



Comments of AT&T on the AGCOM Public Consultation on Net Neutrality

3 May 2011

Introduction

AT&T Global Network Services Italia S.p.A (“AT&T”) respectfully submits these comments on AGCOM Public Consultation Paper on Net Neutrality (the “Consultation Paper”).

Operating globally under the AT&T brand, AT&T’s parent, AT&T Inc., through its affiliates, is a worldwide provider of Internet Protocol (IP)-based communications services to businesses and a leading U.S. provider of wireless, high speed Internet access, local and long distance voice, and directory publishing and advertising services, and a growing provider of IPTV entertainment offerings. AT&T Inc. operates one of the world's most advanced global networks, carrying more than 23.7 petabytes of total IP and data traffic to 300 million people and more than 1 billion devices on an average business day, the equivalent of a 3.7 megabyte music download for every man, woman and child on the planet. With operations in countries that cover 97% of the world’s economy, AT&T Inc. has extensive experience as an incumbent and a new entrant, as a fixed line operator and a mobile operator, and in the dynamic areas of converged technologies and services.

In Italy and other EU Member States, AT&T Inc., through its affiliates, is a competitive provider of business connectivity and managed network services and is a leading provider of bilateral connectivity services linking Italy and all other EU Member States with the United States.

AT&T appreciates the opportunity to express its views in this consultation on Net Neutrality. AT&T hopes that its responses will be helpful to the Authority in formulating a comprehensive strategy for the sustainable development of the Information Society within Italy, and among Italy and the globally interconnected Internet networks, allowing market participants to invest in the infrastructures and services which will benefit both consumers and businesses.

Summary

AT&T supports the goal of an open Internet, which means an Internet ecosystem that enables users to exchange ideas and communicate freely, gives them freedom to access the lawful applications and content they wish to use, and affords them the ability to choose and assemble packages of services and equipment that meet their needs.

Prior decisions by governments to avoid unnecessary regulation of the Internet are validated every day by the spectacular growth of the Internet and its remarkable contribution to culture, political discourse, and economic development throughout the world. The Internet has evolved from being a network that provided only file downloads and remote access to distant academic or government computers to being a vibrant global commercial network that now provides countless different services to millions of content and applications providers and billions of users.

The Internet has become the most powerful communications medium and engine for economic growth in our time precisely because governments have wisely allowed market forces to shape its evolution free from prescriptive regulation that would have locked in place certain specific technologies or business models. Further dynamic advances are likely to occur in response to future technological change and consumer demand. Indeed, the Internet's next 40 years are likely to be just as dynamic as the past 40 years. To avoid limiting the future growth and development of the Internet, unless actual problems and harms are specifically demonstrated, Internet regulation should remain limited to protecting the basic customer freedoms associated with openness and customer value under which the Internet has always operated.

In particular, maintaining an open Internet does not require the implementation of new, prescriptive network neutrality rules that would restrict traffic management. With the new powers attributed to the National Regulators by the EU Directive *on Universal Service and Users' Rights relating to Electronic Communications Networks*,¹ potential problems can be solved readily by the National Regulatory Authorities in the event that any market failure actually does appear.

¹ Directive 2009/136/EC of the European Parliament and of the Council, 25 Nov. 2009.

Thus, any discriminatory conduct by firms with significant market power is likely to be closely scrutinized to ensure there are no anticompetitive effects. Certainly, there is no evidence of any such general market failure brought on by a dominant participant abusing its market power, nor has there been evidence of an anticompetitive practice by an individual actor that has not been resolved quickly through the application of existing regulatory measures and procedures.

There is also no basis to the claims made by some that Internet traffic management or prioritization practices now threaten the historic “neutrality” of the Internet and therefore require new prescriptive regulation. In fact, traffic management and other network practices to ensure quality of service for particular Internet applications and content have been widely used for many years without controversy. In addition, the rapid convergence of all electronic communications onto the IP platform and growing network demands will make the continued use of these traffic management practices increasingly important to consumers in the future to ensure their economic access to the content and information services they desire. That is especially the case for users of mobile broadband services, since mobile operators must rely heavily on the use of network management techniques to avert or respond to network failures or congestion of scarce spectrum and to allow customer use of latency-sensitive applications.

Arguments that regulators should now restrict traffic management and service differentiation by ISPs fail to take account of the longstanding non-controversial use of these practices by operators throughout the world. The adoption of such policies would create significant costs and practical difficulties for operators subject to these requirements and would undermine Italy’s most pressing objectives for the digital economy: expanding deployment of more capable broadband facilities and fostering investment in related technologies and services.

Substantial new investment is needed to support the unprecedented growth of Internet traffic and the increasing demands of its changing traffic mix and to extend broadband networks to increase the availability of broadband services. Most importantly, to fund these investments, and to expand broadband adoption, all network providers need to be able to price their services in manners that are attractive and affordable to consumers. Reliance on the expansion of facilities alone to meet Internet traffic growth would require significant additional construction leading inevitably to the need for consumer price increases that

would reduce broadband adoption, even if it was possible for network operators to avoid the use of traffic management techniques simply by building additional facilities.

With the continued growth of bandwidth-intensive services, and the increasingly large and unpredictable spikes in Internet traffic, the construction of new facilities will not be sufficient by itself to maintain economic service capability and quality. Consequently, ISPs must place increasing reliance on traffic management practices to maintain services. Any restriction on the use of these practices would limit the speed and functionality of Internet services overall and reduce the utility and value of the Internet for all users. In the newly adopted European Commission (EC) Communication “The Open Internet and net neutrality in Europe,” the EC recognizes that “*it is widely accepted that network operators need to adopt some traffic management practices to ensure an efficient use of their networks and that certain IP services, such as for instance real-time IPTV and video conferencing, may require special traffic management to ensure a predefined high quality of service*”²

For these and the further reasons set forth in these Comments, AT&T urges the Authority to avoid the prescriptive regulation of traffic management. Instead, the role of regulators in these circumstances should be to monitor the market to see whether real problems are developing. As the Organisation for Economic Co-operation and Development (OECD) and numerous economists have observed, the imposition of new regulation based on speculation of future harm is premature and potentially damaging.³ Similarly, as Vice President Neelie Kroes noted at the ARCEP Conference in Paris on April 13, 2010, “we should avoid taking unnecessary measures that may hinder new efficient business models from emerging.”⁴ If any corrective action is needed, AT&T believes that such action should be informed on a case-by-case basis by the specifically-identified problems.

² European Commission, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *The Open Internet and Net Neutrality in Europe*, Apr. 19, 2011 (“European Commission Communication on the Open Internet and Net Neutrality in Europe”), at 3.

³ Organisation for Economic Co-operation and Development, *Internet Traffic Prioritisation: An overview*, at 5 (Apr. 6, 2007), available at <http://www.oecd.org/dataoecd/43/63/38405781.pdf> (concluding that it would be “premature for governments to become involved at the level of network-to-network traffic exchange and demand neutral packet treatment for content providers”).

⁴ See EUROPA Press Releases, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/153&format=HTML&aged=0&language=EN&guiLanguage=en>.

AT&T supports the use of consumer-focused principles requiring ISPs to furnish end-users with the ability to send and receive the legal content of their choice, use the services and run the applications of their choice, and connect the hardware and use the programs of their choice, provided they do not harm the network. These are similar to the principles adopted by the EU Institutions in 2009 and by the U.S. Federal Communications Commission (FCC) in 2005.⁵ AT&T also supports an additional principle to encourage greater transparency for consumers regarding operators' network management practices.

This approach would preserve the openness of the Internet, while maintaining incentives for broadband providers to make the massive investments necessary to increase broadband deployment. It also would encourage those providers to invest in the next-generation "smart" managed networks that are needed to support the innumerable new and varied Internet applications that will enrich our daily lives, as well as make us healthier, safer, more energy efficient, and more prosperous.

AT&T responds to the questions asked by the Consultation Paper as follows:

- 1. What are the technological and commercial profiles that, in perspective, will become important in the evolution of the data service sector both for wireless and fixed? Will such profiles influence the market strategies created by the different subjects working in the sector, ISPs and content providers? And in which way? How will those profiles influence consumers' data service consumption?***

All existing evidence indicates that congestion problems in the networks comprising the Internet are likely to continue for the foreseeable future. Even during this economic downturn, Internet traffic continues to grow at a tremendous rate. A recent report by Cisco notes that global IP traffic will quadruple from 2009 to 2014.⁶ The nature of Internet traffic is changing as well, with the fast-increasing usage of bandwidth-intensive applications like streaming video placing greatly increasing burdens on underlying networks. For example,

⁵ See FCC, Policy Statement, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14986 (2005) ("Internet Policy Statement"), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf.

⁶ Cisco Visual Networking Index: Forecast and Methodology, 2009-2014, available at http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-481360_ns827_Networking_Solutions_White_Paper.html.

Cisco expects video to account for over 90% of global consumer traffic and 66% of the world's mobile data traffic by 2014.⁷ The European Commission reports that "[a]ccording to some traffic projections, traffic is set to increase by 35% year on year for fixed networks and by 107% year on year for mobile."⁸

Increased investment is a critical element in responding to these unprecedented and increasing demands on the capacity of Internet access and backbone networks. Continued massive investment in fibre, wireless, and other network infrastructure is necessary to increase the bandwidth and Internet functionality available to consumers, even though competition and the unpredictability of consumer demand often make these investments exceptionally risky for the companies that underwrite them. While these risky, capital-intensive capacity upgrades are necessary steps that any network provider must take to keep pace with escalating bandwidth demands, alone they are insufficient steps to address these challenges.

As the attached Engineering Background explains (at pp. 11-12), operators cannot economically enlarge network capacity to ensure instantaneous delivery of all packets at all times, particularly with the escalating magnitude of unpredictable spikes in Internet traffic.⁹ Any reliance solely on increased investment to meet escalating Internet usage would greatly increase network costs and in turn require huge increases in user prices. Even if there were no economic constraint on network expansion, experience has shown that network usage, particularly in the form of peer-to-peer file transfer applications, inevitably expands rapidly to fill new capacity and user behavior is difficult to predict in advance. Consequently, network operators cannot simply construct higher-capacity facilities, but must also use greater network intelligence, including the ability to identify and provide the appropriate

⁷ One minute of video requires 10 times the bandwidth as voice. Kleeman, Michael, "Point of Disconnect," University of California, San Diego, August 30, 2007, *available at* <http://cpe.ucsd.edu/assets/013/6535.pdf>

⁸ European Commission Communication on the Open Internet and Net Neutrality in Europe, at 3

⁹ Like conventional telephone networks, IP networks are sized to handle demand during periods of peak usage. The closer that peak usage is to average usage, the more efficient the network's cost structure will be, and the more predictably the network operator can recover those costs from the users of its network. According to some estimates, however, video applications roughly double the "peak-to-mean" ratio of traffic on IP networks because of the "viral" (self-intensifying) nature of popular video files.

level of performance required by different applications traversing the network, to ensure that users can receive the service quality they desire.

As described below, Internet providers have made longstanding use of traffic management practices to ensure quality of service for their users. With increasing network congestion, Internet providers will be required to place even greater reliance on traffic management techniques in the future to manage competing demands on finite bandwidth. Internet providers will be required to place even greater reliance on traffic management techniques in the future as the rapid convergence of all electronic communications onto the IP platform allowing the integration of voice, video and text into new multi-media applications for consumers raises the critical engineering challenge of making applications with different quality of service needs function as well as possible over a shared and increasingly challenged network infrastructure.

2. What types of data services and what kinds of traffic management are particularly important within the debate on net neutrality? What is the likely impact that the increasing spreading of traffic management's forms, either for technical reasons or the blocking of applications for commercial reasons, will have on the principle of net neutrality? Which factors contribute to the definition of net neutrality?

The speculation at the root of the current “net neutrality” debate rests on deeply flawed premises, including that the Internet has always been an inherently neutral collection of “dumb pipes” that cannot distinguish among packets based on their associated applications or content, and that new tools allowing operators to prioritize particular data now threaten the Internet’s supposed historic “neutrality.”

As described in these comments and in the attached Engineering Background, each of these premises is mistaken, and the strict “non discrimination” requirements proposed by net neutrality advocates to address this purported “threat” are not only unnecessary, but would have severe adverse effects on broadband providers and consumers, by prohibiting longstanding network management practices, inhibiting the provision of widely used applications and services, increasing consumer rates, and limiting further deployment and adoption of the broadband services that are increasingly important to all countries’ future growth and prosperity.

The Internet has never been merely a collection of “dumb pipes” and has never been “neutral” in its treatment of different applications and content. Rather, content providers with capital resources have long purchased specialized network services in order to distinguish their traffic from other Internet traffic and to offer their end users far better Internet experiences than would be possible without those quality-of-service enhancements.

Nearly three decades ago, the Internet Engineering Task Force (IETF) – the Internet’s standard-setting organization – first included a “type of service” field within the Internet Protocol to enable prioritization of real-time and other performance-sensitive applications.¹⁰ The IETF expanded upon that capability in 1994 and 1998 by creating the — differentiated service code point — field (DSCP or —DiffServ), and it has now incorporated an even more advanced version of this capability into IPv6.¹¹ Net neutrality advocates that contend that no Internet packets should be provided with any transmission quality superior to that given every other packet – regardless of whether this extra quality derives from guaranteed bandwidth or reduced packet loss, latency or jitter – are, in effect, trying to re-write the open, IETF-approved standards that have made the Internet such a tremendous success.

Broadband providers have long sold prioritized capabilities to enterprise customers, including content providers, to ensure proper handling of performance-sensitive Internet and other content through a broadband provider’s network. Such services can make use of packet-prioritization techniques on several protocol layers, including DiffServ on the IP layer and analogous mechanisms on other layers, such as the ATM, Ethernet, and MPLS protocols. Broadband providers use the same basic types of service-differentiation technologies in the residential market to guarantee quality of service for performance-sensitive IP applications and content, such as IPTV and VoIP, that are offered to consumers over the same physical infrastructure as best effort Internet access.

In addition to these longstanding prioritization techniques, application and content providers with the capital resources to purchase services from third-party CDNs such as Akamai or Limelight – or to build CDNs of their own, as Google and other large content providers have done – enjoy huge performance advantages over rivals without those resources. Traffic shaping, CDNs and traffic prioritization are all forms of Internet traffic

¹⁰ See Information Sciences Institute, *Internet Protocol DARPA Internet Program Protocol Specification, RFC 791*, at 11 (Sept. 1981), available at <http://www.ietf.org/rfc/rfc0791.txt>.

¹¹ See generally, James F. Kurose & Keith W. Ross, *Computer Networking: A Top-Down Approach* 367 (5th ed. 2010).

management and demonstrate that the use of such practices is not a new feature of the Internet economy.

The increased importance of traffic management: As described above in response to Question 1, in today's environment of increasing network congestion, Internet providers have a critical need to use the various traffic management techniques and technologies available to manage competing demands on finite bandwidth. The use of these techniques to maintain service quality over congested networks provides ISPs with a greater ability to maximize the efficiencies of future investment in additional network capacity.

