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

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

COMMENTS OF
THE FREE STATE FOUNDATION[*]

INTRODUCTION AND SUMMARY

These comments are filed in response to the Commission's *Notice* proposing rules to regulate the practices broadband Internet service providers (ISPs).[1] If adopted as proposed, this new Internet regulation – which, in effect, would be much like the public utility regulation that applied to last century's voice-only telephone companies and the nineteenth century's railroads -- almost certainly would discourage investment and job creation, stymie innovation, and harm overall consumer welfare. Ending or significantly altering the largely unregulated broadband environment that presently prevails, an environment in which broadband Internet service has proliferated in an increasingly competitive fashion, would be risky business. This is particularly so given the absence of present identifiable harms to

[*] These comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Adjunct Fellow of the Free State Foundation. FSF is an independent, non-profit free market-oriented think tank. Their views do not necessarily represent the views of the Board of Directors, staff, or others associated with FSF.

[1] Notice of Proposed Rulemaking ("*Notice*"), *In the Matter of Preserving the Open Internet,* GN Docket No. 09-91; *Broadband Industry Practices*, WC Docket No. 07-52 (October 22, 2009), *available at*: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-93A1.pdf.

consumers or any evidence of market failure. Indeed, this whole proceeding is cast in terms – even in the proceeding's caption – of "preserving" the open Internet. Thus, the *Notice* is plagued by a capricious duality which, on the one hand, acknowledges an extensive record devoid of any demonstration of broadband market failure, and which on the other hand, nevertheless calls for regulation to fix a problem that its own record shows doesn't exist. This surely is a case where the old adage "if it ain't broke, don't fix it" ought to guide regulatory policy."

The adoption of a rule requiring transparency and disclosure of relevant consumer information regarding ISP practices may make sense. But the Commission should abandon, at least until some evidence of market failure materializes, the notion of adopting other net neutrality rules. Taken on their own terms, the proposed regulations (apart from the transparency rule) suffer from internal defects and contradictions that render difficult the Commission's ability to distinguish between beneficial and harmful conduct. This is especially true of the non-discrimination rule which is at the heart of the agency's proposal and which will also have the likely consequence of stifling innovative risk-taking and competitive new offerings to consumers in the broadband market.

The proposed regulations also impose compelled speech access mandates and otherwise restrict the ISPs' free speech rights in ways that likely violate the First Amendment.

DISCUSSION

I. Absent Regulation, the Broadband Market Is Dynamic, Growing, and Competitive

Broadband Internet service is part of a dynamic communications marketplace that has arisen in a largely unregulated environment. Unfortunately, by proposing new regulation of

Internet networks, the Commission seriously jeopardizes continued investment and innovation in new broadband networks and Internet services. The Commission is unable to show even a modest number of actual harms taking place under existing law and policy. And its inability to point to any evidence of marketplace failure and its reliance instead on speculative future harms would render its proposed regulations an unjustifiable expansion of regulatory authority over the Internet.

A. Broadband Internet Services and Technologies Have Experienced Rapid Growth and Innovation *In the Absence* of Regulation

To date, the Internet's innovation and growth has taken place in a uniquely *un*regulated environment. Recent advances in broadband investment and deployment in connection with wireline, wireless, and cable platforms have been spurred by key deregulatory policies adopted by the Commission.[2]

As the Commission has acknowledged on several occasions, this deregulatory period has witnessed significant growth in high-speed broadband services competition and adoption.[3] Wireline and cable platforms offer competing broadband services for consumers. The *Notice* and the Commission's recent reports also point to explosive growth in wireless broadband

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[2] *See, e.g., Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) (classifying cable modem service as "information services" and thereby exempt from potential common-carrier regulation under Title II of the Communications Act), *affirmed, NCTA v. Brand X*, 545 U.S. 967 (2005); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005) (classifying wireline broadband services as "information services" exempt from regulation under Title II), *affirmed, Time Warner Telecom v. FCC*, 507 F.3d 205 (3d Cir. 2007); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, 22 FCC Rcd 5901 (2007) (classifying wireless broadband services as "information services" exempt from regulation under Title II).

