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BROADBAND CONNECTIVITY COMPETITION POLICY WORKSHOP – PUBLIC COMMENT, PROJECT NO. V070000

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The Center for Democracy & Technology (CDT) would like to thank the Federal Trade Commission for the opportunity to participate in the Broadband Connectivity Competition Policy Workshop and to file these written comments. The first two sections below reiterate and expand on CDT's oral comments at the Workshop, while the last two sections offer CDT's thoughts on key themes from the Workshop and how the FTC could play and active and beneficial role in this policy area going forward. The sections are as follows:

I. The Importance of Preserving an Internet without Gatekeepers

CDT believes that the Internet neutrality debate should not focus solely on traditional conceptions of anticompetitive conduct and abuses of market power. While preventing such bad behavior is important and antitrust enforcement is a crucial tool, policy in this area also should be aimed at a more affirmative goal: preserving a network structure that has proven extraordinarily successful in facilitating independent innovation and speech.

Specifically, the Internet allows small innovators or individual speakers to offer content, services, or applications to any interested Internet user without having to get any kind of permission from or enter into any kind of deal with that user's Internet service provider (ISP). This is not to say that the Internet is completely egalitarian; large entities can purchase advantages in the form of caching services, greater server capacity, higher bandwidth connections from their own ISP, and of course publicity and marketing. But it remains the case that, once a person purchases a gateway to the Internet from his own ISP, there are no further gatekeepers he must negotiate with to reach the whole Internet.

This characteristic keeps entry barriers low and makes the Internet uniquely open to innovation, competition, and speech.

It is important to recognize that this kind of open network is not something that the marketplace often initiates in the absence of regulation. Private-sector network builders have tended to prefer to retain more control. For example, it took FCC action in the 1960s to force AT&T to open its network to non-AT&T telephone equipment. Cable and wireless telephone networks were not created with the idea of offering an open platform for unaffiliated content or applications.

This is not to say that there is, per se, anything nefarious or anticompetitive about a less open model. It often may make sense from a business perspective, and non-open networks like cable television networks can and do deliver valuable services.

However, less open networks are not the Internet. The Internet was created – in an academic context, with government funding, running over the regulated telephone network – on a different model. Openness was rooted in its technical design, as the TCP/IP suite of protocols was designed specifically to enable any Internet user to exchange packets with any other user without any kind of central coordination. As the Internet was extended beyond academia and commercialized, it remained open to independent innovators and speakers in ways the most commercially initiated networks are not. This openness was further reinforced by the fact that there were numerous narrowband ISPs and barriers to entry for new ISPs were very low, resulting in ample consumer choices.

The consequences of this open structure were dramatic. The Internet unleashed a wave of innovation driven by small inventors and entrepreneurs acting totally independently of major network operators. Examples include:

- The World Wide Web – originally conceived and created by one scientist, Tim Berners-Lee;
- Web-based e-mail – popularized by startup companies;
- Instant messaging – popularized by small startup companies;
- Open SSL, the implementation of Secure Sockets Layer that is widely used to provide cryptographic protection to Web browsing and Internet commerce – produced by two individual Australians;
- The SSH Secure Shell protocol, critical for many remote access services – designed by an individual Finnish college student; and
- Google – started by two graduate students at a time when search was dominated by a few search engines focused on striking deals with the major portals.

It is highly unlikely that the parties behind these and many other now-popular innovations would have been in a position to negotiate deals with large network operators prior to launch. And while many successful innovations eventually have been adopted or acquired by large companies, this typically has occurred only once the concepts' viability and popularity have been clearly demonstrated.

The innovations fostered by the Internet have generated a huge amount of economic value. Major companies, entirely new categories of products and services, and e-commerce of many kinds have arisen virtually from scratch. Greater competition has been introduced into many markets as Internet-based endeavors challenge traditional business models. Tremendous non-economic value has been created as well. Bloggers and user-generated content sites like YouTube have enabled broader participation in civic and political discourse, and endeavors like Wikipedia are showing the potential of Internet-based collaboration outside the commercial realm.

