Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Broadband Industry Practices	)	WC Docket No. 07-52
	)	

NOTICE OF INQUIRY

Adopted: March 22, 2007 **Released: April 16, 2007**

Comment Date: June 15, 2007
Reply Comment Date: July 16, 2007

By the Commission: Chairman Martin and Commissioners Tate and McDowell issuing separate statements; and Commissioners Copps and Adelstein concurring and issuing separate statements.

I. INTRODUCTION

1. In this Notice of Inquiry, we seek to enhance our understanding of the nature of the market for broadband and related services, whether network platform providers and others favor or disfavor particular content, how consumers are affected by these policies, and whether consumer choice of broadband providers is sufficient to ensure that all such policies ultimately benefit consumers. We ask for specific examples of beneficial or harmful behavior, and we ask whether any regulatory intervention is necessary.

II. BACKGROUND

2. Over a year ago, the Commission issued a Policy Statement[1] "offer[ing] guidance and insight into its approach to the Internet and broadband" consistent with Congress's direction in sections 230[2] and 706.[3] In that Policy Statement, the Commission announced the following principles:

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[1] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd 14986 (2005) (*Policy Statement*).

[2] 47 U.S.C. § 230(b):

> It is the policy of the United States – (1) to promote the continued development of the Internet and other interactive computer services and other interactive media; (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation; (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

[3] 47 U.S.C. § 157 nt (incorporating section 706 of the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996) ("The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications

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- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to access the lawful Internet content of their choice.

- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.

- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet,* consumers are entitled to connect their choice of legal devices that do not harm the network.

- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to competition among network providers, application and service providers, and content providers.[4]

3. Since that time, the Commission has had the occasion to review several providers' practices. In several proceedings evaluating wireline mergers, the Commission found that no commenter had alleged that the entities engage in packet discrimination or degradation,[5] and that, given conflicting incentives, it was unlikely that the merged companies would do so.[6] Nonetheless, the Commission specifically recognized the applicants' commitments to act in a manner consistent with the principles set forth in the Policy Statement, and their commitments were incorporated as conditions of their mergers.[7] Likewise, in its review of the Adelphia-Time Warner-Comcast transaction, the Commission found that the transaction was not likely to increase incentives for the applicants to engage in conduct harmful to consumers, and found no evidence that the applicants were operating in a manner inconsistent with the Policy Statement.[8]

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capability to all Americans . . . ."); *see also* 47 U.S.C. § 157(a) ("It shall be the policy of the United States to encourage the provision of new technologies and services to the public.").

[4] *Policy Statement*, 20 FCC Rcd at 14988, para. 4; *see also* Statement of Administration Policy, H.R. 5252 – Communications Opportunity, Promotion, and Enhancement Act of 2006, Executive Office of the President, Office of Management and Budget (June 8, 2006) ("The Administration supports the broadband policy statement of the Federal Communications Commission (FCC) and . . . believes the FCC currently has sufficient authority to address potential abuses in the marketplace.").

[5] *See infra* note 16.

[6] *See SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18366-68, paras. 141-43 (2005) (*SBC-AT&T Merger Order*); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18507-09, paras. 140-42 (2005) (*Verizon-MCI Merger Order*); *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, FCC 06-189, paras. 151-53 (rel. Mar. 26, 2007) (*AT&T-BellSouth Merger Order*).

[7] *See SBC-AT&T Merger Order*, 20 FCC Rcd at 18368, para. 144, 18414, Appx. F; *Verizon-MCI Merger Order*, 20 FCC Rcd at 18509, para. 143, 18561, Appx. G.

[8] *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8296-99, paras. 217-23 (2006).

