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

REPLY COMMENTS OF
THE FREE STATE FOUNDATION[*]

Yesterday's decision of the D.C. Circuit Court of Appeals in the *Comcast* case has changed dramatically the context and contours of this proceeding.[1] The unanimous holding that the FCC lacks jurisdictional authority under the Communications Act to regulate broadband Internet providers' network management practices sends the Commission an unmistakably strong signal that the net neutrality regulations the agency has proposed rest on extremely shaky ground. The purpose of these comments is not to provide a legal analysis of the Commission's authority in light of the court's decision. Rather, the purpose is to suggest a way forward for the Commission that acknowledges, even though thus far there is no proven market failure in the broadband Internet market that conceivably would justify imposition of the overly broad anticipatory regulations envisioned by the Commission's *Notice*,[2] it may be

[*] These comments express the views of Randolph J. May, President of the Free State Foundation. FSF is an independent, nonpartisan Section 501 (c)(3)free market-oriented think tank. His views do not necessarily represent the views of the Board of Directors, staff, or others associated with FSF.
[1] Comcast Corporation v. FCC, No. 08-1291, D.C. Cir., April 6, 2010.
[2] 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) (hereinafter "*Notice*"). After

appropriate for the Commission to have authority, in relatively rare instances, to remedy any instances of demonstrable consumer harm caused by Internet providers that possess substantial and non-transitory market power. What the Commission should do in the wake of the D.C. Circuit's decision, assuming a Commission majority believes there is a need for some form of regulatory authority over Internet providers, is to suspend its current rulemaking proceeding and avail itself of the opportunity to work with Congress to fashion a proper statutory regime. What the Commission should not do is to embark on a foolhardy, and legally highly suspect, course of trying to classify Internet providers as common carriers.

With the Commission's participation and leadership, and given some time for consultation and fresh thinking, a significant consensus could emerge in support of a sensible, market-oriented legislative framework embodying a narrowly-circumscribed regulatory approach appropriate for today's technologically dynamic, competitive, ever-evolving digital age Internet ecosystem.

The core of the new legislative framework would be a provision granting the FCC authority, upon a complaint filed and after an on-the-record adjudication, to prohibit broadband Internet Service Providers from engaging in practices that are determined to constitute an abuse of substantial, non-transitory market power *and* that cause demonstrable harm to consumers. Such a carefully-circumscribed market-oriented rule would provide the FCC with a principled basis for adjudicating fact-based complaints alleging that ISPs are acting anti-competitively and, *at the same time*, causing consumer harm.[3] Using antitrust-like

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review of the substantive comments filed by the most active parties to this proceeding, it should be clear there is no persuasive evidence of present broadband Internet market failure or consumer harm that justifies adoption of broadly drawn prohibitory rules such as those proposed in the *Notice*.

[3] I recommended adoption of a new act along these lines years ago in this law review article: Randolph J. May,

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.[4]

In today's competitive environment, when consumers increasingly have a choice of multiple Internet providers, it is unlikely there will be instances of ISP practices that abuse market power and actually harm consumers.[5] Indeed, the Commission's *Notice* initiating this proceeding and the record compiled thus far point to only two isolated instances of allegedly abusive practices. Surely, this is not a sound basis for constructing an unbridled regulatory regime that could easily stifle the broadband Internet investment, innovation, and consumer welfare gains that have occurred in the current deregulatory environment and which were described in detail in FSF's initial comments.

Even though the likelihood of abuses in the broadband Internet market is minimal, the suggested legislative proposal nevertheless would provide a framework that recognizes, in the relatively rare instances when there may be a proven market failure, it may be appropriate for the FCC to take some remedial action upon a showing that an ISP practice has caused

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Why Stovepipe Regulation No Longer Works: An Essay on the Need for a New Market-Oriented Communications Policy, 58 FED. COMM. LAW J. 103 (2006): http://www.law.indiana.edu/fclj/pubs/v58/no1/MayPDF.pdf. And I should acknowledge that the approach reflected in that law review article and here owes much to all those scholars who collaborated on the Digital Age Communication Act project which I led while serving as Senior Fellow and Director of Communications Policy Studies at the Progress & Freedom Foundation. With respect to the particular regulatory framework suggested here, such acknowledgment especially includes the contribution of Professor James B. Speta, who co-chaired the Regulatory Framework working group with me. The full report may be found here: http://www.pff.org/issues-pubs/other/050617regframework.pdf .

[4] I recently set forth an approach along these lines in Randolph J. May, "A New Direction for Net Neutrality," Forbes, March 24, 2010: http://www.forbes.com/2010/03/24/broadband-fcc-regulation-opinions-contributors-randolph-j-may.html .

[5] Keep in mind that the requirement for an evidentiary showing of consumer harm is not the same as a claim that there has been some "discrimination" in one way or another as the Commission proposed in its overbroad rulemaking *Notice*. As the Commission acknowledged, but did not grapple with, there are instance when discrimination may be beneficial to consumers.

demonstrable consumer harm. It is important to emphasize the proposed provision would require an evidentiary showing of the exercise of both substantial and non-transitory market power before any relief could be granted. In a dynamic marketplace driven by rapid technological change, it is essential to require a showing of both elements – substantial market power and market power that is more than merely transitory. And the showing of consumer harm is an essential element as well, so the focus will remain where it should -- on consumers and not the protection of particular competitors. Importantly, a legislative framework along the lines suggested here would eschew the FCC's traditional approach in which it adopts broad-brush anticipatory regulations that, almost invariably, are overly broad, designed as they are to anticipate all conceivable harms. Instead, it embodies a market-oriented rule that would allow complaints to be filed and adjudicated on a *post hoc* basis with reference to the particular competitive marketplace situation and specific alleged consumer harms.

I understand that the legislative approach proposed here is quite different than what the most rigid net neutrality advocates may prefer, as well as perhaps what a majority of the Commission might prefer, if a majority of the Commission constituted Congress rather than an agency created by Congress. But especially in light of the D.C. Circuit's *Comcast* decision, this approach offers a basis for a constructive, consensus-building way forward.

Apart from the all-important fact that such a legislative framework would give the Commission a jurisdictional basis for acting, the market-oriented provision proposed here has distinct advantages over the anticipatory approach proposed in the Commission's *Notice*. While providing a means for remedying specific abuses, it is much less likely to deter investment on a broad scale, and less likely to constrain the development of innovative

Internet business and social models responsive to evolving consumer demands. And by eschewing *a priori* blanket mandates tied explicitly to the treatment of Internet content, it has the advantage of being more First Amendment-friendly.[6]

CONCLUSION

The Commission should immediately suspend its efforts to adopt net neutrality regulations and, instead, begin preparations to work with Congress to develop appropriate amendments to the Communications Act to embody the legislative approach suggested here.

Respectfully submitted,

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[6] This does not mean that I might not still have First Amendment concerns about actions under the legislative provision proposed here. But it does mean that such concerns would be lessened because the chilling effect of a rule not based on *a priori* speech restrictions ought to be diminished.