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

In re: Broadband Industry Practices	)	
	)	WT Docket Nos.
and	)	
	)	07-52
In the Matter of the Petition of	)	
	)	and
Public Knowledge *et al.*	)	
	)	08-7
for Declaratory Ruling Stating that Text Messaging and Short Codes are Title II Services or are Title I Services Subject to Section 202 Nondiscrimination Rules	)	

COMMENTS

OF

THE AMERICAN CIVIL LIBERTIES UNION ("ACLU"),

THE TECHNOLOGY AND LIBERY PROJECT OF THE ACLU,

AND

THE ACLU OF NORTHERN CALIFORNIA

BY

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SUMMARY

The ACLU, Technology and Liberty Project of the ACLU, and ACLU of Northern California support the underlying petitions and urge the Commission to find in favor of Petitioners by upholding concepts of accessibility and non-discrimination in the provision of text messaging and short code services and in the delivery of broadband services.

COMMENTS OF THE ACLU, TECHNOLOGY AND LIBERTY PROJECT OF THE ACLU, AND ACLU OF NORTHERN CALIFORNIA

The ACLU, Technology and Liberty Project of the ACLU, and the ACLU of Northern California have been principal participants in nearly all of the Internet censorship and neutrality cases that have been decided by the United States Supreme Court in the past two decades, including *Reno v. ACLU*,[1] *Ashcroft v. ACLU*,[2] *Ashcroft v. Free Speech Coalition*,[3] and the *Brand X* decision, in which the Court held that cable companies providing broadband Internet access were "information service providers" for purposes of regulation by the FCC under the Communications Act.[4] The ACLU of Northern California and its Technology and Civil Liberties staff have been leaders on preserving Internet neutrality at both the national and state level. Our recent work has included advocacy for net neutrality, safeguarding unimpeded internet access at public libraries, and protecting the free speech, freedom of association and privacy of users of California's growing number of municipal wireless (Wi-Fi) networks.[5]

The underlying Petitions are not just about a simple dispute between an ISP (Comcast) and service provider (BitTorrent) or about the ability of a text messaging provider (Verizon Wireless) to censor the political speech of an advocacy organization (NARAL Pro-Choice America), but about the future of the Internet as a marketplace of

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[1] 521 U.S. 844 (1997) (striking down the Communications Decency Act and holding that the government cannot engage in blanket censorship in cyberspace).

[2] 542 U.S. 656 (2004) (upholding a preliminary injunction of the Child Online Protection Act, which imposed unconstitutionally overbroad restrictions on adult access to protected speech).

[3] 535 U.S. 234 (2002) (striking down restrictions on so-called "virtual child pornography"). The ACLU's amicus brief is available at 2001 WL 740913 (June 28, 2001).

[4] *See National Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967 (2005). The ACLU's amicus brief is available at 2005 WL 470933 (Feb. 22, 2005).

[5] For more information, please visit http://www.aclunc.org/issues/technology/index.shtml.

ideas for all users. Specifically, the Petitions raise the broader question of whether the Internet is to be preserved as a bastion for the exchange of lawful content and ideas free of censorship by corporate gatekeepers. These principles are embodied in the Commission's own "Four Freedoms" established in its 2005 policy statement, including user "access to the lawful Internet content of their choice" and running "applications and services of their choice."[6] We commend the Commission for that statement, which recognized the need to preserve neutrality rules in place prior to the 2005 *Brand X* decision. We further applaud the initiative of the Chairman and other members of the Commission for holding public hearings on the importance of preserving Internet freedom and neutrality. Nevertheless, corporate service providers increasingly are trampling on those Four Freedoms through actions like Comcast's deliberate blocking of online file-sharing through BitTorrent and the refusal by Verizon Wireless to allow text messaging by NARAL Pro-Choice America. The growing body of content-based discrimination demonstrates that the threat to Internet freedom has never been greater.

Congress and the courts have recognized how an open Internet facilitates speech and associational activities. Unlike other media, "the Internet has no 'gatekeepers' – no publishers or editors controlling the distribution of information."[7] It provides "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[8] Equally important, "[i]t enables people to communicate with one another with unprecedented speed and efficiency and is rapidly

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[6] *See* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260435A1.pdf.

[7] *Blumenthal*, 992 F. Supp. 44, 48 n.7 (D.D.C. 1998) at 48 n.7.

[8] 47 U.S.C. § 230(a)(1)(3).

revolutionizing how people share and receive information."[9] No one "owns" the Internet. Instead, the Internet belongs to everyone who uses it. The combination of these distinctive attributes allows the Internet to provide "a vast platform from which to address and hear from a worldwide audience of millions."[10]

Neutrality promotes open discourse. The Internet's openness enhances speech through its decentralized, neutral, nondiscriminatory "pipe" that automatically carries data from origin to destination without interference. Consumers decide what sites to access, among millions of choices, and "pull" information from those sites rather than having information chosen by others "pushed" out to them, as with television and other media in which the content is chosen by the broadcaster.