4. The Commission, under Title I of the Communications Act, has the ability to adopt and enforce the net neutrality principles it announced in the Internet Policy Statement. The Supreme Court reaffirmed that the Commission "has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications."[9] Indeed, the Supreme Court specifically recognized the Commission's ancillary jurisdiction to impose regulatory obligations on broadband Internet access providers.[10]

5. The Commission may exercise ancillary jurisdiction under Title I when: (1) Title I confers subject matter jurisdiction over the service to be regulated; and (2) the assertion of jurisdiction is reasonably ancillary to the effective performance of the Commission's responsibilities.[11] Both of these conditions are met with respect to the four principles of the Commission's 2005 Policy Statement. Indeed, the Commission found "that both of the predicates for ancillary jurisdiction are likely satisfied for any consumer protection, network reliability, or national security obligation that we may subsequently decide to impose on wireline broadband Internet access service providers."[12]

6. First, as the Commission stated, broadband services are "wire communications" or "radio communications," as defined in sections 3(52) and 3(33) of the Act,[13] and section 2(a) of the Communications Act gives the Commission subject matter jurisdiction over "all interstate and foreign communications by wire or radio."[14]

7. Second, section 1 of the Communications Act confers responsibility on the Commission "to make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." This responsibility is guided by the "policy of the United States . . . (1) to promote the continued development of the Internet"; "(2) to preserve the vibrant and competitive free market that presently exists for the Internet"; and "(3) to encourage the deployment of technologies which maximize user control over what information is received by . . . [users of] the Internet."[15]

III. DISCUSSION

8. We seek a fuller understanding of the behavior of broadband market participants today, including network platform providers, broadband Internet access service providers, other broadband transmission providers, Internet service providers, Internet backbone providers, content and application service providers, and others. First, we ask commenters to describe today's packet management practices. That is, do providers treat different packets in different ways? How[16] and why? Are these providers operating

[9] *National Cable & Telecomm. Ass'n v. Brand X Internet Serv*ices, 545 U.S. 967, 976 (2005) (*Brand X*).

[10] *Brand X*, 545 U.S. at 996 ("[T]he Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction. In fact, it has invited comment on whether it can and should do so.").

[11] *United States v. Southwestern Cable Co*., 392 U.S. 157, 177-78 (1968).

[12] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14914, para. 109. (2005) (*Wireline Broadband Internet Access Services Order*), *pets. for review pending sub nom. Time Warner Telecom v. FCC*, No. 05-4769 (and consolidated cases) (3d Cir. filed Oct. 26, 2005).

[13] 47 U.S.C. § 153(33), (52).

[14] 47 U.S.C. § 152(a).

[15] 47 U.S.C. § 230; *see also* 47 U.S.C. § 157 nt (Advanced Telecommunications Incentives).

[16] For example, a packet header contains an IP destination address field, which carries routing information, and a protocol field, which informs the receiving system of the format of the contents of the packet. The destination

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consistent with the Policy Statement? Are there specific examples of packet management practices that commenters consider reasonable or unreasonable? More specifically, are providers engaging in packet management that is helpful or harmful to consumers? For example, during times of congestion,[17] do providers prioritize packets for latency-sensitive applications such as voice calls, video conferencing, live video, or gaming? Do providers prioritize packets for safety- and security-related applications such as health monitoring, home monitoring, and emergency calls? Do providers block packets containing child pornography, spyware, viruses, or spam? Do providers offer parental controls that block packets containing sexually explicit material? Do providers manage packets to improve their network performance, engineering, or security? Do providers deprioritize or block packets for certain content when the providers or their affiliates offer similar content, or do providers prioritize packets containing their own content over packets containing similar content from unaffiliated providers? Do providers deprioritize or block packets containing material that is harmful to their commercial interests, or prioritize packets relating to applications or services in which they have a commercial interest? Are any of these packet management practices in place to implement other legal requirements?[18] Are there other packet management practices of which the Commission should be aware? Commenters should provide specific, verifiable examples with supporting documentation, and should limit their comments to those practices that are technically feasible today.

