

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

In the Matter of the Petitions of)	
Free Press et al.)	
for Declaratory Ruling that Degrading an Internet Application)	
Violates the FCC’s Internet Policy Statement and Does Not Meet an)	RM- _____
Exception for “Reasonable Network Management”)	
and)	
Vuze, Inc.)	RM- _____
to Establish Rules Governing Network Management Practices by)	
Broadband Network Operators)	
Broadband Industry Practices)	WC Docket No.
Commercial Availability of Navigation Devices)	07-52
)	
)	CS Docket No. 97-80

**FURTHER COMMENTS
of
CONSUMER FEDERATION OF AMERICA AND CONSUMERS UNION**

Submitted for inclusion in the record of the

PUBLIC HEARING,

STANFORD UNIVERSITY LAW SCHOOL, APRIL 17, 2008

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The Long and Successful History of Non-Discrimination in Communications

The dispute that is the subject of this hearing has a long history that can teach the Commission valuable lessons as it labors to accomplish its primary task under the Communications Act of ensuring an open and non-discriminatory communications network in America, while applying a light regulatory hand. In the Wireline Broadband order the Commission terminated Title II regulation of advanced communications and replaced the

Computer Inquires with Internet principles. This was risky business. The Computer Inquiries were the communications backbone of the success of the Internet. Combined in 1968 with the Carterphone decision, the FCC created an open communications platform on which the decentralized communications protocol of the Internet could thrive.

There is no doubt that the decisions to promote competition and extend the principle of non-discrimination to data traffic were unmitigated successes – the pillars on which the Internet stood. For thirty years virtually every bit that traversed the Internet to serve the mass markets was transmitted and received by devices that were approved under Carterphone and carried by regulated common carrier networks on just, reasonable and nondiscriminatory rates, terms, and conditions set by the Computer Inquires.

From the beginning to the idea of a decentralized communications network in the early 1960s to this very moment, network companies have resisted an open communications network and repeatedly tried to overturn the computer inquires to re-assert centralized control over data traffic but they were rebuffed. Network operators have always resisted non-discrimination as a principle of communications networks and never voluntarily adopt it as an architectural principle for their networks because their private economic interests are better served by discrimination. Public policy has rightly concluded that the burden discrimination would place on communications and the chilling effect it would have on innovation are not in the public interest. Consequently, communications networks have been recognized as affected with the “public interest” for centuries.

We understand that Comcast thinks it should be able to run its business the way it wants, but in America for at least 100 years, if you are in the communications business, you have social obligation, the most important of which is to operate your network in a non-discriminatory manner. Given the long history of network operator behavior, anyone who thinks network operators will give up discrimination voluntarily is delusional.

We believe the Commission would have been in a better position to ensure non-discrimination with a light handed regulatory approach if it had declared broadband communications networks are subject to Title II and then eased up on Title II regulation, rather than abandoning Title II and trying to do the job under the ancillary powers of Title I. But make no mistake about it; the Commission has the authority to achieve this goal under Title I. Indeed, the Computer Inquiries, which were the communications backbone for the success of the Internet, were carried out largely under Title I.

Moreover, we should recall that the obligation of non-discrimination antedates the broader common carrier regulation of the Communications Act of 1934 by at least a quarter of a century (The Mann Elkins Act of 1910 brought the telephone industry under the Interstate Commerce Act of 1887). Indeed, an open, nondiscriminatory communications network has been the first principle of U.S. communications since the obligation of nondiscrimination was grounded in the common law brought over by English settlers.

The importance of open communications networks stretches back beyond the advent of the telephone in America. A late 19th century court case reminds us that all means of transportation and communications have been subject to these public obligations.

The telephone has become as much a matter of public convenience and of public necessity as were the stagecoach and sailing vessel a hundred years ago, or as the steamboat, the railroad, and the telegraph have become in later years. It has already become an important instrument of commerce. No other known device can supply the extraordinary facilities which it affords. It may therefore be regarded, when relatively considered, as an indispensable instrument of commerce. The relations which it has assumed towards the public make it a common carrier of news – a common carrier in the sense in which the telegraph is a common carrier – and impose upon it certain well defined obligations of a public character. All the instruments and appliances used by the telephone company in the prosecution of its business are consequently, in legal contemplation, devoted to a public use.

Indeed, the principle of nondiscrimination is embedded in the very DNA of capitalism. As capitalism was dissolving feudalism, the emerging social order discovered an important new social, political and economic function – mobility. Physical and social mobility were anathema to feudalism, but essential to capitalism and democracy. Providing for open and adequate highways of commerce and means of communications were critical to allow commerce to flow, to support a more complex division of labor and to weave small distant places into a national and later global economy. Legal obligations of nondiscrimination were the solutions. For example, under common law, when the innkeeper hung out his sign (called a tariff) he brought upon himself the obligation to serve all travelers in a nondiscriminatory manner, thereby supporting the movement of people, goods and services.

Today, as communications and commerce converge, adherence to that principle is important then ever.

The Breakdown of Non-Discrimination Under the Internet Principles

The vacuum the Commission created by the sweeping abandonment of both Title II authority and the Computer Inquiries has quickly put the Internet principles to the test because the fundamental economic interests of the network operators are in conflict with the principles. The current dispute with Comcast is a critical moment in this process. If the Commission fails with its light handed approach to ensure nondiscrimination, the groundwork will be laid for much sterner measures.