The Internet's structure facilitates free speech, innovation, and competition on a global scale. "The Internet presents low entry barriers to anyone who wishes to provide or distribute information. Unlike television, cable, radio, newspapers, magazines, or books, the Internet provides an opportunity for those with access to it to communicate with a worldwide audience at little cost."[11] "Such broad access to the public carries with it the potential to influence thought and opinion on a grand scale."[12] The Internet has thus become one of the leading marketplaces of ideas because of neutrality rules that promote nondiscriminatory speech, association, and content.

Content discrimination by service providers such as Comcast and Verizon Wireless threatens the online free exchange of ideas. At the end of 2007, Comcast

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[9] *Blumenthal v. Drudge*, 992 F. Supp..at 48.

[10] *Reno v. ACLU*, 521 U.S. at 853.

[11] *American Library Ass'n v. United States*, 201 F. Supp.2d 401, 416 (E.D. Pa. 2002), *rev'd on other grounds*, 539 U.S. 194 (2003).

[12] *Oja v. United States Army Corps of Eng'rs*, 440 F.3d 1122, 1129 (9th Cir. 2006).

engaged in "traffic shaping," which can be an appropriate and even necessary way of managing data flows over the Internet. However, Comcast went further by blocking file transfers from customers using popular peer-to-peer networks such as BitTorrent, eDonkey, and Gnutella.[13] To prevent the successful transmission of materials, Comcast delivered messages to users involved in file-sharing that forced them to terminate the transmission. It succeeded in its attempts by using hacking technology to pose as a party involved in the file-sharing process, contrary to company statements that it "[respects its] customers' privacy."[14] Comcast's online discrimination is contrary to the FCC's Internet Policy Statement, which provides that "consumers are entitled to access the lawful Internet content of their choice" and "are entitled to run applications and use services of their choice, subject to the needs of law enforcement."[15]

In late 2007, Verizon Wireless similarly committed an egregious act of discrimination by cutting off NARAL Pro-Choice America's access to a text-messaging program that the right-to-choose group uses to communicate messages to its supporters. Verizon Wireless stated it would not service programs from any group "that seeks to promote an agenda or distribute content that, in its discretion, may be seen as controversial or unsavory to any of our users."[16] Verizon claimed that it had the right to ban NARAL's messages because current laws that prohibit carriers from blocking voice transmissions do not apply to text messages. In addition, Verizon argued that the

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[13] Peer-to-peer technology allows customers to share files on their personal computers with other Internet users. Comcast's actions were confirmed by nationwide tests conducted by the Associated Press.

[14] Comcast, http://www.comcast.com/customers/faq/FaqDetails.ashx?ID=4391.

[15] Complaint at 10, Hart v. Comcast, PG 07355993 (Cal. Super. Ct., Alameda County, Nov. 13, 2007), *available at* http://www.digitalmusicnews.com/legal_docs/comcast_bittorrent.

[16] Adam Liptak, *Verizon Blocks Messages of Abortion Rights Group*, N.Y. TIMES, Sept. 27, 2007, http://www.nytimes.com/2007/09/27/us/27verizon.html?_r=1&oref=login.

Communications Act, which requires that commercial cellular providers must be nondiscriminatory for commercial mobile services, does not apply to non-traditional uses of phone services such as text-messaging.

In both cases, the service providers later reversed course after being ravaged by widespread negative publicity. Verizon Wireless claimed the company's initial resistance to NARAL's messages was merely "an incorrect interpretation of a dusty internal policy" that was implemented before text messaging technology could ensure that customers would not receive unwanted messages.[17] Recently, Comcast and BitTorrent announced a side agreement they described as a collaborative effort to jointly manage Internet traffic.[18] While the reversal of these intentionally discriminatory policies is a positive development, it does not alter the need for relief in the underlying Petitions.

BitTorrent is but one of an infinite number of present and future applications to make use of the Internet. The fact that Comcast has reached an agreement with this particular company provides no guarantee that other application developers, innovators, and speakers will be able to reach an accommodation with their providers. It certainly does not ensure that such innovators will be able to communicate with Internet users on a fair and equal basis with other, potentially more powerful, competitors. If and when some innovators create an improved alternative to BitTorrent, will they be able to compete with BitTorrent based on the value of their product alone, or will they be

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[17] Adam Liptak, *Verizon Reverses Itself on Abortion Message*, N.Y TIMES, Sept. 27, 2007, http://www.nytimes.com/2007/09/27/business/27cnd-verizon.html?_r=1&oref=slogin.

