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

In the Matter of	)	
	)	
	)	GN Docket No. 10-127
Framework for Broadband Internet Service	)	
	)	

COMMENTS OF
THE FREE STATE FOUNDATION*

INTRODUCTION AND SUMMARY

These comments are filed in response to the Commission's *Notice of Inquiry* proposing to reclassify broadband Internet service as a "telecommunications service."[1] Rather than pursue a mistaken course by subjecting Internet providers to common carrier regulation, the Commission should continue to treat broadband Internet services as minimally regulated "information services." The Commission's "Third Way" proposal would be harmful to broadband innovation and investment, and, lacking evidence of market failure or any pattern of consumer abuse, it makes no sense in today's dynamic competitive market to go backwards.

The Commission's regulatory treatment of wireless voice provides absolutely no basis for reclassifying broadband Internet service. Indeed, the Commission has classified wireless broadband as a minimally regulated information service, and it has treated

* 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. Their views do not necessarily represent the views of the Board of Directors, staff, or others associated with the Free State Foundation. FSF is an independent, Section 501 (c)(3) free market-oriented think tank.

[1] *See* Notice of Inquiry ("*Notice*"), *In the Matter of Framework for Broadband Internet Service*, GN Docket No. 10-127 (June 17, 2010), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-114A1.pdf.

wireless voice providers as non-dominant carriers whose rates and practices are presumptively reasonable. This treatment is very much unlike what the Third Way plan entails. Apart from the reasons why the Third Way proposal is unsound as a matter of policy, the forbearance component of the proposal presents serious legal and process problems. If, despite the lack of evidence of market failure or abusive Internet service provider practices, the Commission believes that a problem exists regarding the operation of the Internet that requires new regulation, it should work with Congress to pass targeted legislation that grants the FCC only narrowly-circumscribed authority to address particular market failures that give rise to demonstrable consumer harms.

DISCUSSION

I. The Commission's Proposed Net Neutrality Rules Disrupted the Consensus for Minimal Regulation of the Internet

The Commission's *Notice of Inquiry* begins with a false premise. It is factually inaccurate right in the first paragraph in placing the disruption of the "settled approach" of minimal Internet regulation on the decision in *Comcast v. FCC*.[2] There was, in fact, a widespread consensus (though not unanimity) in favor of a policy of minimal broadband regulation before the Commission initiated its network neutrality rulemaking last fall. It was the *Open Internet Notice of Proposed Rulemaking*[3] that most disrupted this settled approach, despite any latter-day disclaimers to the contrary.

Specifically, the *NPRM*'s addition of a new nondiscrimination prohibition to the four "openness" principles proposed to implement a regime significantly more susceptible to investment-stifling and innovation-inhibiting regulatory overreach. More

[2] 600 F.3d 642 (D.C. Cir. 2010).
[3] *See* Notice of Proposed Rulemaking ("*NPRM*"), *In the Matter of Preserving the Open Internet*, GN Docket No. 09-191 (October 22, 2009).

than anything else, the proposed new nondiscrimination prohibition – one of the core obligations of common carrier regimes generally applicable only in monopolistic situations – upset the existing consensus. Putting aside the *NPRM*'s other proposed rules, the new nondiscrimination mandate necessarily would convert an existing minimal regulatory environment into a considerably more regulatory regime.

By calling into question the Commission's jurisdiction to impose network neutrality regulation on ISPs, the ruling in *Comcast v. FCC* disrupted the Commission's plans to establish a considerably more regulatory Internet environment than which existed before the *Open Internet NPRM*. This was a good thing. The *NOI* seeks to salvage the Commission's disrupted plans to impose Internet regulation by establishing a common carrier basis for a new nondiscrimination prohibition. Unfortunately, the *NOI* only widens the chasm that exists between the real "settled approach" of minimal Internet regulation that existed before the *NPRM* and the regulation-heavy approach to Internet regulation urged by the Commission.

II. The "Third Way" Nondiscrimination Obligation is Harmful and Inconsistent with Today's Competitive Environment

The nondiscrimination obligation first proposed in the *NPRM* and which is encompassed by the *NOI*'s "Third Way" would be harmful and inconsistent with today's competitive broadband Internet services marketplace. Nondiscrimination mandates have always been at the heart of common carrier regulation. In the past such mandates have never been considered characteristic of light-handed regulation. But heavy-handed regulation would be the direct result if the Commission adopts the *NOI*'s Third Way proposal in order to prop up the nondiscrimination obligation first contemplated by the *NPRM*.

