrangements and exclusivity that deny Internet users access to an ever-growing selection of content, applications, services, and devices.

What ACA says:

[T]o achieve the goal of preserving an open Internet, the Commission must extend the scope of the regulations to providers of broadband content, applications, services, and devices. Without that change, powerful owners of content, applications, services, and devices will transform today's open Internet into an increasingly *closed* Internet, using wholesale arrangements to deny access to entire classes of users.⁴

* * * *

The Commission cannot achieve the goal of preserving an open Internet without extending a nondiscrimination principle to *all* participants in delivering the broadband experience.⁵

What other participants say:

Time Warner:

To better ensure that any regulatory framework it adopts is effective, fair, and lawful, and to best serve consumers, the Commission should modify the scope of any rules that it ultimately adopts to treat all marketplace participants comparably...Google has led the charge to adopt regulation to ensure Internet openness, yet it has the ability

³ *Comcast Corp. v. F.C.C.*, ___ F.3d ___, 2010 WL 1286658 (D.C. Cir., 2010).

⁴ *ACA Comments* at 3 (emphasis in original).

⁵ *ACA Comments* at 3 (emphasis in original).

and incentive to engage in a range of decidedly non-neutral conduct due to its control over so many aspects of the Internet experience.⁶

* * * *

ESPN makes ESPN360 accessible only to users whose broadband Internet access service provider pays ESPN for the website's content. As a result, some consumers who may want to access the website but whose service providers do not pay for the privilege are unable to do so – a result that the NPRM would outlaw if the broadband Internet access provider were responsible for it...[u]nder ESPN's arrangement, *all* of a broadband Internet access service providers [sic] subscribers must pay for ESPN360 *whether they want it or not*... In other words, *all* of that service provider's subscribers must pick up the tab for special-interest content that only a fraction of them want to view.⁷

OPASTCO:

[A] nondiscrimination rule should apply not only to broadband Internet access service providers, but also to all providers of Internet-based content, applications, and services...⁸

* * * *

A video content provider's ongoing abuse of its market power demonstrates OPASTCO's concern. Specifically, numerous OPASTCO members have informally reported that ESPN requires them to pay a fee for every one of their broadband Internet access subscribers in order for their customers to gain access to the ESPN360.com website. This behavior is no different than the potential market power abuse by broadband Internet access service providers which the NPRM seeks to prevent via the proposed nondiscrimination rule.⁹

Comcast:

The need to ensure that any rules apply equally and appropriately to all participants in the Internet ecosystem is consistent with the definitions of the "Internet" proposed in the NPRM and the one adopted by Congress in Section 230(f)(1) of the Communications Act.¹⁰

⁶ *Net Neutrality NPRM*, Comments of Time Warner Cable, Inc. at 73-74 (filed Jan. 14, 2010) ("*Time Warner Comments*").

⁷ *Time Warner Comments* at 92-93 (citations omitted).

⁸ *Net Neutrality NPRM*, Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies at 2-3 (filed Jan. 14, 2010) ("*OPASTCO Comments*").

⁹ *OPASTCO Comments* at 4.

¹⁰ *Net Neutrality NPRM*, Comments of Comcast Corporation at 30-31 (filed Jan. 14, 2010) ("*Comcast Comments*") (citations omitted).

NCTA:

[S]earch engines, browsers and other applications on the Internet are the means by which large numbers of Internet users find and access content and other applications. By blocking or discriminating against certain content and application providers, some of these entities – which are used by more consumers than subscribe to any single cable operator’s Internet access service – could affect the openness of the Internet and innovation at the edge to an even greater extent than any ISP.¹¹

* * * *

[I]f the Commission were to impose the obligations proposed in the *Notice* on cable operators and other wireline and wireless ISPs for the ostensible purpose of preserving Internet openness, it is hard to imagine how it could reasonably refrain from imposing similar obligations on Internet-based applications that also control consumers’ access to other Internet content and applications.¹²

As the record reflects, absent Commission action, more companies will follow the business model implemented by ESPN and block access to their online content, unless a customer’s broadband service provider agrees to a wholesale arrangement, typically requiring a per subscriber payment for all broadband customers.¹³ Customers of smaller broadband providers like ACA members are most vulnerable. As explained in ACA’s Comments, extending any regulations will serve the public interest by protecting users from being shut out by wholesale arrangements or exclusive agreements.¹⁴

To protect the public interest and foster a free and open Internet, the Commission must extend any regulations to providers of broadband content, applications, services, and devices.

