



Nonprofit Publisher  
of Consumer Reports

# CONSUMERS, TRANSPARENCY AND THE OPEN INTERNET

*Testimony of*

Joel Kelsey  
Policy Analyst  
Consumers Union

*Before the*

Federal Communications Commission

January 2010

Good afternoon. I would like to begin by thanking the Commission for the opportunity to testify before you today. Consumers Union<sup>1</sup> is the non-profit publisher of *Consumer Reports*. In addition to fighting for strong consumer friendly policies in Washington, D.C., we also provide unbiased advice and educational materials to assist consumers in making marketplace decisions through our magazine, online properties and other publications.

We are here today to discuss the necessity, scope and format of providing relevant information on broadband network management practices to consumers, innovators and regulators. As a magazine that seeks to cut through the noise of advertising and give consumers access to truthful information necessary to compare goods and services, we value and support strong and enforceable government disclosure standards.

While we are heartened to see the Commission engaged in a comprehensive approach to improving both wireless and wireline disclosure through the *Consumer Information and Disclosure NOI*, we believe that the scope and language of the proposed rules in the *Open Internet NPRM* must be clarified and broadened to alleviate the market harm caused by the dearth of information available to consumers and regulators on network management practices. The Commission should require Internet Service Providers to regularly disclose high-level information to subscribers on how network management practices are likely to affect the end-user experience, as well as detailed information on the purposes, methods and reasons for particular network management practices. These requirements should not be tied to any other consumer protections in the *Open Internet NPRM* (“the Notice”), but should be considered separately, both for their value to consumers and because there is a greater probability that disclosure predicated on reasonable network management will create unintended loopholes that render the *Transparency Principle* ineffective.

## **I. The Need for Transparency**

We agree with the Commission’s assertion in the Notice that transparency discourages harmful market behavior, and that information regarding network management practices should be publicly disclosed.<sup>2</sup> Communications markets function best when consumers

---

<sup>1</sup> Consumers Union of United States, Inc., publisher of Consumer Reports®, is a nonprofit membership organization chartered in 1936 to provide consumers with information, education, and counsel about goods, services, health and personal finance. Consumers Union’s publications and services have a combined paid circulation of approximately 8.3 million. These publications regularly carry articles on Consumers Union’s own product testing; on health, product safety, and marketplace economics; and on legislative, judicial, and regulatory actions that affect consumer welfare. Consumers Union’s income is solely derived from the sale of Consumer Reports®, its other publications and services, fees, noncommercial contributions and grants. Consumers Union’s publications and services carry no outside advertising and receive no commercial support.

<sup>2</sup> *In the Matter of Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191; WC Docket No. 07-52, Notice of Proposed Rulemaking, FCC 09-93 (rel. October 22, 2009), (hereinafter “*Open Internet NPRM*”), at Para 118.

have access to accurate, consistent and meaningful information. This is especially true when limited competition constrains consumer choice and dilutes the incentives among providers to provide an accurate representation of the services being offered. When people have the facts, they can make informed and rational decisions.

In the context of an open Internet, the disclosure of network management practices is particularly important for two reasons: (1) to provide consumers with an accurate and ongoing representation of the Internet experience they can expect when they sign-up for service and throughout their relationship with a service provider, and (2) to ensure that network management practices are narrowly tailored to address a legitimate purpose and are not unduly interfering with consumers access to a best efforts network.

Internet subscribers pay high price points for service each month, and assume that their subscription grants them the freedom to post and access the content of their choice. However, this is not the case. Service providers reserve the right to block content, cut service off, and to apply arbitrary caps or usage fees to monthly bills with little or absolutely no notice to their subscribers. These “rights” are buried deep within the Terms of Service consumers must sign before subscribing to Internet access.<sup>3</sup>

Internet service subscribers are confronted with confusing and often inaccurate information regarding service quality when making choices between providers. The (few) customers who have access to more than one broadband provider are often unaware at the point-of-sale, or after signing up for Internet access, whether their particular provider will block or prioritize particular kinds of Internet applications or software that compete with their business model, or whether the provider engages in any other network management practices that may interfere with their Internet experience. Particularly but not exclusively for wireless services, consumers are directed to commit to lengthy contract terms without being given information about the quality or cost of data services. Too often, consumers experience sticker shock when looking at their monthly wireless data bill, and are often left with no knowledge how network management practices might impact their ability to download and use particular “apps”.

