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[*]

I. Introduction And Summary

These comments are submitted in response to the Commission's *Further Inquiry* regarding additional issues raised by proposed regulation of broadband Internet service providers (ISPs). The Commission's decision to issue this *Notice*, rather than rushing to adopt net neutrality regulations, is commendable. In light of the sizeable bipartisan consensus that broadband policy should be set by Congress, it would be wrong for the Commission hastily to impose net neutrality regulations. The present lack of market failure or consumer harm counsels strongly against any rush to regulate. Indeed, it has been the position of Free State Foundation scholars since at least last April's *Comcast* decision that the FCC should not move forward with its net neutrality proposals absent Congress granting the agency authority to do so.

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

Even though the Commission should not move forward by administrative fiat, the *Further Inquiry Notice* could still serve a useful function by further clarifying issues, as well as perhaps by building a further consensus on certain fundamental points key to developing a proper legislative framework. In certain respects, questions raised in the *Notice* are suggestive of approaches that differ from the Commission's previously proposed net neutrality rules. For example, the *Notice*'s recognition of the growing consensus favoring case-by-case adjudication of high-level rules as a means of addressing alleged anticompetitive practices differs from the prescriptive rule-based approach previously proposed. And the *Notice*'s apparent recognition of the benefits of usage-based pricing flexibility in the wireless context is conceptually at odds with the stricter wireline antidiscrimination regulation the Commission proposed earlier in this proceeding. The Commission should resolve these differences by jettisoning its low-level prescriptive rule-based approach altogether and by affirming the consumer benefits of pricing flexibility not just for wireless, but for all technological platforms.

Furthermore, proposals for carving out differential regulatory regimes for wireless and "specialized services" may unnecessarily entangle the Commission in a troublesome regulatory thicket by posing ongoing definitional problems and by compromising unnecessarily the goal of technological neutrality. The impulse behind these potential carve-outs – to protect such services from rigid net neutrality restrictions – is laudable, and certainly one we share. So, we don't favor regulating wireless or specialized Internet services in ways they are not presently regulated. The preferred approach is to reject net neutrality regulation for all broadband services, regardless of the technology platform or particular definition of the service. This regulatory minimalist approach will ensure that

investment and innovation in new broadband platforms and Internet services continues to grow, subject not to regulatory dictates, but rather to the dictates of the marketplace.

II. A Consensus Exists That The Commission Should *Not* Adopt Net Neutrality Regulation While Congress Considers Legislation

Any need for hasty Commission action is precluded by ongoing congressional consideration of broadband legislation. The recent draft Internet legislation prepared by House Commerce Committee chairman Henry Waxman should cement the bipartisan consensus that has been growing steadily since the April decision U.S. Court of Appeals for the District of Columbia Circuit in *Comcast v. FCC* that the Commission should not adopt net neutrality mandates absent legislation granting the agency authority to do so.[1] So long as there is a prospect that Congress may legislate in this area, it ought to be unthinkable for the agency to charge ahead with its ill-conceived Title II classification proposal that would convert Internet providers into common carriers.[2]

The Commission as a whole, or individual commissioners, can play a constructive role in helping to inform the legislative process.[3] They can work with Congress to design a narrowly-circumscribed legislative framework. As discussed below, any such framework should embody the growing consensus in favor of case-by-case enforcement, and it also should be premised upon the need for threshold findings of consumer harm and market failure before the imposition of any administrative sanction.

---

[1] *See* "Proposed Net Neutrality Legislative Framework," available at: http://www.nationaljournal.com/congressdaily/issues/documents/Proposed_Net_Neutrality_Legislative_Framework.pdf; 600 F.3d 642 (D.C. Cir. 2010).

[2] *See* Comments of the Free State Foundation, *In the Matter of Framework for Broadband Internet Services*, GN Docket No. 10-127 (July 15, 2010), available at: http://fjallfoss.fcc.gov/ecfs/document/view?id=7020538450.

[3] *See* Reply Comments of the Free State Foundation, *In the Matter of Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52 (April 7, 2010), available at: http://fjallfoss.fcc.gov/ecfs/document/view?id=7020406522.

III. There Is No Evidence Of Any Market Failure Or Consumer Harm to Justify Net Neutrality Regulation

Just as there is virtue in proceeding cautiously when considering intervention in a marketplace that is working well, so there is there is vice in rushing to regulate absent a clearly identified problem. The prerequisite for proceeding with any agency regulation ought to be the existence of a clearly identified problem.

The record of this proceeding contains no evidence of broadband market failure or evidence that consumers are experiencing any demonstrable harm on account of the absence of Internet regulation. There is no evidence the Internet is somehow not "open" for everyone. And there is no reason to believe, consistent with the workings of the marketplace, that the Internet will not remain open.