III. THE RECORD SUPPORTS ACA’S PROPOSED REFINEMENTS.

In addition to extending any regulations to providers of broadband content, applications, services, and devices in its Comments, ACA called for the Commission to make several other

¹¹ *Net Neutrality NPRM*, Comments of the National Cable & Telecommunications Association at 47 (filed Jan. 14, 2010) (“*NCTA Comments*”).

¹² *NCTA Comments* at 49.

¹³ *ACA Comments* at 5-6.

¹⁴ *ACA Comments* at 8.

adjustments and clarifications to the proposed regulations.¹⁵ We highlight below the record's solid support for ACA's proposals.

A. Reasonable Network Management regulations should be broad and should not impose any affirmative obligations.

What ACA says:

The Commission must make clear that certain network management practices are permitted, including: (i) "bandwidth throttling" for high-bandwidth users during period of congestion; (ii) nondiscriminatory prioritization of traffic during period of congestion; and (iii) consumption-based billing.¹⁶

* * * *

The regulations should make clear that broadband providers are not obligated to employ any specific network management practices.¹⁷

* * * *

The regulations should make clear that they do not impose any affirmative obligations dealing with unlawful content or the unlawful transfer of content.¹⁸

What other participants say:

Time Warner:

Broadband Internet access service providers...face the significant challenge of facilitating the use of...valuable applications while also seeking a fair allocation of shared resources. One means of addressing that dilemma...would be to allow such providers to bill subscribers based on usage....But particularly where service plans do not bill based on usage, basic principles of fairness require managing bandwidth allocation during periods of congestion to prevent a small number of disproportionately heavy users from unduly degrading others' performance.¹⁹

* * * *

[B]roadband Internet access service providers must have flexibility to employ a wide variety of tools, including not only retail pricing strategies but restrictions that consumers can opt into in the interest of customizing their Internet experience. There

¹⁵ *ACA Comments* at 9-20.

¹⁶ *ACA Comments* at 10-11.

¹⁷ *ACA Comments* at 12.

¹⁸ *ACA Comments* at 12-13.

¹⁹ *Time Warner Comments* at 67-68.

is no way to predict what types of customized services consumers will demand, but the Commission should eliminate any doubt about the validity of network management practices that are tailored to consumer preferences.²⁰

Charter:

Network management allows the Internet to function in the face of rapidly growing congestion from spectrum hungry applications, relentless attacks by malicious traffic (*i.e.*, spam, viruses, cyber attacks and other malware), and the transmission of unwanted and unlawful content.²¹

Cox:

The *ability* to test and experiment (with appropriate disclosure) new and innovative ways for managing its broadband network to address significant customer service issues such as safety and traffic congestion is critical to Cox's provision of a dynamic and robust customers broadband experience. Any action by the Commission that has the effect, even if unintended, of freezing current network management practices will only service to negatively affect the very consumers that the Commission aims to protect.²²

Comcast:

[T]he Commission should consider a presumption that any practice demonstrably designed to manage temporary traffic congestion, or to combat spam, "malware" and denial of service attacks, or other threats known and yet to emerge, is reasonable.²³

* * * *

For the "reasonable network management" exception to work, the threshold for reasonableness must be one that allows network operators freedom to experiment with different technologies, techniques, and practices, and that allows engineers to take actions in good faith in response to rapidly changing network conditions.²⁴

NCTA:

Any rules adopted by the Commission need to ensure that ISPs have broad flexibility to experiment with and find network management techniques that keep pace with...changes and ensure a good Internet experience for...customers.²⁵

²⁰ *Time Warner Comments* at 73.

²¹ *Net Neutrality NPRM*, Comments of Charter Communications at 7 (filed Jan. 14, 2010) ("*Charter Comments*").

²² *Net Neutrality NPRM*, Comments of Cox Communications, Inc. at 20 (filed Jan. 14, 2010) ("*Cox Comments*").

²³ *Comcast Comments* at 58.

²⁴ *Comcast Comments* at 59.

²⁵ *NCTA Comments* at 27-78.

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ISPs need and should be given discretion and deference in finding, experimenting with and employing techniques to keep up with evolving problems in managing the flow of traffic on their networks.²⁶

Cisco:

[T]he Commission should make every effort to ensure that network operators maintain very broad latitude to manage their networks to respond to ever-changing traffic patterns and other development. The growing demands placed on broadband networks threaten the user experience and the value of the network. Enhanced network management offers a viable and tailored means of addressing those demands.²⁷

The Commission must ensure that any network management regulations are broad enough to allow broadband Internet access providers to tailor management practices to a specific network. This will provide broadband providers flexibility to improve their subscribers' Internet experience, including combating nuisances such as spam and malware. Specifically, network management practices such as bandwidth throttling and nondiscriminatory prioritization of traffic, as well as bandwidth- or consumption-based billing pricing models, must be expressly recognized by the Commission as reasonable.

