**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| In the Matter of | ) | |
| Broadband Industry Practices | ) | |
| Vuze, Inc. Petition to Establish Rules Governing Management Practices by Broadband Network Operators | ) | |
| Free Press et al. Petition for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management" | ) | WC Docket No. 07-52 |

# REPLY COMMENTS OF AT&T INC. ON PETITIONS OF FREE PRESS AND VUZE


Jack S. Zinman
Gary L. Phillips
Paul K. Mancini
AT&T INC.
1120 20th Street NW 10th Floor
Washington, D.C. 20036
202-457-3053 (phone)
202-457-3073 (facsimile)

Jonathan E. Nuechterlein
WILMER CUTLER PICKERING
HALE & DORR LLP
1875 Pennsylvania Ave., NW
Washington, D.C. 20006
202-663-6850 (phone)
202-663-6363 (facsimile)


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## INTRODUCTION AND SUMMARY

As AT&T has previously explained, the Internet has triumphed not because the Commission has submitted to demands for regulatory intervention, but because, as Congress instructed, it has allowed the "free market . . . , unfettered by Federal or State regulation," to serve consumer needs.[1] That free market mandate fully applies to the network-management issues presented here. Like any marketplace, the Internet presents resource-allocation challenges: in this case, how to allocate finite, costly, shared bandwidth in a manner that consumers value most. The question is whether the Commission will let free-market forces continue doing what they do best—efficiently allocate scarce resources for the benefit of consumers overall—or whether, as Free Press proposes, the Commission will turn that resource-allocation task over to a scheme of command-and-control regulation. There is only one responsible answer to that question. The premise of a free economy, and of four decades of Internet "unregulation," is that the government should rely on market forces to serve consumer needs unless and until a clear market failure arises.

A wide variety of commenters confirm that there has been no market failure at all, much less one so systemic as to warrant the radical scheme of regulatory intervention proposed by Free Press and others. The commenters who understand how modern networks actually operate—such as the Fiber-to-the-Home ("FTTH") Council, the Distributed Computing Industry Association ("DCIA"), the PART-15 Organization, and Global Crossing—acknowledge the

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[1] 47 U.S.C. § 230(b)(2); *see also* Pub. L. 104-104, Title VII, § 706, 110 Stat. 153 (47 U.S.C. § 157 note) (instructing FCC to follow a policy of "regulatory forbearance" where needed to "remove barriers to infrastructure investment"). *See generally* AT&T Comments on Free Press and Vuze Petitions, WC Dkt. No. 07-52, at 1-2, 40 (Feb. 13, 2008) ("AT&T 2/13/08 Comments"); AT&T Comments, WC Dkt. No. 07-52, at 47-50 (June 15, 2007) ("AT&T 6/15/07 Comments"). Unless otherwise indicated, citations of comments below refer to the February 2008 responses to the petitions of Free Press and Vuze.

engineering challenges posed by escalating network congestion as well as the dangers posed by prophylactic rulemaking in this area. For example, DCIA (of which BitTorrent and Joost are members) explains that "applications and services that require significant bandwidth and other network resources to deliver their large rich-media content payloads should bear some meaningful responsibility for consuming disproportionate amounts of network resources to the potential detriment of an ISP's collective customer base, and ISPs' network management *should be permitted to take into account and manage their networks to address any such impact*."[2] Likewise, as the FTTH Council points out, "the history of the Internet . . . can be characterized by the attempts that have been made to minimize the potential for congestion while maximizing the number of users and the intensity of their use. . . . This leads all participants to develop differentiated 'congestion reducing' practices that change frequently and that should only be determined to be unreasonable *when specific facts are presented that such activities are exclusionary*" in the sense of being anticompetitive.[3]

Many commenters likewise recognize that general rules restricting network-management practices would, at best, substantially raise end user prices and, at worst, threaten network security.[4] On this point, the Commission is hardly writing on a blank slate, for other government

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[2] DCIA Comments at 8-9 (emphasis added).

[3] FTTH Council Comments at 27 (emphasis added); accord Part-15 Organization Comments at 5 (opposing regulatory limits on network management because "[l]imiting traffic is important . . . . Without limiting traffic one consumer could effectively deny service to other consumers."); Telecommunications Industry Ass'n Comments at 21.

