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GEORGE MASON UNIVERSITY

Regulatory Studies Program

**Public Interest Reply Comment on  
Broadband Industry Practices<sup>1</sup>**

July 16, 2007

**WC Docket No. 07-52; FCC No. 07-31**

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The Regulatory Studies Program (RSP) of the Mercatus Center at George Mason University is dedicated to advancing knowledge of the impact of regulation on society. As part of its mission, RSP conducts careful and independent analyses employing contemporary economic scholarship to assess rulemaking proposals from the perspective of the public interest. Thus, this reply comment on the Federal Communications Commission's (FCC's) Notice of Proposed Rulemaking on broadband industry practices does not represent the views of any particular affected party or special interest group, but is designed to evaluate the effect of the Commission's proposals on overall consumer welfare.

**I. INTRODUCTION**

In our initial comment, we suggested that the FCC should employ the same framework for regulatory analysis used by most other federal agencies to evaluate market performance and the pros and cons of prospective regulation.<sup>2</sup> The framework consists of six principal steps, reproduced below.

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<sup>1</sup> Prepared by Jerry Brito, senior research fellow, and Jerry Ellig, senior research fellow, Mercatus Center at George Mason University. This comment is one in a series of Public Interest Comments from Mercatus Center's Regulatory Studies Program and does not represent an official position of George Mason University. The authors are indebted to Chris White and Scott Rosen for their research assistance.

<sup>2</sup> Comments of the Mercatus Center at George Mason University, In the Matter of Broadband Industry Practices, FCC WC Docket No. 07-52 (June 15, 2007), at 8 [hereinafter "Mercatus Public Interest Comments"], [http://www.mercatus.org/repository/docLib/20070615\\_Public\\_Interest\\_Comment\\_on\\_Broadband\\_Industry\\_Practices-Brito-Ellig.pdf](http://www.mercatus.org/repository/docLib/20070615_Public_Interest_Comment_on_Broadband_Industry_Practices-Brito-Ellig.pdf).

## SIX KEY STEPS IN REGULATORY ANALYSIS

- 1. Identify the desired outcomes**  
Figure out what you're trying to do and how you'll know you did it.
- 2. Assess evidence of market failure or other systemic problem**  
Figure out whether government needs to do something, and if so, why.
- 3. Identify the uniquely federal role**  
Figure out what the federal government needs to do.
- 4. Assess effectiveness of alternative approaches**  
Think about different ways to do it and find the one that works best.
- 5. Identify costs**  
Figure out what you have to give up to do whatever you're trying to do.
- 6. Compare costs with outcomes**  
Weigh pros and cons.

The FCC's Notice of Inquiry has the potential to generate information useful to perform steps 1, 2, 4, and 5 of this analysis:

### *Step 1: Identify the desired outcomes*

The Commission asked whether it has authority to enforce the Policy Statement “in the face of market failures or other specific problems” and how to tailor rules “only to reach any identified market failures or other specific problems.”<sup>3</sup> The NOI also asked whether regulations would help promote deployment of advanced telecommunications capability to all Americans.<sup>4</sup> The Commission thus left open the question of whether its sole focus is consumer welfare, or whether it also seeks to promote other values.

The NOI did not explicitly ask which values or outcomes the Commission should seek to promote. Nevertheless, these statements in the NOI suggest that any further rulemaking will explicitly articulate the outcomes the Commission seeks to produce—either increases

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<sup>3</sup> FCC, NOTICE OF INQUIRY, *In the Matter of Broadband Industry Practices*, WC Docket No. 07-72 (released April 16, 2007) at ¶ 11, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-07-31A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-31A1.pdf) ) [hereinafter Broadband NOI].

<sup>4</sup> *Id.*

in consumer welfare due to mitigation of market failures, or outcomes linked to other values that may be of concern to the Commission.

*Step 2: Assess evidence of market failure or other systemic problem*

The NOI asked commenters to provide specific, empirical information about broadband industry practices that may be evidence of market failure or other systemic problems.<sup>5</sup> The NOI also asked what market characteristics would justify adoption of rules in the future, if rules are not justified at this time.<sup>6</sup>

*Step 4: Assess effectiveness of alternative approaches*

The Commission appears to be considering at least four approaches: maintain the status quo, add a new non-binding non-discrimination principle to the Policy Statement, adopt the Policy Statement as a set of rules, or adopt the Policy Statement as a set of rules with some additions or deletions.