[3] *See, e.g., 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* (*"Fifth Report"*), GN Docket No. 07-45, 23 FCC Rcd 9615, 9650 (2008) (declaring it "anticipate[s] ever-greater demand for services and applications requiring greater bandwidth over an ever-expanding area...multiple industries are aggressively investing and deploying services to meet this demand, enhancing consumer choice in both providers and services"), *available at*: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08- 88A1.pdf.

services and competition.[4] Surging Internet usage and data traffic via these evolving, competing platforms evidence a *dynamic* broadband marketplace with increasing consumer choice.

Despite the recent progress in broadband deployment and rapid advances in Internet technologies and applications, the *Notice* proposes a new regulatory regime to police Internet data traffic and broadband network management. Although the Commission claims to want to "promote investment and innovation with respect to the Internet,"[5] the *Notice* effectively ignores the *non*-regulatory context for rapid Internet innovation and growth witnessed in the last several years. But the Commission should *not* take for granted the role of the non-regulatory environment in promoting Internet dynamism. The proposed regulatory interventionism contained in the *Notice* unmistakably would alter that environment and likely would work at cross-purposes with the stated intentions of the *Notice* to foster Internet growth and innovation.

B. The *Notice* Fails to Cite Evidence of Existing Harm or Marketplace Failure

This proceeding's title (*In the Matter of Preserving the Open Internet*) and the Chairman's statement that the Commission is "launching a process to craft reasonable and enforceable rules of the road to *preserve* a free and open internet"[6] because of supposed

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[4] *See Notice* at 56, para. 158 (discussing the emergence of mobile Internet access and observing that "[m]obile wireless is now a key platform enabling consumers to access communications devices"); *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services* ("*Thirteenth Report*"), WT Docket No. 08-27 (January 16, 2009) at 5 para. 1 ("U.S. consumers continue to reap significant benefits – including low prices, new technologies, improved service quality, and choice among providers – from competition in the CMRS marketplace, both terrestrial and satellite CMRS"), *available at*: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-54A1.pdf.

[5] *Notice* at 21-22, para. 51.

[6] Statement of Chairman Julius Genachowski, *In the Matter of Preserving the Open Internet*, GN Docket No. 09-91, at 1 (October 22, 2009), *available at*: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-93A2.pdf.

"emerging challenges to a free and open Internet"[7] concede the Internet presently is free and open. But the *Notice* nonetheless proposes regulations based on speculative assumptions about future harm and future potential lack of competition. Tellingly, the *Notice* cites only *two* instances of broadband Internet access provider (ISP) conduct deemed by the Commission to be at odds with the *Internet Policy Statement*: (1) Madison River Communications' blocking its subscribers' ability to use voice over Internet Protocol (VoIP);[8] and (2) Comcast's network management practices regarding BitTorrent peer-to-peer file-sharing.[9] The former instance was quickly resolved by the Commission pursuant to consent decree in 2005,[10] and the latter instance was resolved between private parties prior to the Commission's controversial 2008 order (now the subject of pending litigation).[11] Given the freedom and openness of the Internet acknowledged by all and the Commission record's lack of actual, prevalent *Internet Policy Statement* violations, imposing an unprecedented regulatory regime for broadband network management is unwarranted.

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[7] Statement of Chairman Genachowski, GN Docket No. 09-91, at 2.
[8] *See Notice* at 12-13, para. 32 (discussing *Madison River Communications*, 20 FCC Rcd 4295 (2005)).
[9] *See Notice* at 15-16, paras. 36-37 (discussing *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, et al.* ("*Comcast Network Management Practices Order*"), 23 FCC Rcd 13028 (2008)).
[10] *Madison River Communications*, 20 FCC Rcd 4295.
[11] *See* Comcast Corporation, Press Release: "Comcast and BitTorrent Form Collaboration to Address Network Management, Network Architecture and Content Distribution" (March 27, 2008), *available at*: http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=740; Press Release: "Commissioner Deborah Taylor Tate Applauds Comcast/BitTorrent Agreement" (March 27, 2008):

> I am pleased that following the FCC's recent investigation and forum, BitTorrent and Comcast have announced several industry-based solutions for acceptable network capacity management and lawful content distribution. I have consistently favored competition and market forces rather than government regulation across all platforms and especially in this dynamic, highly-technical marketplace

available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281154A1.pdf. *See also Comcast Network Management Practices Order*, 23 FCC Rcd 13028, review pending in *Comcast Corp. v. FCC*, Docket #08-1291 (D.C. Cir).