[4] *See, e.g.*, FTTH Council Comments at i; Telecommunications Industry Ass'n Comments at 12-13; Global Crossing Comments at 3; Comments of CNET analyst George Ou at 9 ("The last thing we should do is force Comcast to implement more expensive and/or less fair traffic management schemes that at best waste[] money and at worst degrade performance for consumers who are using far less than their fair share of bandwidth.").

agencies have reached the same conclusion. The Federal Trade Commission, for example, concluded in a 5-0 vote after a year-long inquiry that—

- "the use of bandwidth-intensive applications like certain peer-to-peer file-sharing protocols by even a small minority of users is already consuming so many network resources as to be worrisome. . . . [and] *even a small portion of Internet users may effectively degrade service for the majority of end users*";
- "the use of application-based prioritization algorithms to improve delivery of certain types of applications (e.g., latency-sensitive ones) or to *deprioritize others (e.g., P2P)* purely as an internally defined traffic-management tool *has not raised significant controversy*"; and
- "*[i]ndustry-wide regulatory schemes*—particular those imposing general, one-size-fits-all restraints on business conduct—*may well have adverse effects on consumer welfare*, despite the good intentions of their proponents."[5]

And the Organisation for Economic Co-operation and Development ("OECD"), which represents some 30 member nations worldwide, has likewise found that, because "[t]here is little evidence of anti-competitive conduct to date," it is "*premature for governments to become involved* at the level of network-to-network traffic exchange and demand neutral packet treatment for content providers."[6]

AT&T submits these reply comments both to underscore this consensus in favor of keeping the Internet unregulated and also to reply to Free Press's comments—a 68-page "response" to Free Press's own 34-page petition for declaratory ruling. It is unclear why Free

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[5] FTC Staff Report, *Broadband Connectivity Competition Policy*, at 28-29, 89, 160 (June 2007) (http://www.ftc.gov/reports/ broadband/v070000report.pdf) ("FTC Net Neutrality Report") (emphasis added). Similarly, the Department of Justice has concluded that "[o]wners of network facilities have legitimate reasons to manage their facilities in ways that lessen congestion" and that, "[h]owever well-intentioned, regulatory restraints can inefficiently skew investment, delay innovation, and diminish consumer welfare, and there is reason to believe that the kinds of broad marketplace restrictions proposed in the name of 'neutrality' would do just that with respect to the Internet." Ex Parte Filing of the United States Dep't of Justice in WC Dkt. No. 07-52, at 2-3, 4 (Sept. 6, 2007).

[6] OECD Report, *Internet Traffic Prioritisation: An overview*, at 5 (Apr. 6, 2007) (http://www.oecd.org/dataoecd/43/63/38405781.pdf) (emphasis added).

Press perceived a need to file a second document, much less one twice as long as the first. Certainly Free Press has no new empirical analysis to present, because its comments are as bereft of serious technological or economic discussion as the original petition. Indeed, Free Press remains oblivious to the fact of network congestion and to the corresponding need of network operators to manage that congestion for the benefit of the overwhelming majority of consumers who do not wish to cross-subsidize the extravagant bandwidth consumption of a few Internet elites. Internet pioneer Richard Bennett aptly observes: "It is as if petitioners believe that the Commission can judge the validity of Comcast's actions as Platonic essences rather than as pragmatic reactions to empirical conditions."[7]

Perhaps Free Press filed these comments merely because it concluded that its original petition was insufficiently over-the-top. If so, Free Press has cured the deficiency, for it now contends, with all apparent seriousness—

- That Comcast's engineering solutions to P2P congestion during peak load periods represent a "paradigmatic example[] of the *clash of civilizations*";[8]
- That such content-neutral congestion-control measures will somehow "constrain[]" consumers "in what they can *say, read, watch, do, and create*";[9]
- That Comcast seeks to deny "consumer[s] . . . access to all lawful Internet content" and specifically wishes to suppress "the uploading and downloading of *certain content*—including the King James Bible";[10]
- That broadband providers should be subject to a ban on "*all* discrimination"[11] that is far stricter than the ban on "unreasonable discrimination" Congress imposed on *telephone monopolists in 1934*;

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7 Comments of Richard Bennett at 2; *see also* Richard Bennett, *Dismantling a Religion: The EFF's Faith-Based Internet*, The Register (Dec. 13, 2007) (http://www.theregister.co.uk/2007/12/13/bennett_eff_neutrality_analysis/page2.html).