*Step 5: Identify costs*

The Notice of Inquiry asked how to craft rules “only to reach any identified market failures or other specific problems, and not to prevent policies that benefit consumers.”<sup>7</sup> This evinces a desire to avoid some of the most potentially significant costs of regulation: the unintended consequences that harm the very people the rules are supposed to help. While such consequences are not the only costs associated with regulation, it is refreshing to see that the Commission explicitly acknowledges and seeks to avoid such costs.

Thus, the NOI addressed some, but not all, aspects of the regulatory analysis framework commonly employed by other federal agencies to assess significant regulations. Most importantly, the Commission explicitly sought empirical evidence on the existence of market failures or other systemic problems, which is a key consideration in determining whether regulation can advance consumer welfare or other values the Commission decides are important.

## **II. THE IMPORTANCE OF ASCERTAINING THE EXISTENCE OF A MARKET FAILURE OR OTHER SYSTEMIC PROBLEM**

As we noted in our initial comment, an analysis of market failure or other systemic problem is critical, for two reasons. First, an understanding of cause and effect, together with empirical evidence, will help the Commission determine whether a problem exists that regulation can help solve. Second, if there is a need for regulation, a rigorous understanding of the root cause of the problem is necessary if the Commission is to craft

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<sup>5</sup> *Id.* at ¶ 8, 9, 11.

<sup>6</sup> *Id.* at ¶ 11.

<sup>7</sup> *Id.*

a regulatory remedy that will actually work. Without an analysis of market failure or other systemic problem, regulation is merely a faith-based initiative.

This Reply Comment focuses specifically on evidence of market failure, for two reasons. First, market failure diminishes consumer welfare, and there is a broad consensus that consumer welfare is one of the most important values that should guide decisions in the net neutrality debate. Second, effective competition can often also promote other values, such as free speech and democratic participation.<sup>8</sup> Market failure, in the form of insufficient competition, would make many outcomes other than consumer welfare more difficult to achieve.

The issue of market failure can be approached in two different ways. The NOI takes the most direct approach, asking whether companies currently engage in specific problematic practices.<sup>9</sup> This is equivalent to asking whether a market failure or other problem already exists. An alternative approach would be to seek evidence showing whether market failure or another problem is likely, even if it has not occurred yet. Since some of the comments submitted in this proceeding make precisely this allegation, it is also worth considering the quality of the analysis offered in support of this contention.

### III. IS THERE EVIDENCE OF AN EXISTING MARKET FAILURE?

The purpose of the NOI was to gather data about broadband industry practices to help the Commission determine whether regulatory intervention is necessary.<sup>10</sup> The Commission asked very specific questions, such as:

- [D]o providers treat different packets in different ways? How and why?<sup>11</sup>
- Are there specific examples of packet management practices that commenters consider reasonable or unreasonable?<sup>12</sup>
- Do providers deprioritize or block packets containing material that is harmful to their commercial interests, or prioritize packets relating to applications or services in which they have a commercial interest?<sup>13</sup>

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<sup>8</sup> See, e.g., Comments of the Consumer Federation of America, Consumers Union and Free Press, In the Matter of Broadband Industry Practices, FCC WC Docket No. 07-52 (June 15, 2007) [hereinafter “Consumer Federation Comments”], 38 (“Leading analysts of industrial organization have long recognized the convergence between truly competitive markets and democratic values.”).

<sup>9</sup> *Id.* at ¶ 8, 9.

<sup>10</sup> *Id.* at ¶ 1.

<sup>11</sup> *Id.* at ¶ 8.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

- Do broadband providers charge upstream providers for priority access to end users?<sup>14</sup>

The FCC no doubt asked such specific questions in an attempt to cut through the rhetoric and theorizing on all sides of the net neutrality debate in order to obtain clear empirical evidence of broadband industry practices. In fact, the Commission explicitly pled with commenters to “provide specific, verifiable examples with supporting documentation, and [to] limit their comments to those practices that are technically feasible today.”<sup>15</sup> Unfortunately, that call was not heeded.