[18] Vish Kumar, *Comcast, BitTorrent to Work Together on Network Traffic*, WALL ST. J., Mar. 27, 2008, at B7.

hamstrung unless and until they can swing their own deal with Comcast? In such negotiations, what leverage would they possess to overcome what might be a tight corporate relationship between their ISP and a powerful incumbent whom they are trying to challenge? What if their main product is speech, advancing a point of view that the provider or a key corporate or political ally despises?

A situation in which content and applications developers – speakers making use of their First Amendment rights – are forced to negotiate with and strike deals with network operators is precisely the situation that the FCC should seek to avoid, and that a genuine network neutrality policy would avert. A city might award a company a charter to build a bridge across a river and give the company the right to collect a toll. But it would not be conducive to efficient commerce or the public interest in general to allow that company to meddle or interfere with the people or goods that cross the bridge, thereby forcing businesses and individuals to strike individual bargains with the bridge keeper. Such a scheme could permit a farmer with inferior produce to gain an advantage in the marketplace because he has gained favor with the bridge keeper and can bring his vegetables across more cheaply. The same holds true in the case of Internet connectivity, and "the marketplace of ideas." The Internet is too valuable a public conduit to allow it to fall prey either to ideology or to parochial business interests.

Comcast claims that its interference with Internet traffic was conducted only for network management purposes. However, it is significant that the application that Comcast appears to have intended to target most of all, BitTorrent, is one used most commonly for the distribution of video – an activity that has long been Comcast's core business in its role as cable television operator (as opposed to Internet Service Provider).

Comcast and other companies appear to want to position themselves as providers of video services over the Internet. But the problem for such providers is that, on a free Internet, the producers of video or other content can distribute that content directly to individuals – perhaps using a protocol such as BitTorrent – thereby cutting the provider out of the deal entirely. Comcast, in short, may have a strong interest outside of network traffic management in obstructing BitTorrent.

Whether or not such interests were at work in the Comcast-BitTorrent case or will come into play at a later date, the fact is that providers have: (1) strong business incentives to interfere with content, and; (2) the technical ability to do so. Should Comcast decide to refrain from pursuing any revenue-producing strategies for exploiting its technological control over Internet traffic, it would not long be able to maintain that stance if its competitors do not. This is a clear case in which the government needs to step in and declare: "Competition that depends upon discrimination is not conducive to the public good; it has too great a distorting effect on other markets and on the marketplace of ideas. We're declaring it off limits."

Some have implied that the Comcast-BitTorrent agreement has proven that, after all, the free market has worked, and that the agreement shows that government action is not needed.[19] But there is a glaring flaw in that argument: the Comcast-BitTorrent agreement was hardly the product of fair business bargaining in a free market. Standing behind BitTorrent Inc. at the table and tipping the scales in its favor was an assortment of factors that cannot be routinely relied upon to produce fair outcomes in the future: (1) the full glare of the media spotlight; (2) a number of public-interest groups including the

[19] *An Alternative to 'Net Neutrality,'* editorial, WALL ST. J., April 12, 2008, at A8.

ACLU; (3) a highly engaged segment of the educated public; (4) a powerful government regulator debating the wisdom of intervening; and (5) a looming presidential election in which several candidates have expressed support for such regulation. In the absence of these factors, it is far from clear what kind of leverage or power BitTorrent Inc. would have had to extract concessions from Comcast, much less what kind of leverage other, smaller, parties would have in a future negotiation. It is only because this battle is live that this deal was struck in the way it was. Once the issue is settled, the power will swing decisively to the side of the providers.

Internet access is not just any business; it involves the sacred role of making available to citizens a First Amendment forum for speech and self-expression and access to the speech and self-expression of others. It is a forum that is perhaps the most valuable new civic institution to appear in the United States in the past century. There is a vital public interest in assuring that Internet access remains free and unencumbered by the kind of tomfoolery that Comcast exhibited with its attempt to sabotage particular uses of the bandwidth that it sells.

CONCLUSION

The ACLU, the Technology and Liberty Project of the ACLU, and the ACLU of Northern California endorse the requests in the underlying Petitions for the FCC to act immediately and apply the anti-discrimination provisions of Title II of the Communications Act – as well as the Commission's "Four Freedoms" policy – to conclude that discrimination is prohibited in providing text messaging and short code services and in the delivery of broadband services. We also support the Petitioners' alternative request to exercise ancillary jurisdiction to apply the nondiscrimination

provisions of Title II to these services to ensure a robust and open communications infrastructure. Regardless of the mechanism used in evaluating the Petitions, the resulting regulatory framework should establish an accessible, non-discriminatory, and content-neutral regimen, provide for meaningful enforcement available to all users of text messaging, short code, and broadband services, and uphold the concepts of neutrality, non-discrimination, equality of access, and non-exclusivity in the provision of those services. We urge the Commission to act favorably on the underlying Petitions, which seek a result consistent with these principles.