



## SUMMARY

Hands Off The Internet is a nationwide coalition of businesses and people united in supporting the growth of the Internet for the benefit of consumers. In connection with its advocacy in support of Internet growth, and on the optimal legal and regulatory regime to achieve such growth, the coalition has studied a number of issues. In particular, it has examined in depth the legal, regulatory, economic, business and consumer protection issues relating to the issue of so-called “net neutrality”. The results of this study are reflected in this submission to the Commission in connection with its inquiry into broadband market practices.

The results of our study mandates the following conclusion, which we urge the Commission to consider: There is no current or anticipated content discrimination or service degradation justifying new regulation by the Commission. Current regulation and consumer protection laws are sufficient to address any potential harms, which have been greatly exaggerated by those advocating net neutrality regulation. It is important to consider the context in which the net neutrality issue arises: Broadband capacity, especially in connections to consumers at their homes, must be greatly increased to handle the massive increase in data traffic (due in large part to video applications). Tiered services and new business arrangements by broadband access providers will not result in content discrimination or service degradation, but will spread the cost of the new build-out so that consumers will not be saddled with the entire cost. Additionally, prominent economists agree that the unintended consequences of premature regulation could well result in adverse unintended consequences including a slowdown in broadband deployment.

Accordingly, for the reasons set forth herein, which are amply supported by the leading experts in the relevant fields, the FCC should refrain from adopting new “net neutrality” regulations, would only hinder development of the next generation Internet and harm consumers.

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

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

**COMMENTS OF HANDS OFF THE INTERNET**

**I. INTRODUCTION**

The Commission has solicited input in this matter on the critical issue of whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion and the related issues concerning future deployment and the need, or lack thereof, for additional government regulation. This submission is made on behalf of a public policy coalition called “Hands Off The Internet”.

Hands Off The Internet is a nationwide coalition of Internet users, manufacturers and network operators united in the belief that the Internet’s phenomenal growth over the past decade will continue if government does not attempt an unwise effort to regulate a market that is otherwise working to give consumers the choices, freedom, prices and diverse experiences they desire in the new age of the Internet.<sup>1</sup>

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<sup>1</sup> Members of Hands Off The Internet include 3M, Acrintec, ADC Telecommunications, Alcatel-Lucent, The America Channel, America Conservative Union, AT&T, BTech Inc., Communications Technology Solutions, Center for Individual Freedom, Cinergy Communications, Citizens Against Government Waste, Communications Systems, Inc., Condux International, Inc., DiamondWare, DSM Desotech, Electrodata, Inc., Enhanced Telecommunications, Inc., FiberControl, Frontiers of Freedom, Hitachi Telecom (USA), Inc., Independent Technologies, Inc., JDS Uniphase Corp., Katolight Corporation, Latinos in Information Sciences and Technology Association, MRV Communications, Inc.,

A critical role for Hands Off The Internet is to study and analyze the marketplace for broadband deployment, and to consider the policy issues affecting future broadband deployment. Our coalition is in the unique position to present to the Commission the results of our study and analysis.

Our comments focus on the issue of so-called “net neutrality”: specifically, whether new laws and regulations are needed and what impact such new rules will have. As explained below, we believe that there is no basis for new laws and regulations. Further, we believe that such laws and regulations, if adopted, will have severe adverse consequences for broadband deployment and consumer access.

Hands Off The Internet commends the FCC for giving parties on all sides of the net neutrality debate the opportunity to discuss the state of the Internet, in particular broadband access, and the need or lack of need for new net neutrality regulation. The Commission itself, in its notice of inquiry,<sup>2</sup> has established the framework for the discussion:

(1) This inquiry comes against the backdrop of broadband market practices that the FCC has examined in the context of several recent wireline and cable merger reviews. The record of those proceedings demonstrates there has been no content discrimination or service degradation by broadband providers;<sup>3</sup>

(2) An important foundation to any discussion of the need or not for additional regulation is the Commission’s own acknowledgement that it issued four net neutrality principles in its 2005 Policy Statement and has reiterated that it has the ability to adopt

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MyWireless.org, National Association of Manufacturers, National Black Chamber of Commerce, National Coalition on Black Civic Participation, NetCompetition.org, NorthStar Communications Group, Inc., NSG America, Inc., OFS Optics, OnTrac Incorporated, Optical Zonu, Inc., Peco II, Inc., Prysmian Communications, Sumitomo Electric, Sunrise Telecom, Inc., Telesync, Inc., Valere Power, Inc., and Vermeer Manufacturing, Inc.

<sup>2</sup> *In the Matter of Broadband Industry Practices*, Notice of Inquiry, WC Docket No. 07-52 (rel. Apr. 16, 2007) (hereinafter “NOI” or “Broadband Industry Practices NOI”).

<sup>3</sup> *Id.* ¶ 3 (citing the Commission’s merger reviews of the SBC and AT&T, Verizon and MCI, and AT&T and BellSouth transactions).

and enforce them under its ancillary authority under Title I of the Communications Act;<sup>4</sup> and

(3) The NOI focuses on the practices of content and application service providers *as well as* those of broadband network and access providers. Thus, the Commission recognizes that conduct by Internet actors can affect the way consumers use or are able to access content on the Internet, and that regulation of only the network and access providers in the goal of non-discrimination may be counterproductive and unfair.<sup>5</sup>

Within this framework, we believe the record will show:

(1) There is no current or anticipated content discrimination or service degradation justifying new regulation.

(2) Current regulation and consumer protection laws are sufficient to address any potential harms, which have been greatly exaggerated by those advocating net neutrality regulation.

(3) Broadband capacity, especially in connections to consumers at their homes, must be greatly increased to handle the massive increase in data traffic (due in large part to video applications).

(4) Tiered services and new business arrangements by broadband access providers will not result in content discrimination or service degradation, but will spread the cost of the new build-out so that consumers will not be saddled with the entire cost.

(5) Prominent economists agree that the unintended consequences of premature regulation could well result in adverse unintended consequences including a slowdown in broadband deployment.

## **II. THERE IS NO CURRENT OR ANTICIPATED CONTENT DISCRIMINATION JUSTIFYING NEW REGULATION**

It is axiomatic that government regulation is unnecessary, and may well be counterproductive, when there is no problem requiring a remedy, or when the threat of future problems is merely hypothetical. To date, with the exception of one isolated incident involving a minor player (which was quickly and forcefully remedied by the Commission), proponents of net neutrality regulation have not pointed to any problems whatsoever resulting from conduct by

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<sup>4</sup> *Id.* ¶¶ 2, 4-7.

<sup>5</sup> *Id.* ¶ 8.

broadband Internet access service providers that harms consumers. Instead, the alleged harms are merely speculative. Meanwhile, every major broadband Internet access service provider in the United States has been adhering to the Commission’s Policy Statement concerning the Internet and broadband, which concludes that:

- (1) consumers are entitled to access the lawful Internet content of their choice;
- (2) consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement;
- (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and
- (4) consumers are entitled to competition among network providers, application and service providers, and content providers.<sup>6</sup>

Consistent with the Policy Statement, broadband Internet access service providers have not been blocking or degrading services to consumers.<sup>7</sup> As the Commission explained in the NOI, during its review of several large wireline mergers, including the mergers involving SBC and AT&T, Verizon and MCI, and AT&T and BellSouth, “no commenter . . . alleged that the

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<sup>6</sup> *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Policy Statement, 20 FCC Rcd 14986 (2005) (hereinafter “Policy Statement”).

<sup>7</sup> We are compelled to note here, without much further comment since there are others who are likely to elaborate in their submissions to the Commission, that the use of technology by content providers at the so-called “edge of the network” creates conditions that give them – the content providers – priority in access to consumers, which results in “non-neutral” conditions. *See, e.g.*, Christopher Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847, 1881-82 (2006) (“The problem is that content delivery networks [that are used by some content providers and which dynamically store content and applications closer to the user or at less congested locations] violate network neutrality.”). Thus, while we are confident that as a result of this proceeding, the Commission will refrain from additional regulation, should it decide at a later date to enact further rules and regulation, it seems clear that the use of technology by content providers to gain priority must be within the purview of such new rules and regulations.

entities engaged in packet discrimination or degradation, and that, given conflicting incentives, it was unlikely the merged companies would do so.”<sup>8</sup>

Chairman Martin has recognized the lack of actual conduct harmful to consumers. As reported by Reuters in late 2005, Chairman Martin explained:

I’m hesitant to adopt rules that would prevent anti-competitive behavior where there hasn’t been significant evidence of a problem . . . . That doesn’t mean people don’t have a lot of concern about potential problems, but there’s a significant difference between potential problems and problems that occur.<sup>9</sup>

The Chairman of the Federal Trade Commission (“FTC”), an agency that also has been following the net neutrality debate,<sup>10</sup> also has noted the lack of actual consumer harm from broadband Internet access service providers: “[T]hus far, proponents of net neutrality regulation have not come to us to explain where the market is failing or what anticompetitive conduct we should challenge.”<sup>11</sup>

The sole example in the United States of a provider’s intentional blocking or degradation occurred in early 2005 when Madison River, a small telecommunications company operating in North Carolina, degraded some Internet phone calls placed through an unaffiliated service provider. In that instance, within three days of receiving an informal complaint, the Commission launched an investigation and two weeks later, the company capitulated in the face of a \$15,000

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<sup>8</sup> Broadband Industry Practices NOI, at ¶ 3 (citing the Commission’s merger reviews of the SBC and AT&T, Verizon and MCI, and AT&T and BellSouth transactions).