At a minimum, the Commission should want to demonstrate there is a real existing problem that requires fixing before adopting first-of-its-kind regulation that, in effect, will impose public utility-type regulation on the broadband Internet. In the present context, this means the Commission should make plain any actual evidence of broadband marketplace failure as a necessary (though not necessarily sufficient) precondition for imposing a new regulatory regime on broadband networks. But the *Notice* makes *no* finding of broadband marketplace failure and makes *no* finding of market power by ISPs. In fact, the *Notice* conducts *no* marketplace analysis whatsoever. The *Notice* does not even cite to any outside marketplace analyses or to any data that shows overall broadband marketplace failure or the possession of market power by ISPs.

The *Notice* is plagued by a duality that, on the one hand, acknowledges an extensive record devoid of any demonstration of broadband market failure, and on the other hand, nevertheless calls for regulation to fix a problem that its own record shows doesn't exist. In the *Notice*, the Commission points to the extensive record recently has compiled concerning broadband network management practices in a separate proceeding:

> In examining this issue, the Commission has provided abundant opportunities for public participation, including through public hearings and requests for written comment, which have generated over 100,000 pages of input in approximately 40,000 filings from interested companies, organizations, and individuals.[12]
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> The two-year-old Broadband Industry Practices proceeding remains active. To date, the docket contains more than 35,000 filings comprising over 80,000 pages.[13]

[12] *Notice* at 2, para. 2.
[13] *Notice* at 16, para. 38.

Despite the voluminous record compiled by the Commission, still *no* showing of marketplace failure was forthcoming. Absent such a showing, the *Notice*'s proposal for broad new Internet regulations is unjustified.

Neither the Commission's *Order* adopting the *Internet Policy Statement* nor its *Comcast Network Management Practices Order* issued in August, 2008, ever suggested that any kind of broadband marketplace failure exists. This presents a crucial question: Since 2005 or 2008, what new data or changed factual circumstances have arisen that justifies regulation of broadband network management? The *Notice* provides *no* answer to this question.

This Commission is not the only federal agency that has studied the broadband marketplace and considered whether regulation is warranted. In June, 2007, the Federal Trade Commission (FTC) unanimously adopted a staff report, concluding that the broadband marketplace was competitive, that competition appeared to be increasing, and that regulation was unwarranted.[14] The FTC's important study of the broadband marketplace presents a similarly crucial question: Since 2007, what new data or changed factual circumstances have arisen that could justify regulation of broadband Internet services?[15] Again, the *Notice* provides *no* answer. Nor does the *Notice* expressly consider the FTC study at all. Although the FTC's recent conclusions about the broadband marketplace and the merits of regulation are not binding upon the Commission, as a sister federal agency, the FTC's findings certainly should be factored into the Commission's decisionmaking. Should the Commission ultimately

[14] Federal Trade Commission (FTC), *Broadband Connectivity Competition Policy: FTC Staff Report* (June, 2007), *available at*: http://www.ftc.gov/reports/broadband/v070000report.pdf. *See also* FTC, Press Release: " FTC Issues Staff Report on Broadband Connectivity Competition Policy" (June 27, 2007), *available at*: http://www.ftc.gov/opa/2007/06/broadband.shtm.

[15] *See* Statement of Commissioner Robert M. McDowell, *In the Matter of Preserving the Open Internet*, GN Docket No. 09-191, at 4 (October 22, 2009) ("What tectonic market changes have occurred since the 2007 FTC report that would warrant a change in policy?"), *available at*: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-93A4.pdf.

reach a different conclusion than the FTC, it should give a reasoned, data-supported explanation.