9. Next, we ask commenters to describe today's pricing practices for broadband and related services. Do providers charge different prices for different speeds or capacities? Given the greater availability of bandwidth-intensive applications, do providers charge a premium to download a particular amount of content? Do broadband providers charge upstream providers for priority access to end users? Should our policies distinguish between content providers that charge end users for access to content and those that do not? Do providers currently discriminate in the prices they charge to end users and/or

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address field in a packet sent from an end user may reveal, for example, the address of a well-known application provider. The protocol field informs the destination system as to which end-to-end protocol applies to the data contained within the packet. The most common end-to-end protocols are the Transmission Control Protocol (TCP), indicated by a Protocol field value of 6, and the User Datagram Protocol (UDP), indicated by a value of 17. A Protocol field value of 50, for example, indicates the use of the Encapsulating Security Payload and may suggest that the user is sending information over a virtual private network. TCP and UDP protocol headers in turn contain Source and Destination Port fields. The Port fields can reveal the type of application with which the packet is associated. For example, a TCP or UDP Destination Port field value of 25 may suggest that the user is transferring email to an email serve using the Simple Mail Transfer (SMTP). A port field value of 26,000 suggests that the user is playing the game "Quake." In addition, service providers may also be able to identify certain applications by the pattern of packet flow, rather than by the information contained in the header. For example, the use of certain voice over Internet Protocol (VoIP) applications or file-sharing applications may be detectable by the size of the packets or the spacing between them. Thus, the various parties involved in sending, transmitting, and receiving packets may be able to manage traffic in various ways by analyzing the information in these fields and using that information to decide how to process the packet.

[17] Indeed, as Moore's Law would suggest in the context of integrated circuit capacity, speed and capacity of broadband networks will continue to increase. *See Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14874, para. 36 n.101. Is congestion a problem? Are consumers' demands for bandwidth-intensive applications being met with higher-capacity broadband services?

[18] For example, the Children's Internet Protection Act and associated Commission rules require schools and libraries receiving discounts for Internet access or internal connections to implement and enforce Internet safety policies that, among other things, must include technology protection measures that protect against Internet access to visual depictions that are obscene, child pornography, or harmful to minors. *See* 47 U.S.C. § 254(h), (l); 47 C.F.R. § 54.520. As another example, the Digital Millennium Copyright Protection Act provides service providers a limitation on liability for copyright infringement with respect to material that users store on the service provider's system or network if, among other things, upon notification of complained infringement the service provider responds expeditiously to remove, or disable access to, the material. *See* 17 U.S.C. § 512(c).

upstream providers? Does behavior vary depending on the number of broadband Internet access service providers offering service in a geographic area? With regard to all practices commenters describe in response to the questions in paragraphs 8 and 9, we ask whether providers disclose their practices to their customers, to other providers, to application developers, and others. Do they offer their subscribers the option to purchase extra bandwidth or specialized processing? How have consumers responded to these pricing practices? How have higher speed broadband networks changed the value proposition for consumers? Are the real prices (*i.e.*, price per Mbps) paid by consumers for broadband nevertheless falling?

10. We next ask whether the Policy Statement should be amended. Do commenters believe that the specific practices described in response to the questions in paragraphs 8 and 9 are helpful or harmful to consumers? In light of the responses to paragraphs 8 and 9, are there specific changes to the Policy Statement that commenters would recommend? We also ask whether we should incorporate a new principle of nondiscrimination.[19] If so, how would "nondiscrimination" be defined, and how would such a principle read? Would it permit any exclusive or preferential arrangements among network platform or access providers and content providers? How would a principle of non-discrimination affect the ability of content and access providers to charge their customers different prices, or to charge them at all?

11. Finally, does the Commission have the legal authority to enforce the Policy Statement in the face of particular market failures or other specific problems?[20] What specific conduct or other factors give rise to any such problems? Does the ever increasing intermodal competition among broadband providers prevent such problems from developing in the first place? If the Commission were to promulgate rules in this area, what would be the challenges in tailoring the rules only to reach any identified market failures or other specific problems, and not to prevent policies that benefit consumers?[21] Would regulations further our mandate to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans"?[22] Assuming it is not necessary to adopt rules at this time, what market characteristics would justify the adoption of rules?

