

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

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<i>In the Matter of</i> )	
)	GN Docket No. 09-191
<i>Preserving the Open Internet</i> )	
<i>Broadband Industry Practices</i> )	WC Docket No. 07-53
_____ )	

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REPLY COMMENTS OF THE  
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

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In response to the Federal Communications Commission’s (“FCC” or “Commission”) October 22, 2009<sup>1</sup> Notice of Proposed Rulemaking (“NPRM”), the National Association of Regulatory Utility Commissioners (“NARUC”) submits the following brief reply comments endorsing initial commenters to extent they:

- “Support the right of all Internet users, including broadband wireline, wireless, cable modem, and application-based users, to have access to and the use of the Internet . . . unrestricted as to viewpoint and . . . provided without unreasonable discrimination as to lawful. . .content;”
- “Support adoption of NRPM principles (1) through (4) and (6);” and
- Support adoption of principle (5) as long as it (i) is applied in a “technologically neutral fashion, (ii) recognizes that “there are differences in markets, bandwidth, spectrum resources, and other factors between providers, whether cable, wireless, landline, application-based or otherwise. . .,” (iii) specifies “what constitutes unreasonable restrictions or unreasonable discrimination,” (iv) gives “providers incentive for innovation and a fair return on their investment,” and (v) does not jeopardize “the goals of ensuring that all consumers have access to and use of affordable and reliable broadband services.”

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<sup>1</sup> *In the Matter of Preserving the Open Internet, Broadband Industry Practices*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 (rel. Oct. 22, 2009), available online at: <[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-09-93A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-93A1.doc)>.

## INTRODUCTION

In this proceeding, the Commission is proposing a set of rules to preserve the openness of the Internet. NARUC represents the interests of State public utility commissions that oversee, among other things, telecommunications utilities in the United States and U.S. Territories. The association has been recognized both by Congress in several statutes<sup>2</sup> and consistently by Article III courts<sup>3</sup> as the proper entity to represent the collective interests of the State utility commissions.

The NRPM in this docket was released last October. The initial comments were due January 14, 2010. After initial comments were filed, NARUC held its Winter meetings in Washington, D.C. and passed a resolution addressing the NPRM.

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<sup>2</sup> See 47 U.S.C. § 410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Board to consider issues of concern to both the Federal Communications Commission and State regulators with respect to universal service, separations, and related concerns; Cf. 47 U.S.C. § 254 (1996) (describing functions of the Joint Federal-State Board on Universal Service). Cf. NARUC, et al. v. ICC, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains "...Carriers, to get the cards, applied to...(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the "bingo card" system.).

<sup>3</sup> See, e.g., United States v. Southern Motor Carrier Rate Conference, Inc., 467 F. Supp. 471 (N.D. Ga. 1979), aff'd 672 F.2d 469 (5th Cir. 1982), aff'd en banc on reh'g, 702 F.2d 532 (5th Cir. 1983), rev'd on other grounds, 471 U.S. 48 (1985) (The Supreme Court noted: "[t]he District Court permitted . . . (NARUC), an organization composed of State agencies, to intervene as a defendant. Throughout this litigation, the NARUC has represented the interests of the Public Service Commissions of those States in which the defendant rate bureaus operate." 471 U.S. 52, n. 10. See also NARUC v. DOE, 851 F.2d 1424 (D.C. Cir. 1988), where, although standing was not specifically addressed, NARUC was the lead petitioner in a successful appeal involving DOE and the nuclear waste program; Indianapolis Power and Light Co. v. ICC, 587 F.2d 1098 (7th Cir. 1982); Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir. 1976); Compare, NARUC v. Federal Energy Regulatory Commission, 475 F.3d 1277 (D.C. Cir. 2007); NARUC v. Federal Communications Commission, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985).

## DISCUSSION

In 2005, the FCC issued a Policy Statement<sup>4</sup> in which it announced as principles on Internet access, subject to reasonable network management, that consumers are entitled to (1) access the lawful Internet content of their choice; (2) run applications and use services of their choice, subject to the needs of law enforcement; (3) connect their choice of legal devices that do not harm the network; and (4) be able to choose among competing network providers, application and service providers, and content providers.