In addition, the Commission should take into consideration the insights of *the ex parte* filing submitted to it by the U.S. Department of Justice's (DOJ) earlier this month in the *National Broadband Plan* proceeding.[16] It counseled that evaluations of competition in industries subject to significant technological change should be forward-looking and not static, and that "[i]n the case of broadband services, it is clear that the market is shifting generally in the direction of faster speeds and additional mobility."[17] The DOJ pointed to wireless broadband as a promising source for additional competition at the local level,[18] opined that "most regions of the United States do not appear to be natural monopolies for broadband service,"[19] and warned that "although enacting some form of regulation to prevent monopoly power may be tempting … care must be taken to avoid stifling the infrastructure investments needed to expand broadband access."[20]

Technology markets characterized by dynamism are particularly ill-suited for static regulation. Unfortunately, the *Notice* fails to address the limits and perils of imposing regulation that conceivably might be appropriate (or at least less damaging) in a static marketplace upon the dynamic broadband marketplace. Those limits and perils caution the

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[16] *Ex Parte* filing of the United States Department of Justice, *In the Matter of Economic Issues in Broadband Competition / A National Broadband Plan for Our Future*, GN Docket No. 09-51 (January 4, 2010), *available at*: http://www.justice.gov/atr/public/comments/253393.htm. Significantly, DOJ's 2007 *ex parte* filing to the Commission in the *Broadband Industry Practices* proceeding recommended that it *not* adopt regulatory constraints on broadband competition given the lack of record evidence of market failure, concluding that "[t]here is neither a sound theoretical nor empirical basis for restricting broadband competition at this time." *Ex Parte* filing of the United States Department of Justice, *In the Matter of Broadband Industry Practices*, Docket No. 07-52, at 5 (September 6, 2007), *available at*: http://www.justice.gov/atr/public/comments/225767.htm.
[17] *Ex Parte* filing of DOJ, GN Docket No. 09-51, at 6, para. 2.
[18] *Ex Parte* filing of DOJ, GN Docket No. 09-51, at 8, para. 1.
[19] *Ex Parte* filing of DOJ, GN Docket No. 09-51, at 28, para. 1.
[20] *Ex Parte* filing of DOJ, GN Docket No. 09-51, at 28, para. 2.

Commission against imposing the broadband network practices regulations proposed in the *Notice*.

C. The *Notice*'s Call for Regulation Based on Speculative Future Harm Arbitrarily Expands Government's Reach over the Internet

Finding only two purported instances of ISP violations of the *Internet Policy Statement* and absent any finding of broadband marketplace failure, the *Notice* lacks a clear, justifiable standard or basis for imposing the proposed regulations. But the Commission's exercise of its regulatory policy judgment should first be informed by a cogent rationale with an ascertainable link to that judgment. Prophylactic regulation should only be undertaken to address a specific expected harm for which there is significant direct evidence, and regulation should be narrowly draw to target the specific harm and give ISPs the highest degree of certainty, flexibility and freedom. Through the *Notice*, however, the Commission proposes to impose a set of general, amorphous regulations in order to respond to a set of merely speculative, future harms. For instance, the Commission proposes a novel "non-discrimination" principle without clear analog in existing law or regulation in order to counter the possible future motives of ISPs to only allow the transmission of certain types of files or certain contents through their own respective networks.

By assigning itself a brooding omnipresence on the Internet through general and amorphous regulation — lacking a basis in those clear regulatory prerequisites and without careful tailoring to specific harms — the Commission appears to adopt a "government will make it work better" standard for undertaking regulatory intervention. The *Notice* thereby takes for granted that the tremendous growth and innovation of the Internet has taken place in an unregulated environment. Such growth and innovation, as befits a dynamic marketplace,

does not require and will more likely be hampered by regulation premised on government-based broadband network management preferences.

II. On Their Own Terms, The Proposed Regulations Present Additional Problems

Even if the proposed regulations contained in the *Notice* did not suffer from the lack of a justifiable foundation, by their own terms they raise a number of additional issues and questions concerning broadband network management. Several of those issues and questions are briefly addressed below.

A. The Proposed Regulation Creates Difficulties in Defining and Distinguishing Harmful Discrimination

In the *Notice*, the Commission itself acknowledges the dilemma created by its proposed "nondiscrimination" regulation: "[t]he key issue we face is distinguishing socially beneficial discrimination from socially harmful discrimination in a workable manner."[21] While on the one hand the Commission proposes a "nondiscrimination" regulation under which "a broadband Internet access service provider may not charge a content, application, or service provider for enhanced or prioritized access to the subscribers of the broadband Internet access provider,"[22] on the other hand the Commission acknowledges that "[p]rice discrimination can enhance social benefits" when it increases the value that users place on a network.[23] The Commission also acknowledges economic scholarship characterizing the Internet as a "two-sided market", and that "[t]heoretical economic analyses suggest that price