To prohibit all differential treatment, as some net neutrality advocates propose, would not only greatly increase network costs and user prices, as noted above, but would also prevent different services, applications, and content from obtaining the quality of service they need to function efficiently and effectively. Imposing this form of "neutrality" on the Internet would have decidedly non-neutral results by discriminating *against* quality of service-sensitive applications like streaming video and VoIP that may not function reliably unless they are accompanied by quality of service enhancements that non-performance sensitive applications do not need in order to continue to function well. Likewise, requiring that all data streams must receive equal treatment regardless of their application or content would force all application and content providers to design their applications and content using the same transport protocol – so that, for example, UDP-based applications that lack the ability to automatically "self-throttle" when faced with congestion do not arrogate network resources from TCP-based applications that can "self-throttle."¹²

¹² UDP applications "send out data as fast as [they] can," even when they encounter congestion, "while [conventional] TCP-friendly applications deliberately send fewer and fewer packets" and may thus end up "starved of network resources." Jon M. Peha, *The Benefits and Risks of Mandating Network Neutrality, and the Quest for a Balanced Policy*, 1 Int'l J. of Comm'n 644, 651 (2007), available at <http://www.ijoc.org/ojs/index.php/ijoc/article/viewFile/154/90>. Nonetheless, when properly managed, UDP's attributes can be beneficial for a range of purposes, including Domain Name System (DNS) queries. By the same token, some applications that use TCP can and do aggressively consume disproportionate amounts of subscriber bandwidth simply by opening up multiple streams (or "torrents," as featured in some P2P technologies) to seize capacity for themselves. See, e.g., Bob Briscoe, *Flow Rate fairness: Dismantling a Religion*, 37 Computer Comm'n Rev. 63 (2007), available at http://www.cs.ucl.ac.uk/staff/bbriscoe/projects/2020comms/refb/fair_ccr.pdf ("Flow Rate Fairness"). Under a requirement to provide "equal treatment" of all Internet communications, the disparate characteristics of these and other transport protocols would need to be homogenized to ensure that no packets receive priority over others.

AT&T strongly disputes claims that the prioritization of packets associated with some content or applications necessarily “degrades” the performance of all other non-prioritized content and applications. Network engineers have been prioritizing real-time and other performance-sensitive applications for years and have developed sophisticated algorithms to ensure proper handling of all traffic. As noted above, this practice has been followed because it is far more cost-efficient to prioritize applications that need prioritization than to construct massively overbuilt networks and pass the unnecessary costs through to consumers.

This longstanding practice of handling IP packets differently, depending on the performance-sensitivity of their associated applications, is not a “zero-sum game” in any meaningful sense of that term. Some applications are highly performance-sensitive and thus need quality of service enhancements to function optimally, and accommodating those application-specific needs will not materially impair the performance of other, less latency-sensitive applications.

In the United States, large, medium, and small providers alike have built IP-based, double- and triple-play platforms that are shared between prioritized IP traffic (IPTV and/or VoIP) and unprioritized, best-effort Internet traffic.¹³ As AT&T’s own experience has shown, differentiation among these service categories gives consumers a high-quality, high-value experience for *all* of these services.¹⁴ The best-effort Internet access service that AT&T offers today, over the shared U-verse platform, is far faster and more robust than it was just a few years ago when it was provided over a legacy DSL network that was *not* shared with managed IPTV and VoIP services. Indeed, the introduction of advanced services generally enhances the quality and capacity of best efforts traffic because the advanced services use on average only a small fraction of increased capacity installed for these services

¹³ These providers range from AT&T, which provides IPTV services to millions of consumers over its shared U-verse platform, to mid-sized provider Surewest to more than *two hundred* rural telephone companies. See National Exchange Carrier Association, *Trends 2009: A report on rural telecom technology*, at 11 (2009) (“NECA Trends 2009 Report”), <https://www.neca.org/cms400min/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=2392> And, all of the major US cable companies offer managed VoIP services over the same shared facilities as their broadband Internet access services.

¹⁴ See AT&T, Press Release, *AT&T Wins Frost & Sullivan 2009 Market Leadership Award in Dedicated Internet Access Service*, Mar. 11, 2010, <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=30631>; AT&T, Press Release, *AT&T Wins Frost & Sullivan 2009 Video Company of the Year Award*, Mar. 11, 2010, <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=30629>.

and router queuing algorithms ensure that the unused incremental bandwidth is available for use by best-efforts traffic.

Mobile broadband networks: The imposition of traffic management restrictions on mobile broadband services would cause significant difficulties to mobile network operations. Mobile operators must contend with mobility, spectrum constraints, interference, and other unique issues in a dynamic environment that is changing even more rapidly than its wireline counterpart. While it is impossible to predict which business models and engineering solutions will best meet consumers' diverse needs in this environment, subjecting the mobile industry to restrictions on network management would preclude many service-enhancing business arrangements and practices altogether, undermine efforts to manage scarce spectrum resources, chill sensitive engineering and business decisions through endless regulatory second-guessing, and deter investment in new network technologies.

While all broadband networks share the need for traffic management, given the ever rising demand for and proliferation of new quality-sensitive, bandwidth-intensive applications, mobile broadband networks also must contend with spectrum constraints, a shared "last mile" radio access network, interference sensitivity, and other concerns that make it far more challenging to provide mobile broadband than fixed wireline broadband. Capacity and quality-of-service challenges for wireless broadband providers are particularly acute in the "last mile" radio access network, where spectrum is shared among both users and cell sites; bandwidth can fluctuate based on weather, interference and other issues; the number of users located in particular cells and their dispersion within those cells at any given time is variable; and the spectrum available for use is not infinitely (or even readily) expandable.

These factors make it exceedingly difficult for carriers to ensure a constant supply of sufficient bandwidth to provide high-quality data transmission for broadband Internet access customers. Providers therefore use a range of dynamic network-management techniques to respond to or avert network failures or severe congestion and to ensure that customers can enjoy latency sensitive applications.

3. *What are the most relevant objectives and instruments, as defined in the European Regulatory framework, for the purpose of regulation, where appropriate, for the relationship between forms of traffic management, commercial techniques and commercial net neutrality? What kind of traffic management can be considered reasonable?*

AT&T believes that the existing EU regulatory framework, together with competition law enforcement, is fully capable of addressing any issues arising from Internet traffic management. Importantly, incentives to engage in exclusionary conduct in connection with traffic management are likely to exist only where a dominant participant is able to abuse its market power. In competitive markets, where consumers may respond to attempted exclusionary conduct by switching to rival operators, market forces prevent any harm to competition or consumers. Since any discriminatory conduct by dominant firms is very likely to be closely scrutinized under existing regulatory and competition law procedures, there is no reason to impose new blanket restrictions on traffic management to address such concerns.

In addition, under the EU regulatory framework, any attempt to regulate traffic management would first have to demonstrate that the market fulfils the “three criteria” test to be susceptible to ex ante regulation.¹⁵ The European Parliament and the Council underscored the importance of this threshold requirement in the November 2009 telecom package, which noted that “[c]onsidering that the markets for electronic communications have shown strong competitive dynamics in recent years, it is essential that ex-ante regulatory obligations only be imposed where there is no sustainable competition.”¹⁶

To AT&T’s knowledge, there have been no significant problems linked to net neutrality, either in Italy or other European Union Member States or in the United States, and certainly none that have not been quickly resolved. In the United States, the FCC has found it necessary to take action only twice: first, to stop Madison River Communications, a small

¹⁵ The three cumulative criteria for ex ante regulation are: high and non-transitory barriers to market entry; the market displays characteristics such that it will not tend towards effective competition over time; and insufficiency of ex post application of competition law alone. See Commission Recommendation of 17 December 2007 on Relevant Product and Service Markets, Art. 2, 2007/879/EC.

¹⁶ Directive 2009/140/EC of the European Parliament and of the Council, 25 Nov. 2009, at L337/37.

rural local exchange carrier, from unreasonably blocking the use of certain VoIP services by its customers; and second, to prevent the cable service provider, Comcast, from using a particular congestion management capability to unreasonably interfere with certain peer-to-peer applications used by its customers.¹⁷

In both instances, FCC actions directly targeted the specific practices in question and led to the voluntary resolution of both cases rapidly and effectively.¹⁸ In fact, in the case of Madison River, the FCC quickly reached a consent decree with Madison River without the need for protracted investigation. In the case of Comcast, the FCC adopted a declaratory ruling that ultimately validated the changes that Comcast had already voluntarily made to its congestion management capability. Thus, the FCC's oversight of industry adherence to the principles embodied in the *Internet Policy Statement* it adopted in 2005 has ensured compliance with those principles and fostered an open Internet.¹⁹ AT&T accordingly supports an approach based on the consumer-focused principles adopted by the FCC in 2005, in addition to encouraging greater consumer-oriented transparency regarding network management practices.

In various proceedings, regulators have taken the position that regulatory measures on net neutrality are not necessary at this time or have adopted more restrained measures than those initially proposed. In the UK, Ofcom emphasized in a Consultation Paper issued in June 2010 that “[w]e believe that there is insufficient evidence at present to justify the setting of blanket restrictions on all forms of traffic management.”²⁰ The European Commission

¹⁷ See FCC Memorandum and Order, *Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd. 13028 (2008); Order, *Madison River Commc'ns, LLC*, 20 FCC Rcd. 4295 (2005).

¹⁸ Although an appellate court subsequently found that the FCC had not identified an appropriate jurisdictional basis for its actions in the Comcast matter, Comcast has not suggested that it would reinstate the network management practices it used prior to the FCC's review of those practices.

¹⁹ See Policy Statement, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14986 (2005) (“*Internet Policy Statement*”), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf

²⁰ Ofcom, Traffic Management and ‘net neutrality,’ 24 June, 2010 (“Ofcom Consultation Paper”), Sects. 1.11 & 4.54. UK Communications Minister Ed Vaizey stated in November 2010 that the initial responses to the consultation “reinforce the view that there is no need for intervention. There is broad agreement on the need for traffic management; and there is broad agreement that there is not yet evidence of any impact either on competition or consumers from traffic management.” Ed Vaizey, Minister for Culture, Communications and Creative Industries, FT World Telecoms

stated in November 2010 at the close of its consultation on net neutrality that “[t]he consultation did not reveal a widespread call for further EU legislation[.]”²¹ Similarly, Japan’s regulator, the MIC, has encouraged providers to develop voluntary guidelines for traffic management, noting that “bandwidth control [packet shaping] is recognized as an appropriate method” to ensure quality of service for Internet users.²²

In December 2010, the FCC adopted an order focusing on the following requirements: (i) the need for transparency, no blocking, and no *unreasonable* discrimination; (ii) allowing for reasonable network management; (iii) exempting from the rules managed or specialized services (*e.g.*, IP-based services that are provided over the same networks as broadband Internet access service, such as IPTV or Enterprise VPNs); and importantly (iv) applying a lighter set of obligations to mobile broadband Internet access services, due to the quickly evolving wireless technology platform and its more substantial bandwidth constraints.²³ The FCC’s measures are more moderate than those originally proposed, but remain controversial in the U.S. and the subject of continuing uncertainty regarding how they will be applied, and whether they will survive legal challenges in the U.S. appellate courts concerning the FCC’s statutory authority to adopt these rules, in addition to legislative challenges in the U.S. Congress. This process may take several years to complete.

While the ultimate resolution of the net neutrality debate in the U.S. is still unclear, many regulators across the globe are emphasizing the importance of avoiding new regulation without a demonstrated market failure, particularly in the evolving areas of wireless Internet access and specialized services such as IPTV and enterprise VPNs, allowing reasonable

Conference 2010, London, November 2010, <http://www.bis.gov.uk/news/speeches/ed-vaisey-open-internet>.

²¹ Europa, Press Release, *Digital Agenda: Consultation Reveals Near Consensus on Importance of Preserving the Open Internet*, Nov. 9, 2010, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1482&format=HTML&aged=0&language=EN&guiLanguage=en>.

²² Ministry of Internal Affairs and Communications, *Report on Network Neutrality, Working Group on Network Neutrality* (Sept. 20, 2007), available at http://www.soumu.go.jp/main_sosiki/joho_tsusin/eng/pdf/070900_1.pdf.

²³ FCC, *Preserving the Open Internet*, GN Dkt. No. 09-191, Report and Order, FCC 10-201, (rel. Dec. 23, 2010).

network management practices, and providing transparency for consumers regarding network management practices without jeopardizing security or commercially sensitive information.

- 4. In the framework of the rules aimed at protecting consumers and, in particular, those protecting transparency of the economical and technical conditions of the services offered; what are the other relevant elements, apart from the current rules, available on the market that contribute to the full knowledge of the end user of the characteristics of the data services both for wireless and fix? What are or which could be the relevant technical modalities to inform users even in real time, when forms of traffic management are happening and, in general, the modalities and the minimum informative channels ensuring end-users transparent information in relation to data services?***

Transparent disclosures of the terms and conditions applicable to a customer's service create the conditions for genuine competition because they enable consumers to make educated choices based on real differences among service providers. Under this principle, a broadband network operator should inform consumers, at an appropriate level of detail, about any material restrictions or limitations on their broadband Internet service so that they can make informed choices about which providers and service plans best meet their needs.

To make such choices, consumers need to know what they can do with the service they purchase, how much of it they can use, what applications they can run, and what quality they can expect. Such information should therefore include maximum and minimum connection speeds (where applicable), usage limits, and a general description of how traffic management practices may affect the user experience.

Thus, customers should receive information on how traffic management practices may affect the user experience. Such information would both assist consumers in choosing between Internet providers and allay any misplaced concerns about the effects of those practices on Internet services. Transparency can address any concerns about openness and competition in the Internet while empowering consumers and businesses to make choices according to their individual preferences. Such transparency requirements, moreover, should apply to all actors in the Internet value chain.

However, there is no reason to require providers to disclose the technical and often highly proprietary details of their particular network-management techniques that may assist

their broadband competitors or third parties who may seek to evade those techniques to the detriment of the network and consumers. Otherwise, network engineers would face the impossible challenge of having to decide each time they employ a new management technique whether its prior disclosure would be required, and whether such disclosure would, or would not, create critical infrastructure vulnerabilities. Such disclosures also would be highly impractical because of the need for constant updates. Network management practices may change on a monthly, weekly, or even an hourly basis as the Internet ecosystem evolves and new congestion challenges and security threats emerge.

AT&T also believes that quality of service requirements should rarely, if ever, be necessary in competitive markets where multiple operators compete vigorously based on their quality of service, in addition to price, service features, and the various other factors that customers may consider in making their choice of provider. Operators in these markets that fail to provide the service quality their customers expect risk losing business to operators that meet or exceed those expectations. AT&T particularly questions the relevance of such quality of service requirements for business services supplied to multi-national corporations, which routinely require service level agreements from their suppliers ensuring the provision of their required service quality.

Mandated standards may also fail to recognize that some network users may desire service quality *below* current “best effort” handling if it is offered at a commensurately lower price (sometimes referred to as “scavenger” class). For example, in the machine-to-machine (M2M) context, some devices and applications may be highly tolerant of latency but may also need very low cost network connectivity to be economically viable. Minimum service quality requirements may have the unintended consequence of preventing these devices and applications from entering the market.