<sup>9</sup> Marilyn Geewax, *Battle Emerges On Future Of Net*, The Atlanta J.-Const., Dec. 27, 2005, available at <http://www.freepress.net/news/13064>.

<sup>10</sup> See FTC Press Release, FTC to Host Workshop on Broadband Connectivity Competition Policy, Dec. 7, 2006, available at <http://www.ftc.gov/opa/2006/12/broadbandworkshop2.shtm>.

<sup>11</sup> Deborah Platt Majoras, Chairman, FTC, Luncheon Address, *The Federal Trade Commission in the Online World*, The Progress & Freedom Foundation’s Aspen Summit 20 (Aug. 21, 2006), available at <http://www.ftc.gov/speeches/majoras/060821pffaspenfinal.pdf>.

fine and growing FCC pressure.<sup>12</sup> Given ever-increasing competition in the broadband Internet access provider market and existing legal safeguards as explained in Part III, *infra*, there is no basis to impose new regulations. Moreover, the dynamic competition in the broadband access market is a major constraint on any potentially-harmful conduct by any one broadband access provider.

#### **A. Competition in the Broadband Access Market Is Dynamic**

The broadband market is competitive. It is already served by various and diverse forms of broadband transmission and market participants. This competition has led to significant recent growth in the United States in broadband access availability. The Commission reported in January that high speed lines increased by over 50% in the United States from the second half of 2005 through the first half of 2006.<sup>13</sup> Even in those countries where broadband penetration exceeds that of the United States, policy makers recognize that “the ability to designate priority to certain applications will be a boon for consumers and providers as long as there is sufficient competition in the market.”<sup>14</sup> The OECD believes that if problems do arise from traffic

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<sup>12</sup> See *In the Matter of Madison River Commc'ns*, Order, File No. EB-05-IH-0110, Acct. No. 200532080126, FRN: 0004334082 (rel. Mar. 3, 2005), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-05-543A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-05-543A1.pdf).

<sup>13</sup> See FCC News Release, *Federal Communications Commission Releases Data on High-Speed Services for Internet Access* (rel. Jan. 31, 2007), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-270135A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270135A1.pdf).

<sup>14</sup> Organisation for Economic Co-Operation and Development (“OECD”), Committee for Information, Computer and Communications Policy, Working Party on Telecommunications and Information Services Policies, *Internet Traffic Prioritisation: An Overview*, Apr. 6, 2007, at 4 (hereinafter “OECD Report”). It should be noted that many net neutrality advocates often highlight the OECD Report to demonstrate that net neutrality regulation is necessary to catch up to the rest of the world. However, in addition to the fact that net neutrality regulation would actually decrease U.S. broadband deployment (*see* Part VI, *infra*), many, including the U.S. government, have identified serious flaws in the OECD Report ranking methodology. *See, e.g.*, Letter from Ambassador David A. Goss, United States Coordinator, International Communications and Information Policy, United States Department of State, to Mr. Angel

prioritization, market-based solutions rather than government intervention in the market are preferable and if government intervention is necessary, ex post rather than ex ante regulation are preferred.<sup>15</sup> The OECD concludes wisely that at this time 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.”<sup>16</sup>

The Commission and the courts have previously recognized that the broadband market is competitive.<sup>17</sup> And not only does competition in broadband access already exist, the broadband access market is particularly vibrant and continues to diversify, particularly as technological advances continue to make new network options viable. Policy makers obviously are not well-advised to disregard a distinguished group of economists that refer to broadband markets that are “dynamic and competitive.”<sup>18</sup>

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Gurria, Secretary-General, Organisation of Economic Co-operation and Development (Apr. 24, 2007), available at [http://www.ntia.doc.gov/ntiahome/press/2007/State\\_OECD\\_042407.pdf](http://www.ntia.doc.gov/ntiahome/press/2007/State_OECD_042407.pdf) (noting the OECD rankings’ failure to account for non-subscriber access, such as that available through Wi-Fi hot spots); Remarks of FCC Commissioner Robert M. McDowell at the Broadband Policy Summit III, 2-7 (June 7, 2007), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-273742A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-273742A1.pdf) (detailing why the OECD rankings are not what they appear to be and criticizing, among other aspects, the OECD’s reliance on a “per capita” approach and its failure to consider household broadband adoption rates, which are significantly higher in the United States than in the European Union).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*; see also Robert E. Litan & Hal. J. Singer, *Unintended Consequences of Net Neutrality Regulation* 30-32 (publication in J. ON TELECOMM. & HIGH TECH. L. forthcoming in 2007) (hereinafter “Litan & Singer”), available at <http://www.nytimes.com>.

<sup>17</sup> See, e.g., Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. §160(c)*, 19 FCC Rcd 2196, ¶ 22 (2004) (“the preconditions for monopoly [in broadband] are not present”); *Earthlink v. FCC*, 462 F.3d 1, 11-12 (D.C. Cir. 2006) (noting, in affirming the Commission’s UNE unbundling forbearance order that the Court had previously “upheld in resounding terms” the Commission’s finding of a “sufficiently competitive environment” in broadband).

<sup>18</sup> AEI-Brookings Joint Center for Regulatory Studies, *Economists’ Statement on Network Neutrality Policy*, Mar. 2007, at 1 (hereinafter “Joint Economists’ Statement”).

While admittedly, incumbent cable operators and incumbent wireline telephone providers are the two most prevalent facilities-based providers of broadband service today, they nonetheless compete vigorously with one another. Moreover, other options exist in many communities and those options are expanding rapidly. These other platforms will continue to increase in availability if investors can be confident these networks will not be burdened with new regulation that will limit potential return on investment. The broadband alternatives include wireless options such as municipal and private Wi-Fi, wireless broadband over 3G networks and Wi-Max, other terrestrial options such as broadband over power line and in some communities cable overbuilders like RCN and other facilities-based CLECs, and in the future, a viable satellite option as technology used by companies like WildBlue, HughesNet and StarBand evolves. The Telecommunications Industry Association reports that there will be strong growth “for competing new broadband technologies such as fiber, satellite, wireless and broadband over powerline, which combined will account for more than 11 percent of broadband subscribers in 2010.”<sup>19</sup> That estimate is likely low given the recent news that DirecTV and EchoStar have partnered with Clearwire Corp. to offer their subscribers Clearwire’s WiMax high-speed wireless Internet service.<sup>20</sup>

Broadband growth is fueled by massive, private risk based investment. Capital investment in the wireless industry in 2006 alone was over 24 billion dollars with the total cumulative capital investment in the industry exceeding 223 billion dollars.<sup>21</sup> The promise of 3G

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<sup>19</sup> Press Release, Telecomms. Indus. Ass’n, TIA Report: Broadband Demand Drives Highest Telecom Industry Growth Since 2000 (Jan. 25, 2007), *available at* <http://tia.vnewscenter.com/press.jsp?id=1169675640598>.

<sup>20</sup> Amol Sharma, *DirecTV, EchoStar Set Tie With Clearwire*, Wall St. J., June 15, 2007, at B4.