8 Free Press Comments at 5 (emphasis added).

9 *Id.* at 3 (emphasis added).

10 *Id.* at 15-16 (emphasis added).

- That Comcast's network-management rationales are "foreclosed by the 700 Mhz Auction Order," which supposedly "could not be more on point," even though that Order applies to licenses for spectrum over which no broadband Internet access services are currently being provided and has absolutely nothing to do with existing broadband networks;[12] and

- That keeping the Internet unregulated would "undermine [the] Congressional policy"[13] reflected in Section 706, even though that provision promotes "*regulatory forbearance*," and Section 230(b), even though *that* provision expresses Congress's intent to preserve the "*free market* that presently exists for the Internet . . . , *unfettered by Federal or State regulation.*"[14]

To quote these sound bites is to refute them. Perhaps the "clash of civilizations" rhetoric works well enough on Free Press's website (savetheinternet.com), where Free Press deceives credulous viewers into filing angry form comments with the Commission. But Free Press has forfeited any remaining credibility by repeating that overblown rhetoric in its formal submissions here.

In short, the Commission should join the FTC and the OECD in concluding that any intervention in this market should be limited to narrowly tailored responses to demonstrated market failures involving anticompetitive conduct. And while the Commission should actively encourage broadband providers to disclose *network-usage restrictions* to their customers, it should reject Free Press's misguided call for "complete disclosure of *network management practices*" in the technical detail needed to facilitate third-party manipulation of broadband networks.[15]

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11 *Id.* at 38 (emphasis added).

12 *Id.* at 35 (emphasis added).

13 *Id.* at 20; *see id.* at 18-20.

14 Pub. L. 104-104, Title VII, § 706, 110 Stat. 153 (47 U.S.C. § 157 note); 47 U.S.C. § 230(b)(2). *See generally* AT&T 2/13/08 Comments at 1-2, 40; AT&T 6/15/07 Comments at 47-50.

15 Free Press Comments at 59.

## ARGUMENT

### I. The Legitimacy of Particular Network-Management Practices Is Not a Proper Subject for a Declaratory Ruling or Rules of General Application.

As noted in our previous comments, AT&T lacks access to the full record in the complaint proceeding brought against Comcast, and it therefore cannot comment on the particular network-management practices at issue in that proceeding. But however it resolves that proceeding, the Commission should make two points clear. First, the Commission should confirm that it will not second-guess the network-management decisions of engineers unless doing so is manifestly necessary to redress conduct that harms consumers overall, as opposed to conduct that has the effect of limiting the ability of particular providers or end users to consume disproportionate bandwidth at the *expense* of consumers overall.[16] Second, the Commission should confirm that the legitimacy of particular network-management practices is insusceptible to prophylactic rulemaking and should therefore proceed on a case-by-case basis.[17] As discussed, both positions are supported by the FTC and by the commenters in this proceeding—

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[16] AT&T 2/13/08 Comments at 27-31. In its comments on the Free Press and Vuze petitions, Comcast alleges that AT&T "use[s] network-management tools to ensure P2P users can operate and trade legal content without impairing everyone else's broadband experience." Comcast Comments at 21 (citing the Seattle Times). Contrary to this assertion, AT&T does not use any P2P management tools in its network today to manage the traffic of its Internet access customers. Moreover, while AT&T's existing Internet access terms of service do not permit consumers to engage in the hosting of peer-to-peer applications that the consumer is not actively using, AT&T has not blocked or degraded any such applications. In all events, AT&T reserves the right to use reasonable network-management practices to ensure that its collective customer base enjoys a high-quality Internet experience.

[17] AT&T 2/13/08 Comments at 24-27 As previously explained, there are also serious threshold questions about whether the Commission—as opposed to antitrust and consumer-protection authorities—has legal authority to impose "nondiscrimination" rules and other forms of economic regulation on Title I information services. *See id.* at 24 n.61. Even the Center for Democracy and Technology, which *favors* some net neutrality proposals, argues against "setting the dangerous precedent that the Commission has general authority over the broadband Internet," Center for Democracy and Technology Comments at 3, and for that matter "is not certain . . . whether the Commission is best positioned or even has jurisdiction to address this issue," *id.* at 8; *see also* Comcast Comments at 52-54; Time Warner Cable Comments at 26-28.

such as the FTTH Council and the DCIA—who understand how IP networks operate and thus recognize the complex trade-offs presented by the escalating growth of bandwidth-intensive applications on the modern Internet.