Close to 10,000 comments were submitted in the docket for this NOI.<sup>16</sup> The vast majority of these comments were brief text comments or emails akin to form letters sent at the urging of groups such as Free Press,<sup>17</sup> Common Cause,<sup>18</sup> and FreedomWorks.<sup>19</sup> These template comments do nothing but express the sender’s political views on net neutrality regulation and ignore the empirical questions asked in the NOI.<sup>20</sup>

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<sup>14</sup> *Id.* at ¶ 9.

<sup>15</sup> *Id.* at ¶ 8.

<sup>16</sup> A search for all documents filed in WC Docket No. 07-52 between March 22, 2007 (when the Broadband NOI was adopted) and June 15, 2007 (when the comment period closed) yielded 9,541 results.

<sup>17</sup> See FREE PRESS, *Save the Internet: Tell Your Story*, at <http://www.savetheinternet.com/yourstory> (last visited July 10, 2007). This web page allows visitors to easily submit a comment to the Broadband NOI docket. Rather than refer visitors to the NOI document and the questions asked by the Commission, the page instructs visitors, “In your own words, tell the FCC why you need a free and open Internet.” The comment area is pre-populated with a two-paragraph endorsement of net neutrality regulation.

<sup>18</sup> See COMMON CAUSE, KEEP THE INTERNET OPEN TO ALL, at <http://www.commoncause.org/siteapps/advocacy/ActionItem.aspx?c=dkLNK1MQIwG&b=2729863> (last visited July 10, 2007). Like the Free Press web page, this page does not link to the NOI document and similarly pre-populates the comment field with a short form letter.

<sup>19</sup> FREEDOMWORKS, *FreedomWorks Campaign: Submit Official Comments to the FCC*, at <http://www.freedomworks.org/action/fcc> (last visited July 10, 2007). Like the Free Press and Common Cause web pages, this page does not offer a link to the NOI and similarly pre-populates the comment field with a short form letter.

<sup>20</sup> See, e.g., form letter supplied by FreedomWorks,

I support the FreedomWorks mission of lower taxes, less government, and more freedom. That's why I am writing to urge the F.C.C. to not regulate the Internet with new net neutrality rules.

These are price controls on the Internet, and they will mean less innovation, and less investment in the infrastructure critical for the deployment of broadband to all Americans. We should let the market work and watch the future of Internet innovation, competition and technological progress. Private business and free enterprise should determine the future of the Internet, not federal regulators and politicians in Washington, D.C.

Thank you for considering these comments.

*Id.*

If one uses the FCC's comment search engine to exclude these brief comments, only 143 comments remain.<sup>21</sup> Of those 143, many are simply letters on behalf of some organization or another expressing support for one side of the issue and offering no answers to the Commission's specific questions. Only 66 of the 143 are longer than two pages. Of those 66, only 20 comments suggest the need for regulation of broadband industry practices, and of those 20 none put forth any significant empirical evidence to suggest that there currently exists a market failure justifying regulatory intervention.

Weighing in at 137 pages, the lengthiest filing alleging a market failure was the combined comment of the Consumer Federation of America, Consumers Union, and Free Press.<sup>22</sup> This comment is characteristic of others in the docket that ignore the Commission's plea for empirical and verifiable data and instead provide a recitation of a philosophical rationale for neutrality regulation. In fact, this particular comment chastises the Commission for asking what the commenters believe to be the wrong questions, namely the NOI's narrow focus on actual business practices and empirical evidence of harmful behavior.<sup>23</sup> Instead of answering the FCC's questions, the commenters take issue with previous FCC decisions that classify broadband as an information service, then proceed to offer their own theory of a "structural" market failure.<sup>24</sup> Its authors call not just for some net neutrality regulation, but also for reversing current policy and subjecting broadband to Title II of the Communications Act.<sup>25</sup>