Comcast's strategy is clear. It manages its network to maximize the capacity for its franchise service – one-way push video distribution. At the same time, it holds itself out as a communications company selling broadband access. However, because it has under allocated network resources to its communications business, it invokes the claim of scarcity to discriminate against Internet service providers. Not so coincidentally, the service providers

who bear the brunt of this discrimination just happen to provide service that competes against its franchise business.

Simultaneously, it makes misleading claims to consumers about the quality of service it provides to the public. It will not give consumers clear information about what they can and cannot do, instead claiming broad presumptive rights to kick consumers off the network or otherwise interdict their service.

To put it bluntly, Comcast is willing to mislead consumers and undermine the value of the Internet to protect its market power in the multichannel video programming market. Having restricted consumer choice by forcing consumers to buy big bundles delivered as cable packages, it is seeking to prevent consumers from exercising choice on the Internet by degrading Internet services that compete with cable programming and which, if so happens, offer consumers true choice -- the ability to pay for only what you really want.

The anticompetitive, anti-consumer practices are the result of strategic decisions about network management that violate the Internet principles adopted in August of 2005. The FCC must take a stand against these practices. It can do so without reverting to regulation by elaborating on the meaning of reasonable network management.

Restoring Order

We are well aware that the Commission does not want to regulate Comcast's quality of service, nor do we advocate that the Commission do so. What the Commission must do is ensure that whatever quality of service Comcast decides to provide treats applications, content and devices fairly and informs consumers precisely about what they are paying for.

One of the keys to the success of open communications networks is the fact that nondiscrimination does not mean no differentiation. Throughout the Internet era telephone companies offered a range of functionalities from plain old telephone up to T-1 service and charged different rates for them. What they could not do, however, was to decide who would be allowed to subscribe to which level of service and certainly could not make exclusive deals with some users that were not available to others. As long as the functionality was available on a nondiscriminatory basis, edge-based innovation – modems and the Internet – could compete with and erode the advantage of the T-1 for many applications. Innovators crammed more and more data through dial-up service, delivering to the mass-market information services that the telephone companies had endeavored to restrict to the enterprise market by price. This is the essential characteristic of the Internet that the Commission must ensure by enforcing its Internet principles vigorously.

In our reply comments in this proceeding we outlined the principles that the FCC should adopt to ensure that network management is reasonable. Management practices should be transparent, claims of scarcity should be genuine and policies to reduce congestions must be implemented in an open and fair manner that, providing the opportunity for Internet service providers to provision and maintain their quality of services with network resources that are not in short supply. Simply put, consumers and service providers need to be told clearly how the

network will be operated and resources that are declared to be in short supply must not, be reserved for the network operator or a favored affiliate, while they are withheld from other users. Notification scarcity and specification of responses will afford the service providers an opportunity to maintain the quality of service by utilizing resources that are not scarce.

At the Boston hearing, David Reed, one of the early scientists to identify and explain the fundamental principles on which the Internet rests, argued that Comcast's secretive, deceptive, unilateral, non-standardized actions is a "serious problem." He concluded that the very "survival of the Internet requires that Internet Access Providers continue to take a proper, transparent role as participants in the Internet." He pointed out that congestion is not a new problem on the Internet and there are tools available for dealing with it and cooperative approaches to addressing problems for which new tools are needed. It is only Comcast's secretive, anti-social response to congestion that is new.

The Commission must discourage companies from anticompetitive, anti-consumer actions that "degrade the Internet by selectively damaging their customers' ability to use the full capabilities of the Internet." The Internet was never just computer code, it was always a social arrangement, an institution that involved norms of behavior in a cooperative enterprise build on transparency, collaborative process of protocol development, and cooperation to preserve quality of service. Internet service providers were governed by norms and the communications networks on which the Internet traffic flowed were governed by rules of nondiscrimination. It took both to create the environment in which the Internet could flourish. Interestingly, in the court case that started us down this path, *Portland v. AT&T*, the order noted the importance of the convergence of the code of communications regulation and the Internet

Among its broad reforms, the Telecommunications Act of 1996 enacted a competitive principle embodied by the dual duties of nondiscrimination and interconnection. See 47 U.S.C. s. 201 (a) ...s. 251 (A) (1)... Together, these provisions mandate a network architecture that prioritizes consumer choice, demonstrated by vigorous competition among telecommunications carriers. As applied to the Internet, Portland calls it "open access," while AT&T dysphemizes it as "forced access." Under the Communications Act, this principle of telecommunications common carriage governs cable broadband as it does other means of Internet transmission such as telephone service and DSL, "regardless of the facilities used." The Internet's protocols themselves manifest a related principle called "end-to-end": control lies at the ends of the network where the users are, leaving a simple network that is neutral with respect to the data it transmits, like any common carrier. On this role of the Internet, the codes of the legislator and the programmer agree.

The Commission has the authority and the tools to ensure that network operators to not damage the essential qualities of the Internet. It must exercise its authority vigorously to preserve the neutrality of the network, or risk undermining one of the most remarkable inventions in human history.