5. *What are the potential competition's concerns arising from the spread of new forms of traffic management? Are the rules to protect transparency of economical and technical conditions of the services offered sufficient to prevent the implementation of anti-competitive conduct in the markets for data services? Where regulation to protect competition is proved to be necessary, which would be the tools policy makers should use to regulate?*
6. *What are the structural elements that characterize the ecosystem of the network that may be relevant, if potential competition problems and specific market circumstances make an intervention of the policy makers to protect competition appropriate? Which factors affect prices and quantities produced by data services, as well as by the ability to innovate and incentives to invest by the various stakeholders? How is the relationship between economic growth and net neutrality and what is the impact of the Internet economy on the development of the society?*

As described above in response to Question 3, notwithstanding the huge growth in Internet usage and massive global increase in Internet traffic in recent years, there is no evidence that unregulated traffic management has in fact led to any anticompetitive or discriminatory practice that has not been fully and swiftly addressed through the application of existing regulatory measures and procedures. Thus, any structural concern with the market performance is speculative rather than fact-driven, and as long as this is the situation, AT&T believes that regulators should refrain from prescriptive regulation intended to resolve *potential* future problems.

Such regulation could limit or prohibit longstanding network management practices, inhibit the provision of widely used applications and services, increase consumer prices due to mandated inefficient network design and management, and thus reduce the deployment and adoption of the broadband services that are increasingly important to all countries' future growth and prosperity. Accordingly, rather than take such action based on speculation that a market failure *might* arise someday in the future, regulators should require adherence to consumer focused principles and should take further action only if real problems in fact arise.

As described in response to Question 2 and in the attached Engineering Background, network practices that ensure quality of service for particular Internet applications and content have proliferated for years without controversy – and the Internet has never been healthier, more functional or more open. For example, just in the last few years, new social networking applications and multimedia sites have exploded in popularity:

- The video giant YouTube did not even exist in January 2005, but now delivers nearly 10.5 billion videos each month in the United States, and has recently begun offering high-definition video with a resolution of 1080p.²⁴
- The social networking site Facebook, which was created in 2003 and was confined to college campuses until 2005, now claims over 500 million users.²⁵
- Twitter, which did not exist in 2005, is now the third most-used social network, with 55 million monthly visits.²⁶
- Amazon.com, which sold its first Kindle in late 2007, has altered the way that millions of people obtain and read books, periodicals, and blog content and has already prompted several competing services.²⁷

These content and application providers and others have changed the face of the Internet and society at large all without any impediment from broadband providers or any need for government regulation. Indeed, the Internet has succeeded largely because broadband providers invested scores of billions of dollars into broadband network infrastructure to accommodate demand for these applications. Similarly, 3G wireless broadband services have surged, and the wireless marketplace also boasts a range of wireless platforms that have spawned literally hundreds of thousands of wireless applications from third-party developers.

Today's thriving Internet marketplace also demonstrates that service differentiation provides significant competitive benefits to both consumers and businesses. Managed services provided alongside access to the open Internet, such as network operators' IPTV services today, have a positive impact on the development of the Internet access service.

²⁴ See *1080p HD Is Coming to YouTube*, YouTube Blog, Nov. 12, 2009, <http://youtubeglobal.blogspot.com/2009/11/1080p-hd-comes-to-youtube.html>

²⁵ Facebook, Press Room, Statistics, <http://www.facebook.com/press/info.php?statistics>; Douglas McIntyre, *Facebook gets funding offer from Russian private equity firm*, Daily Finance, May 23, 2009, <http://www.dailyfinance.com/2009/05/23/facebook-gets-funding-offer-fromrussian-private-equity-firm/>.

²⁶ Andy Kazeniak, *Social Networks: Facebook Take Over Top Spot, Twitter Climbs*, Compete.com, Feb. 9, 2009, <http://blog.compete.com/2009/02/09/facebook-myspace-twittersocial-network/>.

²⁷ See Mellissa J. Perenson, *Amazon Kindle Review: Igniting Interest in E-Books?*, PC World, Nov. 21, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/21/AR2007112100030.html>; BBC News, *Plastic Logic e-reader aims to challenge Kindle*, Jan. 7, 2009, <http://news.bbc.co.uk/2/hi/technology/8446959.stm>.

They are an important driver for the take-up of high-speed broadband connections and a key generator of revenues for operators, enabling the deployment of fast and very fast broadband networks.

For example, the recent extraordinary development of the mobile Internet and of compelling devices, such as the Blackberry and iPhone, has been possible thanks to the development of mobile infrastructure and technologies that were largely driven by the popularity of mobile voice telephony services. Innovation in the operators' networks carried out for their own managed services thus leads to infrastructure roll-out and bandwidth increases, fuelling innovation in Internet services and applications.

As regards future offers for pre-defined quality of service offered to third party content and online service providers, individual arrangements with third parties may exist alongside offers which are open to all interested parties. Where operators are able to enter commercial arrangements for superior quality of service at the wholesale level, this creates positive commercial incentives to offer the service to all parties to increase revenues. Any restrictions regarding the provision of managed services by network operators going beyond the application of competition law rules would significantly slow down broadband investment and take-up.

Therefore, differentiated commercial offers should be allowed in the Internet as in other areas of the economy. Quality and price differentiation in most markets and circumstances enlarges consumer choice and increases consumer welfare. There is similarly no case for *per se* banning discrimination by operators providing access to the Internet. At the same time, any anti-competitive discrimination by a market dominant undertaking should be addressed by the competent authorities, whether at the network layer or other layers of the Internet value chain. However, such agreements are likely to raise competitive concerns only where a dominant participant is able to abuse its market power.

Claims that regulators should ensure equality of treatment for smaller applications and content providers also fail to recognize that the Internet today treats various applications and content providers quite differently depending on their capital resources. Applications and content providers that can afford access to the content-delivery networks of Akamai and others, or that can build their own such networks, as Google and Microsoft have done, already enjoy substantial performance advantages over rivals that cannot afford the use of such networks. Yet, there is no suggestion that this inequality of treatment warrants a

regulatory solution. Indeed, prohibiting all such differential treatment would require the abolition of these CDNs that leverage edge networks to provide online customers with lower latency and higher quality of service than the competition.

There is also no basis to claims that operators would have an incentive to degrade best efforts Internet access in order to increase revenues obtained from managed services arrangements. Competitive market pressures prevent any such conduct, which would quickly drive customers to switch to rival operators that offered better performance. Indeed, providers have long offered quality of service enhancements to business-class customers, and no one has suggested that they have degraded bandwidth for the best-effort Internet access platform to increase the value of their prioritized services. To the contrary, best-effort Internet access speeds keep increasing year after year across the industry; broadband providers are investing billions to increase those speeds; and they are spending millions more on advertising to compete on the basis of such bandwidth.

Likewise, Internet interconnection markets are highly competitive and have brought massive reductions in transit prices to ensure that application and content providers can reach end users quickly and reliably. As described in the attached Engineering Background, Internet backbone providers use commercially-negotiated peering or transit agreements for traffic between their networks depending in part on the traffic volumes exchanged. The use of distributed interconnection between peers and transit customers using neutral Internet Exchange Points also has led transit customers to interconnect directly at these points. In fact, ISPs and content providers have many options to exchange traffic while avoiding Internet backbone transit costs including secondary peering arrangements between ISPs and paid peering arrangements between ISPs and content providers.

As noted above, some content providers have constructed huge content delivery networks (CDNs) to deliver their content to cache servers closer to ISP networks. As a result, there is intense competition for transit business among the many choices for the delivery and exchange of transit traffic, resulting in a huge reduction in transit prices from approximately \$1200 per Mbps in 1998 to less than \$12 per Mbps in 2008 and even lower levels today.²⁸

²⁸

See, e.g., http://drpeering.net/a/Ask_DrPeering/Entries/2009/4/28_Transit_Prices_Race_to_the_Bottom.html; DrPeering, Why care about Transit Pricing?, http://drpeering.net/a/Peering_vs_Transit_The_Business_Case_for_Peering.html.

7. *More generally, given the profiles related to the protection of the consumer and to the protection of the competition, what are the methods of intervention and regulation that allow protecting the principle of net freedom, namely, that free and open nature that distinguishes the Net?*
8. *What forms of intervention are deemed most appropriate and effective, without prejudice to the principles of appropriateness, necessity and proportionality of the intervention respect to the objectives pursued under the new regulatory framework?*

For the end-user to fully benefit from an open Internet environment, AT&T believes that the debate on Internet openness should not be limited to the ‘network layer’ in the Internet. Key elements for users’ unrestricted access to information, content and services are located on other layers of the Internet value chain, such as Internet search or content and service platforms. It is in these areas that complaints over alleged anti-competitive behaviour have been raised in the recent past.

Against this background, regulatory principles to ensure openness, such as competition and transparency rules, should as far as possible be applied symmetrically and equally across the players in the Internet value chain. These policies should address issues of competition, openness and consumers’ rights not only at the level of electronic communications networks and services but wherever they emerge in the Internet value chain.

AT&T believes that existing policies on Internet openness are serving consumers well in their present form and that there is no need to expand these measures. The more imminent threat to consumers and competition is inadequate competition and diversity in the search market, where one provider has an overwhelmingly dominant position. Thus, the Authority cannot protect Internet “neutrality” without considering the significant role that search engines play in influencing and limiting consumers’ access to online content, applications, and services – and online content, application and service providers’ access to consumers.

The crucial role that search engines play in determining which Web sites users will visit means they affect the free flow of information on the Internet more than any broadband Internet access provider. And one search engine in particular—Google’s—dominates that

market in selecting the winners and losers on the Internet. Google's share of the search market is between 83% and 90% worldwide for the year to Q1 2010²⁹.

Furthermore, Google is decidedly non-transparent about how it affects consumers' experience. In its own words, "opening up the code [to our search and advertising products] would not contribute to these goals [of Internet openness] and would actually hurt users. . . . Not to mention the fact that opening up these systems would allow people to 'game' our algorithms to manipulate search and ads quality rankings, reducing our quality for everyone."³⁰ Thus, by Google's own design, consumers have no basis to make any kind of informed choice when selecting their search provider, and may simply continue using Google based on habit or its preeminence in the search and online advertising markets.

In contrast, the largest broadband Internet access provider could at most theoretically foreclose access only to a small percentage of Internet users (and even then, only to those that connect to the Internet exclusively through one broadband access provider, and not those who may have a connection both at home and at work, or who use both wireline and wireless broadband Internet access).

To be clear, AT&T contends that adherence to existing Internet principles and policies as adopted by the EU, the FCC and other countries such as Japan, combined with general antitrust enforcement, are sufficient to govern all Internet-based services and applications. But no regulator rationally could regulate broadband access providers on the basis of hypothetical misconduct, when this approach would leave search providers unregulated in the face of Google's market power, its gatekeeper capabilities, and its actual demonstrated abuse of both.

Google's already widely-distributed network and data center system also gives it a significant incentive to prevent potential competitors from being able to obtain prioritization for their services. As described in the attached Engineering Background, Google has constructed a vast "overlay" content-delivery network (CDN) that enables it to out-perform its rivals in the delivery of search results to users throughout the world. While Google can obtain settlement-free peering directly with end-user broadband networks, less well-funded

²⁹ See marketshare.hitslink.com available at: <http://marketshare.hitslink.com/searchenginemarket-share.aspx?qprid=4#> statcounter.com available at: <http://gs.statcounter.com>

³⁰ See Jonathan Rosenberg, The meaning of open, Google Public Policy Blog, Dec. 21, 2009, <http://googlepublicpolicy.blogspot.com/2009/12/meaning-of-open.html>

application and content providers must purchase CDN services or rely on traditional access/aggregation and backbone services to send their traffic through potentially congested routers and links en route to other Internet users. Google thus has every interest in promoting government-enforced “network neutrality” regulations that would prohibit or limit network operators’ use of traffic management techniques that would allow competitors to match some of Google’s self-provisioned advantages.

9. How would the full implementation of the principle of net neutrality impact on the social, cultural and political life of the country? What are the general values associated with debate on net neutrality that should be taken into account to ensure the full implementation of the principle of net neutrality? In this regard, what tools can be used by the Authority?

10. What is the relationship between the different aspects of the principle of Net Neutrality and pluralism of information and, more generally, freedom of communication and of expression?

The spectacular growth of the Internet and its remarkable contribution to communication, culture, political discourse, and economic development throughout the world is the direct result of policies that have allowed the Internet to develop in the marketplace free from government regulation that would have locked in place specific technologies or business models. AT&T believes that governments and regulators should continue to apply these highly successful deregulatory policies to encourage and stimulate the further development of the Internet as network operators make investment decisions regarding the huge expansions of broadband network facilities, both fixed and mobile, that are required to meet ever-increasing consumer demands for high bandwidth services.

Information and communications technology (ICT) is already a critical driver of economic growth in both developed and developing countries. The further deployment of broadband technologies promises to multiply these benefits by leading to the creation of innovative services that are key economic drivers in themselves and also enhance the benefits of investments in other industries and institutions – such as by enabling transportation systems to run more smoothly, delivering new efficiencies to electric grids, expanding access to health care, providing new work options that allow reduced travel and

emissions, connecting students to expanded educational resources, and bringing increased effectiveness to government.

To deliver these results, governments and regulators should continue the investment-friendly policies that have brought the vast expansion of network facilities throughout the world and allowed this critically important global communications medium to flourish and benefit the global community in ways that would have been unimaginable twenty years ago. Prominent among these beneficial policies that should be maintained to achieve this goal is the need to avoid any prescriptive regulation of the Internet and associated service arrangements.

Regarding the question on freedom of expression and human rights, AT&T is committed to respect basic human rights. We believe that the freedom to access information, the freedom to communicate and the respect for personal privacy are essential to the advancement of human potential. At a most basic level, the infrastructure we build and operate is part of a global platform which enables the ability to connect and communicate. Through our services and platforms, we make it possible for our users to hold and share opinions freely, to seek out the ideas of others and to communicate their own. This exchange of information and ideas is at the very core of what we do as a company. We believe restrictions on freedom of expression using communications services and the Internet will diminish their usefulness, dampen the exchange of ideas and reduce innovation and commercial opportunities.

Although national governments have a primary role in determining and protecting basic human rights, it is increasingly important for businesses working internationally to establish a framework for their actions that potentially impact human rights. We will work with governments, industry, consumers and civil society to promote human rights around the world in areas associated with our operations. We recognize that governments can have a legitimate interest in addressing important objectives such as national security, public safety, law enforcement and preventing harm to children. We believe governments should narrowly tailor such restrictions to meet those objectives, and should base any such restrictions in transparent laws and regulations to the extent permitted by law. When faced with such restrictions, AT&T will validate the legality of the restriction under applicable law and seek to minimize any adverse impacts on our users. We will generate periodic reports regarding

our experience with such requests to the extent permitted by the law. We encourage the national governments to address human rights issues with other governments directly.

The International dimension of the Net Neutrality debate

In these comments, AT&T has already reviewed the US and EU Net Neutrality discussions. We would like also to highlight the other major international proceedings on net neutrality during the past 6 years. The purpose of these comments is to assist the Authority by highlighting what most regulators have concluded after extensive review.