[21] *Notice*, at 41, para 103. *See also id* at 66 ("8.13. Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner").
[22] *Notice*, at 42, para 106.
[23] *Notice*, at 28, para 66 at fn 154.

discrimination may be more beneficial in a two-sided market than in the standard one-sided market."[24]

Through the "nondiscrimination" regulation proposed in the *Notice*, the Commission hands itself the difficult task of discriminating between practices that meet or do not meet its proposed "nondiscrimination" definition as well as discriminating between "harmful" discrimination while allowing "beneficial" discrimination. Given the nature of this task, to be carried out in piecemeal fashion on a case-by-case basis, it is highly unlikely that the Commission would bring predictability and certainty to its "nondiscrimination" regulation for a long time, if ever. In light of the untried and novel nature of the *Notice*'s proposed regulatory regime for broadband network management, unless or until greater regulatory predictability and certainty can be assured, hidden opportunity costs are a probable consequence of such regulation. It is likely that "nondiscrimination" regulation will inhibit ISPs from experimenting with and engaging in beneficial types of discrimination that offer innovation and quality of service value to consumers.

The Commission emphasizes a short-sighted picture of the broadband marketplace in setting the stage for its proposed regulation of network management. The *Notice* includes near-doomsday predictions about Internet access and fees somehow pushing content, application and service providers from the market.[25] Such a scenario is premised on a lack of effective competition in the broadband Internet access market. The *Notice* does qualify itself by observing that "[w]here effective competition is lacking (i.e., where broadband Internet access providers have market power), it is more likely that price and quality discrimination

[24] *Notice*, at 28, para. 66.
[25] *Notice*, at 29, para. 69.

would have adverse effects."[26] As indicated above, both the Commission's own reports and the FTC have pointed to the existence of competition in broadband Internet access, and neither pointed to evidence of market power possessed by broadband Internet access providers.

B. The Commission Should Adhere to Its Rejection of the "Unnecessarily Restrictive" Standard Adopted in the *Comcast Order*

To the Commission's credit, the *Notice* rejects the narrow standard for acceptable network management that it purported to adopt in the *Comcast Network Management Practices Order*.[27] The Commission's characterizes that standard as "unnecessarily restrictive" in the context of its proposed nondiscrimination rule.[28] In so doing, the Commission correctly comprehends the consequences of adopting a regulatory standard that places a high burden on ISPs to justify management of their networks. ISPs own and operate competing networks, relying upon different platform technologies and facilities, posing different kinds of technological and geographical challenges, and requiring complex and intuitive engineering judgments and trade-offs be made in order to deliver a consistent quality of service. An intrusive regulatory standard like the one adopted in the *Comcast Order* would have a chilling effect on reasonable network management decision-making efforts by ISPs, because such network engineering decisions would have to obtain bureaucratic approval by overcoming regulatory burdens of persuasion. If the Commission intends to proceed with its

[26] *Notice*, at 30, para. 70.
[27] *Comcast Network Management Order*, 23 FCC Rcd 13028, 13055-13056 (asserting that for network management practices to be considered "reasonable" it "should further a critically important interest and be narrowly or carefully tailored to serve that interest"); *Notice*, at pgs 50-51, para 137 (rejecting the *Comcast Order* standard).
[28] *Notice*, at 50-51, para. 137.

ill-conceived proposal, which it should not, it should nonetheless confirm its rejection of the *Comcast Order*'s "unnecessarily restrictive" network management standard.

C. If the Proposed Regulations Are Adopted, the Burden of Proof Should Be on Parties Challenging ISP Practices

In the *Notice*, the Commission leaves open the question of who bears the burden of showing that an ISP's network management practices constitute "nondiscrimination", fall under one or more of the proposed exceptions, or meet the proposed definition of "reasonable network management."[29] If the Commission is going to impose new regulation — which it should *not* — it is crucial that the burden of challenging network management practices be placed *on the Commission or any complainants* who come before the Commission to challenge practices in question, and *not* ISPs.

