**Comments of Time Warner Cable Inc.**
**GN Docket No. 09-191, WC Docket No. 07-52**

**Exhibit A**

# Proposed "Net Neutrality" Mandates Could Be Counterproductive And Violate The First Amendment

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**October 19, 2009**

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The question of so-called "net neutrality" regulation is coming to a head.[1] The Federal Communications Commission (FCC) is considering expanding the Commission's net neutrality initiative. Several legislative measures have been offered in recent years, as have various academic proposals. The common theme to these varied proposals is that broadband service providers (BSPs) would generally be required to give identical treatment to all of the data that flows across their private networks.

Net neutrality proponents are generally guided by a laudable goal of maintaining an open Internet. The concern that arises from net neutrality initiatives is not with that aspiration, but with the means they employ: net neutrality regulations, if not properly framed, threaten to interject the government into the management of the Internet in a way that undercuts their own goals and endangers the First Amendment right of free speech.

BSPs have a goal similar to that of net neutrality proponents: provide robust Internet services that are responsive to customers' demands at a reasonable cost. But BSPs also want to preserve their existing freedom to innovate in the products, services and business models they employ. That freedom has been essential to BSPs' responsiveness to rapidly changing consumer uses, preferences and technological changes, as well as their ability to provide affordable services.

The wisdom of maintaining BSPs as engines of innovation free from government intervention is hard to dispute: in the absence of almost any government regulation, BSPs created the modern broadband Internet, which has prospered and grown in ways no one could foresee. The incentives built into the free market are robust and obvious: a BSP that is unwilling to provide excellent service that meets its customers' demands at an affordable cost will lose those customers to competitors, as every day Americans have access to still more diverse sources of high-speed Internet services.

Net neutrality regulation, if not carefully crafted, could squelch the ability of BSPs to continue to innovate and provide consumers with the products and services they desire. For example, the bandwidth demands of users and other parties have continued to grow at a rapid pace. Yet most net neutrality proposals would tightly restrict the ability of BSPs to employ traffic management techniques as well as to develop new business models and services that will be required to keep Internet service robust. That regulation creates the realistic prospect of overloaded networks that produce worse service for most customers.

Also troubling is that the net neutrality proposals offered to date have been sweeping in scope, yet vague and ambiguous in helping a BSP understand what it is forbidden to do. Most of these proposals would leave it to regulators to determine what conduct is permissible only after the fact, on a case-by-case basis, but with no clear standards to guide this decision making. For example, many proposals permit "reasonable" network management, but a BSP has no way to know ahead of time what regulators will later regard as having been "reasonable." In any area, such after-the-fact rulemaking would be troubling. But those dangers are amplified in this

[1] This White Paper was commissioned by Time Warner Cable, but the views set forth are those of the authors.

context, in which freedom of speech is directly affected and technology and consumer uses continue to change at a breathtaking pace. Since it often takes BSPs years and millions of dollars to develop new technologies, services and business models, vague net neutrality regulation is likely to lead to paralysis on the part of companies that would otherwise continue to spend and innovate to develop the products and services consumers want.

Furthermore, the net neutrality proposals offered to date have not generally presented a balanced solution to concerns about Internet openness. Most net neutrality proposals would apply to BSPs, but not to parties that present potential bottlenecks to Internet openness. In particular, the practical gateways to Internet access are now search engines, which effectively control whether individuals are aware of what content exists on the Internet. There are very few search engine providers, and barriers to entry in that business are high. Other Internet applications, such as browsers, play a similarly crucial role in Internet openness. Thus far, net neutrality proposals would leave both search engines and browsers unregulated, notwithstanding that they make content-based decisions about users' access to the Internet far more directly.

Beyond these significant policy concerns, net neutrality threatens important First Amendment rights and is subject to significant constitutional challenge, because it interjects the government into private decisions about speech. Here too, net neutrality advocates have a laudable goal: expanding communication through the Internet. Net neutrality proponents thus claim the mantle of the First Amendment in arguing that their proposals actually *enhance* free speech by ensuring that BSPs will not interfere with the delivery of Internet content.