The detailed facts about the importance of reasonable network management put on the record in these proceedings have helped to narrow the gap between opposing perspectives, and have made clear that there is a general consensus on acceptable network operator behavior requiring the avoidance of anti-competitive practices or any blocking of lawful content, applications and services, and the need for adequate transparency and openness concerning network management practices and their potential impact on consumers.

The major debate in these proceedings has been between those advocating the use of prescriptive regulation to mandate that network operators adhere to these behavioral norms in their provision of Internet access, and those emphasizing that competitive market forces ensure such adherence while avoiding the harmful effects to the market that likely would result from new regulation. Importantly, during these proceedings, regulators frequently have begun their analysis of net neutrality with an impression, fostered by pro-regulatory interest groups, that extreme interventionist measures are needed in order to prevent severe harm to the Internet. After learning the facts about the Internet ecosystem, however, ultimately these regulators either have adopted much more restrained measures that reflect a dynamic and competitive market, or have decided that new regulatory measures are not necessary at this time.

Canada

After an extensive proceeding, Canada has taken a light-handed approach to net neutrality oversight. In October 2009, the Canada Radio-Television and Telecommunications Commission (CRTC) issued a policy (rather than *regulation*) permitting Internet service providers to use a variety of prioritization methods, including traffic shaping and slowing

down of certain applications, as long as such practices do not result in “noticeable degradation of time-sensitive Internet traffic” or slow down other traffic “to such an extent that it amounts to blocking the content.”³¹³² The CRTC described its policy as “a principled approach that Although the policy forbids practices that are “unjustly discriminatory” or “unduly preferential,” it permits service providers to engage in a variety of prioritization practices providing they act in an impartial manner that is transparent to consumers.appropriately balances the freedom of Canadians to use the Internet for various purposes with the legitimate interests of ISPs to manage the traffic thus generated on their networks, consistent with legislation, including privacy legislation.”³³

Hong Kong

The Office of the Telecommunications Authority (OFTA) in Hong Kong also has taken a restrained approach with respect to net neutrality. In March 2009, OFTA issued a discussion paper³⁴ in which it expressed its view that net neutrality oversight should concern anti-competitive and unreasonably discriminatory conduct. OFTA noted that the competitive nature of the telecom market in Hong Kong can dilute any negative impact that would arise if an operator were to engage in discriminatory and anti-competitive actions and, moreover, that existing safeguards against the abuse of market power and discrimination are adequate to guard against such conduct. OFTA stated that “[a]s long as the ISPs adopt a fair and open method to control the flow of Internet traffic on their networks, this should be tolerated. Adopting more vigorous regulations at this stage may have unintended consequences that can stifle investment and innovation.”³⁵ As with many other regulators, OFTA has thus focused on the need for transparency, reliance on market forces, and the prevention of anti-competitive conduct, rather than the introduction of new prescriptive regulation of traffic management.

³¹ Canada Radio-television and Telecommunications Commission, *Telecom Regulatory Policy CRTC 2009-657, Review of the Internet Traffic Management Practices of Internet Service Providers*, at pars.123-27 (Oct. 21, 2009), available at <http://www.crtc.gc.ca/eng/archive/2009/2009-657.htm>.

³² *Id.* at Summary.

³³ *Id.* at Summary.

³⁴ Regulatory Affairs Advisory Committee, *RAAC Paper No. 2/2009, Network Neutrality* (Apr. 23, 2009), available at http://www.ofta.gov.hk/en/ad-comm/raac/paper/raac02_2009.pdf.

³⁵ *Id.* at 20.

Japan

After a substantial multi-year study, the Japan Ministry of Internal Affairs and Communications (MIC) concluded that there is no current need for net neutrality regulation. Following a number of public consultations, draft reports, and industry panels, in September 2007 the MIC released a final report³⁶ concluding, among other things, that there is no case for imposing *ex ante* rules and that charges for bandwidth-intensive content may be determined through negotiations between Internet service providers and content providers. Notably, referencing Japan's 2004 general transition from *ex ante* to *ex post* regulations in order to ensure minimum regulatory intervention in the marketplace, the MIC stated that "it is appropriate to always bear in mind this minimal regulatory framework be also kept for IP-based networks since remarkable changes in market structure and network structure brought on by rapid innovation are further expected."³⁷ Japan's regulator did, however, encourage communications providers themselves to develop guidelines for traffic management, noting that "bandwidth control [packet shaping] is recognized as an appropriate method" to ensure quality of service for Internet users. They further stated that "to establish a broad-based consensus on bandwidth control criteria, it is advisable to seek participation from diverse parties in drawing up 'packet shaping guidelines.'"³⁸ In response, in May 2008 four telecommunications trade associations issued *voluntary* guidelines³⁹ that permit traffic shaping. These industry guidelines allow providers, subject to disclosure obligations, to impose restrictions on certain end-users and applications such as peer-to-peer (P2P) that consume disproportionate bandwidth and potentially degrade service quality for other users. Thus, the position of the Japan regulator is that the government should not prescriptively regulate the Internet, and that the industry should self-regulate through industry guidelines.

³⁶ Ministry of Internal Affairs and Communications, *Report on Network Neutrality, Working Group on Network Neutrality* (Sept. 20, 2007), available at http://www.soumu.go.jp/main_sosiki/joho_tsusin/eng/pdf/070900_1.pdf.

³⁷ *Id.* at 9

³⁸ *Id.* at 29-30.

³⁹ Japan Internet Providers Association *et al.*, *Guideline for Packet Shaping* (May 2008), available at http://www.jaipa.or.jp/other/bandwidth/guidelines_e.pdf.

United Kingdom

In the United Kingdom, the regulator Ofcom has repeatedly refused calls to interfere with Internet service providers' reasonable management of their networks. In a March 2007 Policy Statement, Ofcom explained that "...the existing market structure, the level of competition in service provision and the regulatory policy in Europe, combined with powers to address such issues under the existing regulatory framework[] will be sufficient to address issues that arise in relation to network neutrality now and in the future. . . Specifically, in a competitive market, with consumers that are well informed in relation to the activities of different ISPs and who can easily move to competing providers, competition itself can [provide] a constraint on behaviours that reduce consumer benefits."⁴⁰

The UK has consistently found that net neutrality regulation is unwarranted. In a January 2009 report,⁴¹ the UK reiterated its rejection of pre-emptive net neutrality principles in the absence of clear market failure, noting that "the Government has yet to see a case for legislation in favour of net neutrality. In consequence, unless Ofcom find[s] network operators or ISPs to have Significant Market Power [justifying] intervention on competition grounds, traffic management will not be prevented."⁴² The report concluded that without such a finding of market failure, net neutrality regulations would be imprudent because they may stifle investment. And after a nearly two-year-long assessment of the mobile sector, Ofcom announced a similar policy with respect to wireless networks, reporting that "[i]n a competitive market we expect that the degree of traffic management (if any) will be determined by consumer choice and therefore does not require regulation. We therefore believe that our promotion of competition in the mobile sector has the potential to address these concerns to a large degree."⁴³ Although Ofcom acknowledged that prioritization and even blocking may occur in the absence of regulation, it concluded that the appropriate

⁴⁰ Ofcom, *Regulation of VoIP Services: Statement and publication of statutory notifications under section 48(1) of the Communications Act 2003 modifying General Conditions 14 and 18*, at 80-81 (Mar. 29, 2007), available at

<http://stakeholders.ofcom.org.uk/binaries/consultations/voipregulation/statement/voipstatement.pdf>.

⁴¹ Department for Culture, Media, and Sport and Department for Business Entertainment & Regulatory Reform, *Digital Britain, The Interim Report* (Jan. 2009), available at http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/images/publications/digital_britain_interimreportjan09.pdf.

⁴² *Id.* at 22.

response is to require transparency concerning such practices, rather than to impose prohibitions.

In the most recent United Kingdom review in June 2010, Ofcom published a discussion paper⁴⁴ on Internet traffic management practices to determine how Ofcom's existing powers, and future enhanced authority under the amended EU rules that will be transposed into UK law this year, might be used to address traffic management concerns. Ofcom stated: "[O]ur initial position is that discriminatory behaviour is only a potential issue where firms have substantial 'market power' and could discriminate in favour of their own services[.]. In this case, any form of discrimination will come under very close scrutiny to ensure that there are no anti-competitive effects. We believe that there is insufficient evidence at present to justify the setting of blanket restrictions on all forms of traffic management."⁴⁵ Moreover, Ofcom noted that to date it has received no formal complaints of traffic management being used as a form of anti-competitive discrimination.

As shown by those examples, there is no disagreement about the central role the Internet plays in society, and the need to preserve its openness. While the ultimate resolution of the net neutrality debate in the U.S. remains unclear, many regulators across the globe are finding common ground on a balanced approach to net neutrality and preserving consumer interests, without overly distorting competition between participants in the Internet ecosystem. Indeed, many regulators have begun their analysis of net neutrality by asserting that heavily prescriptive regulation is necessary, but this has not been the typical outcome of these proceedings. Rather, the general result has been one of restraint. Regulators have emphasized the need to preserve incentives for network operators to reasonably manage and invest in their networks. Specifically, regulators have:

- Highlighted the importance of meaningful **transparency** for network management practices—*i.e.*, providing information to consumers about practices, without

⁴³ Ofcom, *Mobile Evolution: Ofcom's mobile sector assessment*, at 21 (Dec. 17, 2009), available at http://stakeholders.ofcom.org.uk/binaries/consultations/msa/statement/MSA_statement.pdf.

⁴⁴ Ofcom, *Traffic Management and 'net neutrality,' A Discussion Document* (Jun. 24, 2010), available at <http://stakeholders.ofcom.org.uk/binaries/consultations/net-neutrality/summary/netneutrality.pdf>.

⁴⁵ *Id.* at 2.

disclosing technical details that could jeopardize security or commercially sensitive information;

- Recognized that network operators have a legitimate need to utilize reasonable network management practices and that such sound conduct does not harm competition;
- Affirmed that competitive markets are the optimal consumer safeguard for and best barometer of an open Internet, and that new regulation should not be adopted absent a demonstrated market failure; and,
- Found that there are compelling reasons to apply especially “light-touch” regulation to the evolving areas of wireless Internet access, and to specialized services such as IPTV and Enterprise VPNs.

As the Authority examines net neutrality, we urge that the starting point for analysis should reflect this emerging global regulatory consensus, which supports a restrained and fact-driven approach toward the adoption of new regulation in this area.

ENGINEERING BACKGROUND

A. The Development of the Internet

The “Internet” is not a single network, but is instead a loose confederation of thousands upon thousands of networks, most of them built and operated with private risk capital, with no guaranteed returns. Without government compulsion or intervention, each of these constituent networks has voluntarily adopted a common protocol and addressing scheme—the Internet Protocol—that enables its customers to communicate with customers connected to other networks for purposes of exchanging higher-layer applications and content.¹ “The Internet,” as that term is commonly used, is a conceptual aggregation of these mostly private IP-based networks spread across the world.

The Internet Protocol and its predecessors were first formulated several decades ago by academics and consultants funded by the Advanced Research Projects Agency (“ARPA”), a subagency within the U.S. Department of Defense. The development of the Internet Protocol was (and continues to be) overseen by the Internet Engineering Task Force (“IETF”), a private entity.² For many years after its inception, the Internet was restricted to academic and governmental institutions and their consultants, and commercial transactions were strictly prohibited. In the early 1990s, the U.S. government fully “privatized” the Internet by selling key infrastructure assets, including an integral backbone network known as NSFNET, to private network operators. Since then, the Internet has developed to its current advanced state, largely unrestricted by government regulation.

B. Overview of the Internet’s Constituent IP Networks and the Blurring Distinction Among Backbone, Access, and Edge Functionalities

The intertwined private networks of the Internet are all part of an evolving global ecosystem. A given network’s role in that ecosystem is complex and dynamic, and the network may play several roles at once. Nonetheless, popular discussions of the Internet tend to classify its constituent networks into three basic categories: backbone networks; access/aggregation networks; and edge networks. Despite their name, the “edge” networks play as central a role as conventional access and backbone networks in ensuring that application and content providers can reach end users quickly and reliably.

1. Backbone Networks

In this context, the term “backbone network” denotes the highest-capacity portion of a network operator’s facilities, typically consisting of very high-speed routers and fiber-optic links stretching across large geographic areas. That backbone network serves two main functions.

¹ See Resolution of the Federal Networking Council, Oct. 24, 1995 (quoted in Barry M. Leiner *et al.*, *A Brief History of the Internet*, ISOC, <http://www.isoc.org/internet/history/brief.shtml>).

² See IETF, *The Tao of IETF: A Novice’s Guide to the Internet Engineering Task Force* (Nov. 30, 2009), <http://www.ietf.org/tao.html>.

First, it connects the various access/aggregation networks that the provider has deployed to reach its end user customers, which may range from residential households to large enterprise businesses, including Internet content and application providers. Second, each provider's backbone network interconnects with other providers' backbone networks. The conceptual accumulation of all network operators' individual backbones is sometimes referred to collectively (and somewhat misleadingly) in the singular as "the Internet backbone."

The bilateral agreements that enable traffic to travel between two different backbone networks commonly follow one of two different business models: *peering* and *transit*. The choice between these two models turns in part on the relative value that each of the two networks brings to the interconnection arrangement.

Under *peering* agreements, each network interconnects for the purpose of terminating packets sent from the other peer to end points served by the terminating peer's network. Such arrangements typically anticipate, among other things, that the traffic exchanged between the two networks will be roughly equal in volume, such that each backbone network will incur roughly the same costs in handling the traffic originated by the other network. To avoid administrative overhead, parties to these bilateral peering agreements typically forgo the mutual exchange of compensation and peer on a settlement-free basis. But in some cases, where the traffic volumes exchanged are unequal, or where one network otherwise falls short of the other's peering criteria, the parties may enter into a paid peering arrangement. Under paid peering, the networks still exchange traffic through high-capacity peering links, but the "non-compliant" network makes payments to the other network.

Under *transit* arrangements, Network X pays Network Y to arrange delivery of Network X's packets to any destination on the Internet and to accept delivery of packets destined for Network X's customers from any location on the Internet.³ Rather than exchanging traffic through peering links with Network Y, Network X typically buys a robust, enterprise-class Internet access service from Network Y, which supplies the interconnection facilities.

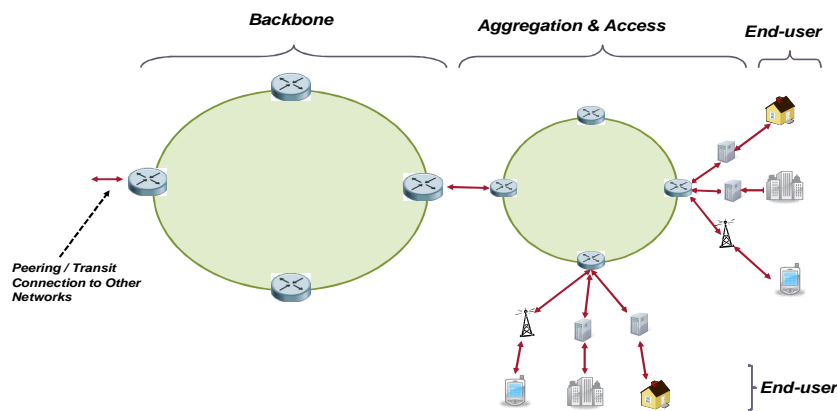
From their inception, these peering and transit relationships have been unregulated, and the market for peering and transit has functioned with great efficiency. A key reason is that the larger backbones "compete for the transit business of smaller backbones in order to increase their revenues," and this competition has driven transit prices down significantly over the last decade, from approximately \$1200/Mbps in 1998 to less than \$12/Mbps in 2008.⁴ At the same time, the growing volume of traffic on the Internet, which we discuss below, will require content and backbone providers alike to explore new technologies and business models for the cost-effective delivery of high-bandwidth and performance-sensitive content.