At the heart of the *NPRM*'s nondiscrimination proposal is the requirement that the transmission component of Internet service be unbundled and regulated as common carriage, with the remainder of what comprises the totality of Internet service, such as applications or content, to remain unregulated. Although the Commission does not call such a requirement "unbundling," the absence of the label does not obscure what the requirement entails: separation of the transmission component from everything else. Such unbundling is impractical in a broadband world of integrated services. And even if it were somehow practical to mandate the unbundling of "transmission" from "content" and "applications," such a regime would be inherently unstable as the line between "transmission" and other services are litigated.

Compounding the problem is unbundling's easy lead into rate regulation. The statement by the Commission's General Counsel that "[t]here is no reason to anticipate" the Commission would regulated Internet rates is itself a telling admission.[4] Combined with the Commission's proposal *not* to forbear from applying the key common carrier rate regulation and nondiscrimination provisions, the Third Way reclassification leaves the door wide open to regulatory rate setting.

Consequently, uncertainties resulting from unbundling and rate regulation fostered by Third Way nondiscrimination obligations discourage the continuing investment in broadband infrastructure and services necessary to bring about increasing innovation and to meet consumers evolving demands.

The lack of any proven market failure or any existing pattern of consumer abuses also reinforces the conclusion that there is no pressing need for the Commission to

[4] Austin Schlick, "A Third-Way Legal Framework for Addressing the *Comcast* Dilemma" at 8 (May 6, 2010).

possess express jurisdiction over ISPs for purposes of imposing network neutrality regulation. Like the *NPRM*, the *NOI*, strikingly, contains no reference to any market failure or any linking of the need for nondiscrimination mandates to the status of marketplace competition.

The wrong-headedness of heavy-handed regulation of the Internet through nondiscrimination unbundling and prospective rate regulation is especially evident in light of the recent development concerning the establishment of the Broadband Internet Technical Advisory Group made up of a diverse group of companies "to develop a consensus on broadband network management practices or other related technical issues that can affect users' Internet experience, including the impact to and from applications, content and devices that utilize the Internet."[5] This new body – and other existing ones like it – holds significant promise for facilitating self-regulatory mechanisms that, through the employment of technical and other specialized expertise, are equipped to protect consumers while avoiding the pitfalls and costs of inflexible, static anticipatory regulatory regimes.

III. Regulatory Treatment of Wireless Voice Does Not Support "Third Way" Reclassification

It is highly misleading for the Commission to now trumpet the growth and dynamism of the "wireless ecosystem" as a shining example of Title II classification under Section 332(c). The reality is that most innovative and in-demand components of that ecosystem have never been subject to any FCC regulatory regime. Wireless operating systems, content, applications and other data services such as text messaging

[5] Broadband Internet Technical Advisory Group, "Initial Plans for Broadband Technical Advisory Group Announced," *PRNewswire* (June 9, 2010).

are not directly subject to either Title I or Title II. Most of those services are likely beyond the Commission's jurisdiction.

Moreover, wireless broadband Internet service has never been subject to Title II. The Commission's *Wireless Broadband Order* declared wireless broadband Internet access service to be a Title I "information service."[6] The Commission made that decision in order to establish regulatory consistency across broadband platforms and in order to provide regulatory certainty to spur technological growth and deployment. The explosive wireless broadband Internet service market has benefited from the certainty provided by light-touch regulatory treatment under Title I. But that regulatory certainty is now threatened by the proposed nondiscrimination and other mandates that would accompany reclassification of wireless broadband Internet service.

In addition, the Commission's proposal for subjecting broadband Internet service to Title II regulation is far more heavy-handed than its Title II regulation of wireless voice service. The attempted analogy between the Third Way and the historic treatment of wireless voice service also fails on account of significant differences: the Commission's Title II regulation of wireless voice service conflicts with the nondiscrimination mandate proposed in the *NPRM*. Because wireless voice providers are classified as non-dominant carriers, "discrimination" by them is treated as presumptively reasonable. The Commission in its N*PRM* indicated it proposed to treat "discrimination" by ISPs as presumptively unreasonable.

[6] *See* Declaratory Ruling, *In the Matter of Appropriate Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, 22 FCC Rcd 5901 (2007).