The Center for Democracy and Technology's (CDT) comments, on the other hand, address specifically why it does not offer empirical evidence of existing harmful business practices. They suggest that "a span of two years under the current legal framework, with merger-related and political considerations operating as significant constraints, is not an adequate period for problematic forms of discrimination to make themselves evident."<sup>26</sup> CDT therefore offers a list of *potential* harmful business practices.<sup>27</sup> Google makes a similar argument, stating that "the problem to be solved is inherent in the concentrated nature of the broadband market itself, rather than in a roster of actual and potential 'bad acts.' In other words, the flaw is structural, not behavioral."<sup>28</sup> Neither CDT nor Google,

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<sup>21</sup> Perhaps aware of the prevalence of such template comments, the Commission's own comment search engine provides the option to "Eliminate Brief Text Comments." FEDERAL COMMUNICATIONS COMMISSION, *Electronic Comment Filing System [Enter Search Criteria]*, at [http://gullfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited July 9, 2007). A search for all documents excluding brief text comments filed in WC Docket No. 07-52 between March 22, 2007 (when the NOI was adopted) and June 15, 2007 (when the comment period closed) yielded 143 results.

<sup>22</sup> See Consumer Federation Comments.

<sup>23</sup> Consumer Federation Comments at 17-24.

<sup>24</sup> *Id.* at 9-13, 20.

<sup>25</sup> *Id.* at 10-11; 26-29.

<sup>26</sup> Comments of the Center for Democracy & Technology, In the Matter of Broadband Industry Practices, FCC WC Docket No. 07-52 (June 15, 2007) [hereinafter "CDT Comments"], 5.

<sup>27</sup> *Id.* at 7-12.

<sup>28</sup> Comments of Google Inc., In the Matter of Broadband Industry Practices, FCC WC Docket No. 07-52 (June 15, 2007) [hereinafter "Google Comments"], 10.

however, offer evidence of discriminatory or otherwise harmful practices by broadband providers.

In its comments, the Open Internet Coalition demurs answering the Commission's questions about discrimination, stating that "the parties currently in the best position to respond to the questions regarding the network operators' packet management practices are the network operators themselves."<sup>29</sup> They therefore suggest that the FCC mandate network operators to submit semiannual reports describing their network management practices.<sup>30</sup> Of course, the entire purpose of the NOI is to gather just such data, and a more prudent approach would be to allow broadband providers to participate in this proceeding before resorting to mandates.<sup>31</sup>

In contrast to most of the comments in this proceeding, the comments of the National Association of State Utility Consumer Advocates (NASUCA) directly address many of the Commission's questions. However, this comment does not offer any evidence of packet discrimination and further states that "[b]roadband providers do not currently charge upstream application providers for priority access to end-users[.]"<sup>32</sup>

On the other hand, NASUCA does highlight a legitimately worrying current industry practice: unclear disclosure of limits to broadband offerings.<sup>33</sup> However, this is a discrete consumer protection issue best left to FCC or Federal Trade Commission (FTC) enforcement. This issue was also discussed at the FTC's February workshop on Broadband Connectivity Competition Policy. Without explicitly offering an opinion on whether such limitations are illegal if not disclosed, the FTC staff's report on the topic notes, "[M]aterial omissions that are likely to mislead consumers acting reasonably under the circumstances are deceptive in violation of Section 5 of the FTC Act."<sup>34</sup>

The Commission's questions were clear and well-crafted to elicit evidence of market failure, if indeed such problems currently exist. The meager responses fail to make a case for net neutrality regulation on the basis of existing abuses.

#### IV. IS THERE EVIDENCE OF A LIKELY MARKET FAILURE?

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<sup>29</sup> Comments of the Open Internet Coalition, In the Matter of Broadband Industry Practices, FCC WC Docket No. 07-52 (June 15, 2007) [hereinafter "Open Internet Comments"], 12.

<sup>30</sup> *Id.* at 13.

<sup>31</sup> In fact, some providers have disclosed their practices. See, e.g., Comments of Verizon and Verizon Wireless, In the Matter of Broadband Industry Practices, FCC WC Docket No. 07-52 (June 15, 2007) [hereinafter "Verizon Comments"], 30.

<sup>32</sup> Comments of the National Association of State Utility Consumer Advocates, In the Matter of Broadband Industry Practices, FCC WC Docket No. 07-52 (June 15, 2007) [hereinafter "NASUCA Comments"], 18.