But net neutrality proposals rest on the mistaken premise that the Constitution gives the government a role in ensuring that the voices of various speakers receive equivalent attention and that audiences receive equal access to all speakers. In fact, a central purpose of the First Amendment is to prevent the government from making just such choices about private speech, including decisions about what amount of any given kind of speech is optimal. Inconsistent with that purpose is any notion that government might properly limit private decisions, such as those by BSPs regarding the control of their networks, in order to widen the access of some to the avenues of speech or to swell the aggregate amount of speech beyond whatever would result from the decisions of private speakers enjoying "absolute freedom from First Amendment constraints."[2]

Individuals and media outlets make countless decisions each day about what they will or will not say, and their decision not to communicate a particular message is entitled to the same First Amendment protection as their decision to communicate it.[3] Everyone would agree that the government generally cannot require a private newspaper to carry reporting or advertising with which it disagrees. As the Supreme Court has repeatedly observed, even though the particular speaker is not the individual "author" of any particular piece, the First Amendment guarantees it

[2] *United States v. Kokinda*, 497 U.S. 720, 725 (1990) (plurality opinion).

[3] *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) ("The First Amendment securely protects the freedom to make – or decline to make – one's own speech . . . ."); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1994).

the right to choose what content to carry.[4] The government cannot require those who convey information or entertainment to speak or to promote communication by others and claim it is thereby promoting "free speech."[5]

The net neutrality proposals offered to date seem inconsistent with that bedrock principle. They seek to override the decisions of BSPs about what content they will deliver to their subscribers. But that is not a choice that the First Amendment allows the government to make.

Many net neutrality proponents argue that BSPs are not actually engaging in speech that implicates the First Amendment. But they are incorrect. The Constitution applies equally even outside traditional print or electronic media, so that, for example, the government cannot require an individual to open his doors and turn his home into a forum for protesters. Further, like a newspaper, a BSP has a limited capacity to distribute information and accordingly enjoys the right to decide how to apportion that space. And as noted, BSPs make decisions about the delivery of particular content as they continue to innovate in the products, services and business models they employ.

Most net neutrality proposals would forbid BSPs from making those basic choices. Under these proposals, the government generally would require a BSP to treat all the data on its own network equally, forbidding it to make the choices that will benefit its users in the aggregate and that will respond to customers' desire to limit (or to accelerate delivery of) the Internet content they want to receive. Under such a net neutrality mandate, a BSP could not refuse to carry certain content (because it was, for example, offensive), speed its delivery of particular content to premium subscribers, or limit the volume of data of a handful of customers who interfere with others' access to the Internet by putting tremendous strains on the network through massive file downloads. An analogous measure would require a newspaper to carry all freelance submissions (however offensive) and forbid the paper from charging a premium for prime advertising placement. A network neutrality measure – like those analogous hypotheticals – triggers serious scrutiny under the First Amendment because it limits BSPs' private decisions about their private speech.

We recognize that most net neutrality proposals would permit BSPs to engage in "reasonable" network management practices. But thus far, at least, the FCC has construed that authority so narrowly as to render it ineffective as a practical matter.

Further, most net neutrality proposals would leave it to case-by-case adjudications to determine the scope of permitted conduct, including addressing BSPs' network management practices, rather than providing clear and consistent guidance at the outset. That approach,

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[4] *See, e.g.*, *Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986).

[5] The Supreme Court thus unanimously struck down a law requiring a newspaper to offer space for a rebuttal by any candidate for election who had been "assailed regarding his personal character or official record" in that newspaper. The statute would have provided more balanced information to the public, but the newspaper had the right to make its own decisions about what to publish. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

however, is contrary to fundamental First Amendment principles. Vague and indeterminate regulations chill free speech for the straightforward reason that the speaker simply does not know in advance the boundaries of what the government believes is unlawful. A BSP will not create new products, services or business models or implement new forms of traffic management if it fears a later determination by the FCC that those practices are unlawful.

There is a heavy presumption that such a restriction on free speech is unconstitutional. The government must prove that it is attempting to address a significant harm that is real, not conjectural, and that the measure is narrowly tailored so as not to restrict more speech than is necessary to reach its objectives. The net neutrality proposals offered to date have not come close to meeting that rigorous standard.

There is no evidence of a compelling need for sweeping net neutrality regulation. Neither Congress nor the FCC has ever identified a reason to believe that BSPs' subscribers are experiencing material interference in their ability to access the Internet. For its part, the Federal Trade Commission recently reported that it was "unaware of any significant market failure or demonstrated consumer harm from conduct by broadband providers," warning that network neutrality mandates may have "adverse and unintended effects," such as "a long-term decline in investment and innovation in broadband networks."[6] The Department of Justice has likewise commented that there is "scant evidence that consumers are being harmed by the business practices of Internet industry participants" and has cautioned that network neutrality mandates may "prevent, rather than promote, optimal investment and innovation in the Internet, with significant negative effects for the economy and consumers."[7]

The data shows that, every day, Americans have more and more – not less and less – access to unimpaired high-speed Internet services. The diversity and volume of content carried over the Internet has grown exponentially over the past decade. Similarly, the overwhelming majority of Americans (more than 99% of zip codes) have multiple choices for high-speed Internet service.[8] And competition is expanding, not contracting. If a particular provider seeks to interfere unduly with its subscribers' access, those subscribers will switch to an alternative.