The Commission's proposed categories of exception to "nondiscrimination", its proposed "reasonable network management" standard, and its acknowledgment that there are forms of beneficial discrimination all evidence the Commission's recognition that ISPs require flexibility if they are to successfully operate, enhance, and expand their broadband networks. Fact-specific contingencies require intuitive judgments be made by expert network engineers who are in the best position of ascertaining network problems and implementing solutions. Placing the burden of proof on ISPs would undermine that flexibility and significantly erode ISPs' ability to manage their own networks for the benefit of all of their subscribers.

Placing the burden of proof on ISPs would render an already overly burdensome regulatory regime a compliance nightmare. Such ISPs would face extensive costs in defending even the most defensible network engineering decisions before the Commission

[29] *Notice*, at 51, para. 141.

whenever a complaint or petition is lodged by outside parties. Marketplace competitors could find the overly loose complaint process a convenient means of bogging down its rivals down with challenges to its network management practices. Under such circumstances, ISPs would be constrained to implement only those network practices that its best "guess" tells it will be vindicated in a costly, uphill battle before the Commission.

D. Applying the Proposed Regulations to Wireless Raises Additional Difficulties

Displaying a degree of double-mindedness, the *Notice* proposes to extend its regulation of broadband network management to wireless broadband networks while nonetheless doing so with some reservation given current capacity limits of such networks.[30] While acknowledging that "[s]ince the adoption of the *Internet Policy Statement* in 2005, alternative platforms for accessing the Internet have flourished, unleashing tremendous innovation and investment,"[31] the Commission nonetheless seeks to end the largely unregulated environment in which wireless has thrived.

The Commission's proposal that wireless broadband networks be subjected to new regulation appears to stem in part from a concern for technological neutrality. However, a more proper concern for neutral treatment of different technologies counsels against imposing *any* burdensome network management regulation on any platform. Given the Commission's

[30] *Notice*, at 56, para. 159 ("In evaluating the highly dynamic landscape for mobile wireless broadband Internet access, we recognize that there are technological, structural, consumer usage, and historical differences between mobile wireless and wireline/cable networks"); *id.* ("cellular wireless networks are shared networks…with limited resources typically shared among multiple users"). *See also id*. at 39, para. 97 (seeking comment on Commission's proposal to apply proposed regulation to wireless networks); *id*. at 40, para. 100 (seeking comment on timing and extent to which regulation for wireless broadband Internet networks can be implemented); *id*. at 55, para. 157 ("[t]he manner in which the principles apply to mobile Internet access raises challenging questions, particularly with respect to the attachment of devices to the network and discrimination with regard to access to content, applications, and services, subject to reasonable network management"); *id* at 55, para. 157 ("mobile wireless networks are not as far along in the process of transitioning to IP-based traffic as wireline networks").

[31] *Notice*, at 56, para. 155.

recognition of the significant technological limitations of nascent wireless broadband networks and facilities, the best technologically neutral approach is *no* new regulation.

E. Transparency Is Beneficial But Should *Not* Include Sensitive Proprietary Information, Endanger Network Security, or Be Overly Burdensome

The *Notice* proposes a transparency rule requiring broadband service providers to disclose information concerning network management practices "reasonably required for users and content, application, and service providers to enjoy the protections" contained in the proposed broadband network management regulations.[32] (Its requirements are subject to "reasonable network management" and other exceptions.[33]) On its face, this proposed requirement. Generally, consumers benefit from the ready availability of information to make informed choices tied to their respective preferences. Modest transparency requirements are particularly apt where a business's high degree of specified technical expertise gives rise to informational asymmetries between the business and the average consumer. By its terms, the *Notice*'s proposed requirement that broadband service providers make some disclosure of their respective network management practices appears likely to empower consumers to make better-informed choices about the type and value of service they are receiving. Indeed, absent demonstrated market failure, at this time it would be unwise for the Commission to go beyond adoption of a transparency regulation.

However, in order for the proposed transparency regulation to achieve its maximum effectiveness without becoming counterproductive, it should be refined or applied with

[32] *See Notice* at 45, para. 118; *id*. at 66 ("subject to reasonable network management, a provider of broadband Internet access services must disclose such information concerning network management and other practices as is reasonably required for users and content, application, and service providers to enjoy the protections specified in this part").
[33] *See Notice* at 45, para. 119 ("We propose that…this rule should be subject to reasonable network management and the needs of law enforcement, public safety, and homeland and national security").

attention paid to at least two of the following limitations. 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 administrative and compliance costs of such unduly onerous disclosure requirements could readily outweigh any expected benefits of such disclosure.