³ See Michael Kende, *The Digital Handshake: Connecting Internet Backbones*, FCC, Office of Plans and Policy, OPP Working Paper No. 32, at 7 (Sept. 2000), http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp32.pdf.

⁴ See *id.* at 20; DrPeering, Why care about Transit Pricing?, http://drpeering.net/a/Peering_vs_Transit___The_Business_Case_for_Peering.html.

2. Access/Aggregation Networks

End users—from residential subscribers to large enterprise customers—connect to the Internet through the “access” portion of an ISP’s network.⁵ Broadband access networks perform two key functions within the Internet ecosystem. First, they provide the last mile (or last several miles) to end-user locations through a variety of technologies, ranging from DSL or coaxial cable links to wireless spectrum to OCn-level fiber-optic cables. Second, at one or more points along the way to the ISP’s backbone network, they *aggregate* the traffic of progressively larger sets of different users and transmit this aggregated traffic over increasingly higher-capacity facilities. This portion of an access network—the bridge between the “last mile” and a backbone network—is sometimes known as an “aggregation” network. While the boundaries between access facilities, aggregation facilities and backbone facilities vary from network to network and are not always easy to identify with precision, the following diagram provides a general approximation of the three network segments:



Different broadband networks require different degrees of network management to function properly for consumers. Wireless broadband, in particular, poses formidable and ever-changing network-management challenges. These arise from, among other things, the unique nature of radio of spectrum, such as hard limits on available spectrum and the physics of radio propagation, and the revolutionary transformation of wireless broadband technology itself as network engineers complete their conversions from 2G to 3G—and then begin converting today’s 3G networks into tomorrow’s 4G LTE networks.

For many years, broadband providers have offered quality-of-service (“QoS”) enhancements to enterprise customers, including application and content providers. For example, broadband providers have long allowed content providers and other enterprise customers to designate certain packets for priority handling during periods of congestion, depending on (among other variables) whether those packets are associated with real-time or other unusually delay-sensitive applications. A broadband provider will then ensure special

⁵ These comments use the terms “broadband Internet access provider” and “ISP” interchangeably.

handling for those packets throughout the QoS-enabled portions of its network. Those network facilities also typically carry non-QoS-enhanced (“best effort”) Internet traffic from both enterprise and residential customers. These networks are engineered to meet the performance requirements of each class of traffic while allowing the network operator and its customers to reap the tremendous cost efficiencies of shared packet-switched facilities.

3. “Edge”/Overlay Networks, CDNs, and the Rise of the Content “Hyper Giants”

In the Internet’s early years, the stereotypical “edge” network used by an application or content provider consisted of a server or two operated by a small entrepreneur working in a garage or in low-rent office space. Today’s leading edge networks have evolved into something radically different: transnational facilities-based networks with an unprecedented combination of transmission capacity, processing power, and data storage.⁶ Among the largest are the massive “server farms” and caching networks developed by companies as diverse as service providers Akamai and Level 3, on-line retailers Amazon.com and eBay, Internet portals Yahoo! and MSN, and—largest of them all—Google. These “overlay” or “content-delivery networks” (CDNs) use much the same technology and perform many of the same routing and long-haul transmission functions as Internet backbones and allow application and content providers to direct customer requests to the closest cache server that has both the requested content and the capacity to serve the request at the instant it is received.

Google, for example, maintains a sprawling network consisting of hundreds of thousands of servers, many of them clumped in massive data centers or server farms, connected by high-capacity fiber-optic cable.⁷ Combined with Google’s multi-billion-dollar investment in data storage and processing power, this “overlay” CDN enables Google to outperform its rivals in the delivery of (for example) split-second search results to end users throughout the world. Google’s success exemplifies the growing power of CDNs on the Internet. Traditionally known as “caching” networks, CDNs distribute and store copies of content on servers at multiple locations across the Internet (typically located near ISP backbone networks) and thus enable end users to gain access to that content more quickly and reliably than in a conventional “unicast” arrangement, where each end user must communicate directly with a single centralized server. For example, when a typical end user types “www.apple.com,” “www.facebook.com,” or “news.google.com” into an Internet browser,⁸ the data request is directed to a nearby CDN cache server, where the content of those websites has been stored, thus enabling the end user and the

⁶ See George Ou, *Two Hypocrites in a Garage*, Digital Society, Nov. 23, 2009, <http://www.digitalsociety.org/2009/11/the-hypocrisy-of-google-and-skype/>.

⁷ See George Gilder, *The Information Factories*, Wired, Oct. 2006, http://www.wired.com/wired/archive/14.10/cloudware_pr.html. In addition to Google, other major Internet companies, including Microsoft and Yahoo!, are likewise constructing enormous networks of their own and, like Google, are revolutionizing the role of these ostensible “edge” networks within the Internet.

⁸ See Akamai, *Customer List*, http://www.akamai.com/html/customers/customer_list.html.

cache server to exchange data far more quickly and efficiently than if the data were stored on a single, centrally located server far from the end user.⁹

The bottom line is that, all else held equal, end users have better experiences in their interactions with CDN-equipped content providers than with content providers that do not use CDN functionality. This in turn means that well-funded content and application providers that can afford to purchase (or self-provision) CDN services have a substantial advantage over less-well-funded rivals in the battle to bring end users top-quality Internet experiences.

The success of Google, Limelight, and other overlay networks also marks an unprecedented shift of power within the Internet ecosystem. Even four years ago, analysts recognized that Google had begun “building a network so massive that several service provider specialists believe it could end up with one of the world’s largest core transport networks, effectively building its own private Internet” and “controlling distribution of much of the world’s Internet traffic.”¹⁰ Today, that process is nearing completion. A recent study conducted by the University of Michigan and Arbor Networks cites the rise of Google and other content “hyper giants” as evidence of a fundamental shift in power relationships within the Internet ecosystem:

Five years ago, Internet traffic was proportionally distributed across tens of thousands of enterprise managed web sites and servers around the world. Today, most content has increasingly migrated to a small number of very large hosting, cloud and content providers. Out of the 40,000 routed end sites in the Internet, 30 large companies – “hyper giants” like Limelight, Facebook, Google, Microsoft and YouTube – now generate and consume a disproportionate 30% of all Internet traffic.¹¹

This development has upended Internet business models. Rather than relying upon conventional Internet backbone networks to deliver their content to “eyeball” networks, these hyper giants have grown so large and powerful that they can “cut out the middle man” and obtain settlement-free (zero-priced) peering directly with some end-user broadband networks.

A related harbinger of change within the Internet ecosystem is the emergence of so-called *reverse-blocking*: the practice by certain content providers of withholding their must-have Web content from end users unless the broadband providers for those end users agree to pay extra for it. For example, Disney currently blocks access to its premium sports programming site,

⁹ Although Google and a number of other large Internet companies self-provision their own CDNs, many application and content providers outsource this functionality by hiring third-party CDN providers such as Akamai, Limelight, Level 3, and AT&T.

¹⁰ R. Scott Raynovich, *Google’s Own Private Internet*, Light Reading, Sept. 20, 2005, http://www.lightreading.com/document.asp?doc_id=80968.

¹¹ Arbor Networks, *Two-Year Study of Global Internet Traffic Will be Presented at NANOG47*, Oct. 13, 2009, <http://www.arbornetworks.com/en/arbor-networks-the-university-ofmichigan-and-merit-network-to-present-two-year-study-of-global-int-2.html>.

ESPN360, from consumers whose broadband providers do not pay fees to Disney, and it explicitly steers those disappointed consumers to rival providers that have paid up:¹²

Google similarly blocks access to YouTube from Internet-enabled set top boxes sold by vendors that do not enter into high-priced advertising arrangements with Google.¹³ There is no reason to suppose that these will be isolated incidents. As illustrated by recent cable retransmission-consent deals, content providers often have more market clout than distribution networks and can now successfully charge those networks substantial fees for the privilege of carrying their content.¹⁴ Over time, the reverse-blocking phenomenon may force ISPs to pass through charges to the specific subscribers who use the content in question—rather than to all subscribers indiscriminately—by establishing different content-based tiers of Internet access service: those for end users who order various combinations of premium applications and content, and those who do not.

There is no clear reason why such overt “balkanization” of the Internet should concern policymakers less than the much more benign prospect that money will sometimes flow in the opposite direction as well, when a content provider voluntarily pays a broadband provider for QoS enhancements for unusually performance-sensitive content. Certainly considerations of market power cannot support this disparity in regulatory treatment, because broadband providers are often the less powerful parties in the relevant (national) market than the application/content providers they must deal with.

C. The Internet Is Not Now a “Neutral” Place, and Proposals to Convert Broadband Networks into a Collection of “Dumb Pipes” Would Make It *Less* Neutral in Its Treatment of Competing Applications and Content

The rise of CDNs and the content hyper-giants is one of several phenomena that explodes a popular myth underlying much net neutrality advocacy: the notion that as a platform for commerce, the Internet does not distinguish between a budding entrepreneur in a student dormitory room and a Fortune 500 company. In fact, application and content providers with the

¹² As Disney explains on the ESPN360 website: “ESPN360.com is available nationwide, but you must subscribe to a participating high speed internet service provider. . . . Click here to find out more on how you can request access to ESPN360.com or switch your service to a participating high speed internet service provider.” *ESPN360.com FAQ*, <http://espn.go.com/broadband/espn360/faq#4>.

¹³ See Eliot Van Buskirk, *YouTube Blocks Non-Partner Device Syabas as Allegations Fly*, *Wired*, Nov. 20, 2009, <http://www.wired.com/epicenter/2009/11/youtube-blocks-non-partner-device-syabas-as-allegations-fly/>.

¹⁴ For example, “News Corp sought as much as \$1 a month per Time Warner Cable subscriber for rights to Fox, home of ‘The Simpsons’ and ‘American Idol’ . . . If other networks seek similar terms, cable operators may have to fork out as much as \$5 billion a year—and would probably pass the cost on to subscribers, said Craig Moffett, an analyst at Sanford C. Bernstein in New York.” Kelly Riddell, *Fox-Time Warner Cable deal could mean billions for broadcasters*, *Washington Post*, Jan. 4, 2010.

capital resources needed to buy CDN services—or to build out their own global networks, as Google has done—will provide consumers with far better performance than can any “mom-and-pop site” or “budding entrepreneur in a dorm room” that lacks such resources and cannot obtain capital financing. As Akamai explains in a 2002 white paper, the competitive advantage that well-funded providers gain from CDN services has long justified the price of purchasing them.¹⁵

In contrast, application and content providers that cannot afford to buy CDN services must rely on traditional access/aggregation and backbone services to send their traffic through many potentially congested routers and links en route to other Internet users, with accompanying increases in the potential for latency, jitter, and packet loss. No one claims that the government should intervene to neutralize this disparity, because no one who understands the Internet ecosystem believes the populist “equality” rhetoric underlying much of the advocacy for net neutrality regulation.

In other respects as well, it is wrong to suggest that the Internet would be “neutral” in its treatment of different applications and content if only broadband networks were turned into a collection of dumb pipes. Indeed, many of the outcomes that the pro-regulation advocates would impose on the Internet would make it, if anything, *less* neutral under any meaningful definition of that term.

One reason relates to a content or application provider’s choice of a transport protocol for its outgoing traffic.¹⁶ The Internet is often described as using the “TCP-IP protocol suite,” with IP at Layer 3 (the “network” layer) and the transport control protocol (“TCP”) at Layer 4 (the “transport” layer). But some Internet traffic does not in fact use TCP; instead, application providers sometimes choose the alternative “user datagram protocol” (“UDP”) at Layer 4. When used appropriately, UDP’s attributes can be beneficial for a range of purposes, including Domain Name System (DNS) queries. At the same time, the choice between these transport-layer protocols has significant implications for how finite bandwidth is allocated among competing uses during periods of congestion. TCP is considered a “polite” transport protocol because it can sense congestion and “throttles back” transmission rates until after the congestion lifts. In contrast, UDP omits the error-correction functions of TCP and, unlike TCP, does not throttle back in the face of network congestion. And precisely because UDP applications “send out data as fast as [they] can,” even when they encounter congestion, “while [conventional] TCP-friendly

¹⁵ Akamai White Paper, *Why Performance Matters*, (2002), http://www.akamai.com/dl/whitepapers/Akamai_Why_Performance_Matters_Whitepaper.pdf (emphasis added).

¹⁶ See generally James Kurose & Keith Ross, *Computer Networking: A Top-Down Approach* 50-54 (5th ed. 2010) (“Kurose & Ross”) (discussing Internet protocol layering). As discussed below, providers also use, in addition to the Layer 3 and Layer 4 mechanisms discussed in the text, a variety of prioritization techniques on other, non-IP layers of data communications, including Layer 2 (e.g., Ethernet, ATM), Layer 2.5 (MPLS), and even Layer 7 (SPDY), all of which affect how end users experience the Internet.

applications deliberately send fewer and fewer packets,” the latter applications may end up “starved of network resources.”¹⁷

Moreover, even if application designers choose TCP for their packets, they can structure their applications to elbow other applications aside in a quest for a greater share of the limited bandwidth across congested links. Indeed, “BitTorrent” sessions are so named precisely because they aggressively consume disproportionate amounts of upstream subscriber bandwidth by opening up multiple connection streams to seize capacity for themselves.¹⁸ As one academic study has shown, “as few as 15 BitTorrent users” on a cable modem network “can significantly reduce the service quality experienced by other subscribers.”¹⁹ As the inventor of BitTorrent has explained, this was intentional: “My whole idea was, ‘Let’s use up a lot of bandwidth.’ . . . I had a friend who said, ‘Well, ISPs won’t like that.’ And I said, ‘Why should I care?’”²⁰ BitTorrent Inc. recently acknowledged the need to be more network-friendly and, to that end, launched a new implementation of the BitTorrent protocol: uTorrent 2.0. According to recent tests, however, the efficacy of this solution is still in doubt.²¹

In short, *passive* management of the IP platform would produce *non-neutral* outcomes among the packets associated with different applications, because it would allow applications with “selfish” protocols to trump those with “polite” protocols in the contest for finite bandwidth.