At the same time, the Commission should emphatically reject Free Press's request for a ruling that "*all discrimination* violates federal policy," except "minimal deviations" mainly relating to "viruses, spyware, or malware."[18] On several levels, this proposal makes absolutely no sense. First, in its call for a flat ban on "all discrimination," Free Press would apparently prohibit any practice that tries to harmonize competing demands on network resources by treating different types of applications differently. But as AT&T has previously explained, no one other than Free Press seriously proposes this "dumb pipes" vision of the Internet, under which broadband providers must treat packets associated with different applications "exactly the same."[19] For example, as Internet pioneer David Farber and Berkeley economist Michael Katz

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[18] Free Press Comments at 40 & n.145 (emphasis added). As several parties recognize, there is in fact no clear line separating network management for the purpose of protecting network security from network management for the purpose of ensuring high-quality access by all consumers to finite network resources. *See, e.g.*, Joint Advisory Committee on Communications Capabilities of Emergency Medical and Public Health Care Facilities, Report to Congress, at 53-54 (Feb. 4, 2008) (http://energycommerce.house.gov/Press_110/JAC.Report_FINAL%20Jan.3.2008.pdf) ("Utilizing network management technologies can lessen congestion on broadband networks. . . . As networks grow in importance, it is critical to enable innovative network technologies that maximize the likelihood that mission critical applications won't be impacted by congestion."); FTTH Council Comments at 35 ("Perhaps the greatest danger from an overtly broad network neutrality proposal is that it could undermine security. . . . [I]t is often difficult to discern when a packet in a service or application poses a threat. It is very much a judgment call by the network provider.") (internal quotation marks omitted).

[19] On its website, Free Press has long claimed that "[t]he fundamental idea on the Internet since its inception is that every Web site, every feature, and every service should be treated *exactly the same*." SavetheInternet.com Coalition, *Net Neutrality 101* (http://www.savetheinternet.com/=101) (visited Jan. 12, 2008) (emphasis added). At some point in the past few weeks, Free Press altered this passage to replace the words "exactly the same" with the words "without discrimination." Time will tell whether Free Press is trying to moderate, or just obfuscate, its longstanding untenable position on this issue.

have explained, no credible advocate would seek to prohibit a network operator from "favor[ing] traffic from, say, a patient's heart monitor over traffic delivering a music download."[20]

Second, a network operator does not "discriminate" against applications, in any meaningful sense, if the differences in treatment reflect differences in the demands that the applications themselves place on the network. As Alfred Kahn explains, net neutrality advocates like Free Press are "guilty of using the term 'discrimination,' sloppily, to embrace mere *differences*" in the treatment of *dissimilar* things, rather than differential treatment of similarly situated things.[21] And many P2P technologies, as currently designed, are *not* similarly situated to most other applications and are anything but neutral in their aggressive consumption of shared bandwidth. The FTC explains:

> The TCP component of the TCP/IP suite . . . monitors delays and slows the packet-transmission rates accordingly. Some applications, however, such as certain peer-to-peer file-sharing protocols, operate in a different manner. When congestion occurs, these applications do not slow their rates of data transmission. Rather, they aggressively take advantage of TCP's built-in reduction mechanism and, instead, send data as fast as they can.[22]

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[20] David Farber & Michael Katz, *Hold Off On Net Neutrality*, Wash. Post, Jan. 19, 2007, at A19 (http://www.washingtonpost.com/wp-dyn/content/article/2007/01/18/AR2007011801508.html); *see also* Google 6/15/07 Comments at 22 ("[I]t is entirely reasonable for a broadband provider to utilize legitimate application and content-neutral practices – such as . . . prioritizing all packets of a certain application type, such as streaming video."); Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. Telecomm. & High Tech. L. 141, 154 (2003) ("certain classes of applications will never function properly unless bandwidth and quality of service are guaranteed," and depriving broadband providers of network management tools could thus "interfere with application development and competition").

[21] Statement of Alfred E. Kahn, Robert Julius Thorne Professor of Political Economy, Emeritus, Cornell University, before the FTC Workshop on Broadband Connectivity Competition Policy, at 4 (Feb. 13, 2007) (2/21/2007 rev.) (some emphasis omitted) (http://www.ftc.gov/opp/workshops/broadband/presentations/kahn.pdf).

