

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20054

PETITION OF FREE PRESS *et al.* )  
FOR DECLARATORY RULING )  
REGARDING INTERNET )  
MANAGEMENT POLICIES )  
 )  
PETITION OF VUZE, INC. )  
FOR RULEMAKING TO ESTABLISH )  
RULES GOVERNING NETWORK )  
MANAGEMENT PRACTICES BY )  
BROADBAND NETWORK OPERATORS )

Docket No. 07-52

COMMENTS OF THE

INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE

To the Commission:

**I. INTRODUCTION**

The Independent Telephone & Telecommunications Alliance (ITTA) hereby submits comments on the above-referenced petitions. ITTA is an alliance of mid-sized local exchange carriers that collectively provide service to 25 million lines in 44 states. ITTA members offer interexchange services, commercial mobile radio services, and information services, both as incumbent and competitive carriers. ITTA submits that regulation of broadband network management practices would not only be inconsistent with the deregulatory view of the Communications Act (the Act), but would also threaten to chill a rapidly expanding market that is meeting evolving consumer expectations and demand.

In the above-referenced petitions, the Commission is asked to promulgate rules that define the boundaries of acceptable network management, and to rule that

intentional degradation of a targeted Internet application without informing Internet users is a deceptive practice. ITTA submits that the Commission’s Broadband Policy Statement<sup>1</sup> establishes reasonable guidelines by which carriers can operate, and that the competitive nature of the market, coupled with existing consumer protection and business practices laws, render additional layers of Commission regulation at best unnecessary, and at worst a threat to the successful evolution of the broadband Internet marketplace.

## **II. THE COMMISSION SHOULD REFRAIN FROM IMPOSING NETWORK MANAGEMENT REGULATION.**

### **A. NETWORK MANAGEMENT REGULATION IS INCONSISTENT WITH THE ACT’S VISION OF A DEREGULATORY ENVIRONMENT FOR THE INTERNET.**

Network management regulation would be inconsistent with the deregulatory intent of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (collectively, Act) which directs the Commission to “promote competition and *reduce regulation*.”<sup>2</sup> Moreover, network management regulation would be inconsistent with explicit Congressional policy to “preserve the vibrant and competitive free market

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<sup>1</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities: Policy Statement*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, 20 FCC Rcd 14986, FCC 05-151 (2005) (Broadband Policy Statement).

<sup>2</sup> The Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996) (1996 Act) amended the Communications Act of 1934 (1934 Act). In these comments, references to the 1934 Act as amended by the 1996 Act will be to “the Act;” references to sections of the Act will be to the Act as it is codified in the United States Code. Specific reference to the 1996 Act will be made where appropriate. Specifically, the 1996 Act intended to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.” Preamble, 1996 Act. The Commission has previously cited this statement in support of deregulatory policies for broadband and Internet deployment. *See*, Broadband Policy Statement, at n.14 and accompanying text.

that presently exists for the Internet.”<sup>3</sup> The Commission has to date refrained from imposing expansive regulation upon Internet access or Internet Protocol-enabled (IP-enabled) services. The Commission has “preserve[d] and promote[d] the vibrant and open character of the Internet”<sup>4</sup> by generally refraining from using its Title I ancillary jurisdiction to impose regulatory burdens on Internet service providers (ISPs).<sup>5</sup> At the same time, the Commission articulated the Broadband Policy Statement to guide growth in spheres wisely left unregulated.

**B. THE HIGHLY COMPETITIVE NATURE OF THE BROADBAND SERVICES MARKET MAKES NETWORK MANAGEMENT REGULATION UNNECESSARY.**

Regulation should be reserved for instances in which the market fails to provide adequate protection. The Commission previously recognized the need for a “hands-off” approach to regulation, describing a “dynamic and evolving broadband Internet access market . . . where the current market leaders, cable operators and wireline carriers, face competition not only from each other but also from emerging broadband Internet access service providers.”<sup>6</sup> The Commission’s approach has been successful: users in many

<sup>3</sup> 47 USC 230(b)(1).