<sup>21</sup> CTIA – The Wireless Association, *Wireless Quick Facts: December 2006*, *available at* [http://www.ctia.org/media/industry\\_info/index.cfm/AID/10323](http://www.ctia.org/media/industry_info/index.cfm/AID/10323).

is finally here as Verizon and Sprint's EV-DO service and AT&T and T-Mobile's USMT service now give consumers speedy mobile broadband options. As Walter Mossberg of the *Wall Street Journal* explained in 2005:

For years Americans who accessed the Internet via cell phone networks looked across the ocean to Europe with envy. The speed of American cell phone networks badly trailed those in Europe. But not anymore. Gradually, and with relatively little fanfare, Verizon Wireless has deployed a nationwide cellular data network in the United States that blows away the fastest widely deployed networks in Europe, the so-called 3G networks that have been rolled out there to huge publicity. And Sprint is starting its own rollout of a similar speedy network based on the same technology Verizon uses.<sup>22</sup>

In addition to Wi-Fi networks, many of which are municipally-owned<sup>23</sup> and 3G, other mobile options are developing. Sprint is investing billions of dollars in a 4G nationwide Wi-Max service.<sup>24</sup> And, it is important to note that the market leaders – incumbent cable and telephone companies – did not achieve that position automatically. In the last 10 years they have collectively invested well over 100 billion dollars of private risk capital in their networks, with combined yearly expenditures on wireline facilities investment along exceeding 40 billion

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<sup>22</sup> See Walter Mossberg, The Mossberg Report, *Surfin U.S.A.*, Oct. 11, 2005, available at <http://report.allthingsd.com/20051011/surfin-usa/>. Since 2005, the wireless companies' roll-out of these services has only escalated. Sprint's and AT&T's 3G networks are widely available throughout the United States and T-Mobile is rolling out its service.

<sup>23</sup> The Commission's Eleventh Annual CMRS Competition Report noted that the number of public wi-fi hotspots in the U.S. in 2005 was from anywhere between 13,000 and 39,000 according to varying estimates. Eleventh Report, Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, 21 FCC Rcd 10947, at ¶ 211. The Wall Street Journal reported last year that there were "more than 250 cities in the U.S. that have deployed or are planning to deploy citywide municipal wi-fi." Bobby White, *Cities Shop for Lower Prices in Wi-Fi: Free*, Wall St. J., June 20, 2006, at B1, available at <http://online.wsj.com/article/SB115076356388684691.html>.

<sup>24</sup> See Amol Sharma & Don Clark, *Sprint Bets on New Wireless 'Wi-Max'*, Wall St. J., Aug. 8, 2006, at B1-B2.

dollars.<sup>25</sup>

New investment in diverse platforms and other appropriate policy prescriptions, such as spectrum liberalization, hold the promise for even greater broadband access provider choices.<sup>26</sup> However, for these options to continue to grow, investors must be confident that new regulations will not encumber their investments or diminish incentives for network owners to invest in capacity expansion and the provision of innovative services and applications that complement and compete with pure content and application service providers – all to the benefit of consumers.

### **B. Absent Market Failure, Regulation is Unwarranted**

As Chairman Martin has explained: “[m]arket forces are the best method of delivering choice, innovation, and affordability to consumers.”<sup>27</sup> He subscribes to the view that only when there are “market failures” is regulation appropriate.<sup>28</sup> Chairman Martin more recently stated: “As I have been saying for the past couple of years, I believe that any [network neutrality] regulation ... would be premature. There is no evidence of a market failure that warrants

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<sup>25</sup> See U.S. Telecom Ass’n, Telecom Statistics, *available at* [http://www.ustelecom.org/index.php?urh=home.news.telecom\\_stats](http://www.ustelecom.org/index.php?urh=home.news.telecom_stats) (indicating telephone industry expenditures for wireline structures and equipment in 2002 as \$24.8 billion); Nat’l Cable & Telecomms. Ass’n, Industry Statistics, *available at* <http://www.ncta.com/ContentView.aspx?contentId=54> (showing cable industry construction and upgrade expenditures of \$12.4 billion in 2006); *see also* Alec Van Gelder, *Net Loss*, Wall St. J., Apr. 5, 2007 (noting that in the past three years alone, over 100 billion dollars for 50 million broadband connections has been invested in the United States).

<sup>26</sup> See, e.g., William Kennard, *Spreading the Broadband Revolution*, N.Y. Times, Oct. 21, 2006, at A13.

<sup>27</sup> FCC News Release, *Press Statement of Kevin J. Martin on the Commission’s Decision on Verizon’s Petition for Permanent Forbearance from Wireless Local Number Portability Rules* (July 16, 2002), *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC224368A4.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC224368A4.pdf).

<sup>28</sup> *Id.*

regulation in this area at this time.”<sup>29</sup>

The *Washington Post* has noted:

The weakest aspect of the neutrality case is that the dangers it alleges are speculative. It seems unlikely that broadband providers will degrade Web services that people want and far more likely that they will use non-neutrality to charge for upgrading services that depend on fast and reliable delivery, such as streaming high-definition video or relaying data from heart monitors. If this proves wrong, the government should step in. But it should not burden the Internet with preemptive regulation.<sup>30</sup>

Distinguished Carnegie Mellon Computer Science Professor, David Farber (often called the “Grandfather of the Internet”), and University of California Berkley economist Michael Katz, note that public policy intervention is only appropriate “where anti-competitive actions can be identified and the cure will not be worse than the disease. Policymakers must tread carefully, however, because it can be difficult, if not impossible, to determine in advance whether a particular practice promotes or harms competition.”<sup>31</sup>

There is, in fact, a growing consensus among economists that the broadband access market is sufficiently competitive to prevent market failure. Economists Dr. Robert Litan and Hal Singer have “concluded that an access provider that lacks monopoly power in the broadband access market – a condition that applies to the vast majority of all access providers in the United States – lacks any ability to foreclose unaffiliated content providers . . . .”<sup>32</sup> Many economists also believe that even if the market for broadband is not competitive, that does not mean there is

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<sup>29</sup> Remarks of FCC Chairman Kevin J. Martin, Nat’l Cable & Telecomms. Ass’n Convention, Las Vegas, NV 3 (May 7, 2007) (As Prepared for Delivery), *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-272897A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-272897A1.pdf).

<sup>30</sup> *The Internet’s Future: Congress Should Stay Out of Cyberspace*, Wash. Post, June 12, 2006, at A20.

<sup>31</sup> David Farber & Michael Katz, *Hold Off on Net Neutrality*, Wash. Post, Jan. 19, 2007, at A19.

<sup>32</sup> Litan & Singer, *supra* note 16, at 9.

a market failure warranting regulation.

For example, Litan & Singer find that “even if some . . . access providers may enjoy some market power in some local markets, they still lack significant economic incentives to foreclose unaffiliated content providers.”<sup>33</sup> They understand that even providers with market power have strong incentives to not block or degrade content because consumers want access to the content of their choosing. A broadband service lacking all available content will attract fewer consumers.<sup>34</sup> Even those experts that are not convinced by one side or the other of the net neutrality debate and who have some concerns about broadband access providers’ ability to interfere with content and applications providers’ services, prefer a wait and see approach to assess whether harms that warrant regulation occur:

There is a good policy argument in favor of doing nothing and letting the situation develop further. The present situation, with the network neutrality issue on the table in Washington but no rules yet adopted, is in many ways ideal. ISPs, knowing that discriminating now would make regulation seem more necessary, are on their best behavior; and with no rules yet adopted we don’t have to face the difficult issues of line drawing and enforcement. Enacting strong regulation now would risk side-effects, and passing toothless regulation now would remove the threat of regulation. If it is possible to maintain the threat of regulation while leaving the issue unresolved, time will teach us more about what regulation, if any, is needed.<sup>35</sup>

Refraining from new regulation is not only consistent with foundational principles of market regulation in the United States but is also consistent with Congress’ mandate in Sections 230 and 706 of the 1996 Telecommunications Act, which expressed a clear preference for not

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<sup>33</sup> *Id.*

<sup>34</sup> See Joint Economists’ Statement, *supra* note 18, at 2 (“[E]ven if some service providers could exercise some market power . . . [i]f a provider restricted access, its product would be less valuable and attract fewer subscribers.”).

<sup>35</sup> Edward W. Felton, *Nuts and Bolts of Network Neutrality* 10 (July 6, 2006), available at <http://itpolicy.princeton.edu/pub/neutrality.pdf>.

regulating the Internet, to ensure its growth.<sup>36</sup>

Introducing a new regulatory regime without any evidence of actual harm is not only unwise and contrary to legislative mandates, it is, as the United States Court of Appeals for the D.C. Circuit held just last year, plainly illegal and in violation of the Administrative Procedures Act.<sup>37</sup> In fact, in our legal system generally, for a plaintiff to be able to sustain an action, he has to allege facts in support of his claim. The Supreme Court recently clarified that a plaintiff's mere inference of misbehavior is not enough to survive even a motion to dismiss.<sup>38</sup> Similarly, a mere suspicion of future misbehavior should not be sufficient to alter public policy.