[22] FTC Net Neutrality Report at 29 (footnote omitted); *see also* AT&T 6/15/07 Comments at 23-27; AT&T 2/13/08 Comments at 13-16.

The inventor of BitTorrent has made no secret of this fact. As he recently explained, "[m]y whole idea was, 'Let's use up a lot of bandwidth.' . . . I had a friend who said, 'Well, ISPs won't like that.' And I said, 'Why should I care?'"[23] As previously explained, AT&T is working closely with the DCIA (and thus with fellow DCIA member BitTorrent) to design a new, more "polite" generation of peer-to-peer technologies that place fewer burdens on the networks that carry them.[24] But in the meantime, network providers can hardly be accused of "discrimination" when they adopt network-management practices that have the effect of neutralizing the bandwidth-hogging characteristics of applications that are specifically designed to "use up a lot of bandwidth" without any regard for the deleterious impact of that bandwidth consumption on other users sharing the network.

Third, even if a given network-management practice *did* involve "discrimination" in some meaningful sense of that word, that would not make the practice inherently bad; indeed "discrimination" is often welfare-maximizing.[25] That is why even regulatory schemes designed for *monopoly markets*, such as the original Communications Act of 1934, typically forbid not

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[23] David Downs, *BitTorrent, Comcast, EFF Antipathetic to FCC Regulation of P2P Traffic*, San Francisco Weekly, Jan. 23, 2008 (http://news.sfweekly.com/2008-01-23/news/bittorrent-comcast-eff-antipathetic-to-fcc-regulation-of-p2p-traffic).

[24] AT&T 2/13/08 Comments at 16-18. As BitTorrent's Chief Technology Officer noted at the Commission's February 25 public hearing, BitTorrent has developed a new hybrid product called "BitTorrent DNA" that contains elements of P2P networking and CDN technology. *See generally* http://www.bittorrent.com/dna/technology.html; http://www.bittorrent.com/dna/faq.html (visited Feb. 27, 2008). By attempting to keep P2P traffic local, BitTorrent DNA would presumably use fewer network resources and create less potential for congestion than today's generation of network-oblivious P2P technologies. In BitTorrent's words, this new product uses a "managed peer network" and is "friendly to service provider networks" in that it "contains a number of enhancements to mitigate the impact of peer networking" on those networks, such as "sophisticated congestion-avoiding transport technology." http://www.bittorrent.com/dna/technology.html (some capitalization altered). While BitTorrent's efforts in this regard are commendable, those efforts are also a tacit admission that today's typical P2P technologies are *less than* "friendly to service provider networks."

[25] *See* AT&T 6/15/07 Comments at 79-80 n.213.

"discrimination" as such, but only "unjust or unreasonable discrimination."[26] And as competition has emerged, regulators have taken an ever-narrower view of what it means for discrimination to be "unjust or unreasonable."[27] Here, given that Congress subjected telephone *monopolies* of the 1930s only to a restriction on "unjust or unreasonable" discrimination, it would be absurd to straitjacket today's competitive broadband networks, as Free Press proposes, with a rigid ban on "all discrimination" among applications.

More generally, Free Press appears oblivious to the concepts of "scarcity" and "trade-offs," which lie at the heart of market dynamics in general and the management of shared networks in particular. For example, Free Press argues that, if network operators take measures to constrain aggressive bandwidth consumption by a few users, the affected bandwidth-hogging applications "will be used less, and will make less profit."[28] That in itself, Free Press seems to believe, is reason enough to forbid such measures. But the question is not whether the particular bandwidth-intensive applications favored by an elite minority of Internet users are "used less" or "make less profit." The question is whether those applications are inefficiently overconsuming scarce bandwidth resources to the detriment of consumers generally. In innumerable contexts, market forces routinely resolve such resource-allocation issues for the benefit of consumers without any need for government intervention; indeed, that is the crux of what markets do. Free Press articulates no coherent reason why market forces should not be relied upon to perform that role here absent a credible showing of anticompetitive conduct.

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26 47 U.S.C. § 202.

27 *See, e.g., Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003), *aff'g Orloff v. Vodafone AirTouch Licenses LLC d/b/a Verizon Wireless*, 17 FCC Rcd 8987 (2002).

