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

In the Matter of	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191
Broadband Industry Practices	)	WC Docket No. 07-52
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TO: THE COMMISSION

Comments of National Religious Broadcasters Regarding
Notice of Proposed Rulemaking on Preserving the Open Internet

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SUMMARY AND INTRODUCTION

National Religious Broadcasters (NRB) is a non-profit association that exists to keep the doors of electronic, broadcast, and digital media open and accessible for the communication of the Christian Gospel. Our membership primarily consists of Christian radio and television broadcasters that produce and/or telecast religious programming, but also includes a wide range of other ministry organizations that engage in communications activities. In 2007, NRB conducted a comprehensive survey of the general Christian radio and television market as a follow up to a prior 2005 survey. The results indicate the extensive use that Christian communications organizations make of the Internet:

- 94% of all Christian radio and television stations had websites;
- 66% of all Christian radio stations streamed programming on the web, and more than 1/3 of those who weren't, planned on doing so by 2008;
- 42 % of Christian television stations streamed programming on the web, and 42% of those who weren't, planned on doing so by 2008;
- 65% of all Christian radio and television stations used the web to promote their programming, and 60% of non-commercial Christian broadcasters used the Internet for the generation of donations;
- As of 2005, 80% of Christian radio broadcasters were using DSL or T1 for their data lines.

Thus, NRB and Christian broadcasters generally have a huge stake in this pending Notice of Proposed Rulemaking (NPRM) which proposes a broad, complex approach to regulation of the Internet.

This NPRM has several failings which can be summarized as follows:

This proceeding rushes ahead while the D.C. Circuit Court of Appeals is considering the legal basis for F.C.C. action in the Comcast case; the Court ruling in that case could well undermine or substantially impact this entire NPRM, as that case has issues similar to this proceeding, and in fact the Commission cites the Comcast dispute as a significant part of the background behind its decision to pursue this rule-making. The Comcast litigation, if it results in a decision that the Commission lacked the authority to have policed the Internet in the way that it did, would render this entire proceeding moot. The best case scenario from the Commission's standpoint is that the Court will merely uphold the F.C.C. rules that were applied in the Comcast case, but that would still not resolve the problems with this proceeding, as the Commission concedes that exercise of authority in Comcast was narrow and "modest;" by comparison, this NPRM is broad and stunningly complex.

Second, the Supreme Court, in the *Brand X Internet Service* case did not resolve the Commission's authority to regulate the Internet in a comprehensive way, because in that case the parties conceded the Commission's authority and no party argued that point.

Third, this proceeding is not supported by an adequate evidentiary, factual record regarding the existence of problems in the Internet that require a regulatory solution, a prerequisite for rule-making.

Fourth, while this NPRM is filled with page after page of complicated considerations regarding "network management" considerations, it contains only the merest whisper about protecting the freedom of web-users to generate or access content without content-or-viewpoint based discrimination from ISP's or other gatekeepers, a critical free speech consideration which is the focus of NRB's greatest concern.

Fifth, critical terms like “reasonable network management,” and “harm,” concepts which could be used by ISP’s as a justification to stifle the free speech rights of citizens, are ambiguous and not adequately defined in this NPRM.

Sixth, the Commission has suggested not employing a First Amendment paradigm that would have given some protection to content users against arbitrary censorship by ISP’s.

Seventh, this NPRM has not been preceded by any comprehensive study of the Internet. Such a study should be done as a pre-condition before regulation, and as a result this attempted regulation is based merely on speculation regarding future problems that *may* arise in the use of the web.

Eighth, NRB notes some examples of potential acts of content/viewpoint discrimination by a large web access provider; that lends support for NRB’s recommendation that this proceeding be stayed until an adequate study of Internet discrimination is undertaken.

Ninth, the Commission asks for comment about the free speech rights of ISP’s and other gatekeepers and how those rights might be balanced against the interests of the public in a free and open Internet. However, that issue involves complex constitutional questions of commercial free speech rights of companies versus the free expression rights of citizens, a novel issue that can hardly be resolved without a more extensive factual record.