### **III. CURRENT REGULATION AND CONSUMER PROTECTION LAWS ARE SUFFICIENT TO ADDRESS ANY POTENTIAL HARMS**

As discussed above, to justify the creation of a new regulatory scheme, advocates of a legislative solution to ensure net neutrality point to hypothetical future actions by broadband providers that could adversely impact the free flow of content, stifle competition, or otherwise result in harmful consumer outcomes. It is important to note, however, that even if such hypothetical adverse outcomes come to pass in some fashion, there are legal remedies already available under existing federal and state laws and legal doctrines to address any issues involving content block or abuse of market power. Indeed, federal regulators have demonstrated they will be quick to rely upon their existing authority to forcefully address any action that would have the potential to impair net neutrality or competition in ways that could be harmful to consumers of

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<sup>36</sup> See 47 U.S.C. § 230(b); 47 U.S.C. § 157 nt.

<sup>37</sup> See *Nat'l Fuel Gas Supply Corp. v. FERC*, 458 F.3d 831, 843 (D.C. Cir. 2006) (vacating a federal agency's order as "not reasoned decisionmaking" and unlawful under the Administrative Procedures Act where the agency "[p]rofess[ed] that an order ameliorate[d] a real industry problem but then cit[ed] no evidence demonstrating that there is in fact an industry problem").

<sup>38</sup> See *Bell Atl. Corp. v. Twombly*, No. 05-1126, 2007 U.S. LEXIS 5901 (May 21, 2007).

Internet services.

**A. The Federal Communications Commission Has Authority to Act If Content is Unjustifiably Blocked or Degraded**

As the NOI points out,<sup>39</sup> Title I of the Communications Act grants to the FCC authority over interstate communications by wire and radio, including the power to “perform any and all acts, make such rules and regulations, and issue such orders” to fulfill its mission.<sup>40</sup> Further, the FCC’s authority “to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications” was recently reaffirmed by the United States Supreme Court in *National Cable & Telecommunications Association v. Brand X Internet Services*.<sup>41</sup> In reaffirming this authority, moreover, the Supreme Court specifically recognized the FCC’s ancillary jurisdiction to regulate broadband providers.<sup>42</sup>

The Commission may exercise its ancillary jurisdiction under Title I when two conditions are met. First, Title I must confer subject matter jurisdiction over the service to be regulated. Second, jurisdiction must be reasonably ancillary to the effective performance of the Commission’s responsibilities.<sup>43</sup> It seems clear, as the FCC has concluded,<sup>44</sup> that both of these conditions are met with respect to enforcing against broadband providers the four net neutrality principles of the Commission’s 2005 Policy Statement without the necessity of any new regulatory or statutory authority. Thus, in the event of future behaviors that the Commission

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<sup>39</sup> Broadband Industry Practices NOI, at ¶ 3.

<sup>40</sup> *See* 47 U.S.C. § 154(i).

<sup>41</sup> 545 U.S. 967, 976 (2005) (hereinafter “*Brand X*”).

<sup>42</sup> *See id.* at 996 (“[T]he Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction.”).

<sup>43</sup> Broadband Industry Practices NOI, at ¶ 3; *see also United States v. Sw. Cable Co.*, 392 U.S. 157, 177-78 (1968).

determines are harmful, the authority currently exists to craft appropriate remedies as and when such problems occur.

As noted by the FCC itself, the prerequisites for the FCC's ancillary jurisdiction are "likely satisfied for any consumer protection, network reliability, or national security obligation that [the FCC] may subsequently decide to impose on wireline broadband Internet access service providers."<sup>45</sup> As Chairman Martin has testified:

the Commission has continued to monitor the marketplace, has been vigilant about it, has tried to continue to make sure that we are enforcing the net neutrality principles, to make sure that consumers don't have access blocked. . . . The Commission, I think, does have authority, under Title I of the Communications Act [to take action if a problem develops]. And, indeed, last summer the Supreme Court . . . stated [in *Brand X*] that the Commission had ancillary authority to adopt additional rules over the infrastructure providers of broadband access, if they needed to.<sup>46</sup>

In short, the FCC already has the authority and jurisdiction it requires to intervene if in the future a broadband provider engages in a practice that is deemed harmful to consumers or in anyway adversely impacts net neutrality.

Not only does the FCC have the authority to act, it already has demonstrated that it will not hesitate to address actions that threaten net neutrality. As pointed out above, in 2005, a small North Carolina broadband provider, Madison River Communications, attempted to interfere with consumers' rights by degrading the service of a non-affiliated competitor. Specifically, Madison

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<sup>44</sup> Broadband Industry Practices NOI, at ¶ 3.

<sup>45</sup> *Id.*; see also *In re 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, 1914, ¶ 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).

<sup>46</sup> *Nominations to the FCC and to the Dep't of Commerce (Nat'l Telecomms. and Info. Admin.): Hearings Before the S. Comm. on Commerce*, 109th Cong. 8-9 (2006) (hereinafter "Hearings") (testimony of FCC Chairman Kevin Martin).

River, which provided both Internet access and telephone services, allegedly blocked its DSL customers from using a rival Voice over Internet Protocol (“VoIP”) provider.<sup>47</sup>

In the only known instance of an Internet service provider interfering with consumers’ rights, the FCC launched an investigation within only three days of the first informal complaint. Only two weeks later, after the FCC completed its investigation, Madison River entered into a consent decree, agreeing to pay a \$15,000 fine and not to engage in port block of VoIP services in the future.<sup>48</sup> As then FCC Chairman Powell said in announcing the prompt, successful resolution of its investigation:

The industry must adhere to certain consumer protection norms if the Internet is to remain an open platform for innovation. . . . In my view, the surest way to preserve ‘Net Freedom’ is to handle these issues in an enforcement context where hypothetical worriers give way to concrete facts and – as we have shown today – real solutions. . . .<sup>49</sup>

## **B. The Federal Trade Commission’s Role Should Also Be Considered**

Putting to one side and without opining on any preemption issues arising from the jurisdictional divide between this Commission and the FTC, it is worth noting that many believe that the FTC also has a current role to address any future effort by broadband providers to block or degrade content or to otherwise abuse market power (if it exists). This role would arise from

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<sup>47</sup> See Deborah Platt Majoras, FTC Chairman, The Federal Trade Commission in the Online World: Promoting Competition and Protecting Consumers, Address before The Progress and Freedom Foundation’s Aspen Summit 16 (Aug. 14, 2006) (hereinafter “Chairman Majoras Address”), available at <http://www.ftc.gov/speeches/majoras/060821pffaspenfinal.pdf>; *Madison River Commc’ns, LLC, Consent Decree*, File No. EB-05-1H-0110 (Mar. 3, 2005), available at <http://www.fcc.gov/eb/orders/2005/DA-05-543A1.html>.

<sup>48</sup> *Madison River Commc’ns, LLC, Consent Decree*, File No. EB-05-1H-0110 (Mar. 3, 2005), available at <http://www.fcc.gov/eb/orders/2005/DA-05-543A1.html>; Hearings, *supra* note 46, at 8; Chairman Majoras Address, *supra* note 47, at 16.

<sup>49</sup> See FCC Press Release, FCC Chairman Michael K. Powell Commends Swift Action to Protect Internet Voice Services (March 3, 2005), available at <http://www.broadbandwirelessreports.com/pressreleases/files/DOC-257175A1.pdf>.

the FTC's existing broad statutory and rulemaking authority to protect consumers against unfair practices and to police anticompetitive conduct, so long as the FCC's own jurisdiction is not determined to occupy the field.

Section 5 of the Federal Trade Commission Act of 1914, provides the FTC with authority to prohibit and prosecute "unfair methods of competition" and "unfair or deceptive acts or practices."<sup>50</sup> The United States Supreme Court has interpreted this Section 5 mandate widely. In *FTC v. Brown Shoe Co.*, the Court held that the FTC has

broad power . . . with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws. . . . [T]he Commission has power under § 5 to arrest trade restraints in their incipiency without proof that they amount to an outright violation of [the Clayton Act] or other provisions of the antitrust laws.<sup>51</sup>

Further, the FTC is authorized to prescribe "interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices" and "rules which define with specificity acts or practices which are unfair or deceptive acts or practices."<sup>52</sup> Thus, in the event that a broadband provider limited consumers' lawful online access, the FTC has the authority to act to stop such practices. No additional statutory or regulatory authority is required for the FTC to act to protect consumers subject to unfair or deceptive acts committed in the future by any broadband provider.

In addition to its broad consumer protection authority, the FTC's Bureau of Competition and the Antitrust Division of the U.S. Department of Justice ("DOJ") share responsibility for

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<sup>50</sup> 15 U.S.C. § 45(a)(1).

<sup>51</sup> 384 U.S. 316, 321-22 (1966).

<sup>52</sup> See 15 U.S.C. § 57a(1)(A)-(B).

enforcing the federal antitrust laws designed to promote competition in the marketplace.<sup>53</sup> There are at least three ways that existing antitrust laws already act to ensure net neutrality.