<sup>4</sup> See Broadband Policy Statement, *supra* n.1, at 3.

<sup>5</sup> Information services and information service providers, such as Internet service providers (ISPs), are not subject to mandatory Title II common carrier regulation. See, *National Cable & Telecommunications Association v. Brand X Internet Services*, 125 S. Ct. 2688, slip. op. at 3 (2005). The Commission has imposed some Title II-type obligations on voice over Internet protocol (VoIP) providers but, unlike ISP service which is clearly an information service offering, the regulatory status of VoIP is unclear. See, e.g., *IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers: First Report and Order and Notice of Proposed Rulemaking*, WC Docket Nos. 04-36 and 05-196, FCC 05-116, at para. 22 (2005).

<sup>6</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings – Bell Operating Company Provision of Enhanced Services, 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 USC 160(c) with Regard to Broadband Services Provided via Fiber to the Premises, Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard*

instances have access to numerous competing providers.<sup>7</sup> The Commission must not impose constraints that would stifle innovation and investment, limit consumer choice, and generate increased costs.

Moreover, the fundamental nature of the Internet as a medium for the rapid exchange of information engenders a “self-policing” approach on the part of providers. The democratization of information enabled by the Internet helps ensure that providers will be loath to impose upon users operational standards that would interfere inappropriately with the delivery of content and applications, since reports that would tend to drive users to other providers can be disseminated widely and rapidly; blogs hold particular power. Providers are accordingly inclined toward open policies. Regulatory fiat, no matter how well intentioned, cannot adapt as quickly or efficiently.

The market has been quick to correct problems. A common feature of pleadings regarding the issues addressed herein is reference to the Commission’s swift action in a 2005 matter that involved the alleged blocking of VoIP traffic by a telephone company.<sup>8</sup> That proceeding did not end in a declaration of policy, or promulgation of rules, but rather a voluntary settlement agreement that evidences the recognition that inappropriate discriminatory treatment of traffic will not be tolerated. More recently, Verizon reversed

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*to Broadband Services Provided via Fiber to the Premises: Report and Order and Notice of Proposed Rulemaking*, CC Docket Nos. 02-33, 01-337, 92-50, 98-10, WC Docket Nos. 04-242, 05-271, 20 FCC Rcd 14853, FCC 05-150, at para. 84 (2005) (Wireline Broadband Order).

<sup>7</sup> See, i.e., *High-Speed Services for Internet Access: Status as of December 31, 2006*, Industry Analysis and Technology Division, Wireline Competition Bureau (December 2003) at Table 16.

<sup>8</sup> See, *Madison River LLC and Affiliated Companies: Order*, File No. EB-05-IH-0110, 20 FCC Rcd 4295, DA 05-543 (2005).

a decision on text messaging after a public outcry.<sup>9</sup> Similarly, AT&T garnered unfavorable attention for allegedly censoring portions of a concert that were critical of President Bush,<sup>10</sup> and for including in its terms of service a condition that some interpreted as providing the carrier with grounds to terminate service if a user criticized AT&T or related corporate entities.<sup>11</sup> Regarding the former, AT&T responded that a webcast contractor had erred, and emphasized its commitment to unfettered access to content; regarding the latter, AT&T responded that the policy was intended to “disassociate” itself from websites advocating violence or threats to children, and later clarified the language in its terms of service.<sup>12</sup> Most recently, Comcast, which is featured prominently in the *Free Press et al.* petition that is at the center of the instant proceeding, revised its terms of service to mirror the Broadband Policy Statement.<sup>13</sup> It is clear that carriers respond swiftly to the interest of consumers and the marketplace. Regulatory

<sup>9</sup> “Verizon Reverses Itself on Abortion Messages,” Adam Liptak, *New York Times* (Sep. 27, 2007), [www.nytimes.com/2007/09/27/business/27cnd-verizon.html?ref=technology](http://www.nytimes.com/2007/09/27/business/27cnd-verizon.html?ref=technology) (last viewed Feb. 7, 2008). The issue of text messaging and short codes is now the subject of a pending Commission proceeding. *See*, “Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling that Text Messages and Short Codes are Title II Services or are Title I Services Subject to Section 202 Non-Discrimination Rules,” Public Notice DA 08-78 (rel. Jan. 14, 2008).

