

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

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

**COMMENTS OF THOMAS M. LENARD, PH.D.¹
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These comments supplement those that I submitted in response to the Commission’s Notice of Proposed Rulemaking on Preserving the Open Internet during the initial comment period.² The purpose of these reply comments is to address the recommendation of several public interest groups to reclassify broadband as a Title II service subject to traditional common carrier regulation.³ Press reports suggest that the Commission is seriously considering implementing this recommendation.⁴

My earlier comments on the Open Internet NPRM apply even more strongly to the proposal to reclassify broadband as a Title II service and I will not repeat them all here. Subjecting broadband to Title II regulation would adversely affect innovation, investment, and consumer welfare, and would undermine the Commission’s goal of extending broadband penetration, particularly to underserved populations. Title II regulation would represent an even sharper departure from the status quo than the NPRM (which itself represents a sharp departure), totally at odds with the Commission’s assertion that it “does not intend to regulate the Internet itself.” Regulating the broadband infrastructure as a public utility is regulating the Internet.

In formulating its broadband policies, the Commission is attempting to learn from the experiences of other countries.⁵ The Commission should, at this juncture, take a lesson from the network management language that the European Union (EU) recently adopted.

¹ The views expressed here are those of the author and not necessarily those of the TPI board, fellows, or staff.

² Comments of Thomas M. Lenard, GN Docket No. 09-191, WC Docket No. 07-52, Jan. 26, 2010; available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020367680>

³ For example, as argued in Reply Comments of Public Knowledge to NBP Public Notice #30, GN Docket No. 09-47, No. 09-51, & No. 09-137, Jan. 26, 2010; available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020383705>

⁴ “Broadband carriers speak out against FCC regulation,” Cecilia Kang, *Washington Post*, Feb. 23; <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/22/AR2010022204890.html?hpid=sec-tech>

⁵ Most clearly illustrated by *Next Generation Connectivity*, the extensive study of international practice done at the FCC’s request by the Berkman Center at Harvard University.

While the Commission ignores the evidence that the broadband market in the United States has generally thrived under the current light-handed regulatory regime, and is taking steps to move away from that regime, the EU is moving in the opposite direction. After more than two years of deliberations, the EU in its recent Framework for Electronic Communications Networks and Services, adopted an approach that is much more consistent with the light-handed network management policy the United States has followed until issuance of the NPRM. Contrary to the direction of the NPRM, and contrary to Title II regulation, the EU's approach does not rely on *ex-ante* rules to define practices that are permitted, but rather opts for an antitrust approach—i.e., a case-by-case, fact-specific approach based on a showing that a particular practice is harmful to competition. The revised Framework Directive states: “Procedures [to measure and shape traffic on a network link] should be subject to scrutiny by the national regulatory authorities, acting in accordance with the Framework Directive and the Specific Directives and in particular *by addressing discriminatory behavior in order to ensure that they do not restrict competition.*” (emphasis added).⁶

The Framework Directive reflects the view that the market is sufficiently competitive to curtail unreasonable network management problems.⁷ Europe has multiple ISPs because of its wholesale regulatory (i.e., open access) policies. As I indicated in my comments on the Berkman study, there is good reason to be skeptical of these policies.⁸ Nevertheless, Europe has adopted them because it does not have the level of vigorous platform competition that prevails in the United States. Most U.S. consumers have access to cable and telco broadband providers and, increasingly, to several wireless broadband providers. This competition will usually be sufficient to protect consumers from unreasonable network management practices. In cases where competition is not sufficient, remedies should be fashioned based on the facts of the specific situation.

Although the EU has traditionally been viewed as more regulatory than the United States, the European Parliament and EU Council officially recognize that their “aim is progressively to reduce *ex-ante* sector specific rules as competition in the markets develops and, ultimately, for electronic communications to be governed by competition law only. Considering that the markets for electronic communications have shown strong competitive dynamics in recent years,

⁶ Directive 2009/136/EC of the European Parliament and the Council OJ L 337 p. 15; available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0011:0036:EN:PDF>

⁷ See Commission Staff Working Document Impact Assessment, SEC(2007) 1472; available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2007:1472:FIN:EN:PDF>. (“From the point of this review, it can be concluded that the sector-specific regulatory issues raised in the net neutrality debate concern essentially barriers for competition that can be effectively addressed by the NRAs under the regulatory framework where appropriate, allowing pricing flexibility, and fostering more efficient use of spectrum to facilitate entry into the broadband market. The competitive markets together with the current provisions on access and interconnection, should therefore be sufficient to protect ‘net freedoms’ and to offer a suitably open environment for both European consumers and service providers.” p. 92)

⁸ See Comments of Thomas M. Lenard on NBP Public Notice #13, GN Docket No. 09-47, 09-51, 09-137, Nov. 9, 2009; available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020347158>. See also Scott Wallsten and Stephanie Hausladen, “Net Neutrality, Unbundling, and their Effects on International Investment in Next-Generation Networks,” *Review of Network Economics* 8(1), pp. 90-112, March 2009; available at http://www.techpolicyinstitute.org/files/wallsten_unbundling_march_2009.pdf

it is essential that *ex-ante* regulatory obligations only be imposed where there is no effective and sustainable competition.”⁹

The Commission’s NPRM and consideration of Title II regulation for broadband services go in an opposite and highly regulatory direction. If the Commission continues in this direction, the consequences will be unfortunate for consumers, the economy, and the development of the Internet.

Respectfully submitted,

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⁹ Directive 2009/140/EC, OJ L 337 p. 37; available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0037:0069:EN:PDF>