III. The Proposed Net Neutrality Regulations Likely Violate the First Amendment

The *Notice* anticipates freedom of speech concerns with the proposed regulations, seeking comment on whether they "impose any burdens on access providers' speech that would be cognizable for purposes of the First Amendment, and if so, how?"[34] Because these proposed regulations require an ISP to send, post, or otherwise allow access to content through its broadband network even when the ISP might prefer not to send, post, or allow access to content, the neutrality mandates are, in effect, compelled speech mandates which likely violate the First Amendment.[35]

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[34] *Notice* at 44, para. 116. There are also serious questions concerning the FCC's jurisdictional authority to adopt the proposed regulations. FSF trusts that these questions will be addressed by others, and FSF may address them as well in reply comments.

[35] For a more thorough argument that network neutrality mandates violate ISPs' free speech rights, *see* Randolph J. May, "Net Neutrality Mandates: Neutering the First Amendment in the Digital Age," *I/S: A Journal of Law and Policy for the Digital Age* (2007), *available at*: http://www.freestatefoundation.org/images/IS_Journal_Net_Neutrality.pdf.
See also Randolph J. May, "First Amendment – Net Neutrality Issues," August 14, 2006, *available at*: http://www.freestatefoundation.org/images/First_Amendment-Net_Neutrality_Issues-NLJ-081408.pdf

The First Amendment's language is plain: "Congress shall make no law . . . abridging the freedom of speech."[36] ISPs possess free speech rights just like newspapers, magazines, movie and CD producers or the man preaching on a soapbox. They are all speakers for First Amendment purposes, regardless of the medium used. While the medium or technological platform employed may impact the degree of First Amendment protection accorded, calling forth one standard of review or another, there should be no doubt that broadband ISPs possess First Amendment rights as speakers.

Under traditional First Amendment jurisprudence, it is just as much a free speech infringement to compel a speaker to convey messages that the speaker does *not* wish to convey as it is to prevent a speaker from conveying messages it wishes to convey. As the U.S. Supreme Court proclaimed in *Pacific Gas & Electric Company v. Public Utility Commission*, "[c]ompelled access...both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set."[37] In *Miami Herald Publishing Company v. Tornillo*,[38] the Supreme Court unanimously held that a Florida statute requiring a newspaper that published an editorial critical of a political candidate to print the candidate's reply violated the First Amendment. The Court acknowledged Tornillo's argument that the Florida mandatory access statute did *not* amount to a restriction of the newspaper's right to say whatever it pleased, but said that isn't the point:

> Appellee's argument that the Florida statute does not amount to a restriction of appellant's right to speak because "the statute in question here has not prevented the Miami Herald from saying anything it wished" begs the core question.

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[36] U.S. CONST. AMEND. I.
[37] 475 U.S. 1, 9 (1975).
[38] 418 U.S. 241 (1974).

> Compelling editors or publishers to publish that which "'reason' tells them should not be published" is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.

The proposed neutrality and anti-discrimination regulations requiring ISPs to post, send, or allow access to any content of the subscriber's choosing without any differential treatment are, for all practical purposes, compelled access mandates akin to the Florida right to access statute at issue in *Tornillo*. Even though the net neutrality regulations do not literally "restrict" an ISP from publishing content of its own choosing, they compel the ISP to convey or make available content it otherwise, for whatever reason, might choose not to convey or make available. And they prohibit ISPs from in any way and for any reason prioritizing or preferring some content over other content, even if in response to new perceived consumer demands or to differentiate its service from its competitors' services.

A Florida federal court decision provides persuasive authority for the express application of the principles in *Tornillo* to advanced communications services. The court held unconstitutional a county ordinance requiring a cable operator to allow competitors access to its cable system on terms at least as favorable as those on which it provides such access to itself.[39] The court declared: "Under the First Amendment, government should not interfere with the process by which preferences for information evolve. Not only the message, but also the messenger receive constitutional protection."[40] And in language directly pertinent to the compelled speech concerns raised by the regulations proposed in this proceeding, the court

[39] *Comcast Cablevision of Broward County, Inc. v. Broward County, Florida*, 125 F.Supp. 2d 685 (S.D. Fl. 2000).
[40] *Comcast Cablevision of Broward County*, 125 F.Supp. at 693.