<sup>10</sup> “AT&T Says it Didn’t Censor Rock Band Pearl Jam,” Grant Gross, *Washington Post*, Aug. 9 2007, [www.washingtonpost.com/wp-dyn/content/article/2007/08/09AR2007080901436html](http://www.washingtonpost.com/wp-dyn/content/article/2007/08/09AR2007080901436html) (last viewed Feb. 7, 2008).

<sup>11</sup> *See, i.e.*, “Verizon, AT&T: We Don’t Silence Criticism,” *Broadband Reports.com*, [www.broadbandreports.com/shownews/Verizon-ATT-We-Dont-Silence-Criticism-88055](http://www.broadbandreports.com/shownews/Verizon-ATT-We-Dont-Silence-Criticism-88055) (last viewed Feb. 7, 2008)).

<sup>12</sup> “AT&T Relents on Controversial Terms of Service, Announces Changes,” Ken Fisher, *ARS Technia*, Oct. 10, 2007, <http://66.225.202.210/news.ars/post/20071010-att-relents-on-controversial-terms-of-service-announces-changes.html> (last viewed Feb. 7, 2008).

<sup>13</sup> “Comcast Tweaks Terms of Service in Wake of Throttling Uproar,” Eric Bangerman, Feb. 7, 2008, <http://arstechnica.com/news.ars/post/20080207-comcast-tweaks-terms-of-service-in-wake-of-throttling-uproar.html> (last viewed Feb. 7, 2008).

intervention is not necessary - the market has demonstrated that it is conforming to standards that are consistent with consumer demand and Commission policy.

The model the Commission developed works. Deployment and usage have increased as applications and content have advanced apace. The Commission should recognize its success and refrain from imposing unnecessary regulation.

**C. ILL-CONCEIVED REGULATION COULD CHILL OR DISTORT THE DEVELOPMENT OF THE MOST TRANSFORMATIVE TECHNOLOGY EXISTING TODAY.**

Broadband services have emerged successfully because technical and marketplace development has occurred outside the realm of artificial governance, *i.e.*, regulation.

Technology developers acting in a free market have developed products to meet consumer demands, and have introduced new ways for citizens to interact, participate in politics, and obtain information, commentary, and entertainment. The Commission has stated, “we find that the public interest is best served if we permit competitive marketplace conditions to guide the evolution of broadband Internet access services.”<sup>14</sup>

The Commission’s approach has worked. For example, in 2006, YouTube reportedly played 2.5 billion videos;<sup>15</sup> 2007 was characterized as a year of “massive growth,” with Nielsen Online reporting growth in on-line viewership among several sites following the Writers Guild of America (WGA) strike.<sup>16</sup> It is clear that users are taking full advantage

<sup>14</sup> Wireline Broadband Order at para. 85.

<sup>15</sup> [http://www.usatoday.com/tech/news/2006-07-16-youtube-views\\_x.htm](http://www.usatoday.com/tech/news/2006-07-16-youtube-views_x.htm) (last viewed Feb. 6, 2008).

<sup>16</sup> See [http://www.viralmanager.com/strategy/research\\_documents/youtube-stats-final-quarter-2007.pdf](http://www.viralmanager.com/strategy/research_documents/youtube-stats-final-quarter-2007.pdf), (last viewed Feb. 6, 2008).

of broadband capabilities. Similarly, Internet “e-commerce” sales increased 19.3 percent from 3Q06 to 3Q07.<sup>17</sup>

As traffic increases, network operators must be able to direct traffic efficiently in order to ensure a viable, functioning network. The exponential growth of network usage demands traffic management in order to ensure optimal operation as carriers deploy additional capacity that enables consumers to navigate the broadband network. As needs outpace growth, carriers must be assured that their authority to manage their networks in the most efficient manner possible remains preserved. As described by the U.S.