As related to the Commission earlier in both this proceeding and a related one, [4] at the core of any new legislative framework should be a requirement that an ISP may be sanctioned, upon a complaint filed and after an on-the-record adjudication, only upon findings that the ISP engaged in practices determined to constitute an abuse of substantial, non-transitory market power *and* that caused demonstrable harm to consumers.[5]

IV. There Is A Consensus Favoring Case-By-Case Enforcement of High-Level Rules

To the extent that the Commission now recognizes that case-by-case enforcement of high-level rules offers a sounder approach to network management oversight for Internet providers than adoption of a set of specific Commission-prescribed technical

[4] *See* Reply Comments of FSF, GN Docket No. 09-191.
[5] *See* Comments of FSF, GN Docket No. 10-127, at 9-11, 13-14. The draft bill recently circulated in the House Commerce Committee, for instance, could be modified to require proof that the Internet provider alleged to have committed a discriminatory practice possesses substantial market power and that the alleged abusive practice causes consumer harm.

rules, such recognition is welcome.[6] However, the *Further Notice*'s positive nod to case-by-case adjudication is invariably at odds with the Commission's proposal to subject broadband Internet access to prescriptive rules in its earlier *Notice of Proposed Rulemaking (NPRM)* – as well as the Commission's "Third Way" proposal to subject broadband Internet to the key traditional Title II common carrier provisions.

As FSF Academic Advisory Board member Glen Robinson recently pointed out, "nothing in [the Commission's] new public notice suggests any retreat from earlier proposed ('low-level') fixed rules."[7] With respect the Commission's previously proposed rules that would ban broadband ISPs from charging different prices for enhanced or prioritized services, except for those that might fall under the category of "specialized services," Professor Robinson also observed: "What is most noteworthy about some of these rules is that they have nothing whatsoever to do with applying 'engineering expertise' on an ad hoc or a fixed-rule basis."[8]

In addition, nothing in the *Further Inquiry*'s "general policy approaches" to "specialized services" suggests that any one or more of those approaches marks any kind of retreat from an onerous, rule-based regime for broadband Internet services that goes beyond network management practices. And the *Notice*'s prolix line of questions concerning details of the wireless business ecosystem — including third-party wireless device connectivity, usage-based data pricing models, wireless application compatibility

---

[6] Of course, voluntary, consensus-based efforts by groups of technical experts, such as the BITAG effort now getting off the ground, have a very important role to play in the resolution of network management disputes that otherwise might end up at the Commission.

[7] Glen O. Robinson, "The Middle Way to Internet Regulation," *Perspectives from FSF Scholars*, Vol. 5, No. 22 (September 13, 2010), at 3, available at: http://freestatefoundation.org/images/The_Middle_Way_to_Internet_Regulation.pdf.

[8] *Id.*

and restrictions, and wireless app distribution models — is still more suggestive of detailed prescriptive regulation than case-by-case enforcement of high-level rules.

The consensus favoring an adjudicatory case-by-case approach is key to maintaining an environment that does not discourage innovation and investment needed for continued broadband progress. Thus, the Commission should resolve this tension between its earlier *NPRM* and its recent *Notice* in favor of case-by-case adjudication.

V. Benefits Of Usage-Based Pricing In The Wireless Context Are Present In the Wireline Context

The *Notice* apparently suggests a new receptivity by the Commission to more flexible broadband pricing arrangements, particularly with reference to wireless services.[9] To the extent the Commission now more fully appreciates the potential efficiency benefits associated with flexible broadband pricing models, this new receptivity is welcome. But at the same time, it is important that the Commission face up to the implications of its recognition of the benefits of usage-based pricing for wireless broadband. Because it follows that similar benefits should obtain for wireline broadband.

It is a fundamental economic truth that consumers respond to price signals. Consumers are accustomed to usage-based pricing with respect to a variety of other goods and services. In the broadband context, usage-based pricing models can serve as efficient methods for network operators to address bandwidth limits and to make optimal use of network infrastructure. And such pricing allows consumers to pay only for the

[9] The *Notice* states "[m]obile broadband service providers such as AT&T Mobility and Leap Wireless (Cricket) have recently introduced pricing plans that charge different prices based on the amount of data a customer uses," *Id.*, at 4, and adds that "[t]he emergence of these new business models may reduce mobile broadband providers' incentives to employ more restrictive network management practices that could run afoul of open Internet principles." *Id.* It goes on to ask for public comments on the question: "To what extent do these [usage-based data pricing] business models mitigate concerns about congestion of scarce network capacity by third-party devices?" *Id.* at 5.

amount of bandwidth they use – meaning that low-volume users who primarily check e-mail or follow friends on Facebook would pay less than high-volume users who routinely send and receive data-rich files such as music or HD video.

But there is no reason to think the benefits of usage-based pricing are limited to wireless services. Those same benefits from usage-based pricing, addressing network scarcity, consumer preferences, and "reduc[ing] mobile broadband providers' incentives to employ more restrictive network management practices," apply to broadband networks generally.[10]

And a disconnect exists between the Commission's nod to usage-based pricing flexibility in the *Notice* and the "nondiscrimination" regulation proposed earlier in this proceeding. In its *NPRM*, the Commission acknowledged that "discriminatory" pricing can be beneficial to consumers while also admitting that administrative agencies have difficulty distinguishing beneficial pricing practices from harmful ones.[11] Nonetheless, the Commission's proposed "nondiscrimination" regulation stipulates that "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."[12] Under the proposed "nondiscrimination" rule, an ISP attempting to employ usage-based pricing would be burdened with proving that its pricing model is consistent with "reasonable network management." This approach is hardly conducive to broadband pricing flexibility that accommodates consumer demand. There likely would be a

[10] Quoting *Notice*, at 4.
[11] *See NPRM*, at 28, para 66 at fn. 154; *Id*., at 41, para 103. *See also Comments of Free State Foundation*, *In the Matter of Preserving the Open Internet*, GN Docket 09-191, WC Docket 07-52 (January 14, 2010), at 10-11, available at: http://fjallfoss.fcc.gov/ecfs/document/view?id=7020369639.
[12] *NPRM*, at 42, para. 106.

plethora of complaints filed under the Commission's proposed "nondiscrimination" regulation.