In September of last year, FCC Chairman Genachowski endorsed those 2005 principles and added two more: (5) broadband providers cannot discriminate against particular Internet content or applications and (6) providers of broadband Internet access must be transparent about their network management practices. Subsequently, on April 6, 2010, the U. S. Court of Appeals for the District of Columbia Circuit, in *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir. 2010) (*Comcast*), available online at: <http://pacer.cadc.uscourts.gov/docs/common/opinions/201004/08-1291-1238302.pdf>, ruled that, because “ the Commission failed to tie its assertion of ancillary authority over Comcast’s Internet service to any “statutorily mandated responsibility,” an

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<sup>4</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Policy Statement, 20 FCC Rcd 14986 (2005) (*Internet Policy Statement*).

enforcement order, based on the 2005- adopted principles could not stand. *Comcast*, slip opinion at page 36. The FCC briefly extended the reply comment period to seek comment on the impact of the Comcast decision.

No one questions that broadband access to the Internet is profoundly affecting the lives of Americans presenting, *inter alia*, critical access to incredible information resources, educational and job opportunities as well as government and health services.<sup>5</sup> It is clear that limiting, or otherwise degrading broadband access for users of the Internet, e.g., blocking VoIP applications, denying access to political content, or implementing technical measures that degrade the performance of peer-to-peer software distributing lawful content, is an unfair practice that “may reduce the Internet’s value to consumers.” Id.

However, it is also true that providers of internet services “have raised concerns that limitations placed upon the manner in which they offer services could stifle legitimate business goals, harm their abilities to earn a reasonable return on investment, and chill their incentive to innovate.” Id.

That is why NARUC has adopted at least two resolutions addressing the critically important issues raised by the FCC in this proceeding. A 2002 NARUC resolution points out that providers of broadband services or facilities have the technical capability to restrict Internet access to particular sites or content. This could

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<sup>5</sup> See, NARUC’s 2010 *Resolution on Open Access to the Internet*, attached as Appendix A.

prevent or limit consumers' ability to reach content of their choosing, presenting significant concerns that free and open information exchange in the marketplace of ideas could be hindered. NARUC concluded that the restriction of user access to the Internet and its effect on an informed public is an issue of real significance to Americans and endorsed the right of all Internet users, including broadband wireline and cable modem users to:

- Have access to the Internet that is unrestricted as to viewpoint and that is provided without unreasonable discrimination as to lawful choice of content (including software); and
- Receive meaningful information regarding the technical limitations of broadband service.

As noted earlier, NARUC's 2010 Resolution, endorses the views of any initial commenters to extent they:

- "Support the right of all Internet users, including broadband wireline, wireless, cable modem, and application-based users, to have access to and the use of the Internet . . . unrestricted as to viewpoint and . . . provided without unreasonable discrimination as to lawful. . .content;"
- "Support adoption of NRPM principles (1) through (4) and (6);" and
- Support adoption of principle (5) as long as it (i) is applied in a "technologically neutral fashion, (ii) recognizes that "there are differences in markets, bandwidth, spectrum resources, and other factors between providers, whether cable, wireless, landline, application-based or otherwise. . .," (iii) specifies "what constitutes unreasonable restrictions or unreasonable discrimination," (iv) gives "providers incentive for innovation and a fair return on their investment," and (v) does not jeopardize "the goals of ensuring that all consumers have access to and use of affordable and reliable broadband services."

NARUC's support for adoption of principles 1 through 4 and 6 require no amplification. However, the resolution's caveats on the adoption of principle 5, that broadband providers should not be allowed to discriminate against particular Internet content or applications, does require some discussion.

#### **“TECHNOLOGICALLY NEUTRAL APPLICATION”**

The Commission asks “to what extent the principles should apply to non-wireline forms of Internet access.” NPRM at ¶ 16. NARUC's resolution answers that question in the affirmative – at least for principle 5's prohibition of discrimination against content or applications. NARUC's support for principle 5 requires it be applied in a “technologically neutral fashion.” Neutrality rules must apply across platforms to assure that the public communications network remains a unified interconnected network.

#### **CLARIFICATION OF WHAT CONSTITUTES UNREASONABLE DISCRIMINATION**

NARUC's resolution argues that – in implementing principle 5, the FCC must recognize that “there are differences in markets, bandwidth, spectrum resources, and other factors between providers, whether cable, wireless, landline, application-based or otherwise” and, significantly, specify “what constitutes unreasonable restrictions or unreasonable discrimination.” The problem is the FCC's proposed rule appears to impose an *absolute* ban on discrimination, rather than just prohibiting “unjust and

unreasonable” discrimination.<sup>6</sup> The FCC has conceded that many types of discrimination are pro-competitive and can provide benefits to consumers,<sup>7</sup> yet the proposed rule does not distinguish discrimination that is either beneficial or benign from actions that can harm competition or consumers. Without additional clarification, this approach could harm quality of service for latency-sensitive applications like telemedicine, VoIP, or streaming video. Indeed, the NPRM does recognize this concern by raising the possibility that its proposed rule might entitle “a broadband provider to protect the quality of service for those applications for which quality of service is important by implementing a network management practice of prioritizing classes of latency-sensitive traffic over classes of latency-insensitive traffic.”<sup>8</sup> But then questions whether “such a practice would be difficult to implement in a competitively fair manner.” *Id.* The intent of the NPRM is far from clear. Reasonable network management practices are critical to important national priorities including assuring cybersecurity, fighting illegal content, and protecting children online. The NPRM does recognize the importance of these goals, and proposes to include exceptions to permit network management practices for these

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<sup>6</sup> Compare NPRM ¶ 109 with 47 U.S.C. §§ 201-202.