In addition, the Commission must ensure that the regulations do not impose any affirmative obligations on how broadband service providers deal with unlawful content or the unlawful transfer of content.

B. The Commission should exempt specialized and managed services from network neutrality regulations.

What ACA says:

The Commission should make clear that the regulations do not extend to specialized and managed services.²⁸

²⁶ *NCTA Comments* at 29.

²⁷ *Net Neutrality NPRM*, Comments of Cisco Systems, Inc. at 8 (filed Jan. 14, 2010) ("*Cisco Comments*").

²⁸ *ACA Comments* at 17-18.

What other participants say:

Time Warner:

[T]he Commission should confirm that managed or specialized services, as described in the NPRM, are exempt from the proposed rules, consistent with past Commission practice.²⁹

Comcast:

The Commission should refrain from prematurely imposing new regulations on managed services. In particular, the Commissions should *not* subject managed services to any open Internet rules it may adopt in this proceeding. Managed services are distinct from the open broadband Internet services that broadband ISPs offer today, and raise different policy questions. Given that this is a brand new, very loosely defined regulatory concept, and particularly in light of the likelihood that the ability to offer managed services will be important to continued investment and innovation in broadband networks, applications, and services, such regulatory restraint is the most prudent course.³⁰

Bright House:

The potential models for managed services should be bounded only by imagination, not by government regulation. The development of such IP services must be given room for experimentation and growth.... Attempting to define and corral a set of IP services into a “managed services” bucket would only constrain and bound in advance what should be an enterprise zone for cable operators to innovate.³¹

Cisco:

[T]he Commission must preserve a wide berth for the provision of managed and specialized services outside the scope of whatever rules are applied to broadband Internet access service.³²

Satellite Broadband Commenters:

The Satellite Broadband Commenters support retaining the broadest flexibility for providers of managed or specialized services to employ network management techniques that provide users with the level and type of service which they demand and expect.³³

²⁹ *Time Warner Comments* at 105 (citations omitted).

³⁰ *Comcast Comments* at 61.

³¹ *Net Neutrality NPRM*, Comments of Bright House Networks at 12-13 (filed Jan. 14, 2010).

³² *Cisco Comments* at 14.

³³ *Net Neutrality NPRM*, Comments of Satellite Broadband Commenters at 9 (filed Jan. 14, 2010) (“*Satellite Broadband Comments*”).

The record reflects widespread concern about the potential for regulations to constrain innovation in specialized and managed services. Specialized and managed services represent an important subset of services ACA members provide, and the revenue from such services supports further investment and innovation. These services include VoIP telephony service, IPTV, website hosting, advertising, and virtual private networks for business. As ACA stated in its Comments, managed and specialized services must remain under the exclusive control of the broadband provider.³⁴

No factual, legal, or policy basis exists for imposing regulations on specialized and managed services, a nascent, dynamic, and rapidly evolving area of service. The Commission must exempt specialized and managed services from regulation.

C. The regulations should limit transparency obligations to posting Network Management practices on a broadband provider's website, and a reasonableness standard should govern the substance of disclosures.

What ACA says:

The regulations should limit transparency obligations to posting network management practices and policies on a broadband provider's website, and a reasonableness standard should govern the substance of disclosures.³⁵

What other participants say:

Time Warner:

Regarding the specifics of such a rule, TWC supports the notion that any transparency requirement the Commission ultimately may adopt should be "minimally intrusive." The operative text of the proposed rule—which would limit disclosure to that which is "reasonably required"—is consistent with that guideline, provided that it is understood to afford entities subject to this obligation flexibility to adjust their communications with customers as necessary in response to marketplace and technological conditions. Moreover, providers should be able to meet such a requirement by posting appropriate descriptions of

³⁴ ACA Comments at 17-18.