IV. PROCEDURAL MATTERS

A. Ex Parte Presentations

12. This is an exempt proceeding in which *ex parte* presentations are permitted (except during the Sunshine Agenda period) and need not be disclosed.[23]

B. Comment Filing Procedures

13. Interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

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[19] *See Adelphia-Time Warner-Comcast Merger Order*, Attach. (Dissenting Statement of Commissioner Michael J. Copps).

[20] The Policy Statement did not contain rules. *See Policy Statement*, 20 FCC Rcd at 14988, para. 5 n.15.

[21] The principles announced in the Commission's Policy Statement were "subject to reasonable network management." *Policy Statement*, 20 FCC Rcd at 14988, para. 5 n.15.

[22] 47 U.S.C. § 157 nt.

[23] *See* 47 C.F.R. § 1.1204(b)(1).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments.

    - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

  Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

    - The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

    - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

    - U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

14. People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

15. In addition, one copy of each pleading must be sent to each of the following:

    (1) The Commission's duplicating contractor, Best Copy and Printing, Inc, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554; website: www.bcpiweb.com; phone: 1-800-378-3160;

    (2) Janice M. Myles, Competition Policy Division, Wireline Competition Bureau, 445 12th Street, S.W., Room 5-C140, Washington, D.C. 20554; e-mail: janice.myles@fcc.gov.

16. Publicly available filings and comments are also available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, S.W., Room CY-A257, Washington, D.C., 20554. Copies may also be purchased from the Commission's duplicating contractor, BCPI, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554.

Customers may contact BCPI through its website: www.bcpiweb.com, by e-mail at fcc@bcpiweb.com, by telephone at (202) 488-5300 or (800) 378-3160, or by facsimile at (202) 488-5563.

V. ORDERING CLAUSE

17. Accordingly, IT IS ORDERED that, pursuant to sections 1, 2, 4(i), 4(j), 201, 202, and 303(r), 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201, 202, 303(r), this Notice of Inquiry IS ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

***Re: Broadband Industry Practices*, Notice of Inquiry, WC Docket No. 07-52**

In 2005, the Commission adopted an Internet Policy Statement containing four principles. The intent of these principles was to protect consumers' access to the lawful online content of their choice and to foster the creation, adoption and use of Internet broadband content, applications, and services. Although we are not aware of any current blocking situations, the Commission remains vigilant in protecting consumers' access to content on the Internet. At the same time, I believe that it is useful for the Commission, as the expert communications agency, to collect a record about the current practices in the broadband marketplace.

This inquiry will provide a convenient forum for various providers, including network and content providers, to tell us what is happening in the market and about their concerns. For example, we seek comment on how broadband providers are managing their Internet traffic, whether certain traffic is prioritized, and whether our policies should distinguish between content providers that charge end users for access to content and those that do not. Gathering this information will allow us to better monitor this market and determine the extent to which providers are acting consistently with our Internet Policy Statement. The Commission is ready, willing, and able to step in if necessary. We have the dual responsibilities of creating an environment that promotes infrastructure investment and broadband deployment and to ensure that consumers' access to content on the Internet is protected. We can best fulfill these responsibilities by being fully informed.

CONCURRING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

***Re: Broadband Industry Practices*, Notice of Inquiry, WC Docket No. 07-52**

We live in a world where a very few concentrated broadband providers exercise powerful and not always consumer-friendly control over the pipes that come into our homes and businesses. While we welcome telephone companies and cable providers competing to sell high-speed services, FCC statistics show that together these duopoly operators control some 96 percent of the residential broadband market, with too many consumers lacking a choice even between those two providers. Wireless and broadband over powerline are exciting prospects, but the reality is we are nowhere near seeing the kind of ubiquitous third or fourth player necessary to turn broadband into a vibrantly competitive market.