<sup>7</sup> The FCC is not alone in making this concession. See also *Letter from Richard Whitt, Washington Telecom Counsel, Google to Marlene Dortch, Secretary, FCC*, WC Docket No. 06-150 (Nov. 21, 2007), Mr. Whitt and Google have been strong proponents of net neutrality. In a 2007 letter, Mr. Whitt recognizes that a flat ban on any discrimination that “prohibit[ed] any differential pricing or conditions” would be “counterproductive” and “overbr[o]ad[.]”

<sup>8</sup> NPRM ¶ 137.

purposes. Clear rules are not just a matter of simple fairness. Without clarification, the practical impact of generic rules could actually undermine carrier's abilities to serve these goals – particularly in the area of security. Providers need to be able to act dynamically and quickly to evolving cybersecurity threats.

The FCC should provide additional clarification of what constitutes unreasonable discrimination in all these areas. Without clarification, the proposed regulations could slow response time, reduce flexibility, introduce uncertainty, and potentially undermine service quality and the consumer experience.

### **THE COMCAST DECISION**

As noted, *supra*, the FCC granted the most recent extension in the reply comment filing deadline to allow commenters to address the D.C. Circuits decision in *Comcast*. In the FCC order<sup>9</sup> on review before the D.C. Circuit that led to the April 2010 decision, the agency found some of Comcast's network management practices violated the network neutrality principles announced in the FCC 2005 Policy Statement. The D.C. Circuit vacated the order finding the FCC "failed to tie its assertion of ancillary authority over Comcast's Internet service to any 'statutorily mandated responsibility.'"<sup>10</sup> However, the court did not say that the Commission could not promulgate such network neutrality principles under its ancillary authority.

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<sup>9</sup> *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd 13028 (rel. Aug. 20, 2008).

<sup>10</sup> *Comcast*, slip opinion at page 36.

Instead, the court held the FCC *had not* identified an appropriate statutory basis for doing so. On remand, the FCC can link its exercise of ancillary jurisdiction to an alternative statutory base. Indeed, the agency identified several possibilities in its original brief to the D.C. Circuit.

The Courts points out that the FCC can exercise its ancillary jurisdiction only when: “(1) the Commission’s general jurisdictional grant under Title I... covers the regulated subject *and* (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”<sup>11</sup> There is no dispute that the first prong of this test is easily met.<sup>12</sup>

The FCC suggested at least one “statutorily mandated responsibility” on brief that might meet the second prong. Specifically, on brief, the FCC pointed out that Section 706(a) requires the FCC to “encourage the deployment on a reasonable and timely basis of advanced communications capability.”<sup>13</sup> The *Comcast* opinion concedes this provision “contain[s] a direct mandate” but notes the FCC concluded in an earlier order that Section 706(a) does not constitute an independent grant of regulatory authority.<sup>14</sup> Section 706(a) cannot serve as the statutory basis for the

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<sup>11</sup> Id. at page 7.

<sup>12</sup> Id. at page 8.

<sup>13</sup> *Brief for Respondents Federal Communications Commission and United States of America* at 40, *Comcast Corp v. FCC*, No. 08-1291 (filed Sept. 21, 2009), citing 47 U.S.C. § 1302(a) (formerly codified in the note to 47 U.S.C. § 157)

<sup>14</sup> *Comcast*, slip opinion at 30-31.

*Comcast Order* unless the FCC reconsiders its prior decision. Nothing prohibits the Commission from taking that action and concluding that Section 706(a) (and Section 706(b)<sup>15</sup>— provides a statutory grant of authority.<sup>16</sup> Even if the FCC does not choose to reconsider its construction of Section 706, it can point to other statutory provisions to justify its exercise of ancillary authority to enforce network neutrality.<sup>17</sup>

## CONCLUSION

NARUC requests that any final rules in this proceeding reflect the foregoing comments.