Second, even if all transport-layer protocols were equally polite, passive management of the IP platform *still* would not produce “neutral” results in any meaningful sense, because it can hardly be “neutral” for network engineers to ignore the vast disparities in the QoS needs of emerging Internet applications. Although the Internet Protocol was designed from the beginning to be capable of providing enhanced service quality (see below), many Internet access networks designed for residential users were initially optimized to process the traditionally most prevalent type of communication: non-latency-sensitive data applications, such as the delivery of email or the downloading of ordinary webpages. One of the most important and pro-consumer developments of the past five years has been the rapid convergence of *all* electronic

¹⁷ Jon M. Peha, *The Benefits and Risks of Mandating Network Neutrality, and the Quest for a Balanced Policy*, at 7 (2006), http://web.si.umich.edu/tprc/papers/2006/574/Peha_balanced_net_neutrality_policy.pdf (“*Benefits and Risks*”).

¹⁸ See, e.g., Bob Briscoe, *Flow rate fairness: Dismantling a Religion*, 37 *Computer Comm’n Rev.* 63 (2007), <http://portal.acm.org/citation.cfm?doid=1232919.1232926>.

¹⁹ James J. Martin and James M. Westall, *Assessing the Impact of BitTorrent on DOCSIS Networks*, at 1 (2007) (<http://www.cs.clemson.edu/~jmarty/papers/bittorrentBroadnets.pdf>).

²⁰ David Downs, *BitTorrent, Comcast EFF Antipathetic to FCC Regulation of P2P Traffic*, *San Francisco Weekly*, Jan. 23, 2008 (<http://www.sfwweekly.com/2008-01-23/news/bittorrent-comcast-eff-antipathetic-to-fcc-regulation-of-p2p-traffic>).

²¹ George Ou, *Analysis of BitTorrent uTP congestion avoidance*, Nov. 22, 2009 (<http://www.digitalsociety.org/2009/11/analysis-of-bittorrent-utp-congestion-avoidance>).

communications around the IP platform, including applications—such as real-time high-definition video—that will not function properly during periods of congestion unless network providers accompany them with quality-of-service enhancements that non-performance-sensitive applications do not need in order to function well.

Any requirement that networks treat all packets exactly the same, irrespective of the QoS needs of their associated applications would flatly discriminate against QoS-sensitive applications like real-time video and VoIP. If required to treat all packets identically, a broadband network “might at times transmit 100 P2P packets before it transmits a single VoIP packet,” causing “many of the VoIP packets . . . to wait so long that they expire and cause dropped audio,” an outcome that “is blatantly unfair and destructive to the VoIP application.”²² Even some proponents of net neutrality regulation therefore agree that any sensible view of “neutrality” must account for these application-specific disparities in QoS needs.²³ If anything, therefore, network-management techniques designed to allocate finite network resources to the latency-sensitive applications that actually need them are *pro*-neutrality – and unquestionably are pro-consumer.

D. The Rapid Convergence of All Electronic Communications Around the IP Platform Poses Critical Engineering Challenges

The rapid convergence of multiple services onto a single IP platform carries many advantages beyond the obvious economies of scale and scope derived from building one network rather than several. It also allows for the integration of voice, video, and text into feature-rich multimedia applications and it facilitates greater competition among service providers. For example, cable and telephone companies may compete fiercely to offer the “triple play” of voice, video, and Internet access services. It also creates opportunities for independent application and content providers to offer a variety of innovative services to a wide range of customers, including residential, small/medium business, and enterprise customers. Such services would be economically infeasible if individual services required separate networks.

But the many advantages of IP convergence come with a critical engineering challenge: how to make all of these applications, with their quite different QoS needs, function as well as possible over a shared and sometimes congested network infrastructure.

²² George Ou, *Debunking the Myth that Prioritized Networks Are Harmful*, Digital Society, Nov. 12, 2009, <http://www.digitalsociety.org/2009/11/debunking-the-myth-that-prioritizednetworks-are-harmful/>

²³ See Wu, *Network Neutrality, Broadband Discrimination*, J. Telecomm. & High Tech. L. 141, 142 (2003) (“the Internet’s greatest deviation from network neutrality” has consisted of its traditional “favoritism of data applications, as a class, over latency-sensitive applications involving voice or video”).

1. Managing the Phenomenon of Convergence Requires Not Just Higher-Capacity Pipes, but Smarter Networks

Virtually all commercial IP networks are “shared” among different users and also different *uses*. This sharing is one of the greatest advantages of IP networks as compared to traditional circuit-switched networks. It lowers costs for users as compared to dedicated networks, and it permits maximum utilization of broadband infrastructure. But sharing presents trade-offs.

The benefits of sharing are best understood by contrasting IP networks with traditional circuit-switched networks. In a conventional telephone network, a fixed amount of bandwidth must be dedicated to a continuous path (the “circuit”) between the two end points to the call, and that circuit must be kept open for the entire call. While this approach ensures highly predictable performance, it “wastes” capacity. For example, even during pauses in a voice conversation or data transmission, the reserved capacity on the circuit is unavailable for any other use.

In contrast, the Internet’s constituent IP networks use packet-switched rather than circuit-switched technology, do not typically establish fixed end-to-end paths between two points, and do not reserve capacity for a particular communication stream. Rather, IP networks break the stream into data packets, each of which contains a “header” (an initial series of bits) that identifies, among other things, the packet’s ultimate destination. Each router examines the address in the packet’s header and directs it to the next router, selected on the basis of predictions about the most efficient route to the packet’s ultimate destination. A conventional “best-effort” IP network makes such routing decisions on a packet-by-packet basis without “knowing” what higher-layer application any packet is associated with or whether that application is performance-sensitive.

Modern Internet access networks are typically engineered to high standards that accommodate sharing among a wide range of applications even on such a “best-effort” basis. This has enabled companies like Vonage, Skype, and Vuze to use such networks to offer highly competitive voice and video services that hundreds of millions of consumers have embraced. Indeed, Skype alone has more than 520 million registered users worldwide.²⁴ But all packet-switched, shared networks are inherently susceptible to several forms of service degradation during peak periods of congestion, which affect some applications far more than others.

First, the packets associated with any given application are subject to *latency*: the delays that result from, among other things, “the accumulation of transmission, processing, and queuing delays in [the multiple] routers” between two end users in an Internet data session.²⁵ Second, Internet applications can suffer from *jitter*: variations in delays among associated packets, such that different packets arrive unpredictably and sometimes out of order. Third, applications can suffer from outright *packet loss*, which—as its name implies—occurs when the buffers in

²⁴ eBay Inc., Form 10-Q, at 25 (filed Oct. 27, 2009), <http://files.shareholder.com/downloads/ebay/797758946x0xS1193125-09-214947/1065088/filing.pdf> (noting that there were 520.8 million Skype users as of September 30, 2009).

²⁵ *Kurose & Ross*, at 618.

congested routers fill to capacity and the network “loses” the additional incoming packets. For example, “[i]f one of the links is congested because other packets need to be transmitted at the same time, then [a given] packet will have to wait in a buffer at the sending side of the transmission link, and suffer a delay. If the wait time is too long, the buffer overflows and the packet is ‘lost.’ The Internet makes its *best effort* to deliver packets in a timely manner, but it does not make any guarantees.”²⁶

Applications differ enormously in their relative sensitivity to latency, jitter, and packet loss and their ability to compensate for them. For example, “in many multimedia applications” such as real-time video streaming, “packets that incur a sender-to-receiver delay of more than a few hundred milliseconds are essentially useless to the receiver. On the other hand, networked multimedia applications are for the most part loss-tolerant—occasional loss only causes occasional glitches in the audio-video playback, and these losses can often be partially or fully concealed. These delay-sensitive but loss-tolerant characteristics are clearly different from those of elastic applications such as the Web, e-mail, FTP, and Telnet,” for which delays are tolerable but substantial packet loss is not.²⁷

While the best-effort Internet has sufficed to support VoIP and some other performance-sensitive services so far, the growing popularity of such services, together with escalating consumer demand for real-time high-definition video and other premium services, poses a fundamental engineering challenge. How can engineers structure a unified IP platform to maintain the cost-reducing *efficiency* of packet-switched IP networks while also assuring the *quality of service* that consumers demand for real-time services, such as voice and video, now that the signals for those services no longer travel on service-specific transmission networks? The answer cannot be that IP networks must blindly treat all packets alike by subjecting them equally to the best-effort delivery principles used today for downloading ordinary web pages or delivering e-mails. That approach would produce unacceptably poor quality for real-time applications like voice and video and would thwart the promise of convergence.

The answer likewise cannot be that network providers, on top of the tens of billions of dollars they have already invested in next-generation networks, must so radically enlarge the capacity of their IP networks as to give *all* packets—including those associated with *non*-real-time applications that are reasonably tolerant of latency and jitter—the same guarantees of nearly instantaneous delivery needed for high-quality video services. Network engineers keep usage affordable by scaling the network’s routers and transmission links to meet desired performance levels for different classes of traffic under foreseeable conditions. Raw bandwidth, in the form of extremely-high-capacity routers and other data-processing and transport infrastructure,

²⁶ Kurose & Ross, *supra*, at 27. Wireless broadband networks (and applications designed for them) must accommodate the unusually high levels of packet loss encountered in wireless transmissions, and are also severely constrained in the bandwidth they may deploy for end users in particular transmission cells. This is one of many respects in which network engineers in the wireless context face network-management challenges more severe than their wireline counterparts.

²⁷ *Id.* at 598. In these comments, we use the term “latency-sensitive” as a shorthand to denote sensitivity to latency, jitter, or both.

remains very costly. Network engineers therefore do not—and could not economically—oversupply capacity to ensure instantaneous delivery of all packets at all times, particularly since random events can trigger unpredictable spikes in usage. Indeed, forcing them to take that approach would rob IP networks of the efficiency characteristics that make Internet usage affordable in the first place. Economic studies have thus shown that, as IP video services escalate in popularity, any single-minded reliance on “fat, dumb pipes” as a solution to QoS requirements in this environment of rapidly escalating Internet usage would dramatically raise network costs and cause end-user rates to skyrocket.²⁸

Moreover, this overcapacity approach might well be futile even if money were no object for broadband networks and their customers. Experience has shown that as networks increase the capacity of given links on the Internet, usage on that link—particularly in the form of peer-to-peer file-transfer applications—rapidly expands to fill the new capacity. For example, Japan, “with widely marketed 100 Mbps connections, still has concerns with congestion and has adopted multiple strategies to cope with problems related to network neutrality. This indicates that, contrary to the views of some proponents of national broadband policies, greater investment in broadband infrastructure alone is unlikely to eliminate the role of traffic management by network operators.”²⁹

In short, the solution to this engineering challenge lies not only in more networks and higher-capacity pipes, but in greater network intelligence as well, including an ability to identify and provide the appropriate level of performance required by different applications traversing the network so that users can receive the service quality they desire. Fortunately, the designers of the Internet Protocol perceived a need for precisely such differentiation of traffic into latency-sensitive and non-latency-sensitive applications, and they built the capacity for such differentiation into IP. The following sections describe the history and technology of “DiffServ,” its common use in the provision of IP services to enterprise customers, and its increasing use within the consumer marketplace as well.

2. The Internet Protocol, and Broadband Networks in General, Have Always Been Designed to Support Differential Treatment of Traffic to Satisfy Quality-of-Service Needs

Much of the advocacy for net neutrality regulation rests on a creative misreading of a 25-year-old white paper by three highly regarded network engineering experts—Jerome Saltzer,

²⁸ See, e.g., George Ford et al., *The Efficiency Risk of Network Neutrality Rules*, Phoenix Center Policy Bulletin No. 16 (2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925347; Richard N. Clarke, *Costs of Neutral/Unmanaged IP Networks*, 8 Rev. Network Econ., 61-89 (March 2009), <http://www.bepress.com/rne/vol8/iss1/5>; Steven Pociask, *Net Neutrality and the Effects on Consumers*, American Consumer Institute 14 (2007), <http://www.theamericanconsumer.org/ACI%20NN%20Final.pdf>.

²⁹ Scott J. Wallsten & Stephanie Hausladen, *Net Neutrality, Unbundling, and Their Effects on International Investment in Next-Generation Networks*, 8 Rev. Network Econ. 90, 101-02 (March 2009), http://www.techpolicyinstitute.org/files/wallsten_unbundling_march_2009.pdf; see also *id.* at 110-11 (citing Japanese government reports detailing congestion problems).

David Clark, and David Reed—concerning the so-called “end-to-end” (or “e2e”) principle.³⁰ Many pro-regulation advocates cite this paper as a policy manifesto for reducing every IP network to a collection of “dumb pipes” that should be forever consigned to treating every IP packet exactly the same, oblivious to whether the packet is associated with a performance-sensitive application or not. The paper is nothing of the kind. It is instead an early description of how key error-correction and related functions in communications across different networks can usually, for most data applications, be conducted more efficiently and effectively by end-user devices on each end of a data session than by the routers in between.

The paper makes clear that the authors never intended this now-unremarkable guideline to be an “absolute rule” even as an engineering matter, let alone any sort of normative policy judgment.³¹ As network engineer Richard Bennett observes, “the end-to-end arguments of network engineering differ significantly from network neutrality advocates’ idiosyncratic end-to-end principle, a demand for a low-function, ‘stupid’ network.”³² And because those advocates have “failed to stay up-to-date with the engineering community’s ongoing discussions about Internet architecture,” they “have consistently asked regulators to require network operators to employ engineering solutions within the Internet that are more appropriate to the traditional, single-function telephone network, such as over-provisioning. . . . Applied blindly, end-to-end can become a dogma that limits network efficiency, increases costs, and constrains opportunities to innovate.”³³

More fundamentally, this rigidly prescriptive misuse of the end-to-end guideline also runs headlong into thirty years of development of the Internet Protocol itself, which has always recognized the need for and utility of IP-layer network intelligence to account for differences in application type. As early as September 1981, the IETF established a mechanism for marking packets by handling class so that networks could give applications within each class at least the minimum level of performance they need. Known as the “Type of Service” (ToS) field in the packet header, the purpose of this mechanism was designed to help IP networks “offer service precedence” under which a network would “treat[] high precedence traffic as more important than other traffic (generally by accepting only traffic above a certain precedence at time of high load).”³⁴ Thus, “[e]ven three decades ago, the vision of providing different levels of service to different levels of traffic was clear[.]”³⁵

³⁰ J.H. Saltzer, D.P. Reed & D.D. Clark, *End-to-End Arguments in System Design* (Nov. 1984), <http://web.mit.edu/Saltzer/www/publications/endtoend/endtoend.pdf> (originally published in 2 ACM Transactions in Computer Systems 277 (Nov. 1984)).

³¹ See *id.* at 7 (“Thus the end-to-end argument is not an absolute rule, but rather a guideline that helps in application and protocol design analysis; one must use some care to identify the end points to which the argument should be applied.”).

³² Bennett, *Designed for Change* at 2.

³³ *Id.* at 4.

³⁴ *Internet Protocol – DARPA Internet Program Protocol Specification*, RFC 791, at 11 (Sept. 1981), <http://www.ietf.org/rfc/rfc0791.txt?number=791>.

³⁵ Kurose & Ross at 648.