Broadband pricing flexibility simply cannot coexist with a "nondiscrimination" regime that erects high hurdles. The Commission should resolve this tension in favor of clearly recognizing that according flexibility for pricing by Internet service providers serves efficiency and consumer welfare goals better than Commission rate-setting dictates based on discrimination claims.

VI. The Commission Can Avoid Treating Wireline and Wireless Platforms Differently By Taking A Minimalist Regulatory Approach

The *Notice*'s line of questioning regarding prospective regulation of wireless services appears motivated, at least in part, by the Commission's concern with treating different technologies in a non-neutral manner. In general, regulating in a technologically neutral way is an important goal. Even so, policies designed to achieve technological neutrality are defective to the extent that, by imposing unnecessary regulation, they restrict innovation and stifle competition in dynamic markets.

The best approach for achieving neutral treatment of different technologies is to adopt a minimalist regulatory approach. Where regulation already exists, parity is obtained by ratcheting regulation downwards, not upwards, especially in markets that are competitive such as the broadband market. Where regulation presently does not exist, such as in the wireless market, the Commission should refrain from imposing regulation. In other words, following this "regulate-down to achieve neutrality" principle, given the

lack of evidence concerning market failure or consumer harm, there is no need for the agency to impose net neutrality regulation on either the wireless or wireline platforms.[13]

VII. A Carve-Out For "Specialized Service" May Create Definitional And Enforcement Difficulties

In the *Notice*, the Commission asks about a regulatory definition and set of rules concerning the "managed or specialized services" concept introduced in its *NPRM*.[14] A potential "specialized services" carve-out appears to be motivated by the laudable concern that regulation of these services could stifle innovation and deployment of new broadband services. This is certainly a concern we share.

As we pointed out earlier in this proceeding, the Commission's proposed nondiscrimination rule and reasonable network management standard already pose difficulties when it comes to defining those concepts or determining when alleged violations take place in practice.[15] But those difficulties could be compounded by the added difficulties associated with defining specialized services and identifying allegedly discriminatory conduct with respect to those services.

Placing prohibitions on the set of specialized services that ISPs can provide – including restrictions on the functionalities that the Commission deems permissible for specialized services – will likely lead to a series of Commission line-drawing exercises concerning a myriad of network practices and applications. Regulating "specialized" services in this manner may well pose a ready source of contention both at the definitional stage and enforcement stage, and continuing into the litigation stage.

[13] *See* Comments of FSF, GN Docket 09-191, at 14-15.
[14] *See* Notice, at 2-4.
[15] See Comments of FSF, GN Docket 09-191, at 14-15.

Requiring that all commercial arrangements with vertically-integrated affiliates or third parties for specialized services be offered on the same terms also would pose problems. The Commission recognizes in the merger review context that vertical integrations typically are efficiency-enhancing. Intrusive regulatory intervention could well undermine those efficiencies to the ultimate detriment of consumers. And as noted earlier, the Commission acknowledges in the *NPRM* that price discrimination can enhance consumer welfare, making it difficult to single out anticompetitive pricing conduct. New technological advancements and service innovations would also pose significant challenges to attempts to define discriminatory conduct.

Regulation of this kind, moreover, could create disincentives for future investment in such specialized services. For ISPs to undertake the risk of capital investments in new technologies there must be sufficient opportunity for recouping such investments. Regulation of the terms of pricing arrangements with competitors in adjacent markets upsets the ability of risk-taking capital investors to balance demand-side benefits stemming from third-party offerings with the need to sustain their own services and obtain an adequate return. And to the extent that additional confusion and uncertainty surrounds new purely regulatory distinctions, the kind of investment and innovation that consumers are counting on to deliver new and improved services will be chilled.

Again, the Commission could avoid the possible pitfalls associated with its laudable attempt to carve out "specialized" services by not imposing net neutrality regulations on any broadband services. This is not to say that if the Commission were absolutely determined, ill-advisedly, to regulate "regular" broadband services, it should

also regulate "specialized" services. Rather it is to say there is no present reason to regulate either, and the difficulties brought on by the questions raised by the Commission in considering "specialized" services merely serve to reinforce this point.

CONCLUSION

For the reasons explained above, the Commission should act consistently with the views expressed herein.

Respectfully submitted,

Randolph J. May
President

Seth L. Cooper
Research Fellow

The Free State Foundation
P. O. Box 60680
Potomac, MD 20859
301-984-8253

October 12, 2010