Respectfully submitted,

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<sup>15</sup> Section 706(b) provides that the Commission shall periodically determine whether advanced telecommunications capabilities are being deployed to all Americans on a reasonable and timely basis and, if it concludes they are not, “it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.” 47 U.S.C. § 1302(b).

<sup>16</sup> See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810-11 (2009) (noting an agency is entitled to change its mind).

<sup>17</sup> For example, the FCC’s brief cited to Section 201, FCC Br. at 44-45, although the D.C. Circuit concluded that the reasoning in the Commission’s brief was not adequately set forth in the agency order, see *Comcast*, slip opinion at 33-34.

## ***Resolution on Open Access to the Internet***

**WHEREAS**, Broadband Internet is profoundly affecting the lives of Americans, through education, communications, health services, and numerous other applications; *and*

**WHEREAS**, Broadband Internet deployment and investment remains significant even though deployment is a capital-intensive process, which has led to barriers to access, particularly in rural America; *and*

**WHEREAS**, Over time, limiting, or otherwise degrading broadband access for users of the Internet, such as by blocking VoIP applications, denying access to political content, or implementing technical measures that degrade the performance of peer-to-peer software distributing lawful content has become widely agreed upon as an unfair practice and may reduce the Internet's value to consumers; *and*

**WHEREAS**, In a Resolution adopted at its 2002 Annual Convention in Chicago, Illinois, NARUC found that providers of broadband services or facilities have the technical capability to restrict Internet access to particular sites or content, which could prevent or limit consumers' ability to reach content of their choosing, thereby presenting significant concerns that free and open information exchange in the marketplace of ideas could be hindered; *and*

**WHEREAS**, NARUC concluded that the restriction of user access to the Internet and its effect on an informed public is an issue of real significance to Americans; *and*

**WHEREAS**, In the 2002 Resolution, NARUC endorsed the right of all Internet users, including broadband wireline and cable modem users to:

- Have access to the Internet that is unrestricted as to viewpoint and that is provided without unreasonable discrimination as to lawful choice of content (including software applications); and
- Receive meaningful information regarding the technical limitations of their broadband service; *and*

**WHEREAS**, In 2005, the Federal Communications Commission (FCC) issued a Policy Statement in which it announced as principles on Internet access, subject to reasonable network management, that consumers are entitled to (1) access the lawful Internet content of their choice; (2) run applications and use services of their choice, subject to the needs of law enforcement; (3) connect their choice of legal devices that do not harm the network; and (4) be able to choose among competing network providers, application and service providers, and content providers; *and*

**WHEREAS**, The FCC Chairman endorsed these principles in September 2009 and added the two following principles that he considers essential to the openness of the Internet: (5) broadband providers cannot discriminate against particular Internet content or applications and (6) providers of broadband Internet access must be transparent about their network management practices; *and*

**WHEREAS**, Members of Congress have expressed concerns over restricting consumers' open access to the Internet and Congress could act to protect such interests; *and*

**WHEREAS**, Providers of Internet services have raised concerns that limitations placed upon the manner in which they offer services could stifle legitimate business goals, harm their abilities to earn a reasonable return on investment, and chill their incentive to innovate; *now, therefore be it*

**RESOLVED**, That the National Association of Regulatory Utility Commissioners, convened at its 2010 Winter Committee Meetings in Washington, D.C., continues to support the right of all Internet users, including broadband wireline, wireless, cable modem, and application-based users, to have access to and the use of the Internet that is unrestricted as to viewpoint and that is provided without unreasonable discrimination as to lawful choice of content; *and be it further*

**RESOLVED**, That NARUC supports the principles (1) through (4) and (6) and supports principle (5) as adjusted consistent with all the NARUC stated Resolves on Internet access set forth above and encourages the FCC and/or Congress to adopt such principles with deference to the following considerations; *and be it further*

**RESOLVED**, That NARUC recognizes that there are differences in markets, bandwidth, spectrum resources, and other factors between providers, whether cable, wireless, landline, application-based or otherwise; *and be it further*

**RESOLVED**, That notwithstanding these differences, NARUC encourages the FCC and/or Congress, when crafting rules and regulations in this area to define what constitutes unreasonable restrictions or unreasonable discrimination, strive to be as technologically neutral as possible, continue to give providers incentive for innovation and a fair return on their investment, without jeopardizing the goals of ensuring that all consumers have access to and use of affordable and reliable broadband services; *and be it further*

**RESOLVED**, That the NARUC General Counsel should include these principles in NARUC comments filed in all relevant FCC broadband proceedings.

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*Sponsored by the Committee on Telecommunications*

*Adopted by the NARUC Board of Directors February 17, 2010*