We urge the F.C.C. to commission a study of the Internet that will research the prevalence and types of content/viewpoint discrimination being perpetrated currently by ISP’s and other web gatekeepers, and which will generate research on the conditions that

would increase or decrease the potential for that occurring, and which would also yield recommendations for non-governmental alternatives to prevent or minimize such discrimination, short of the complex and far-reaching federal regulations suggested by the current Notice of Proposed Rulemaking. We urge the Commission to stay this proceeding until such a study can be conducted and the results publicly disseminated.

I. DISCUSSION

A. Legal Standards Counsel the F.C.C. to Heed NRB's Advice and Stay Further Proceedings Pending a Comprehensive Study of Discrimination, and Particularly Viewpoint Discrimination on the Internet

1. The Affect of the Pending Comcast Appeal

NRB strongly suggests that the Commission halt its current NPRM until such time as it can complete a comprehensive review of the prevalence and quantity of instances of Internet content discrimination by ISP's. This suggestion is bolstered by the legal uncertainty created by the pending case of *Comcast v. F.C.C.*, Appeal No. 08-1291 (D.C. Cir.).

At the core of that appeal is the following question, according to the attorneys for the F.C.C.:

> The threshold question in this case is whether the FCC has authority to examine Comcast's Internet-blocking practices and to require disclosure of those practices and verification of their cessation. Logically, the Court must answer the question whether the agency had the authority before it addresses whether the agency wielded such authority lawfully, which is Comcast's lead argument.

Brief for Respondents, F.C.C. and the United States of America, Comcast v. F.C.C., Appeal No. 08-1291 (D.C. Cir.) (hereinafter, "FCC Brief"), page 25. It is clear, as conceded by the F.C.C. that Comcast has advanced the argument in that appeal "that the Commission lacked authority to investigate Comcast's practice of blocking peer-to-peer applications and ensure its cessation." Id., page 27. "Comcast nevertheless claims that the Commission is powerless to exercise its jurisdiction to protect the Internet, which is arguably the most important innovation in communications in a generation." Id., page 30.

With the question of the Commission's authority to regulate the Internet front and center in the Comcast appeal, prudence would indicate that the Commission should take this time to await the decision from the D.C. Court of Appeals before proceeding further in this rulemaking, particularly considering the stunning breadth and scope of the NPRM here. In the subject NPRM, this agency has listed the Comcast investigation and ruling as an important part of the history leading up to this proceeding. *In the Matter of Preserving the Open Internet*, Notice of Proposed Rulemaking (hereinafter "*Internet NPRM*") §§ 36. & 37. If the Court of Appeals were to rule against the F.C.C. regarding its authority in the Comcast case it would throw this entire NPRM into a 'cocked hat.'

Yet, even if the Court were to rule in favor of the Commission on the jurisdiction issue in the Comcast litigation, that would not answer the considerable jurisdictional issues that would remain in this NPRM. As the Commission's counsel have written regarding the agency's exercise of ancillary jurisdiction in the Comcast ruling, "[h]ere, the Commission's exercise of ancillary jurisdiction was extremely modest … the Commission only required that Comcast disclose what it had been doing and verify that it

had discontinued the practice. The Court should reject the efforts of Comcast's intervenors and amici to inflate the case far beyond its actual boundaries." FCC Brief, page 35.

Thus, the Commission considers the Comcast ruling to be a "modest" and narrow administrative matter. If we were to place the Comcast dispute into an elementary school analogy, we might say that the F.C.C. contends that it merely required Comcast to write an "apology" on the blackboard. By contrast to that, however, this NPRM would then represent a complicated proposal for regulations that would govern the use of every blackboard in America. There are complex legal questions that attend this proceeding and not just those that go to the Commission's authority to impose network management regulations on the Internet. This agency has recognized the quagmire of First Amendment issues that accompany this proceeding, such as the "state actor" rule which would under the Commission's view render Free Speech guarantees inapplicable to the web, as well as the issue of "strict scrutiny" as a reviewing standard for allegations of content discrimination which the Commission rejects. *Internet NPRM*, §§ 75, 76, & 77.