<sup>33</sup> *Id.* at 17 & 20. See also Comments of the Information Technology Industry Council, In the Matter of Broadband Industry Practices, FCC WC Docket No. 07-52 (June 15, 2007) [hereinafter "ITIC Comments"], 2-3.

<sup>34</sup> BROADBAND CONNECTIVITY COMPETITION POLICY, Federal Trade Commission Staff Report (June 2007) [hereinafter "FTC Staff Report"].

Many commenters seem to suggest a prophylactic justification for neutrality regulation by appealing to the possibility of harmful behavior. The Open Internet Coalition states that “a network provider may have the ability and incentive to exclude rival content, applications or portals from its network[.]”<sup>35</sup> BT Americas writes that “U.S. broadband providers now have the incentive and ability to unfairly discriminate in price and quality[.]”<sup>36</sup> NASUCA writes of “the economic incentive and the potential” for providers to engage in anticompetitive discrimination.<sup>37</sup> Google claims that broadband incumbents have “the incentives and ability to discriminate against third party applications and content providers.”<sup>38</sup>

At best, such claims could be interpreted as allegations that market failure is likely to occur in broadband markets, and firms with market power will eventually choose to exercise it by engaging in various types of discriminatory behavior. The problem with such claims is that other, more competitive, outcomes are equally plausible—even in markets with a small number of competitors. Commenters have offered numerous theories suggesting what *could* happen, but “could” is not the same as “likely.”

A rigorous analysis demonstrating that market failure is likely must define the relevant market, determine whether there is significant market power in that market, determine whether profit incentives for discriminatory behavior outweigh profit incentives for avoiding such behavior, and then determine whether the net effect of such behavior would be likely to help or harm consumers.<sup>39</sup>

*Market definition*—Commenters favoring regulation tend to define the market narrowly, excluding wireless broadband because it is allegedly not fast enough and excluding satellite because it is allegedly too expensive.<sup>40</sup> Those favoring a narrow market definition also contend that the FCC’s practice of counting competitors in zip codes makes market appear more competitive than they really are.<sup>41</sup> As we explained in our initial comment, sound market definition consistent with the methods used in antitrust analysis requires actual evidence demonstrating which services consumers regard as substitutes.<sup>42</sup>

*Market power*—Counting competitors, calculating market shares, or calling broadband a “duopoly” is not sufficient to prove a “structural” market failure. Not even using the

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<sup>35</sup> Open Internet Comments at 9 (quoting Barbara van Schewick, *Toward an Economic Framework for Network Neutrality Regulation*, 5 J. ON TELECOMM. & HIGH TECH. L. 329, 370 (2007)).

<sup>36</sup> Comments of BT Americas Inc. on Behalf of Itself and Other BT Entities, In the Matter of Broadband Industry Practices, FCC WC Docket No. 07-52 (June 15, 2007) [hereinafter “BT Comments”], 2-3.

<sup>37</sup> NASUCA Comments at 2.

<sup>38</sup> Google Comments at i.

<sup>39</sup> For examples that elaborate these concepts, see FTC Staff Report at 123-28.

<sup>40</sup> See, e.g., Google Comments at 13.

<sup>41</sup> See, e.g., Google Comments at 11.

<sup>42</sup> Mercatus Public Interest Comment at 11-12.



word “duopoly” a tiresome 34 times, or the phrase “cozy duopoly” 11 times, is sufficient to prove market failure.<sup>43</sup> There are three reasons that market structure is only one part of the puzzle. First, economic theory and empirical evidence both demonstrate that markets with a small number of competitors can still produce competitive behavior.<sup>44</sup> Second, there is substantial evidence of competitive conduct in consumer broadband, such as rapid price reductions and increases in speeds.<sup>45</sup> Third, additional competition, in the form of wireless broadband backed by substantial investment, has just begun entering the market.<sup>46</sup>

Barriers to entry also require subtle analysis. Broadband markets are not “perfectly contestable”; entrants must shoulder some “sunk costs” that they might not be able to recover if they leave the industry.<sup>47</sup> However, the presence of multiple actual and prospective competitors using a variety of technological platforms suggests that broadband is far from being a “natural monopoly.” The relevant issue, therefore, is not whether barriers to entry exist, but whether they are so high that they make monopolistic behavior likely to succeed.