That vision started to become a significant commercial reality by the 1990s. In 1994, another RFC noted that, in addition to the “simple priority” described in the 1981 RFC, more work needed to be done to facilitate latency-sensitive Internet applications: “[R]eal-time applications often do not work well across the Internet because of variable queuing delays and congestion losses,” and thus “[b]efore real-time applications such as remote video, multimedia, conferencing, visualization, and virtual reality can be broadly used, the Internet infrastructure must be modified to support real-time QoS.”³⁶ The 1994 RFC thus endorsed a mechanism that would enable network operators “to divide traffic into a few administrative classes and assign to each a minimum percentage of the link bandwidth under conditions of overload, while allowing ‘unused’ bandwidth to be available at other times.”³⁷

In 1998, building on RFC 791 and other RFCs, RFC 2474 adopted an updated version of ToS, known as Differentiated Services or DiffServ, that uses the Differentiated Services Code Point (DSCP) to mark and prioritize packets at the IP layer.³⁸ Today, bits 8-15 within an IPv4 packet are devoted to DSCP functionality. DiffServ operates at the IP layer (Layer 3) and permits differentiated service handling wherever routers are equipped to recognize and act upon the DSCP field.³⁹

AT&T and other providers have long used DiffServ in conjunction with analogous mechanisms at other layers, including Ethernet and ATM at Layer 2 and MPLS at Layer 2.5, to ensure differentiated service handling across diverse network facilities.⁴⁰ For example, AT&T offers an enterprise-grade Internet access service, known as Managed Internet Service (“MIS”), that combines DiffServ and MPLS-based class-of-service mechanisms to ensure enhanced performance for traffic that MIS customers designate for special handling.⁴¹ AT&T and other network providers sell such services to a range of enterprise customers, including content providers that wish to purchase prioritized handling for performance-sensitive content throughout core network facilities.

³⁶ R. Braden *et al.*, *Integrated Services in the Internet Architecture: an Overview*, RFC 1633, at 1 (June 1994), <http://www.ietf.org/rfc/rfc1633.txt?number=1633>.

³⁷ *Id.*

³⁸ K. Nichols *et al.*, *Definition of the Differentiated Services Field (DS Field) In the IPv4 and IPv6 Headers*, RFC 2474 (Dec. 1998), <http://www.ietf.org/rfc/rfc2474.txt?number=2474>.

³⁹ A. Retana *et al.*, *Using 31-Bit Prefixes on IPv4 Point-to-Point Links*, RFC 3021 (Dec. 2000), <http://www.ietf.org/rfc/rfc3021.txt?number=3021>; *see also* RFC 2914, *supra*. Figure 5 is taken from Wikipedia, *IPv4*, <http://en.wikipedia.org/wiki/IPv4> (last accessed Dec. 12, 2009).

⁴⁰ *See* Nortel, *Introduction to Quality of Service (QoS)* (2003), http://www.nortel.com/products/02/bstk/switches/bps/collateral/56058.25_022403.pdf; Ralph Santitoro, *Metro Ethernet Services – A Technical Overview*, Metro Ethernet Forum, at 9 (Apr. 2003), http://metroethernetforum.org/PDF_Documents/metro-ethernet-services.pdf (“DiffServ . . . provide[s] more robust QoS capabilities when compared to the simple forwarding-based priority of IP TOS[.]”).

⁴¹ *See* AT&T Wholesale, *Managed Internet Service*, <http://www.business.att.com/wholesale/Family/ip-solutions-wholesale/managed-internet-service-wholesale/>.

AT&T likewise combines Layer 3 DiffServ functionality with Layer 2 mechanisms to separate its U-verse “triple play” platform into logically discrete voice, video, and Internet access streams and guarantee each service the network performance it needs to meet customer expectations.⁴² The top Internet access speed available over the shared U-verse platform—24 Mbps—is several times the top speed attainable under AT&T’s legacy DSL service, even though the copper infrastructure used for that service was *not* shared with any managed video service. AT&T’s Internet access customers have thus benefited from the extensive fiber deployments that permit such dramatically higher-speed services. But those multi-billion-dollar deployments have made economic sense in the first place precisely because the new infrastructure *is shared*—because it supports voice and video services in addition to Internet access.⁴³

The Internet community has now adopted and is beginning to implement a successor protocol, IPv6, to today’s standard version of the Internet Protocol, IPv4. Among other things, IPv6 permits many times the number of unique IP addresses and thus accommodates the exploding global demand for such addresses. The designers of IPv6 not only retained IPv4’s differentiated-services functionality within the updated protocol, but significantly expanded on it by making provision for differences both in “traffic class” and “flow”:

RFC 1752 and RFC 2460 state that [the flow header] allows “labeling of packets belonging to *particular flows for which the sender requests special handling*, such as a nondefault quality of service or real-time service.” For example, *audio and video transmission might likely be treated as a flow*. On the other hand, the more traditional applications, such as file transfer and e-mail, might not be treated as flows. . . . The IPv6 header also has an 8-bit traffic class field. This field, like the TOS field in IPv4, can be used to *give priority to certain datagrams within a flow*, or it can be used to *give priority to datagrams from certain applications . . . over datagrams from other applications*[.]⁴⁴

Like other aspects of the Internet Protocol, each of these “service handling” mechanisms (ToS, DiffServ, MPLS, and others) was developed by network engineering experts through the time-tested, consensus-building RFC process. They represent the collective wisdom of the global Internet engineering community, as embodied in IETF, and they are intended to meet the needs of the global user community. Regulators have historically, and very wisely, left the resolution of engineering debates to that community and have never proposed to take this evolving and highly nuanced set of engineering judgments about IP architecture, freeze it to suit

⁴² AT&T’s U-verse service recently surpassed 2 million subscribers. AT&T, Press Release, *AT&T U-verse TV Marks 2 Million Customer Milestone*, Dec. 9, 2009, <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=30203>.

⁴³ The success of this model has led Frost and Sullivan to choose AT&T U-verse as its “2009 North American Consumer Communications Service Product of the Year.” See http://www.att.com/Common/merger/files/pdf/Frost_Sullivan_2009_Consumer_Product_of_the_Year.pdf.

⁴⁴ *Kurose & Ross* at 367 (emphasis added).

the policy preferences of particular advocates, and stamp it with the coercive authority of law. That, however, is what the proponents of net neutrality regulation seek.

3. The Importance of QoS Enhancements in the Market Today

Any prohibition of prioritization agreements would not only foreclose many *future* pro-consumer services, but also draw a range of *existing* services into doubt and disrupt current arrangements throughout the Internet.

IP networks currently honor requests from enterprise customers (including content providers) for prioritized handling of designated content beginning on the access/aggregation links serving those customers across the network's core backbone network links—and, in some cases, all the way through that network for end-to-end QoS-enhanced data sessions between enterprise customers. At present, the network capabilities needed to provide such end-to-end QoS enhancements for Internet traffic are more prevalent in the access/aggregation networks deployed primarily to serve business customers rather than in those deployed in more residential areas.⁴⁵

One type of end-to-end QoS arrangement in the enterprise space involves the use of network-based *virtual private networks*. Such VPNs often make use of MPLS at Layer 2.5 to “encapsulate” traffic from defined customer locations and route them transparently over prescribed paths to other such locations. “The customer experiences direct communication to their sites as though they had their own private network, even though their traffic is traversing a public network infrastructure and they are sharing that infrastructure with other businesses.”⁴⁶ Network providers use various QoS techniques to establish priorities among “multiple classes of service within a VPN, as well as priorities *among* VPNs.”⁴⁷

Although many network-based VPNs are specific to given enterprise customers, network operators can and do configure them to encompass groups of multiple customers. The engineering community has thus deployed methods for merging “two or several VPNs . . . to a single VPN.”⁴⁸

⁴⁵ As with many technologies that are first made available to business users, it is reasonable to expect that these QoS capabilities will also become increasingly available to residential consumers. For example, while AT&T's U-verse high speed Internet access service is offered on a best-effort basis today, AT&T's network is technically capable of supporting multiple classes of service in the future. Similarly, the standards for wireless LTE-based broadband services, which will serve both business and residential users, contain a very robust set of QoS mechanisms. And it will be essential to use those mechanisms in order to efficiently provide, among other things, the voice quality that consumers demand of their mobile devices, given that voice appears as just one IP application among many in the LTE environment.

⁴⁶ Cisco, *Introduction to Cisco MPLS VPN Technology*, at 1-3 (http://www.cisco.com/en/US/docs/net_mgmt/vpn_solutions_center/1.1/user/guide/VPN_UG1.pdf).

⁴⁷ *Id.* at 1-5 (emphasis added).

⁴⁸ *Id.* at 1-12.

To our knowledge, no one has suggested that such enterprise-to-enterprise arrangements might be problematic, nor could they plausibly make that argument in a marketplace where networks have long provided such QoS enhancements to willing business customers. Instead, the focus has always been on prioritization of Internet traffic in the last mile to “consumers” or, in the industry vernacular, “eyeball” customers. However, a regulator could not reasonably draw regulatory distinctions between “business” or “content-producing” customers (for whom last-mile prioritization would be permitted) and “eyeball” customers (for whom it presumably would not be). Assigning Internet users to such regulatory silos would be ill-conceived because, among other considerations, every user is potentially *both* a content provider *and* a set of eyeballs.

Moreover, these innovations are not, and should not be, confined to the business space to begin with. In the residential space as well, providers use the same DSCP-based prioritization (and related mechanisms) to provide QoS to performance-sensitive services, like IPTV and VoIP, that share a converged IP platform with best-effort Internet access. As even pro-regulation advocates have conceded, it would make no sense to prohibit such prioritization.⁴⁹ Such a ban could only give broadband providers perverse incentives to keep their voice and video networks physically separate from the IP networks used for Internet access: that is, to create redundant networks in order to ensure that their consumers retain the service quality they need for applications that must be run on a managed network. That result—if economically achievable at all—would introduce radical inefficiencies into the communications market: It would lead to higher prices for all network customers, who must ultimately pay for these unnecessary costs; it would defeat the promise of convergence by forcing different services back onto physically distinct, “siloeed” platforms; and it would deter the roll-out of video competition for incumbent cable television companies.

More generally, just as it is efficient and pro-consumer to logically (rather than physically) segregate the dedicated IPTV stream from best-effort Internet traffic, so too is it efficient and pro-consumer to permit different classes of service for different types of applications and content *within* the Internet portion of the pipe—as, again, broadband providers have long done for enterprise customers.

Thus, a regulator cannot ban applications-specific differential service handling without either (i) seriously disrupting the industry by prohibiting commercial arrangements that are already common in the enterprise space, such as the sale of QoS enhancements to content providers and other enterprise customers; or (ii) creating new regulatory silos dividing “content-producing” customers from “eyeball” customers. The first option should be unthinkable. And the second would be unwise, both because there is no valid reason to deprive “residential” customers of the advanced capabilities now available to “enterprise” customers and because every network user is potentially *both* a consumer *and* a producer of Internet content.

E. The Market for Service Enhancements

⁴⁹ See Letter from Timothy Wu and Lawrence Lessig to Marlene H. Dortch, CS Docket No. 02-52, at 14 (Aug. 22, 2003).

As exemplified most prominently by the rise of CDNs, the Internet ecosystem features an entire market for *service enhancements*: methods that allow performance-sensitive applications and content to function well even during periods of congestion. One of the key questions in this regard is whether broadband Internet access providers should be barred from fully competing with CDNs and other vendors in that market, which is national and indeed global in scope. Understanding this point requires some background in the various technologies for managing competing demands on finite bandwidth.

The following discussion summarizes a number of key methods that network engineers at broadband and content providers alike can use to ensure higher-quality end-user experiences in an environment of increasing network congestion.⁵⁰

1. Bandwidth Provisioning

Every broadband end user, from a suburban household to the largest global content provider, chooses the bandwidth of the broadband “pipe” or pipes that connect it to the Internet. For example, in the United States, there are different tiers of AT&T U-verse broadband Internet access, with download speeds ranging from 1.5 Mbps (the “express” tier) to 24 Mbps (the “max turbo” tier). And enterprise businesses, including application and content providers, choose from a vast range of different enterprise broadband services offered by a variety of providers.

The bandwidth an end user chooses will depend, of course, on the volume of traffic it expects to exchange with other end points on the Internet, both upstream and downstream. While broadband providers continually upgrade their networks to give customers the bandwidth they desire (consistent with their terms of service), virtually all Internet traffic crosses shared facilities at some point in its end-to-end transmission path. As a result, the access “bandwidth” an end user purchases, no matter how great, cannot insulate it from the service degradation caused by congestion on shared links, ranging from aggregation facilities in the access network to peering points connecting Internet backbones. As discussed, moreover, network providers cannot economically serve their customers by radically over-provisioning bandwidth throughout their networks to guarantee the same low-latency, low-jitter, and low-loss performance at all times for all applications, whether those applications are performance-sensitive or not.⁵¹

2. Differentiated Service Handling, Buffering, and Queuing

As discussed, network engineers manage QoS for real-time applications such as streaming video—which are often highly sensitive to latency and jitter—by configuring routers to provide special handling for packets with DSCP-field (“DiffServ”) markings.⁵² Routers

⁵⁰ This discussion is meant to be illustrative rather than comprehensive. For example, content providers also can reduce data-transfer times through digital compression technologies.

⁵¹ Indeed, even on the circuit-switched PSTN, carriers cannot economically over-provision capacity so that all calls by all callers can be completed at all times, which is why some callers receive a “fast busy” signal during certain peak calling periods.

⁵² See generally Murat Yuksel, *et al.*, *Value of Supporting Class-of-Service in IP Backbones* (2007) (“*RPI Study*”) (<http://www.cse.unr.edu/~yuksem/my-papers/iwqos07.pdf>).

typically implement this task through *buffering* and *queuing* techniques. The costs of a network that employ DiffServ techniques are substantially lower for all users than the costs of a network that addresses performance needs solely through increases in capacity.⁵³ Indeed, Cisco estimates that these techniques, when used to prioritize up to 10% of a network's traffic, will more than double the network's bandwidth in real terms.⁵⁴

Although queuing and buffering techniques are complex, the following captures the basics. Routers transfer packets between links in a network in time intervals typically measured in a few milliseconds. It is not uncommon, however, for the packet load on a particular link (*i.e.*, the number of packets attempting to access the link) to spike briefly above the link's capacity. When this happens, more packets may arrive at the link than can be placed immediately on the link. To handle this situation, network engineers equip routers with "buffers," which very briefly store excess packets until capacity on the link becomes available. If enough packets arrive to fill up the buffer, newly arriving packets are dropped and may need to be resent.

"Queuing" and "scheduling" involve placing packets into different buffers and determining the order in which these buffers release packets from a router onto a link.⁵⁵ If a router supports DiffServ, each service class is queued into a separate buffer. Buffers designed for the latency-sensitive service classes must be small (so that no packet will be held for long), and will be "polled" frequently to release their packets onto the link. Buffers designed for latency-insensitive service classes may be larger because longer delays are tolerable. If a buffer is empty when it is polled, the process moves immediately to the next buffer. All buffers are polled often enough to give each service class the opportunity to consume at least its prescribed minimum amount of bandwidth.