In view of these legal uncertainties, we urge the Commission to follow NRB's suggestion, and stay these proceedings until a definitive, jurisdictionally sound factual record can be built through an exhaustive study, regarding the need for this staggering regulatory proposal.

2. <u>The Brand X Decision Does Not Legitimize This NPRM</u>

In the Comcast appeal, the Commission has placed great reliance on the decision of the Supreme Court in *NCTA v. Brand X Internet Services*, 545 U.S. 407 (2005) for,

among other things, its authority to have issued the Comcast ruling. *FCC Brief*, pages 4, 5, 6, 19, 20, 31 & 33. We presume that the Commission would advance a similar argument as the basis for its authority for this proceeding, if challenged, along with the Communications Act of 1934 as amended. But we don't think that Brand X resolves the issue of whether this proceeding and a resulting Internet order exceeds the Commission's authority.

The issue in Brand X was the propriety of the F.C.C.'s ruling that "cable companies that sell broadband Internet service do not provide 'telecommunications service[e]' as the Communications Act defines that term, and hence are exempt from mandatory common-carrier regulation under Title II." *Brand X Internet Services*, 545 U.S. at 974. Yet as the Supreme Court recognized, the issue of the F.C.C's jurisdiction to issue its order in that case was uncontested. " … the Commission issued the order under review in the exercise of that authority; and no one questions that the order is within the Commission's jurisdiction." *Brand X Internet Services, supra* at 981.

Thus, *Brand X* is not good legal support for this NPRM. Unlike that case, in this proceeding the Commission cannot and should not presume that its jurisdiction to issue this NPRM and any resulting order will go unchallenged. Just the opposite is true, given the cantankerous background of public debate surrounding the so-called "fifth principle" of the Commission's Internet regulations, a notion popularly referred to as "net neutrality." See: *Internet NPRM*, §§ 103-105 (discussing the fifth principle).

3. <u>Speculation Leads To Questionable Regulation</u>

The Commission may not conduct a proceeding in such a way as to create regulations that "hav[e] no relationship to the underlying problem." *Sinclair v. F.C.C.*,

284 F. 2d 148, 162 (D.C. Cir. 2002). That implies of course that the Commission has sufficiently investigated and isolated "the underlying problem." We would respectfully suggest that it has not been done here. As Commissioner Baker has written in this proceeding, " … I am not convinced that there is a sufficient record to establish that a problem exists that should be addressed by Commission rules." *Internet NPRM*, Statement of Commissioner Meredith A. Baker, Concurring in Part, Dissenting in Part. See also: Statement of Commissioner Robert McDowell, Concurring in Part, Dissenting in Part. " …the Commission cannot escape the requirements that its action not 'run[] counter to the evidence before it." *Sinclair*, 284 F.2d at 162. That presumes that the Commission has accumulated a sufficient record of evidence to show the existence of a problem and provide a basis for regulatory choices that are made. There must be a "rational connection between the facts found [by an agency] and the choices made." *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

The record thus far in this proceeding is scant. Regarding the "need" for the Commission's proposed Internet approach, the NPRM cites a meager slice of evidence, primarily that relating to the Comcast dispute. *Internet NPRM*, § 50. While admittedly, this NPRM may glean additional anecdotal accounts of Internet practices that support, or oppose the Commission's proposals, that is a poor substitute for a rigorous, Internet-wide study of the instances of content/viewpoint-based discrimination, a phenomena, which, if substantiated, would indicate a wholesale challenge to free speech, freedom of religion and freedom of the press, and therefore should be the *most urgent area* of focus for this NPRM. On the other hand, if the evidence from such a study were to show a *lack* of prevalence of that kind of discrimination, then we are left simply with the Comcast type

situation, where market and technology decisions are made by ISP's regarding the mechanics of the web, and the potential damaging impact of some Internet uses on the uses of its other customers. The latter scenario is simply Comcast II, and we would have to question, if that were the extent of the problem, why the previous Commission rules are not adequate.