First, Section 2 of the Sherman Antitrust Act of 1890 gives the FTC and the DOJ the authority to bring an action against a broadband provider in the event a provider were to have sufficient market power to use its network unreasonably to obtain or maintain a monopoly position and limit consumer choice.<sup>54</sup> Second, Section 2 of the Clayton Antitrust Act of 1914 gives both the FTC and the DOJ the power to bring enforcement actions in the event a broadband provider engaged in any discriminatory pricing behavior in a way that lessens competition.<sup>55</sup> Third, Section 1 of the Sherman Act permits enforcement actions to protect consumers against broadband providers that collectively act to unreasonably restrain trade.<sup>56</sup>

The efficacy of existing federal antitrust laws to halt anticompetitive behavior by a broadband provider is clearly demonstrated in the DOJ's successful prosecution of Microsoft Corporation.<sup>57</sup> In this well-publicized matter, Microsoft was found to have unlawfully maintained its monopoly by using anticompetitive means in violation of section 2 of the Sherman Act.<sup>58</sup> In addition, Microsoft was found to have violated section 1 of the Sherman Act by using impermissible tying methods to use its market power from its Windows platform to force

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<sup>53</sup> See generally Business Laws, Inc., Corporate Counsel's Guide To Unfair Competition, Thomson/West at 3.002-003 (2006) (hereinafter "Corporate Counsel's Guide").

<sup>54</sup> See 15 U.S.C. § 2.

<sup>55</sup> See *id.* § 13.

<sup>56</sup> See *id.* § 1. FTC authority to address Sherman and Clayton Act antitrust violations derives from the FTC Act's ban on "unfair methods of competition." See generally Corporate Counsel's Guide, *supra* note 53.

<sup>57</sup> See *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000).

<sup>58</sup> *Id.* at 35.

consumers to acquire a separate product, Internet Explorer.<sup>59</sup> In agreeing to settle the case with the federal government, Microsoft adopted corrective action and submitted to several years of supervision.<sup>60</sup>

In addition to demonstrating in very real terms the fact that the existing statutory and regulatory scheme provides the federal government with the authority to address anticompetitive behavior, the import of the DOJ's prosecution of Microsoft is that it undoubtedly serves as a significant deterrent against any practices by broadband providers seeking to offer diverse broadband and network services that will harm consumers. The Microsoft antitrust prosecution also demonstrates the ability of government antitrust regulators to successfully adopt and employ existing statutes and regulations to address anticompetitive practices in emerging industries and technologies.

Indeed, FTC Chairman Deborah Platt Majoras recently noted the fact that “most of the fundamental principles of antitrust law and economics that [the FTC has] applied for years are equally relevant to even the newest industries” and that the “unique qualities of any product market can be taken into account” when the FTC performs its fact-intensive analysis of potential antitrust violations or unfair consumer practices.<sup>61</sup> In particular, the FTC is committed under its existing authority to devoting “substantial resources to monitoring market conditions in cyberspace and being alert to any [new] potential harms to competition and consumers.”<sup>62</sup>

The FTC's commitment to act under its existing authority in the area of emerging

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<sup>59</sup> *Id.*

<sup>60</sup> See DOJ Antitrust Division, Antitrust Case Filings, United States v. Microsoft, [http://www.usdoj.gov/atr/cases/ms\\_index.htm](http://www.usdoj.gov/atr/cases/ms_index.htm).

<sup>61</sup> See Chairman Majoras Address, *supra* note 47, at 19.

<sup>62</sup> See *id.* at 19-20.

technologies, moreover, already has been demonstrated by the fact that the FTC has investigated and brought enforcement actions under the antitrust laws in “matters involving access to content via broadband and other Internet access services” and to address unfair consumer practices.<sup>63</sup>

For example, the FTC has:

- filed a complaint in the matter of the AOL-Time Warner proposed merger alleging that it would harm competition and injure consumers in several markets, including the market for broadband Internet access and the market for residential broadband Internet transport services. The FTC required “non discriminatory access to the components of the Time Warner system necessary for other firms to compete on an even basis.”<sup>64</sup>
- investigated the acquisition by Comcast and Time Warner of the cable assets of Adelphia Communications and a related transaction in which Comcast and Time Warner exchanged various cable systems. The FTC reviewed the likely effects of the transactions on access to and pricing of content and concluded that the acquisitions were unlikely to prevent competition or to result in increased prices.<sup>65</sup>
- filed cases against (a) 240 individuals and companies to stop fraudulent spam and stop spyware that altered home pages and installed programs that spied on consumers’ Web surfing and (b) companies that failed to take reasonable security measures to protect sensitive customer information or that made deceptive security claims.<sup>66</sup>

In short, as Commissioner Majoras has explained when cautioning against adopting new measures to regulate the Internet and its related, emerging technologies without a clear determination that the current regulatory scheme is insufficient to address potential issues as they

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<sup>63</sup> See *id.* at 8-9.

<sup>64</sup> See *id.* at 9; see also *In re Am. Online, Inc. & Time Warner Inc.*, FTC Docket No. C-3989 (Dec. 14, 2000) (complaint), available at <http://www.ftc.gov/os/2000/12/aolcomplaint.pdf>; *id.* (Apr. 12, 2001) (consent order), available at <http://www.ftc.gov/os/2001/04/aoltwdo.pdf>.

<sup>65</sup> See Chairman Majoras Address, *supra* note 47, at 9; see also Statement of Chairman Majoras, Commissioner Kovacic, and Commissioner Rosch Concerning the Closing of the Investigation Into Transactions Involving Comcast, Time Warner Cable, and Adelphia Communications (Jan. 31, 2006) (FTC File No. 051 0151); Statement of Commissioners Jon Leibowitz and Pamela Jones Harbour (Concurring in Part, Dissenting in Part) Time Warner/Comcast/Adelphia (Jan. 31, 2006) (FTC File No. 051 0151).

<sup>66</sup> See Chairman Majoras Address, *supra* note 47, at 2-3.

arise, a robust law enforcement and regulatory structure is already in place, enforced by the FTC, DOJ and the FCC, to protect competition and consumers.<sup>67</sup> As she candidly put it:

[L]et me make clear that if broadband providers engage in anticompetitive conduct, we will not hesitate to act using our existing authority. But I have to say, thus far, proponents of net neutrality regulation have not come to us to explain where the market is failing or what anticompetitive conduct we should challenge. . . . The FTC is committed to maintaining competition and to protecting consumers from deceptive or unfair acts or practices relating to all Internet access services within its jurisdiction.<sup>68</sup>

### **C. Existing State Law Protections Complement Federal Law**

The FCC, FTC and DOJ are not alone in possessing the existing statutory and regulatory authority to investigate, stop and prosecute anticompetitive or unfair or deceptive practices that threaten net neutrality. States have enacted their own unfair competition laws and so-called “Little FTC Acts” that also can be enforced by state regulators to address practices that threaten net neutrality or harm consumers. California, for example, prohibits unfair competition defined as “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. . . .”<sup>69</sup> California courts have applied this statute broadly, providing meaningful protection to consumers and the flexibility to address unfair practices that could result from emerging technology.<sup>70</sup> In addition to statutory protections, state common law business tort actions may be available to seek civil monetary damages for injury resulting from actions that impede net neutrality. Such actions can encompass claims under common law

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<sup>67</sup> *See id.* at 19-20.

<sup>68</sup> *See id.* at 20-21.

<sup>69</sup> *See* CAL. BUS. & PROF. CODE § 17200.

<sup>70</sup> *See, e.g., Schnall v. Hertz Corp.*, 93 Cal. Rptr. 2d 439, 442 (Cal. Ct. App. 2000) (unfairness prong of unfair competition law is intentionally broad allowing courts maximum discretion to prohibit new schemes to defraud).

theories of fraudulent misrepresentation, interference with contractual or business relations, and unfair competition.

Again, it is not within the purview of this submission to opine on whether such laws are operative in the face of FCC jurisdiction to regulate in this area, but we note their potential applicability, and the need to consider such applicability in determining whether an additional layer of regulation is needed.

Given this established and/or potentially applicable legal framework to protect consumers through the offices of the FCC, FTC and DOJ, supplemented by state law, it is clear that existing law must be examined to determine whether new regulation is truly needed to deal with the hypothetical harms being advanced by some favoring new net neutrality regulation.

#### **IV. BROADBAND CAPACITY MUST BE GREATLY EXPANDED AND MANAGED TO HANDLE THE MASSIVE INCREASE IN TRAFFIC**

The Internet has been a transcendent development for humankind, dramatically expanding knowledge and the ability to communicate around the globe. It has also transformed the amount of information that changes hands on a daily basis. With new technological developments and expanded capacity, the information flows continue to grow exponentially. While new applications and technological developments, such as Internet video, have benefited consumers tremendously, the Internet is reaching the point where there is now a real risk that current capacity will not be able to keep pace with the increasing content flows that consume high amounts of bandwidth. Net neutrality regulation would take away the incentives for network owners to provide the necessary investment.