The experience of the Internet to date, then, suggests an important lesson: The network's openness to independent innovation creates major spillover benefits to the economy and to society. As a society, we have a very strong interest in ensuring the continued availability of this kind of innovation-friendly, low-barrier-to-entry network.

This does not mean that an open network on the Internet model is the only kind of network that should be allowed to exist, or that experimentation with other models should be banned. It simply means that experimentation with other models should not be allowed to crowd out the network structure that has proved so beneficial. Take the analogy of the Postal Service. Ordinary postal delivery can and does coexist with premium delivery services like FedEx. But as a policy matter, it has been important for the economy and for society to ensure that ordinary postal delivery is maintained at an acceptable level of service quality. Premium services are fine so long as they are truly a separate and additional option, but problems may arise if they take resources away from ordinary postal delivery and thus degrade its reliability and usefulness.

In short, there is a strong policy interest in ensuring that an open, "best efforts" Internet – on which there is no need to strike any kind of deal with each potential recipient's ISP – is maintained as a viable option for small innovators and speakers.

II. CDT's View of an Appropriate Policy Framework

An appropriate policy framework clearly would need to address the risk that an ISP could block access to selected sites, services, or applications. The Federal Communications Commission's 2005 Policy Statement appears to target this issue, stating that Internet consumers are entitled to access and use the lawful content, applications, and devices of their choice. Blocking also might implicate existing competition law, particularly if the sites or services blocked are competitors to a service affiliated with the blocking ISP. Nonetheless, given questions about the enforceability of the FCC's Policy Statement and the uncertainty associated with after-the-fact enforcement of competition law, it would be useful to establish with greater legal clarity that blocking generally will not be permitted.

Short of outright blocking, and in the absence of an appropriate policy framework, ISPs could in theory engage in various forms of discrimination. For example, an ISP could purposefully degrade the delivery of certain traffic. It could grant special priority to

content, services, or applications affiliated with the ISP. It could grant special priority based on exclusive deals with content providers, or based on deals made available on equal terms to any interested content providers, or based on traffic type without reference to the specific identity of the content provider. It could allow subscribers to designate particular traffic streams for priority treatment.

In some scenarios, there could be a risk that discrimination would have the practical effect of making it necessary for innovators to seek permission or deals with the ISPs of intended recipients. Parties seeking to communicate with the subscribers of a particular ISP might find that while their traffic is not blocked, delivery is unacceptably poor in the absence of a special arrangement with the ISP. A policy framework needs to address this risk.

As in the case of blocking, existing competition law certainly can play a role. Some types of discrimination might well run afoul of existing law. Antitrust litigation, however, is likely to be too cumbersome and slow to provide a useful remedy for individual innovators and small startup companies who feel they have been the victims of unfair competitive practices. FTC action might provide a more helpful safeguard, as discussed in greater detail in Part IV below.

In addition, it is not clear whether existing competition law would cover the full range of potential threats to the preservation of the open Internet. For example, an ISP might degrade certain types of applications without any obvious anticompetitive purpose. Or, suppose an ISP were to strike deals with many content providers for priority treatment. If such deals became sufficiently commonplace, ordinary, unprioritized traffic might find its performance degraded – because it would always be "last in line" behind all the prioritized traffic. It is at least arguable that the individual deals would not be unlawful under the current legal framework. Yet they could have the cumulative effect of making deals with ISPs a de facto necessity for many purposes – precisely the result that policy in this area should seek to avoid. Widespread deals for priority also could reduce the incentive for an ISP to invest in expanding basic Internet bandwidth, by giving the ISP a revenue source that depends upon continued bandwidth scarcity.

Furthermore, addressing this policy concern on a purely after-the-fact basis would be extremely risky. Unraveling a web of discriminatory deals after significant investments have been made and business plans built would be a difficult and complicated undertaking both logistically and politically. It also could be difficult to document the specific competitive harms; nobody knows about small businesses and innovative applications that are lost before they make it off the ground.

For these reasons, CDT believes that if policymakers wish to avoid an outcome in which content providers must seek deals with recipients' ISPs, they should send a clear signal in advance. Establishing a policy framework that addresses some basic questions in advance would also be preferable from the standpoint of marketplace certainty.