Instead, the F.C.C. should slim down this proceeding to a first order inquiry regarding the prevalence of content/viewpoint discrimination against users by ISP's and other Internet gatekeepers. To address that first order question, a rigorous scientifically valid study should first be done. This is an incremental approach. But then, "[n]othing prohibits federal agencies from moving in an incremental manner." *F.C.C. v. Fox Television Stations,* 556 U.S. ___ (2009) (slip op. at page 19).

B. The Current NPRM Is Heavy on Network Management Considerations and Light on Free Speech Considerations

Our review of this NPRM indicates that it contains an overwhelming predominance regarding network management techniques on the web, and expresses the overriding mission of "preserv[ing] the openness of the Internet" by providing "greater clarity" and "greater predictability" in the Federal Communications Commission (F.C.C.) rules. *Internet NPRM*, § 6.

The F.C.C. in this proceeding proposes a codification of four previously applied rules dealing with consumers' right to (1) access lawful web content of their choice, (2) run applications and use services of their choice, (3) enjoy connections within the Internet of their choice, and, (4) competition among network providers, application and service providers and content providers. *Internet NPRM*, § 5. All of these would be subject to a

standard of "reasonable network management" that would permit ISP's to "reasonab[ly]" block or inhibit content that would cause congestion or diminish quality of service, or that is "harmful" or "unwanted by users" or is "unlawful." *Internet NPRM*, § 135. A fifth principle of "non-discrimination" is also proposed, requiring all ISP's to "treat lawful content, applications, and services in a nondiscriminatory manner," *Internet NPRM*, § 16, but which also is subject to the right of ISP's to impose their own practices as long as they comply with "reasonable network management" rules. *Internet NPRM*, § 110.

Unfortunately, those rules, despite a lengthy NPRM document, have not been adequately defined. NRB's concern is with the first-order issue of freedom of Internet users to use, generate, access, or transfer otherwise lawful content on the web without ISP's or other gatekeepers committing content or viewpoint-based discrimination. Yet only a few scant, limited references are made in this NPRM regarding this issue.

In setting forth the right of ISP's and other gatekeepers to impose "reasonable network management" practices in very broad and ambiguous terms, the Commission would facilitate the very types of content discrimination that it says it wants to prevent. In essence, the exceptions would end up swallowing the rule. Granted, in a single paragraph (*Internet NPRM*, § 137) the Commission does note that "the singling out of any particular content (*i.e.*, viewpoint) for blocking or deprioritazation" would <u>not</u> "be reasonable, in the absence of evidence that such traffic or content was harmful." Yet the NPRM does not define "harmful" in that context other than listing two very vague examples: "congestion" and "quality of service concerns." If a web access gatekeeper has either of these very general concerns, according to the Commission's perspective, they could "limit bandwidth", engage in "limiting usage" or applying varying subscription rates, and

could prioritize or deprioritize different classes of uses of the Internet, obviously with detrimental (and in some cases censorious) results to the user.

The Commission further erodes the free speech rights of web content users by refusing to apply a familiar First Amendment paradigm as a pre-condition before ISP's and gatekeepers could discriminate (i.e. the two prong requirements of a "critically important interest" and "narrowly or carefully tailor[ing]" their network management practices "to serve that interest"). *Internet NPRM*, § 137.

This NPRM is lacking any foundational research on the prevalence or types of content/viewpoint discrimination being perpetrated currently (if any) by ISP's and other web gatekeepers, nor does it reference research on the conditions that would increase or decrease the potential for that occurring. We urge the Commission to stay this proceeding until such a study can be first conducted and the results publicly disseminated.

There are anecdotal suggestions, however, that as an example, Christian content has suffered from attempts by Internet gatekeepers to discriminate against it. [1] For this reason we believe the F.C.C. should sponsor a thorough study of the issue of content/viewpoint discrimination, which, if it exists in a widespread basis, would be a major fundamental constitutional and civil liberties threat.