³⁵ ACA Comments at 16-17.

their practices on their websites or in their promotional materials, as the NPRM suggests.³⁶

* * * *

As many parties have explained, providing bad actors a roadmap of how to engage in denial-of-service attacks and similar harm at a minimum would endanger service quality, risk exposing subscribers to the potential theft of personal data and other harms, and potentially even jeopardize public safety and national security. In this sense, the expanded disclosure obligations contemplated in the NPRM would threaten significant harm for consumers.³⁷

Comcast:

Disclosures such as those provided by Comcast to its customers provide significant information about Comcast's network management practices, and are available to *anybody on the Internet*, consumers and Internet application and service developers alike. In addition, the *NPRM* does not explain how creating this new legal duty would in any way potentially benefit the Internet ecosystem, nor does it balance that potential benefit with the risks that such information would be used by bad actors whose intent is to circumvent legitimate network management and security practices.³⁸

Charter:

Disclosure of certain information could give purveyors of spam, viruses, worms and other malware the ability to circumvent legitimate network security measures that consumers depend on to protect personal computers and to benefit from broadband Internet access. Disclosures that are too detailed could compromise competitive advantages of providers. Moreover, it would be counterproductive to provide information that empowers parties to circumvent traffic congestion management techniques that benefit the vast majority of customers.³⁹

* * * *

Posting of such disclosures on the service provider's website will provide effective and efficient access for interested parties, including monitoring by the FCC in lieu of routine reporting requirements.⁴⁰

Cox:

³⁶ *Time Warner Comments* at 100-01.

³⁷ *Time Warner Comments* at 101-02 (citations omitted).

³⁸ *Comcast Comments* at 47 (citations omitted).

³⁹ *Charter Comments* at 20.

⁴⁰ *Charter Comments* at 21.

Should the Commission decide to add a transparency principle to the current *Policy Statement*, Cox believes such a principle will be most effective if it gives providers the flexibility to determine how to make information available to their customers.⁴¹

* * * *

The Commission also should be careful with the scope of any transparency principle, given its broad goal of “ensuring that *all* interested parties have access to *necessary* information about the traffic management practices of networks.” A transparency principle should not require broadband Internet access providers to unnecessarily disclose sensitive information that would enable hackers and others to circumvent security or management protections built into the service provider’s network.⁴²

NCTA:

A rule requiring general, one-size-fits-all disclosure of network management techniques should be a last resort, where there is reason to believe that voluntary disclosures to consumers and the Internet community, along with ongoing discussions among ISPs and application providers to enable the development of new products, are not sufficient to foster and preserve a vibrant, innovative Internet marketplace for consumers and for service providers.⁴³

* * * *

But where such voluntary disclosures and collaborative efforts are working and such a vibrant marketplace exists, it would be premature, unnecessary and counterproductive to impose a burdensome disclosure requirement – or, indeed, *any* prophylactic rules to ensure openness – at this time.⁴⁴

Free State Foundation:

First, the proposed regulation should *not* require broadband service providers to disclose proprietary information and thereby harm their respective competitiveness, undermine incentives for continued innovation, or pose risks to network security. Second, the proposed regulation should *not* mandate unduly burdensome informational disclosure. Unduly onerous disclosure requirements will result in only marginal return for consumers and public officials who would be unlikely to undertake a painstaking review of broadband network practice micro-minutiae. And the

⁴¹ *Cox Comments* at 9-10.

⁴² *Cox Comments* at 11 (citations omitted).

⁴³ *NCTA Comments* at 44-45.

⁴⁴ *NCTA Comments* at 45.

administrative and compliance costs of such unduly onerous disclosure requirements could readily outweigh any expected benefits of such disclosure.⁴⁵

Numerous commenters share ACA's concerns about both the manner of disclosure and the information that is required to be disclosed. As ACA noted in its Comments, any transparency obligations should be limited to website or webpage disclosure of network management practices.⁴⁶ Moreover, any disclosure obligations should have a clear exemption for network management practices that protect the network from harmful traffic, such as spam and malware.⁴⁷ Disclosing the specifics of the practices employed to combat networks from harmful traffic would enable spammers, hackers, and others to more easily breach network security.

By requiring broadband providers to post their network management practices on their websites or webpages, the Commission can avoid imposing an entirely new set of compliance and reporting obligations on broadband providers. Additionally, the Commission should provide an exemption for the disclosure of network management practices that protect the network from harmful traffic.

IV. Conclusion.

To achieve a free and open Internet, the Commission must expand the scope of any regulations to include providers of broadband content, applications, services, and devices. The Commission must also incorporate the specific adjustments and clarifications proposed in ACA's Comments. These changes will provide clear guidance for all stakeholders, reduce ambiguity, and help minimize the risk of unintended consequences.

⁴⁵ *Free State Comments* at 16.

⁴⁶ *ACA Comments* at 16.

⁴⁷ *ACA Comments* at 17.

Respectfully submitted,

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