28 Free Press Comments at 40.

Moreover, Free Press seeks not only to shift responsibility for such resource-allocation decisions from the market to a command-and-control regulatory regime, but also to impose a substantive "solution" that could only disadvantage the vast majority of ordinary consumers: a flat ban on any network-management practices that would constrain the network capacity consumed by bandwidth-greedy applications, even during peak usage periods. That ban would have debilitating consequences in both the short term and the long term. In the short term, it would degrade network performance for all users across the board. One recent study vividly underscores the problem for cable broadband networks in particular:

> The web response time statistic increased from a value of 0.25 seconds when no BitTorrent users were active to 0.65 seconds when 15 BitTorrent users were active. This suggests that 15 BitTorrent users can cause a drop in performance by a factor of 2.5. When the number of BitTorrent users exceeds 30 performance degrades beyond the 1 second metric threshold.[29]

It is no surprise, therefore, that many network operators to whom even Free Press ascribes no anticompetitive motives—colleges and universities—have taken aggressive steps to limit the amount of shared bandwidth consumed by BitTorrent and other P2P technologies.[30] As Richard Bennett explains, "Internet2 schools practice traffic shaping and policing on their campus networks, for the same reasons that public carriers such as Comcast do: it's not economically feasible to build networks around the excessive bandwidth appetites of a few users."[31]

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[29] James J. Martin and James M. Westall, *Assessing the Impact of BitTorrent on DOCSIS Networks*, at 7 (Sept. 2007) (http://people.clemson.edu/~jmarty/papers/bittorrentBroadnets.pdf).

[30] *See, e.g.*, Comments of the Information Technology and Innovation Foundation at 2; Time Warner Cable Comments at 17.

[31] Bennett Comments at 6; *see also* Erica Naone, *Bandwidth on Demand: An academic internet provides clues about ways to improve the commercial Internet*, Technology Review, Feb. 14, 2008 (http://www.technologyreview.com/Infotech/20277/page1/?a=f) (describing recent initiatives to make Internet2 a "smarter" network capable of differentiating between types of applications).

In the long term, broadband operators saddled with Free Press's proposed network-management ban would have to spend billions of dollars on needless and wasteful capacity upgrades simply to keep network performance from deteriorating for the vast bulk of their customers. As AT&T has discussed, those costs would ultimately be passed through to those customers, raise broadband prices across the board, and force the vast majority of users to subsidize the bandwidth-hogging activities of a privileged minority. That regulation-induced wealth transfer from the many to the few would deter broadband subscribership on the margins and exacerbate the digital divide—which is why telecommunications policy experts like former Chairman William Kennard oppose net neutrality mandates.[32]

Nowhere in the 68 pages of its comments, let alone the 34 pages of its original petition, does Free Press face up to any of these trade-offs.[33] Indeed, nowhere does Free Press identify a plausible market failure that could justify the rules of general application it advocates here. Although Free Press appears to believe that the Internet marketplace is rife with anticompetitive conduct, Free Press is wrong—as the Internet's very success reveals, as the Commission has repeatedly confirmed in deciding to keep the Internet unregulated, and as the FTC and the OECD

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[32] William E. Kennard, *Spreading the Broadband Revolution*, N.Y. Times, Oct. 21, 2006, at Op-Ed (http://www.nytimes.com/2006/10/21/opinion/21kennard.html) ("Policymakers should rise above the net neutrality debate and focus on what America truly requires from the Internet: getting affordable broadband access to those who need it.").

[33] Although Free Press's petition proposed in passing that broadband providers should rely on "metered pricing" to ensure efficient use of bandwidth, Free Press and other proponents of net regulation immediately criticized Time Warner when it subsequently announced that it would experiment with metered pricing, *see* AT&T 2/13/08 Comments at 21-22 (quoting criticism), and Free Press now makes clear in its comments that, in practice, it would condemn most metered pricing schemes as "discriminatory." Free Press Comments at 35 n.139. In all events, any metered pricing solution to the problem of bandwidth scarcity should arise from market forces; the Commission should not force that solution on consumers by banning alternative solutions. AT&T 2/13/08 Comments at 22-23; *see also* Time Warner Cable Comments at 24.

have independently reaffirmed in their own exhaustive analyses of the issue.[34] Free Press offers nothing to challenge that consensus.[35] As the D.C. Circuit has cautioned federal agencies, "[p]rofessing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decisionmaking."[36] Thus, contrary to Free Press's demand for a sweeping prohibition on network management, the Commission should not second-guess network-management decisions unless a complainant—in a specific case with specific facts—has made a prima facie showing of anticompetitive conduct that harms consumers overall.[37]

## II. The Commission Should Encourage the Voluntary Disclosure of Customer-Usage Limitations but Should Not Require Disclosure of Actual Network-Management Practices.