CDT's view is that some aspects of a policy framework might best be addressed through new legislation. Legislation would need to deal with both blocking and discrimination, and should probably have a transparency component as well.

Any legislation, however, would need to be carefully targeted. It should avoid creating a burdensome and bureaucratic regulatory regime. In particular:

- The scope of any legislation should be limited to consumer-class broadband Internet service. It need not apply to – or preclude – other services offered over a broadband provider's network. AT&T's recent merger commitment takes just such an approach, excluding enterprise managed IP services and IP television services from the neutrality provision.

- Legislation should not impose a full common carriage regime. In particular, it should not require any regulation of an ISP's prices to its subscribers. ISPs would remain free to devise various service and price plans for customers, including tiered plans based on capacity or throughput.

- Legislation need not involve a complete ban on all discrimination or prioritization. At a minimum, ISPs should be free to offer prioritization to their own subscribers, enabling individual subscribers to pick what content or applications they would like delivered with priority. Thus, if a particular type of video or VOIP product required special priority to work smoothly, the subscriber could arrange the needed priority – but the subscriber would retain full choice over which specific video or VOIP provider to use. ISPs also should remain free to fight spam and security threats like viruses and denial-of-service attacks.

- Legislation should not prevent or interfere with the provision of caching services. Caching does not cause some packets to be prioritized over others during the transmission process; it improves delivery speed by storing certain content closer to potential recipients. This is analogous to a pizza delivery business reducing its delivery time by establishing shops in different neighborhoods throughout the city. The city's road system remains neutral; the pizza delivery vehicles do not gain any ability to cut in front of other vehicles or bypass general traffic rules. Pizzas arrive more quickly simply because they travel a shorter distance.

- Legislation should avoid granting open-ended authority to a regulatory agency. An agency – presumably either the FCC or FTC – would have an enforcement role, but the basic parameters of the rules or principles it enforces should be set forth in the statute.

III. Themes from the Two-Day Workshop

Among the themes that came up on a recurring basis at the FTC's Workshop on February 13 and 14, several seem particularly worth highlighting. CDT does not mean to suggest

that there was full consensus on the points below, simply that they were reflected in the comments of multiple speakers.

First, a number of participants noted that the quality of debate on the Internet neutrality issue so far has not been good. It has been dominated by slogans, its rhetoric has been too extreme, and many arguments have focused on attacking straw men rather than grappling with the real complexity of the issues. Going forward, there is a need to get more specific and more practical. The policy discussion needs to examine potential policy approaches on a more concrete basis, rather than via broad generalizations or exaggerated caricatures of the other sides' positions.

Second, the Internet neutrality issue raises competing interests, and there are risks on both sides. On one hand, overbroad regulation could restrict legitimate behavior by network operators and prevent network-level innovation. Some types of differentiation are beneficial and should not be precluded. On the other hand, harmful discrimination is certainly technically possible, and could have a dampening impact on innovation and competition at the edges of the network. In particular, many neutrality proponents stressed the importance of preserving the ability of innovators to reach the entire network on day one, without the entry barrier of needing to enter commercial arrangements with lots of different ISPs.

Third, given these competing interests, a number of participants suggested that sound policy should strike a balance. Innovation at the edge of the network and innovation by network operators need not be mutually exclusive goals; policy should aim to preserve an environment in which both remain possible. A number of network neutrality proponents suggested that this could translate into allowing prioritization/differentiation on some portions of the network, while still retaining a basic "best efforts" Internet.

Fourth, a key question for policymakers is how to respond in the face of uncertainty about the relative magnitudes of the different risks. Debates about key factors such as the extent of competition in the marketplace and the incentives facing network operators are not likely to yield clear answers. Some observers say this uncertainty argues for waiting until actual harm is shown and relying on ex post remedies like existing antitrust law – thus avoiding the potential negative consequences of unnecessary regulation. Others argue that harms may be difficult or impossible to remedy after-the-fact, and that addressing some issues in advance would be both more effective and provide greater certainty to the marketplace. The policy choice may depend less on predictions about the likelihood of different network operator behaviors than on an analysis of which approach – acting or refraining from acting – risks larger or more irreparable harms.