If eventually we develop a truly competitive marketplace with consumers enjoying broadband speeds like those available to our counterparts in other industrial countries, we can step back and rely on the genius of that marketplace. But in the meantime, the concentrated providers out there increasingly have the ability—and some think the business incentive—to build networks with traffic management policies that could restrict how we use the Internet. I haven't taught history for many years, but I remember enough of it to know that if someone has both the technical capacity and the commercial incentive to control something, it's going to get tried.

Don't take my word for it. It was the *Wall Street Journal* that said large carriers "are starting to make it harder for consumers to use the Internet for phone calls or swapping video files." The more powerful and concentrated our facilities providers grow, the greater their motivation will be to close off Internet lanes and block IP byways. After all, some have already touted their support for segregating Internet traffic by charging premium tolls for passage for favored websites, while consigning everyone else's websites and applications to bumpy travels in steerage.

This brings us to the item before us. It really puts the Commission at a crossroads and the path we choose has the potential to recast and shape the Internet for years to come. At issue is whether a few broadband behemoths will be ceded gatekeeper control over the public's access to the full bounty of the Internet. We have a choice to make.

Down one road lies a FCC committed to honor and preserve the fundamental openness that made the Internet so great—a place of freedom and choice where anyone with a good idea and a little tech-savvy can create an idea or business with global reach. On this road the FCC would adopt policies to ensure that the Internet remains a dynamic technology for creating economic and educational opportunity, a fierce economic engine for innovation and entrepreneurship, and a tool for the sustenance and growth of democracy across the land.

Down the other road lies a FCC that, while it celebrates the Internet, sits idly by as broadband providers amass the power and technical ability to dictate where you can go and what you can do on the Internet. This FCC would see no public interest harms when providers set up gated communities and toll booths on the Internet, altering the openness that has characterized this medium from the very start and endangering the principles of packet equality and non-discrimination. Make no mistake—the practical effect of what is being proposed by some network operators is to invert the democratic genius of the Internet. The original idea was to have neutral dumb networks with intelligence invested at the edges, with you and me and millions of other users. Now some seem bent on making the pipe intelligent and all-controlling even while they make all of us users at the edges dumb. Maybe the Internet entrepreneurs of the future will have to seek permission to innovate from the owner of the broadband pipe. That would be really hard to square with what I think should be our responsibility at the FCC, and that is to do

everything we can to preserve the openness that made the Internet so great. You know what? I have enough confidence in this technology and enough confidence in American innovation and creativity to believe we can get to the promised land without that kind of discrimination.

I know what I want. I want an FCC that unconditionally states its preference for non-discrimination on the Internet. I think consumers want that, too. Polls from Consumers Union and the Consumer Federation tell us that two-thirds of Internet users have serious concerns about practices by network owners to block or impair their access to information and services over the Internet. My own informal poll, taken by listening to Americans in dozens of forums around the country, confirms those findings.

How did we get to this unfortunate junction? Let's review a little history. Back in 2003, in a speech at the New America Foundation, I suggested the Internet as we know it could be dying. Some thought that was a rather controversial claim at the time, I know, but let's look at what has happened since. In 2005, the Commission decided to reclassify broadband transmission facilities as Title I "information services" rather than Title II "telecommunications services." To the uninitiated this sounds like semantics. But it had real consequences. That's because the nondiscrimination obligations that attach to telecommunications traffic and which were vital to keeping the Internet open in the dial-up era no longer apply to broadband services.

So when the Commission set off on this course, I asked my colleagues to at least adopt an Internet Policy Statement. They did, and I appreciate that, and as a result, today the Commission has a public document that summarizes the basic rights of Internet end-users. The Internet policy statement states that consumers are entitled to: access content; run applications and services; connect devices to the network; and enjoy competition among network providers, application and service providers and content providers. So far, so good.