The Commission's Title II policies for wireless voice originate with the *Mobile Services Order* implementing amendments to the Communications Act.[7] There the Commission reiterated the logic of its *Competitive Carrier* docket decisions that "[b]ecause non-dominant carriers lacked market power to control prices and were presumptively unlikely to discriminate unreasonably the Commission adopted for them a policy of forbearance from certain regulations."[8] Extending this logic to wireless voice service, the Commission granted forbearance relief to wireless carriers from several Title II provisions by classifying "commercial mobile service providers" as "non-dominant" Title II common carriers.

But the Commission's Third Way proposal paves the way for far more onerous regulatory restraints than countenanced in the *Mobile Services Order*. As the Commission itself made clear in the *NPRM*, "our proposed nondiscrimination and reasonable network management rule bears more resemblance to unqualified prohibitions on discrimination added to Title II in the 1996 Telecommunications Act than it does to the general prohibition on 'unjust or unreasonable discrimination' by common carriers in section 202(a) of the Act."[9] By incorrectly relying on the unregulated or lightly regulated success stories of the wireless ecosystem in its proffering of a nondiscrimination mandate more onerous than anything ever imposed on non-dominant wireless voice service, the Commission's Third Way analogy with the wireless ecosystem fails. The Third Way is a departure from deregulatory policies that threatens to stifle broadband Internet services with new regulatory burdens and uncertainties.

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[7] *See* Second Report and Order, *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, 9 FCC Rcd 1411 (1994).
[8] *Id.* at 1416.
[9] *NPRM*, Docket No. 09-191, at 43, para. 109.

IV. "Third Way" Forbearance Poses Policy and Process Problems

The Commission's attempt to spare broadband Internet service from the innovation-inhibiting and investment-stifling consequences of monopoly-era telephone regulation by proposing to forbear from applying several Title II provisions present additional problems. Third Way forbearance would be difficult under forbearance standards recently adopted by the Commission, and creating differing forbearance standards for the Third Way plan likely also would be difficult to justify.

In its recent *Qwest Phoenix MSA Order* (2010), the Commission adopted a new market power framework for applying Section 10 forbearance criteria.[10] Combined with the Commission's new burden of proof rules for forbearance, the *Order* significantly raises the bar for obtaining forbearance relief. Under the framework, even in the absence of market failure or collusion, telecommunications service providers must proffer empirical evidence sufficient to satisfy the Commission's duopoly/oligopoly-themed competition concerns. The *Order* hints that "a different analysis may apply when the Commission addresses advanced services, like broadband services, instead of a petition addressing legacy facilities."

But a different forbearance analysis for broadband Internet service under the Third Way plan would result in a strangely curious policy whereby broadband is all at once submerged under Title II, but then split off into a separate Title II subculture for forbearance purposes. The already jerry-rigged nature of the Third Way reclassification would be further convoluted – you might say "jerry-rigged squared" – by employing differing standards for obtaining relief under the statutory forbearance provision. If a

[10] Memorandum Opinion and Order, *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135 (June 22, 2010).

different, lighter-touch regulatory treatment of broadband Internet service is desirable – as it is -- then why subject broadband to Title II in the first place? After all, it was the need for a minimal and certain regulatory environment to foster rapid innovation, investment, competition, and deployment that led to the Commission's decisions declaring broadband Internet services to be information services.

Moreover, nothing in the terms Section 10 calls for or suggests differing treatment of various telecommunications services. It amounts to an odd, *ad hoc* policy and seemingly arbitrary administrative process to make statutory forbearance relief a difficult process for telecommunications services in some settings, while purporting to make it an easy foregone conclusion in other settings. Whatever the extent of Commission's authority through rulemaking or case-by-case adjudications to spin off differing forbearance standards in applying Section 10, it must still supply a reasoned explanation for doing so.

Finally, as both a policy and legal matter, Section 332(c) is an unavailing precedent for what the Commission has proposed with its Third Way forbearance suggestion. Section 332(c) is entirely separate from Section 10, and it was a specific directive from Congress to the Commission. If anything, Section 332(c) is a precedent that favors the agency seeking regulatory authority from Congress.

V. In the Event That Regulatory Authority Over Broadband Internet Is Necessary, the Commission Should Work with Congress to Pass Limited, Targeted Legislation

If the Commission determines that, in its view, there needs to be some agency authority over broadband ISPs, it should work with Congress to pass a new, narrowly-

circumscribed legislative framework. As a majority of U.S. House members recognize,[11] it is preferable for Congress to enact legislation granting such express authority rather than have the Commission impose a reclassification plan so fraught with problems. There is no profit for the Commission itself, or for consumers, in having the agency adopt a course that, on its face, appears so jerry-rigged — all in the cause of avoiding the import of a court ruling that the agency lacks jurisdiction to impose network neutrality mandates.