Internet access companies generally provide their subscribers with broad terms of service that give them the flexibility to change their terms without prior notice to their subscribers or the public. Here are a few examples<sup>4</sup>:

Verizon<sup>5</sup>

*Verizon reserves the right to change any of the features, Content or applications of the Service at any time with or without notice to you.*

---

<sup>3</sup> See Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, and Public Knowledge, CG Docket No. 09-158, CC Docket No. 98-170, WC Docket No. 04-36 (Oct. 13, 2009) (Consumer Truth-in-Billing Comments). Page 25.

<sup>4</sup> See Consumer Truth-in-Billing Comments, *supra* note [3], at Appendix A

<sup>5</sup> The following are excerpts from Verizon’s Terms of Service, available at: [http://www.verizon.net/policies/vzcom/tos\\_popup.asp](http://www.verizon.net/policies/vzcom/tos_popup.asp)

*You agree to permit us to access your computer and Equipment and to monitor, adjust and record such data, profiles and settings for the purpose of providing the Service.*

#### AT&T<sup>6</sup>

*AT&T reserves the right to monitor or change your current plan speed at any time. No minimum level of speed is guaranteed.*

*You cannot create a network (whether inside or outside of your residence) with AT&T DSL Service using any type of device, equipment, or multiple computers unless AT&T has granted you permission to do so and you use equipment and standards acceptable to AT&T.*

#### Time Warner Cable<sup>7</sup>

*TWC may suspend my account, take other action to prevent me from utilizing certain account privileges (e.g., home pages) or cancel my account without prior notification.*

*I also agree that TWC and/or ISP and/or OLP may suspend or cancel my account for using all or part of the HSD Service to post content to the Internet or to engage in "peer to peer" file exchanges or other forms of file exchanges that violate this Agreement or the Terms of Use.*

The need for Commission action could not be clearer. As a matter of good consumer disclosure policy, the FCC should stop ISP's from describing binding terms and conditions within a multi-page legal document in eight point font.

The Commission should require ISP's to make notices of changes to terms and conditions clear and conspicuous, and the requirement should be applied in a consistent manner across providers to enable consumers to compare and contrast. These requirements should include, but are not limited to, complete disclosure of any practices that interfere with an end-user's experience, and whether or not these practices violate the Commission's definition of "reasonable network management".

The Commission seeks comment on when relevant information should be publicly disclosed.<sup>8</sup> We refer to our comments in the *Consumer Information and Disclosure NOI*, which makes the case for disclosure of basic high-level information, such as actual versus advertised speeds, as well as more detailed information about network management practices, both at the point of sale and on an on-going basis to subscribers in a conspicuous manner.<sup>9</sup>

---

<sup>6</sup> The following are excerpts from AT&T's DSL Subscriber Agreement, available at: <http://worldnet.att.net/general-info/terms-dsldata.html>

<sup>7</sup> The following are excerpts of Time Warner Cable's Subscriber Agreement, available at: [http://help.twcable.com/html/twc\\_sub\\_agreement2.html](http://help.twcable.com/html/twc_sub_agreement2.html)

<sup>8</sup> Open Internet NPRM at Para 125

<sup>9</sup> See Consumer Truth-in-Billing Comments, *supra* note [3].

## II. Clear, Consistent and Conspicuous Disclosure

The Commission seeks comment on the breadth and detail of information that should be disclosed to consumers.<sup>10</sup> We understand and value the need for concise, clearly formatted, and easily understood information design. Our organization prides itself on writing clear and concise reports that help consumers cut through the noise of advertising to make marketplace decisions. To that end, consumers must have access, both at the point of sale and on an on-going basis, to high-level information that plainly articulates actual service performance (rather than up-to speeds), limitations to the use of the service, and general criteria regarding when a provider may block, prioritize or monitor service use. This information should be provided in a consistent manner across service providers, to enable consumers to compare and contrast their choice of providers.

To be clear, the clarity of information provided about management practices is a question of information design. It should not be confused with, or be used to argue against, the dire need for Commission to issue requirements making thorough and detailed information about such practices available. Consumers are empowered when they have more, not less, information on which to base decisions.