But time has taught us that something is missing from this document and another step is needed. In a world where big and concentrated broadband providers are searching for new business models and suggesting that web sites may have to pay additional tolls for the traffic they generate, we need to keep our policies current. It is time for us to go beyond the original four principles and commit industry and the FCC unequivocally to a specific principle of enforceable non-discrimination, one that allows for reasonable network management but makes clear that broadband network providers will not be allowed to shackle the promise of the Internet in its adolescence.

We proceed too leisurely here. Rather than strike out and unflinchingly proclaim this agency's commitment to an open and non-discriminatory Internet, we satisfy ourselves with one tiny, timid step. Let's be frank. Putting out a Notice of Inquiry is not the way to sail boldly forth. History shows that Notices of Inquiry like this have a way of disappearing into the regulatory dustbin, putting off decisions that need to be made now. These are no longer new and novel questions. We adopted our Four Principles of Internet Freedom nearly two years ago. And these issues come back to us in just about every major merger that comes before us—and there have been a lot of those!

We should be building on what we have already approved and going with at least a Notice of Proposed Rulemaking with a commitment to move to an Order within a time certain. These are not esoteric, inside-the-Beltway issues—they go to the very core of what kinds of opportunities are going to be available to all of us in this digital age. We're being left behind in broadband globally, the country is paying a steep cost, and we face the stark challenge to decide if we are going to do something about it or not. We're talking here about the greatest small "d" democratic technology platform that has ever

existed. Taking another year or two to decide if we want to keep it that way shortchanges the technology, shortchanges consumers and shortchanges our future. I will not dissent from the one small step forward we take today, but I do lament our not making a Neil Armstrong giant leap for mankind.

CONCURRING STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

***Re: Broadband Industry Practices*, Notice of Inquiry, WC Docket No. 07-52**

The Inventor of the World Wide Web, Sir Tim Berners Lee, has said: "The Internet is increasingly becoming the dominant medium binding us. The neutral communications medium is essential to our society. It is the basis of a fair competitive market economy. It is the basis of democracy, by which a community should decide what to do. It is the basis of science, by which human kind should decide what it true."[24]

His eloquent observation highlights precisely why it is so critical that we maintain the potential and promise that the Internet holds for enriching our economic and social well-being. I support this effort to open a proceeding because it is critical that the Commission focus a spotlight on this issue. Nevertheless, given the importance of Internet freedom, I would have preferred a more pro-active approach, including the adoption of a Notice of Proposed Rulemaking. This Commission must not send a signal that preserving the open character of the Internet is anything less than a top priority.

The open nature of the Internet has enabled those with unique interests and needs, or with unique cultural heritage, to meet and form virtual communities like no tool before it. It also means that consumers are being empowered as citizens and as entrepreneurs, and they are increasingly creative in the way that they use these new technologies. The Internet has been a source of remarkable innovation and an engine for extraordinary economic growth and productivity. It has fostered democracy and opened a new world of opportunities for those who have access. It is such a transformative tool precisely because of its openness and diversity.

Yet, there are increasing pressures that have the potential to alter dramatically consumers' on-line experiences. We now face important questions about whether we can preserve those unique characteristics of the Internet, particularly given the Commission's recent efforts to reshape the legal framework that we have operated under since the dawn of the Internet. By largely deregulating broadband Internet access, the Commission is moving outside of the scope of the traditional protections afforded under the Act.

As a counter-balance to this decision, the FCC adopted a set of Internet Policy principles to encourage broadband deployment and preserve and promote the open and interconnected nature of the Internet. While the Internet Policy Statement was an important step, the debate over what consumers and companies can expect from the Internet has taken on a new dimension as network providers discuss new plans that suggest a fundamental shift in the character of the Internet. Some may suggest that there is a lack of hard evidence of a problem, but we miss important signals if we do not take these leading broadband providers at their word. Providers may be on their best behavior for now with the spotlight turned on net neutrality. But decisions being made today about the architecture of the Internet could affect its character for years to come, so it is important that we make our expectations clear.