Department of Justice,

Packets of traffic on the Internet are processed on a “best effort” basis, which does not provide any guarantees regarding speed, delivery, service quality, or priority treatment when the network is congested. When routers have more packets to process than capacity to do so, the overflow packets are queued up for processing in the order they arrive, up to the router’s physical capacity. Any additional packets beyond the router’s capacity are lost.<sup>18</sup>

Traffic management practices that can mitigate these problems should not be foreclosed.

**D. EXISTING LAW ADDRESSES INTERNET SERVICE SUFFICIENTLY.**

The Broadband Policy Statement is suited aptly to the services to which it applies, since it establishes broad guidelines that can accommodate with flexibility the evolving broadband Internet market. A continually evolving market would be constrained unduly and detrimentally by metrics that might be relevant at the time of promulgation, but inapplicable as the market evolves. The Commission’s Broadband Policy Statement

<sup>17</sup> “Quarterly Retail E-Commerce Sales 3<sup>rd</sup> Quarter 2007,” US Census Bureau News (Nov. 19, 2007), <http://www.census.gov/mrts/www/data/html/07Q3.html> (last viewed Feb. 6, 2008).

<sup>18</sup> *Broadband Industry Practices: Ex Parte Filing of United States Department of Justice*, Docket No. 07-52, at n.17 (filed Sep. 6, 2007).

provides “room to grow,” as well as guidance for providers that move forward with increased deployment and access to new content and applications.

Existing law can be invoked to ensure consumer protection, without the need for an additional layer of Commission regulation. For example, the Federal Trade Commission (FTC) has noted that Internet service contracts can be addressed with existing case law,<sup>19</sup> explaining, “Existing case law easily would support determinations that certain types of terms common to most or all Internet service contracts, such as price and duration, are ‘material.’”<sup>20</sup> Moreover, the FTC also described the application of general anti-trust law to Internet services:

[B]locking access to the Internet by a content or application providers or discriminating in favor of a supplier with whom the broadband provider has an affiliated or contractual relationship would be analyzed, for example, under either Section 1 of the Sherman Act, as an exclusive dealing relationship, or under Section 2 of the Sherman Act, as a unilateral refusal to deal.<sup>21</sup>

The Commission should stay the course of permitting the market to develop unencumbered by regulation. The imposition of regulation would stall development and deployment and introduce unnecessary redundancy.

### III. **CONCLUSION**

As broadband usage continues to grow, providers must have the ability to manage their networks in the most efficient manner possible to ensure customer needs are met. Broadband services have flourished because technology and the marketplace have been

<sup>19</sup> Broadband Connectivity Competition Policy, United States Federal Trade Commission Staff Report, at 134 (Jun. 2007) (FTC Broadband Report), *citing Orkin Exterminating Company v. FTC*, 849 F.2d 1354, 1363-66 (11<sup>th</sup> Cir. 1988).

<sup>20</sup> FTC Broadband Report at 131, *citing Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7<sup>th</sup> Cir. 1992) and *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095-96 (10<sup>th</sup> Cir. 1994).

<sup>21</sup> FTC Broadband Report at 121 (internal citations omitted).

allowed to develop in a largely unregulated environment. Regulation of broadband network management practices would be inconsistent with the deregulatory view of the Communications Act, and it is unlikely that regulation would be able to keep pace with rapid technological and market evolution. The market is competitive and has demonstrated that it responds swiftly and effectively to consumer needs. Accordingly, and for the reasons stated above, the Commission should refrain from imposing unnecessary regulation.

Respectfully submitted,

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