Georgetown Economics Professor and Executive Director of the Center for Business and Public Policy at Georgetown University's McDonough School of Business, John W. Mayo has explained that “there are legitimate, growing and seemingly insatiable demands by consumers –

both households and firms – for information.”<sup>71</sup> Concerning the rapid growth in video, he explains:

[it] is ravenous in its consumption of network capacity. For example, downloading a one hour television show consumes 1,700 times the Internet bandwidth as downloading a typical website. And, downloading a single high definition movie consumes more bandwidth than does the downloading of over 35,000 web pages. While Internet infrastructure firms such as AT&T and Verizon will typically view content and applications providers as enhancing the demand for, and value of, their networks, the prospect of applications providers’ high-end offerings outstripping the available capacity has become a bona fide risk.<sup>72</sup>

The firm of Deloitte & Touche put it this way earlier this year:

[T]he Internet could be approaching its capacity. The twin trends causing this are an explosion in demand, largely fueled by the growth in video traffic and the lack of investment in new, functioning capacity . . . [C]apacity constraints may well appear in the ISP and telecommunications networks that provide broadband connectivity to consumers. The impact may be most noticeable in the form of falling quality of service. Surfers are most likely to be annoyed by the slowdown in service. And it may only take an unexpected upsurge in video usage to turn the inconvenience caused by a drop in access speeds into full-scale consumer dissatisfaction.<sup>73</sup>

Even companies that support new regulation acknowledge the bandwidth used by Internet video or other applications will overwhelm existing capacity. As reported earlier this year, Vincent Dureau, Google’s head of TV Technology, said “[t]he Web infrastructure and even

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<sup>71</sup> John Mayo, *Net Neutrality: The Prequel*, AEI Brookings Joint Center Policy Matters 07-12, Mar. 2007, available at <http://www.aei-brookings.org/policy/page.php?id=283> (hereinafter “The Prequel”).

<sup>72</sup> *Id.*

<sup>73</sup> Deloitte, *Telecommunications Predictions, TMT Trends 2007* (rel. Jan. 2007). See also Bret Swanson, *The Coming Exaflood*, Wall St. J., Jan. 20, 2007, at A11; Charles Giancarlo, *The Internet Accelerates While U.S. Trails Behind*, SFGate.com, Dec. 14, 2006 (noting that “[h]ousehold bandwidth demand continues to increase and is expected to reach approximately 1.1 terabits per month per household by 2010 in the United States” and by way of comparison explaining that “20 of these new homes would generate more traffic than the entire Internet of 1995”).

Google's (infrastructure) doesn't scale. It is not going to offer the quality of service consumers expect.<sup>74</sup>

Not only has the need to expand network capacity increased with the development of new applications, the need to manage networks has grown as well. With increased intermodal competition in voice, data, video and specialized services such as VPNs for businesses, telemedicine and video monitoring for parents' to view young children or elderly parents, the need to ensure smooth delivery of such services has increased. Professor Mayo explains network management as a result of:

the rapidly growing and increasingly sophisticated nature of consumer demands for content and applications that will run over the network infrastructure . . . . In a world of digital packet switching, some Internet applications (e.g., email) may be simply "tossed" into the network and arrive without quality degradation, while other applications (e.g., video streaming) requires active network management to assure that the video arrives "unscrambled".<sup>75</sup>

Even if capacity were sufficient to carry the expanded amount of communications coming to consumers over the Internet, it would not negate the necessity of network owners to manage their networks. The varying amount of users on a network and the various services available inevitably produces spikes in traffic, or jitters, that can diminish the end users' experience.<sup>76</sup> It follows that many real-time content providers want managed networks so their viewers can avoid jitters.<sup>77</sup> Litan & Singer report that Richard Clarke, AT&T's Director of Economic Analysis, estimates that trying to satisfy Internet demand exclusively through

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<sup>74</sup> Google and Cable Firms Warn of Risks From Web TV, USA Today, Feb. 7, 2007, *available at* [http://www.usatoday.com/tech/news/2007-02-07-google-web-tv\\_x.htm](http://www.usatoday.com/tech/news/2007-02-07-google-web-tv_x.htm).

<sup>75</sup> The Prequel, *supra* note 71.

<sup>76</sup> Litan & Singer, *supra* note 16, at 12.

<sup>77</sup> *Id.*

bandwidth would cost consumers \$47 to \$466 per month.<sup>78</sup> The higher range accounts for future video use and as Clarke concludes, it would render Internet service commercially nonviable.

Another study places the cost at between \$350 and \$400 a month.<sup>79</sup>

Network management is the key to efficient delivery of service to consumers. David Farber and Michael Katz have explained:

When traffic surges beyond the ability of the network to carry it, something is going to be delayed. When choosing what gets delayed, it makes sense to allow a network to favor traffic from, say, a patient's heart monitor over traffic delivering a music download. It also makes sense to allow network operators to restrict traffic that is downright harmful, such as viruses, worms and spam.<sup>80</sup>

Unless investment in infrastructure is encouraged and broadband providers are allowed to manage their networks to ensure proper delivery of Internet traffic to consumers, the Internet will rapidly become overwhelmed by traffic to the detriment of the consumer experience.

## **V. NEW BUSINESS ARRANGEMENTS WILL HELP SPREAD THE COSTS OF EXPANDING CAPACITY, BENEFITTING CONSUMERS**

Permitting network owners to enter into new business arrangements with content providers and others is truly an efficient way for the market to allocate the costs of the necessary network expansion and upgrades. Allowing business arrangements also prevents the full costs of network upgrades from falling on squarely on consumers. Economists agree that spreading the

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<sup>78</sup> *Id.* at 15.

<sup>79</sup> George Ford, Thomas Koutsky and Lawrence Spiwak, *The Efficiency Risks of Network Neutrality Rules*, Phoenix Center, Public Policy Bulletin No. 16, May 2006.

<sup>80</sup> Farber & Katz, *supra* note 31. With regard to the heart monitoring traffic point, the Commission has recognized that “[t]elemedicine networks made possible by advanced services save lives and improve the standard of healthcare in sparsely populated, rural areas. *In the Matter of Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act*, Notice of Inquiry, GN Docket No. 07-45, ¶ 4 (rel. Apr. 16, 2007).

costs of network upgrades increases consumer welfare. Allowing the costs of upgrades to be borne by more than just the end user is known as “multi-sided pricing.” As Steve Pociask explains:

[M]ulti-sided pricing, particularly based on voluntary agreements between network providers and upstream providers, would provide huge consumer benefits, increase the size of the market, and increase advertising revenues for the benefit of upstream providers. However, net neutrality regulations would prevent these consumer benefits and prevent voluntary agreements between providers. The bottom line is that these regulations raise consumer prices and provide no additional benefit for consumers.<sup>81</sup>

Dr. Alfred Kahn, Professor Emeritus of Cornell University, a self-professed liberal democrat who served in the Carter Administration in various roles and who is former Chairman of the New York Public Service Commission, puts it:

[B]roadband facilities have to be created by investments – especially huge ones by the telephone companies; and applications requiring priority transmission can entail lower priority transmission of others. . . . [T]hose costs must be collected from users – subscribers to broadband services, on the one side, providers of programming or content on the other, or some combination of the two – just as in the case of newspapers or television stations.<sup>82</sup>

Without multi-sided pricing, broadband providers would have to incur the full costs of upgrading their networks, which would have to be passed on to consumers. Passing the costs on to consumers would likely make broadband access service prohibitively expensive for many consumers. With such investment pricing consumers out of the market, broadband Internet access providers would have strong economic incentives to *not* invest capital in their networks sufficient to provide or accommodate the latest technical advances and applications. Chairman

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<sup>81</sup> Stephen B. Pociask, *Net Neutrality and the Effects on Consumers* 25, The American Consumer Institute (May 9, 2007); see also Larry F. Darby, Darby Associates, *Consumer Welfare, Capital Formation and Net Neutrality: Paying for Next Generation Broadband Networks* 12-20, American Consumer Institute (June 6, 2006).

<sup>82</sup> Alfred E. Kahn, *A Democratic Voice of Caution on Network Neutrality* 3, The Progress & Freedom Foundation Progress Snapshot (Oct. 2006).