Fifth, participants seemed generally to agree that network operators should not block or degrade lawful Internet traffic. Even as they resisted the idea of new rules or regulations, several representatives of network operators indicated a commitment to refrain from blocking and degradation.

Sixth, many participants suggested that there is an important role for disclosure and transparency. Internet users need to understand the usage terms of their broadband services – including not just how much capacity they are getting, but also whether there are limitations on how they may use that capacity and whether the provider is prioritizing or otherwise influencing the speed or performance of specific content or applications.

Finally, some participants indicated that the real concern in the Internet neutrality debate is for future innovators. Established companies like Google, Amazon.com, and eBay may prefer and benefit from an open Internet, but they also presumably would have the clout to cut deals with ISPs if necessary. Future innovators lack such clout, but for obvious reasons are not in a position to send representatives to forums like the FTC Workshop. They do not have Washington D.C. offices, they do not have employees focused on policy debates, and they may not even exist yet. The FTC should keep in mind that this key group has limited direct representation at this kind of forum – despite the vital role the group plays in innovation, the growth of the Internet, and the long-term competitiveness of the applications marketplace.

IV. Recommendations for an Active FTC Role

As discussed above, CDT believes carefully targeted legislation may be warranted to safeguard the continued existence of an open Internet with minimal entry barriers. The FTC could take a number of important and useful steps, however, under its existing legal authority.

In its traditional ex post enforcement role, the agency can police unfair competitive behavior. The FTC has already indicated, in a 2006 letter from Chairman Majoras to the House Judiciary Committee, that it believes broadband services are non-common carrier services subject to FTC jurisdiction. The FTC could send an important signal to the marketplace by publicly reiterating that, in light of widely expressed concerns about the Internet neutrality issue, it will be on alert for signs of unfair competition in the broadband marketplace and will not hesitate to take enforcement action.

The FTC could also, however, take a more proactive stance to help preserve the benefits of an open Internet with low entry barriers.

First, the FTC could announce publicly – through public guidance, policy statements, or even formal rules – that it will not permit broadband providers to block or degrade lawful Internet traffic. The FTC could take the view that blocking and degradation are (i) anticompetitive, due to their negative impact on innovation and on competitive entry in markets for content, services, and applications; and (ii) unfair and misleading from a consumer protection standpoint, because they can limit consumer choice and violate consumers' legitimate and traditional expectation that Internet access entails the ability of users to communicate with any and all other Internet users without interference from one's own ISP.

Exceptions could apply when the purpose of blocking or degrading traffic is to protect Internet users from damage or harassment, as in the cases of measures taken to combat viruses, spam, and denial-of-service attacks. But the FTC could demand that broadband carriers publicly disclose their policies concerning the specific circumstances under which they will invoke these exceptions.

It also would be useful for the FTC to offer some guidance on what constitutes "degradation," since this term is less straightforward than "blocking." CDT would suggest as a starting point that degradation involves a purposeful reduction in the quality, reliability, or speed of delivery to a level below that provided to any other traffic that is not the beneficiary of any special deal for priority. In other words, any singling out of specific traffic for below-standard delivery would constitute degradation.

Finally, the FTC could announce that, as a consumer protection measure, any prioritization of traffic by an ISP should be transparent to the ISP's subscribers. In the absence of clear disclosure, the average Internet access subscriber has no way to evaluate the cause of observed differences in the quality and speed of different websites, services, or applications. Many likely would assume that such differences stem from factors related to the websites, services, or applications themselves – how much server capacity they have purchased, the quality of their software or their own Internet connection, etc.

If in fact the subscriber's own ISP has caused the difference by agreeing to prioritize certain selected traffic, subscribers should have an accessible means of finding this out. Public disclosure of prioritization arrangements could enable consumers to exert pressure against any policies they perceive as excessive ISP meddling in their choices among competing Internet content, services, and applications. Strong FTC guidance on disclosure would be an important step.

CDT appreciates the FTC's attention to these important questions. Thank you again for the opportunity to comment.