proclaimed: "Compelled access like that ordered by the Broward County ordinance both penalizes expression and forces the cable operators to alter their content to conform to an agenda they do not set."[41]

In an apparent attempt to circumvent the free speech concerns raised by the proposed regulations, the *Notice* also seeks comments on whether any First Amendment burdens placed on ISPs speech might "be outweighed by the speech-enabling benefits of an open Internet that provides a non-discriminatory platform for the robust interchange of ideas."[42] However, the First Amendment does not give the Commission power to balance its infringement of ISPs free speech rights by enabling the speech rights of others. As the *Notice* itself explains, "[b]ecause broadband Internet access service providers are not government actors, the First Amendment does not directly govern their actions."[43]

Instructive here is the Supreme Court's rejection in *Tornillo* of government-compelled speech access mandates based on arguments that "[t]he First Amendment interest of the public in being informed is said to be in peril because 'the marketplace of ideas' is today a monopoly controlled by the owners of the market."[44] For purposes of First Amendment protection, the Court said:

> However much validity may be found in these [concentration of control] arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years.[45]

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[41] *Comcast Cablevision of Broward County*, 125 F.Supp. at 694.
[42] *Notice*, at 44, para. 116.
[43] Notice, at 33, para. 75.
[44] 418 U.S. at 251.
[45] *Tornillo*, 418 U.S. at 254.

Although the Supreme Court emphasized the result would have been the same even if the mandated right to reply was costless to the newspaper, it pointed out that the Florida statute necessarily imposes penalties and burdens on the newspaper required to print a reply:

> The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the costs in printing and composing time and materials and in taking up space that could be devoted to other material that the newspaper may have preferred to print.[46]

Similarly, in the *Broward County* the Florida federal district court observed that the mandated access provision applicable to cable operators "distorts and disrupts the integrity of the information market by interfering with the ability of market participants to use different cost structures and economic approaches based on the inherent advantages and disadvantages of their respective technology."[47] The compelled access and anti-discrimination mandates central to the proposed regulations have this very same effect and suffer the same defect.

The proposed regulations' compelled speech requirements are reminiscent of the Commission's "Fairness Doctrine," which the agency jettisoned two decades ago in light of the new media proliferating even then. The "Fairness Doctrine" required broadcasters to present adequate coverage of pubic issues and do so in a "balanced" way.[48] When the Supreme Court upheld this form of compelled access regulation against First Amendment challenge in 1969 in *Red Lion Broadcasting Co. v. FCC*,[49] it did so on the basis that it considered broadcasters different from other speakers because they use the radio spectrum,

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[46] *Tornillo*, 418 U.S. at 256.
[47] 125 F. Supp.2d at 694.
[48] For a description of the doctrine, its impact on broadcasters, and its demise, *see Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), *affirmed*, 867 F.2d 654 (D.C.Cir. 1989). *See also Meredith Corp. v. FCC*, 809 F.2d 863 (D.C.Cir. 1987).
[49] 395 U.S. 367 (1969).

which the court characterized as a scarce public resource.[50] Apart from whether the Court today would reach the same result regarding broadcasters' free speech rights[51] -- and many commentators say it would not -- it has refused to extend such scarcity-based reasoning to other media. The Commission should *not* import "Fairness Doctrine"-type speech restrictions into the newly-competitive environment of high-speed broadband.

CONCLUSION

In considering the *Notice* proposing net neutrality regulations for broadband Internet service providers, the Commission should act consistent with the views expressed herein. This means that, with the exception of the proposed transparency rule, the Commission should not move forward at this time.

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[50] "[B]ecause the frequencies reserved for public broadcasting were limited in number, it was essential to tell some applicants that they could not broadcast at all because there was room for only a few." *Red Lion Broadcasting*, 395 U.S. at 388.

[51] There has been considerable criticism of the "scarcity doctrine" for many decades, even before the Supreme Court employed the rationale in Red Lion. *See, e.g.*, Ronald Coase. R. H. Coase, "The Federal Communications Commission," 2 J. L. & ECON. 1 (1959); Christopher S. Yoo, "The Rise and Demise of the Technologically-Specific Approach to the First Amendment," 91 *GEO. L. J*. 245, 266-292 (2003).