Martin recently conveyed his “belie[f] that network providers need to be able to recoup the costs for upgrading their infrastructure. Regulation in this area could have the detrimental effect of slowing down the deployment of broadband networks and thus the adoption of broadband services.”<sup>83</sup>

As the broadband market stands now, network owners have the incentive to invest not only in their networks, but also in applications and services, which make those networks more attractive to consumers and allows network owners to recoup their costs, which in turn allows even greater investment in the network to enable it to accommodate the new applications and services. Some innovations in applications can be part and parcel with the network. Robert Kahn, widely known as the “Father of the Internet” has argued against net neutrality legislation because he is “totally opposed to mandating that nothing interesting can happen inside the net.”<sup>84</sup> Accordingly, capital investment in broadband networks is the key to innovation, as is allowing network owners to enter into free market business arrangements to help finance that investment. The *Washington Post* has noted that the only serious argument for net neutrality is that without it, start-up content and applications service providers might face slightly higher barriers to entry. As the *Washington Post* explained:

This concern should not be exaggerated. Cyber-upstarts already face barriers: The incumbent [content and applications providers such as Google, Microsoft, eBay] have brand recognition and invest in tricks to make their sites load faster. The extra barrier created by a lack of net neutrality would probably be small because the pipe owners know that consumers want access to innovators. Meanwhile, there are powerful arguments on the other side. If you want innovation on the Internet, you need better pipes: ones that are faster, less

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<sup>83</sup> Remarks of FCC Chairman Kevin J. Martin, Nat’l Cable & Telecomms. Ass’n Convention, Las Vegas, NV (May 7, 2007) (as prepared for delivery), *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-272897A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-272897A1.pdf).

<sup>84</sup> See Andrew Orlovski, *Father of the Internet Warns Against Net Neutrality*, *The Register* (January 2007).

susceptible to hackers and spammers, or smarter in ways that nobody has yet thought of.<sup>85</sup>

The last quote highlights the underlying issue in this debate – whether innovation should be allowed to occur in the network instead of only at the edges. There is no reason it cannot be in both places, but network neutrality regulation would take away the incentives for carriers to do so and under the status quo, the big, established content and applications providers will continue to maintain their advantage over start-ups. Peter Huber, a senior fellow at the Manhattan Institute, provides some context:

The network that's lighting your screen today isn't neutral at all. Google, Amazon, Citicorp – all pay a privately negotiated price for better connections from their huge banks of servers to the Internet. What they get are fast connections from their premises – and for just their content – to one of the several dozen “network access points” that channel data into the Internet's sprawling, ultrahigh-speed backbone. Then they buy still more speed – for their content and no one else's – from companies like Akamai. Akamai provides neutrality-busting service. The company has deployed a global array of servers that cache content supplied by its customers so that it's sitting out there when it's needed, much closer to the people who need it.<sup>86</sup>

While some net neutrality advocates attack broadband providers for having what they allege to be market power, they ignore that many of the big established content and applications providers that enter into business arrangements to prioritize their traffic, appear to have market power. Dr. Larry Darby, a former Chief of the Commission's common carrier bureau and a fellow at the ACI Institute explained:

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<sup>85</sup> Editorial, *The Internet's Future, Congress Should Stay Out of Cyberspace*, Wash. Post, June 12, 2006, at A20.

<sup>86</sup> Peter Huber, *The Inegalitarian Web*, Forbes.com, Feb. 12, 2007, available at [http://www.forbes.com/opinions/free\\_forbes/2007/0212/094.html](http://www.forbes.com/opinions/free_forbes/2007/0212/094.html); see also Yoo, *supra* note 7, at 1881-82 (“The problem is that content delivery networks [that are used by some content providers and which dynamically store content and applications closer to the user or at less congested locations] violate network neutrality.”).

Market segmentation and differential pricing are not counter to market competition, but rather an integral part of the operation of market forces. In a wide variety of circumstances . . . it is the very presence of effective competition that forces discriminatory prices on the firm. Uniform prices (that is prices that are not differentiated with respect to idiosyncratic demand characteristics associated with different uses) are NOT sustainable in most industry contexts. Put differently, competition requires price discrimination.

- Indeed, it is hard to think of industries without price discrimination . . . even though most . . . are highly competitive or contestable, and the firms in them earn zero economic profit (i.e., a normal rate of return).
- . . . in a broad range of market types and conditions, where consumers can be separated into distinct groups with different demand elasticities [willingness to pay] . . . , market pressures will prevent any equilibrium at which the price is uniform. Not only will each firm be forced to adopt discriminatory prices, but each firm is likely to be forced to adopt a unique . . . [structure] . . . of prices . . . , each of which is dictated by the market.
- . . . in highly competitive markets, firms may have no choice [but to practice price discrimination] . . . .

The consensus among mainstream economists is that price discrimination is not only compatible with effective competition and economic welfare maximization, but that it may be the only sustainable structure of prices for capital intensive, high sunk cost, low marginal cost undertakings. Banning natural pricing practices will suppress investment and consumer choice.<sup>87</sup>

Given the competitive broadband access environment and the deals being made by content and applications providers, and the massive costs to upgrade the networks, it follows that broadband access service providers should be free to enter into business arrangements, as long as they follow the Commission's Policy Statement. As the ACI found:

[R]ules to limit [broadband network] service variation, market segmentation and price differentiation would reduce consumer welfare even further, since a mandatory "one size fits all" regulatory scheme will limit the scope and intensity of competition. The research showed that market segmentation and price differentiation . . . is widely supported by welfare economics and analysis; is

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<sup>87</sup> Dr. Larry F. Darby, Consumer Gram, *FAQs About Price Discrimination and Consumer Welfare*, The American Consumer Institute, available at <http://www.theamericanconsumer.org/discrim.pdf>.

necessary for efficiency and welfare maximization in most settings; and, overall, improves consumer economic welfare.<sup>88</sup>

Prohibiting network innovation and freezing network technology in place for a problem that does not exist, but which can be corrected after the fact if abuse does arise, is neither prudent nor in the public interest.<sup>89</sup>

## **VI. REGULATION WOULD RESULT IN UNINTENDED ADVERSE CONSEQUENCES**

Network neutrality regulation would likely have far-reaching impacts that impede, rather than encourage the growth of the Internet. By insisting that new technology be reserved for the edge of the network, rather than allowing its deployment within the network in new and beneficial ways (in the name of preventing content discrimination), the growth of the Internet and benefits to consumers will be thwarted. Recent history demonstrates that technological advancements bring new opportunities. Regulating now ignores the impacts technology will continue to have. As Adam Thierer has explained:

The core of the problem here is that Net neutrality regulation – like all other open access proposals before it – falls into what might most appropriately be called the ‘assume a platform’ school of thinking. That is, proponents of forced regulation seem to ignore market evolution and the potential for sudden technological change by adopting a static mindset preoccupied with micromanaging an existing platform regardless of the implications for the development of future networks.<sup>90</sup>

Aryeh B. Bourkoff, a UBS Managing Director and Senior Analyst covering the equity and fixed income debt securities of the cable TV, satellite and entertainment sectors, recently provided testimony to the Senate Committee on Commerce, Science, and Transportation

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<sup>88</sup> Consumer Gram, *Internet Regulations Would Harm Consumers*, The American Consumer Institute, available at <http://www.theamericanconsumer.org/NN%20examples.pdf>.

<sup>89</sup> See Yoo, *supra* note 7, at 1855.

<sup>90</sup> Adam D. Thierer, “Net Neutrality”, *Digital Discrimination or Regulatory Gamesmanship in Cyberspace* 18, Policy Analysis (Jan. 12, 2004).

expanding the point: “[I]t is [still] too early to introduce regulation on key issues such as a la carte packaging and pricing and on net neutrality as the market is still in its early stages. . . . [I]t is essential that market forces and consumer demand drive the economic model.”<sup>91</sup>

The “unintended consequences” of unnecessary net neutrality regulation are both foreseeable and likely. A July 24, 2006 Telecom Policy Report, citing research released by the Phoenix Center for Advanced Legal & Economics Policy Studies, included these observations:

While network-neutrality regulation would materially impact broadband deployment generally, such regulation could disproportionately and negatively impact broadband deployment by a sizeable amount in areas that are, on average, high-cost areas (such as rural markets) - at a magnitude of at least six times the impact relative to areas with lower costs.<sup>92</sup>

Thus, the impact is likely to be felt most by those most in need of safeguarding.

[N]et-neutrality mandates could undermine efforts to expand broadband deployment and adoption by raising costs to network providers and/or limiting their ability to generate revenues by restricting certain types of payment arrangements with content providers. The impact is greater in high-cost areas because rising costs make broadband too expensive for a greater number of consumers . . . . [I]n a very real way, the burden that a network-neutrality mandate would create would be disproportionately (but not exclusively) borne on the back of rural America.<sup>93</sup>

Craig Moffett, an analyst at Sanford C. Bernstein and Co., LLC, has identified with more specificity the adverse consequences likely to be caused by network neutrality regulation:

- Mandated ‘Net Neutrality’ would further sour Wall Street’s taste for broadband infrastructure investments, making it increasingly difficult to sustain the necessary capital investments.