In practical terms, just because consumers do not understand technical network terms today, does not mean they won't develop sophistication over time. It stands to reason that the vast majority of consumers were not conversant in miles per gallon, caloric values, octane levels in gasoline or credit scores, until the federal government provided an industry standard and mandated consistent public disclosure of such information. Indeed, there have been numerous studies on the value of providing extensive, and often unfamiliar, information to consumers.<sup>11</sup>

Moreover, when detailed information is withheld, it creates market harms felt beyond consumers. Network management practices have vast down-market effects on software and applications innovators at the edge. Today's graduate student broadband subscriber may be working on tomorrow's must have app, and sufficient disclosure of network management tools is essential to allow her to predict whether the application will mesh with a particular network.

In order to meet the Commission's goal of discouraging, "inefficient and socially harmful market behavior,"<sup>12</sup> *detailed* disclosure is warranted and required. We urge the Commission to make the proposed sixth principle meaningful by developing federal standards requiring meaningful and detailed disclosure.

---

<sup>10</sup> Open Internet NPRM, Para 126.

<sup>11</sup> See Stephen Morris, Hyun Song Shin. *Social Value of Public Information*. American Economic Review 92(5) December 2002 Page(s): 1521-1534; and Michael Chernewa, Gautam Gowrisankaran and Dennis P. Scanlonc. *Learning and the value of information: Evidence from health plan report cards*. Journal of Econometrics. Volume 144, Issue 1, May 2008, Pages 156-174.

<sup>12</sup>Open Internet NPRM, Para 118

### III. Recommendations for Meaningful Detailed Disclosure

Consumers should be able to choose providers based on truthful information detailing speed, cost, quality, and limitations of their service, as well as any obstacles they may face should they later change their minds.<sup>13</sup> With regard to network management, the Commission should require an easily accessed means for subscribers to learn about network management practices that in any way restricts or limits their access to the best efforts Internet, as well as a more detailed analysis on the purpose, method, and congestion levels necessary to trigger a particular practice.

Examples include, but are not limited to:

1. Any limits imposed on a subscriber's upstream or downstream traffic. This includes blocking, delaying, de-prioritizing or prioritizing, or inserting traffic into the stream.
2. Technical details of the methods used.
3. Thresholds that trigger certain network management practices, an estimate of the percentage of users affected, and the duration of the practice. Examples include time of day, network congestion levels, user bandwidth consumption.
4. Any technology that inspects the content of Internet traffic, other than the processing of basic addressing information
5. Differences in how the network is being allocated to different uses, including "managed services". This includes the amount of capacity dedicated to Internet traffic, and if shared capacity, how it is shared.

We are concerned that the proposed disclosure standards articulated in the *Open Internet NPRM*, do not sufficiently address the harms caused by the absence of this information and also include language that could lead to unintended loopholes, rendering the proposed transparency principle ineffective.

First, subjecting disclosure to "reasonable network management" could render disclosure practices ineffective by creating large unintended loopholes. For example, one interpretation of this exemption could mean that "reasonable" practices need not be disclosed, opening the door for ISPs to be the judge of "reasonableness" and only requiring that they disclose unreasonable, or illegal, practices. The ambiguity leading to this circular logic should be avoided in the final order.

Second, disclosure obligations must be clearly articulated and should not rest upon the compliance with other consumer protections in the order. It is not clear based on the Commission's proposed language what practices fall under the umbrella of, "information reasonably required...to enjoy the protections specified in this part."<sup>14</sup> That is, it is unclear what consumer protections in the proposed Order *require* disclosure. There are several limitations on network usage, and other network management tools, that may be reasonable network management; however disclosure should be required regardless. This

---

<sup>13</sup> See Consumer Truth-in-Billing Comments, *supra* note [3], at page 21 - 30.

<sup>14</sup> Open Internet NPRM, Para 119.

is particularly true because applying the same management practice under different circumstances could result in harmful, or unreasonable, consequences.

The Commission can easily mitigate these potential pitfalls in the proposed rules by requiring clear and complete disclosure of any interference with user control over, or access to, communications on the Internet.

Thank you for the opportunity to testify today, and I look forward to working closely with the Commission in the coming months on improving transparency and disclosure to consumers in the telecom marketplace.