As AT&T has previously discussed, the Commission should encourage broadband providers to disclose *network-usage restrictions* to their customers, but it should reject calls by

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34 *See* AT&T 6/15/07 Comments at 47-50; pp. 2-3, *supra.*

35 AT&T has previously debunked the notion, renewed here by Free Press (Comments at 47), that inter-platform competition somehow *increases* the likelihood of anticompetitive conduct. *See* AT&T Reply Comments in WC Dkt. 07-52, at 27-28 (July 16, 2007). There is also no merit to Vonage's unelaborated proposal for a "presumption that network management that results in the blocking or material degradation of a service or application that competes with a service offered by the network operator (or its affiliate) is not reasonable." Vonage Comments at 6. Competition policy is rightly concerned with efforts by platform monopolists to discriminate against applications that pose a threat *to the platform monopoly itself*. *See* AT&T 2/13/08 Comments at 30-31 (citing, inter alia, *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001)). But that concern could not logically justify an expansive presumption against any action that disadvantages any application for which any broadband provider (or its affiliate) happens to have a commercial counterpart. *See generally* FTC Net Neutrality Report at 21 ("Even assuming discrimination against content or applications providers took place, moreover, there remains the question—also unanswerable in the abstract—whether such discrimination would be harmful, on balance, to consumer welfare. For example, such discrimination may facilitate product differentiation, such as the provision of Internet access services designed specifically for certain population segments or other audiences with specialized preferences.").

36 *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843 (D.C. Cir. 2006).

37 AT&T 2/13/08 Comments at 27-31.

Free Press and Vuze for "complete disclosure of *network management practices*."[38] The Commission should keep that distinction front and center as it considers various "disclosure" proposals.

The disclosure of network-usage restrictions can be pro-consumer and pro-competition. Such disclosures help consumers understand how network-management practices will affect the Internet as they experience it, and thus give them the information they need to make informed decisions among alternative providers. By contrast, publicizing the technical details of network-management practices would merely facilitate network manipulation by third parties, many of whom have little regard for the external effects their network usage may have on other users and some of whom maliciously wish to destroy America's Internet infrastructure. As we have explained, the quickest way to expose networks to worms, spam, and effective denial-of-service attacks is to give worm-designers, spammers, and would-be attackers notice of precisely how network engineers plan to address the threats they pose. Publicizing the details of how a network plans to engineer traffic loads would likewise make it easier for designers of "selfish," bandwidth-greedy applications protocols to seize shared bandwidth for themselves at the expense of customers generally.[39] Finally, because network management is an intensely dynamic process, network providers could not be expected as a practical matter to give constant updates each time its engineers design a new technological method to defeat network threats or ensure efficiently balanced traffic loads.

Here, too, the commenters that actually understand how networks operate agree with this common-sense distinction between disclosure of network-usage restrictions and network-management practices. DCIA—the organization that is sponsoring the P4P initiative and

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38 Free Press Comments at 59 (emphasis added).

39 *See* AT&T 2/13/08 Comments at 33.

includes both broadband networks and P2P providers—explains: "ISPs should explain to their customers, in plain English, how the ISP's network management practices may materially impact the customers' Internet experience. At the same time, however, ISPs should not be required to disclose network management practices that are competitively sensitive or proprietary, nor should they be required to disclose information that would undermine their ability to keep their networks and customers secure."[40] The FTTH Council agrees:

> [N]etwork providers have an obligation to notify users in clear and easily understood language of the terms and conditions of the services they purchase. That, however, does not mean that there also is an obligation to disclose the precise nature, including technologies employed, of the providers' network management practices. Not only do these practices change constantly, but network providers must be able to control their disclosure to ensure that network security and reliability is achieved and maintained.[41]

Finally, as several commenters explain, no mandatory disclosure rules of any kind are necessary at this stage, both because "it would be a fool's errand for a provider to attempt to sneak material service limitations by their subscribers" in the first place,[42] and because "[e]nd-users and content and applications providers—as well as government officials—are highly vigilant about potential anticompetitive practices by network platform providers,"[43] as Comcast's own experience illustrates. The Commission should allow providers the opportunity to develop and refine their network-usage disclosures before contemplating any direct regulatory involvement in the area.