A prerequisite to the Commission's exercise of regulatory authority over ISPs should be that the ISP possess market power and abuses it in a way that causes consumer harm. Any regime under which the Commission exercises authority over ISPs should be on a post hoc adjudicatory basis upon a complaint filed.

The core of a legislative framework should be a provision granting the Commission authority, upon a complaint filed and after an on-the-record adjudication, to act to prohibit broadband ISPs from engaging in practices determined to constitute an abuse of substantial, non-transitory market power and that cause demonstrable harm to consumers. Such a circumscribed market-oriented rule would provide the Commission with a principled basis for adjudicating fact-based complaints alleging that ISPs are acting anticompetitively and, at the same time, causing consumer harm. Using antitrust-like jurisprudence that incorporates rigorous economic analysis, the Commission would focus, *post hoc*, on specific allegations of consumer harm in the context of a particular marketplace situation.

[11] *See, e.g.*, David Hatch, "Majority of Congress Opposes FCC Reclassification," *Tech Daily Dose* (May 28, 2010).

There are different ways such legislation might be drafted consistent with achieving a narrowly-circumscribed legislative fix. And specific language depends upon technical matters such as where in the Communications Act amendments are asserted and whether new definitions of terms are needed. That said, FSF has offered some suggested legislative language,[12] reproduced here in the attached appendix, which would grant the Commission authority to protect consumers according to a framework premised on ISP possession of market power and the abuse of that power in a way that causes harm. This proposal circumscribes such authority in a way that prevents the Commission from overreaching and stifling investment and innovation in the dynamic environment that characterizes the Internet.

CONCLUSION

In considering the *Notice* proposing to reclassify broadband Internet service as a telecommunications service, the Commission should act consistent with the views expressed here. The Commission should not move forward with reclassification, but

[12] Randolph J. May, "Broadband Regulatory Authority: Some Suggested Legislative Language": http://freestatefoundation.blogspot.com/2010/06/broadband-internet-regulatory-authority.html

rather it should keep broadband Internet service a minimally regulated information service.

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APPENDIX

Suggested Legislative Language for Limited Broadband Internet Regulatory Authority

Section 1. Complaints Against Broadband Internet Service Providers

Except as expressly provided in this section and Section 2, the Commission shall have no authority to impose sanctions on or otherwise regulate, either through the adjudication of complaints or resolution of complaints by other means, or through the adoption of rules, broadband Internet service providers.

(a) The Commission shall have the authority, upon a complaint filed and after an on-the-record adjudication, to prohibit broadband Internet service providers from engaging in acts or practices that are determined to constitute an abuse of substantial, non-transitory market power and which cause harm to consumers.

(b) The Commission shall have the authority, upon complaint filed and after an on-the-record adjudication, to require interconnection between and among Internet service providers if the Commission determines that failure to order such interconnection poses a substantial, non-transitory risk to consumer welfare by materially impeding the interconnection of public communications facilities and services in circumstances in which marketplace competition is not sufficient adequately to protect consumer welfare, provided that in making any such determination the Commission must consider whether requiring interconnection will affect adversely investment in facilities and innovation in services.

(c) Before filing a complaint with the Commission under this subsection (a) or (b) of this section, a subscriber to an offering of an Internet service provider or an Internet service provider requesting interconnection must first engage in an informal dispute resolution process that has been recognized by the Commission as a forum for attempting to resolve such disputes in a fair and expeditious manner.

Section 2. Rules Governing Acts or Practices of Internet Service Providers

(a) The Commission shall have no authority under this section to prescribe rules that declare unlawful an act or practice on the grounds that such act or practice is harmful to consumers unless the Commission determines,

based on a showing of clear and convincing evidence presented in a rulemaking proceeding in which the public is afforded notice and an opportunity to comment, that marketplace competition is not sufficient adequately to protect consumer welfare and that such act or practice causes or is likely to cause injury to consumers and is not avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.

(b) Any rule promulgated under this section shall terminate automatically by operation of law five years from the date it becomes effective unless the Commission, in a proceeding in which the public is afforded notice and an opportunity to comment, makes an affirmative determination, based on a showing of clear and convincing evidence presented in such proceeding, that the rule continues to be necessary because marketplace competition is not sufficient adequately to protect consumers from substantial injury which is not avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.