Although this is a complex issue – one made more so by continually-evolving technologies -- I share the growing concern that the leading broadband providers which control the last mile connections to the home may have the ability and incentive to discriminate, and to limit the choices available over the Internet. While we all have high hopes for the development of alternate technologies to promote greater competition in the broadband access market, right now, we see a broadband market in which, according

[24] Tim Berners-Lee "Neutrality of the Net", Decentralized Information Group (May 2, 2006).

to FCC statistics, telephone and cable operators control over a 95 percent share. For many consumers, there is no meaningful choice of providers.

Since the FCC's deregulation of broadband services, we have also witnessed a dramatic consolidation among the nation's leading providers. We've seen the formation of the largest broadband provider in the nation, last mile providers have purchased backbone providers, providers are clustering their service territories, and we've seen new combinations of content and services. In major mergers between both cable and telephone companies, I have urged my colleagues to condition approval on compliance with the Commission's Internet Policy Statement. Notwithstanding AT&T's significant commitment to abide by the four principles of the FCC Internet Policy Statement and to maintain a neutral network and neutral routing in its wireline broadband Internet access service, it is critical that we remain vigilant and continue to explore comprehensive approaches to this issue.

Policymakers both here at the FCC and in Congress are faced with important choices about what the future of Internet access will look like in a broadband world. Will our policies continue to foster an open and diverse Internet? Will our policies create incentives for network providers to build capacity to respond to consumer demand or to foster scarcity? What will it mean for the consumer experience if network providers play a greater role in selecting which Internet applications and services work best? What does it mean if an innovator has to ask permission before deploying an Internet application?

Even as we launch this proceeding, we should be looking to add a new principle to our Policy Statement to address incentives for anti-competitive discrimination and to ensure the continued vibrancy of the Internet. It is clear that Americans view the Internet differently than they do other mediums. Consumers want to be able to choose an independent VoIP provider, or to be able to access video clips, and not just video programming from the largest media companies. Consumers don't want the Internet to become another version of TV, controlled by corporate giants.

Some have questioned whether policies that promote an open Internet are compatible with giving network providers the incentive to build out their facilities. I firmly believe that preserving the vibrant quality of the Internet and promoting high speed access to the Internet are goals that go hand-in-hand. Yet, the U.S. faces critical challenges in achieving these goals. Compared to the global leaders, broadband connections in the U.S. are "slow, expensive, and not available to everyone," as described by a recent report from a coalition of consumer advocates.[25] This report found that U.S. consumers pay nearly twice as much as Japanese customers for connections that are 20 times as slow. For millions of low income consumers, that means that broadband connections remain out of reach. And the situation is far from ideal for residents and businesses in many rural communities as well. The GAO recently confirmed again that rural residents are less likely to have broadband than their urban counterparts. One thing is clear in the Internet Age: access translates to opportunity. Leaving millions of our citizens without access to affordable and high performance broadband Internet access disadvantages them and fails to draw on all the resources our country can bring to bear in a global economy. This is not a public relations problem, it's a productivity problem.

Whether this Notice will appreciably further efforts to preserve an open Internet and promote high speed Internet access remains to be seen. Soliciting a clear understanding of facts and developing rigorous analyses are integral to the FCC mission. Yet, this Notice is short on analysis and could do far more to draw out discussion about the plans of our increasingly large and concentrated network providers and the implications for consumers.

[25] *See Broadband Reality Check II*, Free Press, Consumers Union, Consumer Federation of America (rel. Aug. 2006).

Of particular concern is the decision to cast this item as a Notice of Inquiry. Unfortunately, some parties may be tempted to read this decision itself as sending a message about how low it ranks on the Commission's list of priorities. Given the importance of this issue, and the fact that the Commission has acted on it repeatedly, including issuing a seminal statement of principles, and including increasingly comprehensive versions of it in a number of major mergers, the time is ripe for an NPRM. Fairly or not, NOIs are often perceived as the Commission's way delaying and downgrading an issue. But we cannot stick our head in the sand on this. The future of the Internet is simply too important. We will need to keep this issue at the fore and move quickly if we are serious about addressing Internet freedom. For these reasons, I can only concur in this item.

STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE

***Re: Broadband Industry Practices*, Notice of Inquiry, WC Docket No. 07-52**

Today's item seeks input on how the broadband industry functions, including the relationships between broadband providers, content and application providers, and consumers. We also seek comment on how industry practices regarding the management of broadband data affect the deployment of broadband and innovation in the development of content, applications and network equipment that are all crucial to enhancing the value of broadband to consumers. It is essential that we, as the expert agency, carefully evaluate what is taking place in today's broadband marketplace to ensure that America remains a leader in an increasingly global economy. We must also employ our regulatory humility to recognize that imposing any new strictures on a blossoming industry could have significant and lasting stifling effects on the growth of broadband – and our overall economy.

The debate over broadband network practices has been percolating under several names in recent years – "net freedoms," "connectivity principles," "Internet policy," and, of course, "net neutrality." Whatever one chooses to call it, I prefer to try to view this issue from the perspective of consumers. The previous Commission did so in its Policy Statement and I hope it will continue to do so. While it remains important for us to understand the industry structure and the relationships between each of the different elements in the market, we must ensure that our policies promote, not deter, investment, innovation, and new entry in networks, products, and services that will help America remain competitive in the increasingly global economy.

As I have stated previously, I am skeptical of the present need to impose new rules, or even principles. In many ways, I think this issue has focused too much on the need to define a cure before there has been a disease, or even a high fever. That is why I am pleased that today's item signifies two important Commission ideals as we move further along into the broadband era: a willingness to engage with consumers and industry to discover exactly how the marketplace is functioning; and the humility to recognize the gravity of our actions. Accordingly, I support today's measured step of seeking more information about what is going on in the marketplace – what companies and consumers are experiencing, or not able to experience.

STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

***Re: Broadband Industry Practices*, Notice of Inquiry, WC Docket No. 07-52**

During the past two years, our nation's discussion regarding net neutrality has been a vigorous and healthy one. The dialogue has heightened awareness of issues that are vital to the future of the American—and global—economies. Where particular parties sit vis-à-vis the Internet determines their perspectives on this issue. Consumers, network owners, content providers and many others, all have differing and important points of view. In fact, differing names and definitions of the term "net neutrality" abound and continue to change.

Quickly after its debut to the general public a mere 13 years ago, the "Internet" became the communications lifeblood of the world economy and the primary means of communication for American consumers. While it is absolutely essential that broadband network and service providers have the proper incentives to deploy new technologies, it is equally as important that consumers have the freedom to pull or post the content of their choice anytime, anywhere and on any device. In fact, this powerful new wave of consumer demand is shaping a beautiful explosion of entrepreneurial brilliance that will change our lives for decades to come.

In anticipation of these developments, in 2005, the Commission adopted a *Policy Statement* that set forth four broad principles designed "to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet." Today, we are adopting a *Notice of Inquiry* that asks broad questions about the state of the market for broadband and related services, whether abuses are occurring in the market that affect the offering of content on the Internet or the development of new technologies, and the ultimate effect on consumers. For those who fear or allege market failure, this NOI gives them an opportunity to present detailed evidence, of which we have none, thus far. For those who argue that the market is working well and no further regulation is needed, now is the time to make their case.

I agree with my colleagues that we must remain vigilant against possible market failure or anti-competitive conduct that would hamper the full development of the Internet and related services being provided to consumers. But we also must resist the temptation to impose regulations that are based merely on theory. Today, we take a sensible, thoughtful and reasonable step that should give the Commission a factual record upon which to make a reasoned determination whether additional action is justified or not, pursuant to the Commission's ancillary jurisdiction to regulate interstate and foreign communications. I look forward to reviewing the information that this proceeding yields.