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<sup>91</sup> *Hearing on Wall Street Perspectives on Telecomms. Before the S. Comm. on Commerce, Sci., and Transp.*, 109th Cong. (Mar. 14, 2006) (testimony of Aryeh B. Bourkoff), available at <http://commerce.senate.gov/pdf/bourkoff-031406.pdf>.

<sup>92</sup> Telecom Policy Report, *Research Cites Net Neutrality’s “Unintended Consequences”*, July 24, 2006, available at [http://findarticles.com/p/articles/mi\\_m0PJR/is\\_29\\_4/ai\\_n16548324](http://findarticles.com/p/articles/mi_m0PJR/is_29_4/ai_n16548324).

<sup>93</sup> *Id.*

- It would also likely mean that consumers alone would be required to foot the bill for whatever future network investments that do get made. That would result in much higher end-user prices, much steeper subsidies of heavy users by occasional ones, and, in all likelihood, a much sharper ‘digital divide.’
- By discouraging the deployment of new networks, it would also likely freeze in place the status quo cable/telco duopoly (or worse in much of the country, where we are, as previously described, on a trajectory to a near cable monopoly for genuine broadband).
- The U.S. as a whole would, in all likelihood, fall further behind other countries in broadband availability and reliability.<sup>94</sup>

These conclusions have been independently reached by a wide array of economists and scholars who generally agree that net neutrality regulation would have negative unintended consequences, ranging from prohibitively expensive broadband to a decline in competition and the number of Internet providers. A study by Steve Pociask of the American Consumer Institute estimates that net neutrality regulation would cause consumers to lose nearly \$70 billion dollars in potential benefits over the next 10 years and would result in higher costs for broadband services.<sup>95</sup> Further conclusions reached in the study include:

- [R]estrictions on price, product and service differentiation would result in higher prices for lower income broadband consumers, which would result in significantly lower industry demand and revenue, deterring investments in next generation network and reducing consumer welfare.
- [N]et neutrality regulations would require consumers to pay all of the upgrade costs of the next generation Internet and prohibit voluntary commercial agreements that would lower consumer broadband prices.

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<sup>94</sup> *Hearing on Wall Street Perspectives on Telecomms. Before the S. Comm. on Commerce, Sci., and Transp.*, 109th Cong. (Mar. 14, 2006) (testimony of Craig E. Moffett), available at <http://commerce.senate.gov/pdf/moffett-031406.pdf>.

<sup>95</sup> Stephen B. Pociask, *Net Neutrality and the Effects on Consumers 2*, The American Consumer Institute (May 9, 2007), available at <http://www.theamericanconsumer.org/ACI%20NN%20Final.pdf>.

- Net Neutrality regulations would also increase the price of broadband services, because it increases the cost of the network that provides those services. Because broadband services are very price sensitive, just a \$5 increase in price could lead to a 15% drop in total broadband subscribership and a 60% decline in demand for lower-income, price sensitive consumers.<sup>96</sup>

Consistent with an earlier FCC finding, the Pociask study concludes that “Internet regulations would harm consumers” and “would impede investment, reduce broadband demand and raise consumer prices.”<sup>97</sup> According to Pociask, “[N]et neutrality is not, by all accounts, about helping consumers.”<sup>98</sup> Litan & Singer reached the same conclusion regarding higher prices to consumers:

For at least two reasons, we believe that New Neutrality legislation would *increase* the price of broadband access, and thereby decrease broadband penetration in the United States. First, the cost per customer of an unmanaged network would be prohibitively expensive. . . . These costs would be passed on to consumers in the form of higher broadband access prices. Second, access providers could use incremental revenue from content providers to partially subsidize the price of access for end-users.<sup>99</sup>

Economic analysis of the issue preformed by Benjamin E. Hermalin and Michael L. Katz at the Haas School of Business, UC Berkley led to this conclusion:

We have formally modeled the effects of product-line restrictions such as those sought by some proponents of network neutrality regulation. For the case of a monopoly service provider, we find that a single-product restriction results in: a) consumers who would otherwise have consumed a low-quality variant being excluded from the market; b) consumers “in the middle” of the market consuming a higher and more efficient quality; and c) consumers at the top of the market consuming a lower and less efficient quality. . . . [C]onsumers at the bottom of the market – the ones that a single-product restriction is typically intended to aid – are almost always harmed by the restriction.<sup>100</sup>

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Litan & Singer, *supra* note 16, at 31.

<sup>100</sup> Benjamin E. Hermalin & Michael L. Katz, Paper CPC06’059, *The Economics of Product-*

Hermalin and Katz further concluded that single-product restriction always reduces welfare in a duopoly analysis: “Absent the restriction, the two firms engage in head-to-head competition across full product lines . . . . [T]he resulting loss of competition harms both consumers and economic efficiency.”<sup>101</sup> Finally, Hermalin and Katz conclude that “to the extent the regulation is intended to eliminate low-quality products, it may fail.”<sup>102</sup>

Small Business & Entrepreneurship Council President and CEO Karen Kerrigan and Chief Economist Raymond J. Keating noted in a May 2007 paper the following comments from a July 2006 debate on net neutrality hosted by the Progress & Freedom Foundation:<sup>103</sup>

- Thomas M. Lenard, PFF Senior Fellow and Senior Vice President, observed: “First, broadband is a very young, rapidly changing business. It is unclear what viable business models will look like as the industry evolves. Second, the rollout of broadband in its various forms entails hundreds of billions of dollars of investment capital . . . . The question is whether you want to impose common carrier type regulation - which is what a net neutrality requirement would do – on a young industry, which would severely inhibit the development of business models, with potentially very serious consequences for the incentives to invest in broadband infrastructure.”
- Echoing such concerns, Adam Thierer, Senior Fellow and the Director of PFF's Center for Digital Media Freedom, declared: “So, again, I'm not sure what structures, which business arrangements, which architectural configurations or platform policies are going to be best in the future. All I know is that I want to see the sort of experimentation that is necessary to figure the answer out to that question. Network neutrality regulation would likely prohibit us from getting there. It would prohibit us from witnessing that sort of marketplace innovation experimentation, especially with pricing policies, because it is, at core, the forced commoditization of broadband.”

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*Line Restrictions With an Application to the Network Neutrality Debate* 35-36, Inst. of Bus. & Econ. Research, Competition Policy Center (2006).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Karen Kerrigan & Raymond J. Keating, *Telecommunications Policy Choices & Entrepreneurs* 9-10, Small Business & Entrepreneurship Council (May 2007).

- Finally, David Farber, Distinguished Career Professor of Computer Science and Public Policy at the School of Computer Science at Carnegie Mellon University and former Chief Technologist for the Federal Communications Commission, neatly summed up concerns many have with government getting involved in such matters: “Giving government the opportunity to muck in this arena frightens me, especially the passing of laws which, at least from my perspective as a technologist, are incredibly hazy, and every time hazy laws are passed, there's an opening for, quite often, mischief.”

In effect, what is being advanced by the proponents of network neutrality regulation is the commoditization of the Internet to the detriment of its users: “[E]fforts to ‘commoditize’ broadband networks, intentional or otherwise, in the name of ‘Network Neutrality’ may, in fact, increase industry concentration, plausibly rendering monopoly. If entry is discouraged, then our analysis shows (under the conditions assumed) that consumers are unambiguously worse off.”<sup>104</sup>

Importantly, the likely harms that so many envision are not insignificant or trivial, rather they can threaten the very core the inventive impetus that makes the Internet so dynamic and valuable to society: “. . . Network neutrality proposals risk significant consumer and social welfare harm because of the loss in efficiency by preventing network owners from making investments that would reduce network costs by improving the management of their broadband Internet access networks. Our review of publicly available shows that if IP video services increase in popularity, the cost of providing a residential subscriber a ‘stupid’ network capable of addressing those bandwidth demands could reach \$300 to \$400 per month more than an ‘intelligent network.’”<sup>105</sup>

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<sup>104</sup> George S, Ford, Thomas M. Koutsy, & Lawrence J. Spiwak, *Network Neutrality and Industry Structure*, 29 HASTINGS COMM’NS & ENTM’T L.J. 149, 167 (2007).

<sup>105</sup> George S, Ford, Thomas M. Koutsy, & Lawrence J. Spiwak, *The Efficiency Risk of Network Neutrality Rules* 16, Policy Bulletin No. 16, Phoenix Center (May 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=925347#PaperDownload](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925347#PaperDownload).