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40 DCIA Comments at 8.

41 FTTH Comments at ii.

42 Verizon Comments at 17.

43 FTTH Council Comments at 3.

## III. If the Commission Were to Adopt "Neutrality" Rules for the Broadband Industry, Those Rules Would Have to Extend Across the Internet Ecosystem, Including P2P Technologies.

The field of Internet regulation proposed by "net neutrality" advocates would not be a slippery slope; it would be a precipice. If the Commission were ever to impose binding "neutrality" or disclosure rules, it could not logically confine those rules to providers of broadband Internet access services. It would have to extend those rules to all other Internet-based providers that influence whether the Internet will treat all applications and content "neutrally." One obvious candidate for such regulation is Google, which dominates the search and on-line advertising markets, and which alone knows the proprietary algorithms it uses to determine winners and losers in the Internet marketplace. AT&T's previous filings in this docket document the growing calls for outright regulation of Google, which have followed on the heels of allegations that Google has abused its market power to shape public debate and suppress disfavored voices.[44] Again, AT&T strongly opposes such regulation. But it would be a necessary corollary of any similarly misguided "net neutrality" regulation of broadband network providers.

The Free Press petition also draws into strong relief another aspect of the Internet marketplace that the Commission would need to begin regulating if it adopted "net neutrality"

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[44] *See* AT&T 2/13/08 Comments at 36-40. The accusations against Google continue apace. Last week, Fox News reported that Google, citing unidentified "user complaints," had delisted an independent news operation (the Inner City Press) from the Google News search function. According to Fox, the Inner City Press claims that the "user complaints" came from a United Nations organization that the Press had criticized—and that had recently entered into a partnership with Google itself. The delisting decision (which Google has since reversed) alarmed the president of the U.N. Correspondent's Association, who commented: "The sad story about Google is that they're shutting people up and not doing a good thing for society by only defending their business interests. . . . They have a responsibility to society in letting people speak out." Michael Y. Park, *Journalist Who Exposes U.N. Corruption Disappears from Google*, Fox News.com, Feb. 18, 2008 (http://www.foxnews.com/printer_friendly_story/0,3566,331106,00.html).

rules: the protocols used for P2P applications. As noted, certain P2P applications are designed to commandeer bandwidth for themselves at the expense of more "polite" applications. In the FTC's words, these P2P applications refuse to throttle back (as other applications do) in the face of network congestion; instead, they "aggressively take advantage of [those applications'] built-in reduction mechanism and . . . send data as fast as they can."[45] There is nothing "neutral" about a technological environment in which broadband networks must stand idly by while P2P applications aggressively arrogate bandwidth for themselves to the detriment of applications favored by the great majority of Internet consumers. Thus, if the Commission were to prohibit those networks from taking remedial steps on their own, it would have to begin regulating BitTorrent and other P2P technologies to make them more "polite" and "neutral" in their effect on other applications and Internet consumers.

Again, no such regulation is appropriate: as the P4P initiative demonstrates, the industry is capable of resolving these issues without government intervention. But the surest way to disrupt such initiatives, and to ensnare the Internet in an ever-thickening web of federal regulation, is to begin down the path to the "neutrality" regulations proposed here.

[45] FTC Net Neutrality Report at 29; AT&T 6/15/07 Comments at 23-27; AT&T 2/13/08 Comments at 13-16; *see also* note 24, *supra* (discussing BitTorrent's own recognition of the need to develop "network-friendly" BitTorrent DNA technology).

## CONCLUSION

The petitions for declaratory ruling and for rulemaking should be denied, and complaints about individual network-management practices should be resolved on a case-by-case basis. The Commission should nonetheless encourage the broadband industry to voluntarily disclose customer-usage limitations.

Respectfully submitted,

/s/ Jonathan E. Nuechterlein

Jonathan E. Nuechterlein
WILMER CUTLER PICKERING
HALE & DORR LLP
1875 Pennsylvania Ave., NW
Washington, D.C. 20006
202-663-6850 (phone)
202-663-6363 (facsimile)

Jack S. Zinman
Gary L. Phillips
Paul K. Mancini
AT&T INC.
1120 20th Street NW 10th Floor
Washington, D.C. 20036
202-457-3053 (phone)
202-457-3073 (facsimile)

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