It is true that “[t]he notion that two competitors are enough to ensure a vigorously competitive market is inconsistent with economic theory and decades of empirical evidence.”<sup>48</sup> But equally fallacious is the notion that a small number of competitors guarantees monopolistic behavior. Actual results will depend on specific facts and circumstances, not just the number of competitors or market shares. This is why the federal government’s merger guidelines impose a greater level of scrutiny on mergers in concentrated markets, but do not prohibit mergers in concentrated markets.<sup>49</sup>

*Incentives*—Commenters favoring regulation typically argue that network operators have the “incentive and ability” to engage in discriminatory behavior.<sup>50</sup> Their comments typically cite theoretical economic models that demonstrate why, under certain assumptions, a dominant firm would have incentives to discriminate.<sup>51</sup> Such models may be an accurate depiction of reality if their assumptions are true and there are no countervailing factors in the real world that might lead to different results. But citing a theoretical possibility is not the same thing as demonstrating empirically that the possibility is highly likely, or even likely, to occur. If the FCC seeks to determine whether market failure is likely in the future, it should require empirical analysis showing

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<sup>43</sup> Figures obtained by searching the Consumer Federation Comments in Adobe Acrobat.

<sup>44</sup> Paul A. Pautler, *Evidence on Mergers and Acquisitions*, 48 ANTITRUST BULL., 181-82 (2003), and references cited therein. See also Mercatus Center Public Interest Comment at 13.

<sup>45</sup> Mercatus Public Interest Comment at 14-18; FTC Staff Report at 8, 100-01.

<sup>46</sup> FTC Staff Report at 8, 10, 102-03.

<sup>47</sup> Mercatus Public Interest Comment at 15.

<sup>48</sup> Consumer Federation Comments at 52.

<sup>49</sup> Mercatus Public Interest Comment at 13.

<sup>50</sup> See comments cited *supra*, notes 35 - 38.

<sup>51</sup> See, e.g., Google comments at 17-18, Consumer Federation Comments at 57-59.

whether network owners' incentives to discriminate are greater or less than their incentives to forego discrimination.

To support their contention that broadband providers have the potential to discriminate, several commenters make reference to the often-cited Madison River case, in which a rural DSL provider was investigated for allegedly blocking VoIP services that competed with its parent company's telephone service.<sup>52</sup> As we noted in our original comment, however, that case is not entirely useful for two reasons. First, the case was never adjudicated and the DSL provider accepted a consent decree, so the Commission never established the exact facts of the case.<sup>53</sup> Additionally, since the Madison River consent decree, the Commission issued its September 2005 DSL Order that classified DSL as an information service to which Title II common carrier regulations no longer apply.<sup>54</sup> Madison River is therefore not evidence of behavior under existing law, including the Internet Policy Statement.

Similarly inapplicable under current law are citations to alleged incidents of broadband discrimination in Australia, Canada, and Korea.<sup>55</sup> Because the legal, regulatory, and market environment in each of those countries is different, such anecdotes cannot serve as evidence of a systemic problem in this country. That some commenters had to resort to foreign jurisdictions for examples underscores the lack of evidence of discrimination relevant to the NOI.

Some commenters in this proceeding have shown that market failure and discriminatory practices that harm consumers are possible in broadband markets, but none have offered a rigorous analysis demonstrating that market failure is likely.

## V. PAUCITY OF EVIDENCE IS CONSISTENT WITH THE FTC STAFF'S FINDINGS

The FCC is not the only expert federal agency to examine the evidence for and against net neutrality regulation. In a report issued after the initial comment period in this proceeding closed, the FTC released a staff report on Broadband Connectivity and Competition Policy. The report extensively summarizes arguments for and against net neutrality regulation, but it notes that there is little evidence of actual discrimination (beyond the Madison River case) and little empirical evidence that would help assess whether discrimination that harms consumers is likely. A two-day FTC workshop held in

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<sup>52</sup> Comments of the National Association of Telecommunications Officers and Advisors, the National Association of Counties, and the National League of Cities, In the Matter of Broadband Industry Practices, FCC WC Docket No. 07-52 (June 15, 2007) [hereinafter "NATOA Comments"], 7-8; CDT Comments at 6-7; Consumer Federation Comments at 107; NASUCA Comments at 11-12.