[1] The Christian Institute in England filed a lawsuit alleging that Google discriminated against its ability to post a Christian-oriented, pro-life advertisement on Google. http://www.dailymail.co.uk/news/article-558177/Christian-group-sues-Google-search-engine-refuses-anti-abortion-adverts.html. The lawsuit was later settled. And in another instance, a Massachusetts pro-family website alleged that Google blocked its content on pretexual grounds, (i.e. contending that the action was taken because the site contained "malware") when in fact the website operators claim that the action was taken because of its content which opposes the homosexual movement. Pete Chagnon, "Accusation: Google targets, blocks pro-family website again," *Onenewsnow.com*, July 15, 2009.

Likewise, the lack of Internet discrimination research also poses a problem with our ability to adequately respond to the question raised by the Commission at *Internet NPRM*, §116, namely: whether the rules proposed by the F.C.C. would burden the free speech interests of ISP's or other web access providers. As intimated by the Commission's framing of that question, such rights should be balanced in some way against the "speech-enabling benefits of an open Internet" (i.e. the rights of citizen users). But this area of constitutional law is fraught with unresolved complexities. Without a factual study of the instances of content discrimination currently occurring, such a balancing act would be a fruitless endeavor. The Supreme Court has noted that rights to "commercial speech" (a category that would undoubtedly apply to ISP's and web access providers) are entitled to *lesser protection* than other forms of expression (e.g. the rights of private citizens in such things as political or religious expression); although this position has been criticized. *U.S. Dept. of Agriculture v. United Foods, Inc*., 533 U.S. 405 (2001). Without a factual overview of current discriminatory practices occurring over the Internet, this complicated constitutional question cannot be adequately addressed in the context of the Internet.

C. The NPRM Has Failed to Articulate any Consideration of Alternatives to Federalized Control of the Internet

At the December 15, 2009, Washington D.C., F.C.C. Workshop on Speech, Democratic Engagement and the Open Internet, Commissioner Robert McDowell aptly pointed out the differences in consequences between federal action and private sector action. When private industry gets "it wrong" he noted, the market is usually not systemically impaired; a free market has the flexibility to adjust to such missteps.

However, when the federal government attempts to co-opt supervision of an entire communications platform (here the Internet), if it "gets it wrong," the negative consequences can be market-wide and catastrophic.

We do not see any attempt thus far for the Commission to consider alternatives to federal regulation as a solution to discriminatory conduct by ISP's and access providers in the Internet. Nor do we see any request by the Commission for suggestions on how the various component providers and users of the web could use non-regulatory means to police, and enforce non-discrimination standards. We could envision, as an example, quasi-judicial forms of relief being offered to offended users, or mediation models being employed. However, unless and until a factual record of current Internet practices is established by the Commission, to pursue remedies or solutions before the problem has been identified and analyzed is an exercise in futility and a waste of administrative economy.

The Commission has engaged in an audacious regulatory journey. But while audacity is sometimes rewarded in the private sector, it is often the hallmark of dangerous over-federalization when the government attempts it. We applaud the Commission's goal of desiring to keep the Internet "open" and robust. NRB's mission is to make sure that platforms like the Internet stay open and accessible to Christian content. However, before any true "open Internet" proceeding can be attempted by rulemaking, an adequate evidentiary record must be made, and that critical first step appears to be absent in this proceeding.

II. CONCLUSION

For the foregoing reasons, we urge the F.C.C. to commission a study of the Internet that will research the prevalence and types of content/viewpoint discrimination being perpetrated currently by ISP's and other web gatekeepers; a study that will generate research on the types of conditions that increase or decrease the potential for that kind of such discrimination to occur, and which would also yield recommendations for non-governmental alternatives to prevent or minimize such discrimination, short of the complex and far-reaching federal regulations suggested by the current Notice of Proposed Rulemaking. We urge the Commission to stay this proceeding until such a study can be conducted and the results publicly disseminated.

Dated this 13th day of January, 2010

Respectfully submitted,

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