Because latency and jitter impair real-time applications much more than non-real-time applications, this technique ensures the most efficient and pro-consumer allocation of scarce network resources—the link capacity between two routers or between a router and an end point. Again, this technique assures that every service class may "claim" at least the minimum bandwidth needed to support normal operations for that class, even during periods of network congestion. In addition, when the network is *not* congested, buffers for less performance-

⁵³ See *RPI Study, supra*; see also RPI Press Release, "Undifferentiated Networks Would Require Significant Extra Capacity," July 2, 2007 (quoting RPI professor Shivkumar Kalyanaraman (coauthor of the RPI study): "The study makes clear that there are substantial additional costs for the extra capacity required to operate networks in which all traffic is treated alike, and carrying traffic that needs to still be assured performance as specified in service level agreements (SLAs).").

⁵⁴ Cisco, A Discussion with the FCC on the Open Internet, at 17 (Dec. 8, 2009), (http://www.openinternet.gov/workshops/docs/ws_tech_advisory_process/Cisco%20FCC%20Network%20Management%20Presentation%20120809.pdf).

⁵⁵ See, *e.g.*, Chuck Semeria, *Supporting Differentiated Service Classes: Active Queue Memory Management*, at 5, Juniper Networks (2002) (http://www.juniper.net/solutions/literature/white_papers/200021.pdf); OpenBSD, *PF: Packet Queuing and Prioritization* (2007) (<http://www.openbsd.org/faq/pf/queueing.html>).

sensitive service classes may claim unused capacity that has not been claimed by the buffers for the more performance-sensitive classes. Since congestion tends to be sporadic and momentary, the division of traffic into these classes of service has no effect on any class the vast majority of the time.

Choices among queuing techniques—the algorithms that determine the manner in which buffers sequentially deliver traffic to transport links—are inherently provider-specific, and there “are no real industry standards.”⁵⁶ Moreover, queuing methodologies are highly dynamic: equipment vendors and network providers are constantly improving existing methodologies and inventing new ones. Thus, each network provider must balance the costs and benefits of the various queuing methodologies to select the one that best meets the needs of its customers.

In addition to “prioritization” at the IP layer (*i.e.*, DiffServ), many other protocols at other layers also allow network operators, content providers, and others to “enhance” or “prioritize” particular data, including data consisting of Internet access traffic. As discussed, these include differential-handling techniques at Layer 2 (*e.g.*, Ethernet, ATM, and Frame Relay) and Layer 2.5 (MPLS). At Layer 4, the specific TCP variant employed affects how aggressively a user’s system will claim bandwidth. Likewise, some Layer 7 protocols, such as the new SPDY protocol created and promoted by Google, appear to enable content providers to prioritize some HTTP data streams over others so that some content (perhaps Google-sponsored advertisements) will appear first when a webpage downloads.⁵⁷ These and similar practices are widespread; all are “non-neutral” in that they prioritize some traffic over others; and any “nondiscrimination” rule would draw many of them into doubt for the first time. Thus, to the extent any regulator proposes to regulate “prioritization” that affects the Internet, it is wading into a vast ocean of technologies and commercial relationships. The risk of harmful unintended consequences is staggering.

3. Congestion Avoidance

Content Delivery Networks. As explained in our discussion of CDN services, one effective way a content provider can surpass its rivals in on-line performance is to minimize the number of hops its packets must make en route to end users, thereby reducing processing- and congestion-related delays. Under the most prevalent such method, a provider caches its data (such as webpages and media files) in multiple locations near the regional ISPs serving its geographically dispersed end users. When an end user requests the data, a cache server can convey the requested packets quickly and reliably from its nearby location, thereby sparing them a long, multiple-hop trip through potential bottlenecks on any of several different networks. As discussed, some companies, such as Akamai and Limelight, provide this CDN service commercially to third parties, whereas others, such as Google, build CDNs of their own.

⁵⁶ Semeria, *Supporting Differentiated Service Classes*, *supra*, at 4.

⁵⁷ See SPDY: An experimental protocol for a faster web, <http://dev.chromium.org/spdy/spdy-whitepaper>; Mike Belshe & Roberto Peon, *SPDY Protocol*, <http://dev.chromium.org/spdy/spdy-protocol>.

CDN Collocation. Some content providers and broadband networks have begun exploring content distribution methods that would involve direct interconnection and caching of content not just *close to* the broadband provider's access/aggregation networks, but *within* those networks as well. Such arrangements, known as "CDN collocation," eliminate the need to deliver content through a transit or peering link when the end user requests it. Depending on the context, this approach often allows content providers to reach end users more economically and with superior performance as compared to more conventional CDN peering or transit arrangements. For example, Google is reportedly negotiating an arrangement to pay British Telecom to store Google's content within BT's (and other ISPs') access networks for efficient transmission to end users.⁵⁸ Such arrangements "enable[] ISPs to store content within *their own* networks," such that "[t]he media companies would pay them, rather than the likes of Akamai, and get a guaranteed service even at peak times."⁵⁹

Paid Peering. Traditionally, large content providers and CDNs have entered into comprehensive transit relationships with large backbone providers to convey their traffic to many different ISPs within the Internet. Backbone providers have often implemented these arrangements by selling these customers enterprise-class Internet access service and interconnecting with them by means of robust, high-capacity facilities. If a content provider wishes to interconnect directly at the peering links of an ISP to obtain closer network proximity to its end users, but does not meet the criteria for settlement-free peering, it may enter into bilateral *paid peering* arrangements with certain ISPs. Under such arrangements, the content provider pays the network operator for such interconnection but at rates lower than it would pay under the traditional transit model if it had contracted with a backbone provider to deliver its traffic throughout the Internet.⁶⁰ Moreover, as explained by the University of Michigan study noted above, Google and other dominant content providers have assumed sufficient market clout that they have now begun interconnecting with ISPs on a settlement-free basis.

IP Multicast. When providing high-definition video streams of popular events in real time, content providers face prohibitive costs if they must arrange for the transport of many redundant streams on an end-to-end *unicast* basis: *i.e.*, as separate streams from a centralized source to each of the many end users that wishes to receive the content. As discussed, a content provider can reduce those costs by hiring or building CDNs to replicate and disperse its content-transmitting nodes closer to an ISP's end-users and thereby reduce the total network resources that each individual stream must consume en route to a given end user. CDNs, however, require substantial investments in cache servers to store all of this content, along with other infrastructure to transport content to all of these cache servers. And from a network resource perspective, too, CDNs can be suboptimally efficient for the distribution of any content that many users in the same area wish to obtain at the same time, such as streaming real-time video,

⁵⁸ Richard Wray, *BT and Google in talks over creating video delivery network for ISPs*, The Guardian, Dec. 7, 2009 (<http://www.guardian.co.uk/business/2009/dec/07/bt-google-isp-digital-video>).

⁵⁹ *Id.* (emphasis added).

⁶⁰ See George Ou, *FCC NPRM ban on Paid Peering harms new innovators*, Nov. 10, 2009 (<http://www.digitalsociety.org/2009/11/fcc-nprm-ban-on-paid-peering-harms-new-innovators/>).

because each cache server must transmit hundreds or thousands of redundant streams to all geographically proximate users that request it.

One promising solution is IP multicast, “a bandwidth-conserving technology specifically designed to reduce traffic by simultaneously delivering a single stream of information to potentially thousands of corporate recipients or homes,” while requiring only a single stream (rather than one per viewer) at the content source.⁶¹ Suppose a content provider wants to stream video coverage of a highly popular sports event over the Internet simultaneously to thousands of subscribers in the same geographic area. Under an IP multicast approach, the content provider arranges with the ISP for the routers in an ISP’s access/aggregation network to instantaneously replicate copies of the incoming packets and transmit them to multiple local users simultaneously, depending on which users have requested the relevant content. No caching is required, and redundancy is enormously reduced by moving the packet duplication as close as possible to the ultimate recipients. IP multicast thus dramatically lowers the cost of high-quality distribution by “minimiz[ing] the burden on both sending and receiving hosts and reduc[ing] overall network traffic.”⁶² And if multicast is used in conjunction with CDN technology (i.e., a CDN cache server transmits content to a multicast-enabled router), even greater bandwidth efficiencies may be possible, which opens up new opportunities for content and application providers to deliver higher-quality services over the Internet. Indeed, multicast already plays a vital role in the efficient delivery of *non*-Internet-based IPTV services, such as AT&T’s U-verse video service.

Paid peering, CDN collocation, and multicast arrangements are unambiguously pro-consumer and should be welcomed. CDN collocation and multicast in particular will be essential to the distribution of affordable streaming high-definition video over the Internet. These and the similar technologies discussed above illustrate a broader point. By targeting QoS enhancements to QoS-sensitive applications, network operators can facilitate the development of innovative Internet applications that would not be feasible to provide otherwise. The use of such techniques thus expands both the business opportunities available to application and content providers and, in turn, the applications and content available to consumers. This virtuous cycle—smarter networks supporting QoS-sensitive applications and content, thereby increasing consumer welfare—will fuel enormous economic growth *if* policymakers encourage the deployment of shared, multi-purpose broadband platforms that are capable of delivering a range of QoS capabilities to content and application providers.

Unfortunately, a broad “nondiscrimination” rule could prohibit such QoS arrangements insofar as they would involve payments by content providers for especially efficient and high-quality distribution of their content within specific access/aggregation networks.⁶³

⁶¹ Cisco White Paper, *IP Multicast Technical Overview*, at 1 (Aug. 2007) (“*Cisco Multicast White Paper*”) (emphasis omitted); *see also* Metaswitch Networks, *IP Multicast Explained*, at 2 (2004).

⁶² *Cisco Multicast White Paper* at 1.

⁶³ *See* Ou, *FCC NPRM ban*, *supra*.

4. P2P Content Distribution

Under traditional content-distribution methods, a complete copy of a content file (such as a song or a feature-length movie) is stored on servers and distributed from there to the end users that request it. In contrast, P2P technologies disassemble content into small files and widely distribute them to different end-user computers for storage and subsequent retrieval and reassembly by other end users.⁶⁴ The result is the functional equivalent of a massively distributed server network, in which each end user's computer acts as an individual server for a portion of the content being distributed. Although P2P technology has been used (and continues to be used) by some parties for the unlawful distribution of pirated content, it has also been adopted as a mechanism for the distribution of lawful content by a variety of companies. Vuze, for example, claims that it "has attracted over 100 content partners, including A&E, BBC, CBC, G4 TV, The History Channel, Ministry of Sound, National Geographic, PBS, Showtime, Starz Media, The Poker Channel, TV Guide Channel, and many more."⁶⁵

In the past, content providers (and their distribution partners) have traditionally borne the costs of maintaining enough centralized storage and server capacity to convey their content to end users. By converting end-user devices into content caches for other end users, however, P2P technology offers a way to shift those costs to end users and their network providers. But while P2P distribution may thereby offer content providers a relatively cheap storage and distribution mechanism, most current implementations of P2P applications impose enormous upstream and downstream traffic burdens on broadband networks, particularly with the rise of shared video. As network-engineering scholars have explained, this "network-oblivious peering strategy . . . may cause traffic to scatter and unnecessarily traverse multiple links within a provider's network, leading to much higher load on some backbone links" and producing "inefficiencies for both P2P applications and network providers."⁶⁶

None of this is to say that P2P technologies are inherently inefficient in all instances. Quite to the contrary, the distributed, peer-based content-delivery model underlying today's P2P technologies could bring tremendous benefits for content providers, network operators and consumers alike—faster distribution at lower cost in some circumstances—if the industry can resolve the current inefficiencies in that model. To that end, AT&T is part of a new industry-wide working group—composed of representatives from BitTorrent, LimeWire, Cisco, Verizon, Verisign, and researchers from Yale and Washington Universities, among others—that is trying to develop an efficient, network-aware peer-to-peer technology. Known as "P4P," this new

⁶⁴ See, e.g., Detlef Schoder, Kai Fischbach, & Christian Schmitt, *Core Concepts in Peer-to-Peer Networking* (2005) (<http://www.idea-group.com/downloads/excerpts/Subramanian01.pdf>).

⁶⁵ Petition for Rulemaking, *Vuze Inc. Petition to Establish Rules Governing Network Management Practices by Broadband Network Operators, Broadband Industry Practices*, WC Docket No. 07-52, at 5-6 (Nov. 14, 2007).

⁶⁶ Haiyong Xie et al., *P4P: Explicit Communications for Cooperative Control Between P2P and Network Providers*, Distributed Computing Industry Ass'n, at 1 (May 2007) ("*P4P: Explicit Communications*") (http://www.dcia.info/documents/P4P_Overview.pdf).

generation of technology is being developed to optimize network resources rather than hoard them.⁶⁷

5. Security Screening

Finally, protection from spam, worms, viruses, distributed denial-of-service attacks, and other malicious behavior on the Internet is critically important to network management, and no net neutrality advocate seriously contends otherwise. An important but often overlooked benefit of these robust network security practices is that keeping harmful traffic out of a network in the first place can significantly reduce network congestion by conserving network resources for traffic from legitimate sources. According to Verizon Wireless, for example, a single spammer tried in 2007 to send 12 million text messages to its wireless customers.⁶⁸ As Verizon Wireless explained, wireless spam “impairs the delivery of legitimate messages, and because spam is often sent in high volume over short periods of time, it can place a strain on overall performance of the wireless network,” and “[t]here’s a lot of time and money that goes into blocking all of that.”⁶⁹

With multiple petabytes of data passing through its network each business day, the first crucial step to effective network security for AT&T or any other network provider is rapid identification of illegitimate packets. By closely monitoring the traffic coming into and out of its network, a network provider like AT&T can take steps to detect the early stages of attacks on network integrity and activate mechanisms to minimize the effects of those attacks. “Before a worm strikes, technicians see strange spikes of traffic going to normally obscure ports, as malware developers test and tweak their code. A sudden, sharp increase in the amount of Web traffic worldwide could mean breaking news—or a distributed denial-of-service attack being lobbed at a single company halfway around the world.”⁷⁰ For example, “AT&T security analysts knew about the 2003 Slammer worm before it hit, because of strange traffic going to port 1434.”⁷¹

Wireless broadband providers may also employ additional techniques to safeguard the security of wireless networks. AT&T, for example, uses a technique called “Code Signing” to control access to the network at the device and application lawyer. AT&T-partnered devices are configured to allow third-party applications to access the network only once AT&T has been reassured (either through testing or through the developer’s affirmative, contractual representation) that the application will not introduce malicious code or some other intrusive

⁶⁷ See *id.*

⁶⁸ See Verizon, Press Release, *Wireless Spammer Target Of Legal Action By Verizon Wireless*, June 1, 2007, <http://news.vzw.com/news/2007/06/pr2007-06-01b.html>.

⁶⁹ Howard Buskirk, *Verizon Wireless Says Filters Cut Wireless Spam’s Impact*, Communications Daily, June 4, 2007.

⁷⁰ Sarah D. Scalet, *Introducing AT&T, Your Internet Security Company*, CIO, May 17, 2007, http://www.cio.com/article/110250/Introducing_AT_T_Your_Internet_Security_Company.

⁷¹ *Id.*

agent into the network. This “certification” process also helps prevent the introduction of applications that inappropriately access customer data (e.g., contact lists, location information) and violate customers’ reasonable privacy expectations.

Any net neutrality regulations that would restrict the wide latitude network providers have to perform such critical functions would strike a serious blow to network security and consumer safety.