<sup>53</sup> Mercatus Public Interest Comments, n.33.

<sup>54</sup> *Id.*

<sup>55</sup> CDT Comments at 7; NATOA Comments at 8.

February produced no more empirical evidence of anticompetitive discrimination than the current FCC proceeding has produced.<sup>56</sup>

The FTC staff concludes that there is little evidence of actual anticompetitive conduct by broadband providers: “[T]here is little evidence to date of consumer harm from anticompetitive practices by ISPs or any other network operators; the allegations of anticompetitive conduct focus mainly on effects that may occur if certain actions, such as exclusive agreements or vertical integration, are undertaken in the future.”<sup>57</sup> Other than the Madison River case, the closest thing to actual discrimination the FTC staff could find was statements by some network operators that they would like to prioritize certain data traffic or to provide other types of quality-of-service assurances to content and applications providers and/or end users in exchange for a premium fee.<sup>58</sup>

“With respect to discrimination,” the FTC staff notes, “broadband providers have conflicting incentives related to blockage of and discrimination against data from non-affiliated providers of content and applications.”<sup>59</sup> Whether network owners have sufficient incentive to discriminate against others’ content and applications in ways that harm consumers is ultimately an empirical question.<sup>60</sup> Unfortunately, little or no empirical analysis exists to guide policymakers: “It appears that, thus far, little attention has been paid in the net neutrality debate to the question how possible harms and benefits from such discrimination might be assessed in the broadband Internet access context.”<sup>61</sup>

Given the lack of evidence of market failure, the FTC staff urged caution:

In evaluating whether new proscriptions are necessary, we advise proceeding with caution before enacting broad, ex ante restrictions in an unsettled, dynamic environment ...<sup>62</sup>

Based on what we have learned through our examination of broadband connectivity issues and our experience with antitrust and consumer protection issues more generally, we recommend that policy makers proceed with caution in evaluating proposals to enact regulation in the area of broadband Internet access. The primary reason for caution is simply that we do not know what the net effects of potential conduct by broadband providers will be on all consumers, including, among other things, the prices that consumers may pay for Internet access, the quality

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<sup>56</sup> Testimony at the workshop is summarized in the FTC Staff Report, and transcripts are available at <http://www.ftc.gov/opp/workshops/broadband/index.shtml>.

<sup>57</sup> FTC Staff Report at 122.

<sup>58</sup> FTC Staff Report at 31, 53.

<sup>59</sup> FTC Staff Report at 10, see also 77-78, 81-82.

<sup>60</sup> FTC Staff Report at 74-75. See also at 76,

<sup>61</sup> FTC Staff Report at 75.

<sup>62</sup> FTC Staff Report at 9.

of Internet access and other services that will be offered, and the choices of content and applications that may be available to consumers in the marketplace.<sup>63</sup>

## VI. CONCLUSION

The FCC's Notice of Inquiry asked specific, detailed questions about broadband industry practices that might justify net neutrality regulation. After prolonged labor, the mountain of paperwork filed with the Commission has brought forth a mouse. Commenters offered no empirical evidence that network owners currently engage in specific business practices stemming from market failure sufficient to justify industry-wide regulation. Nor did any commenter make a definitive case that market failures are likely to occur in the future. At best, some commenters suggested problems that could happen, without demonstrating how likely they are. Of course, as the FTC staff report notes, "The potential for anticompetitive harm exists in the various Internet-related markets, as it does in all markets."<sup>64</sup> But more than a possibility of harm must be demonstrated before we can be confident that regulation will do more good than harm.

The comments in this proceeding have failed to make a definitive, empirically supported case for net neutrality regulation. Either the FCC's Internet Policy Statement has been sufficient to curb abuses, or such abuses were unlikely to begin with.

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<sup>63</sup> FTC Staff Report at 10.

<sup>64</sup> FTC Staff Report, at 121.