Most net neutrality proposals are also unlikely to survive First Amendment scrutiny because they are not tailored to accomplish their goals while interfering with free speech to the minimum degree possible. To the contrary, these mandates prohibit all efforts by BSPs to control traffic over their networks, without regard to whether the practice in question expands

[6] Federal Trade Commission, *Staff Report: Broadband Connectivity Competition Policy* 159-60 (June 2007).

[7] U.S. Department of Justice, Ex Parte Filing, *In re Broadband Industry Practices*, WC Docket No. 07-52, at 1, 3 (Sept. 6, 2007).

[8] *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 23 F.C.C.R. 9615, app. B, tbl. 15 (adopted Mar. 19, 2008; released June 12, 2008).

subscribers' access to Internet content or serves some other important purpose. All the while, the potential burden on BSPs' ability to select and carry content is virtually limitless.

As a point of comparison, the First Amendment intrusions of net neutrality would be much greater than those of the "must carry" regime that only barely survived Supreme Court scrutiny. The Supreme Court, ruling by a narrow five-to-four majority, recognized a limited authority for the government to require cable television providers to carry a specified number of additional channels. But it did so only because Congress had compiled an extensive record showing that (a) cable providers generally operated as local monopolies, (b) a "must carry" requirement was necessary to preserve diverse television programming for the 40% of Americans who did not have cable television, and (c) the statute would rarely interfere with the choices of which stations would be carried by cable companies, which in fact continued to carry 99.8% of the same programming.[9]

Most net neutrality proposals are also not narrowly tailored to further the government's goals because they focus exclusively on BSPs. As discussed above, most decisions about the availability of Internet content are made not by BSPs but instead by third parties. For example, search engines make critical decisions about the content that they will highlight to users. Internet browsers also may modify the content that the user receives. Any proceeding relating to net neutrality must address the conduct of these parties as well.

Nor, finally, can net neutrality advocates fall back on the supposed ability of BSPs to overcome the burdens of these proposals by expanding their networks. There is no support for the notion that the government may violate the First Amendment rights of private speakers who can afford to invest resources in speaking more despite such violations. But even assuming so surprising a reading of the Constitution were accepted, and assuming further that BSPs could make further massive capital investments to keep up with the projections of continued astonishing growth in demand on their networks, the costs that would be passed through would force the many subscribers who use only email and who access only basic Internet content (such as newspapers) to subsidize the onslaught of video downloads and peer-to-peer file sharing of a small minority. The costs of expanding infrastructure escalate an estimated 60% if BSPs are unable to prioritize traffic on their networks, as would be the case under many net neutrality proposals.[10] To avoid imposing those costs, BSPs must manage the ability of their networks to distribute information fairly, which they have the right to do under the First Amendment.

For the reasons given above, if they are to survive First Amendment scrutiny, net neutrality regulations must, at a minimum, (i) target particular practices that are shown by substantial evidence to undermine a significant government interest in open Internet openness, leaving substantial room for all parties, including BSPs, to continue to innovate in the business models and technologies they employ; (ii) identify those practices clearly, so that the regulated

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[9] *Turner Broad. Sys. v. FCC*, 520 U.S. 180 (1997); *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994).

[10] *See* Joseph D. Houle et al., *The Evolving Internet – Traffic, Engineering, and Roles*, 35th Research Conference on Communication, Information and Internet Policy (Sept. 30, 2008), http://web.si.umich.edu/tprc/papers/2007/786/Evolving%20Internet.pdf.

parties can innovate and operate with certainty without the overhanging prospect that they will later be found to have violated the law; and (iii) apply even-handedly not merely to BSPs but to all parties whose practices might affect Internet openness.

In sum, net neutrality proposals rest on a laudable goal that BSPs actually share and have every incentive to achieve: users should have robust Internet services that respond to their changing needs and preferences. But the First Amendment limits the extent to which government can regulate BSPs' choices about how to achieve that goal through the operation of their private networks. And apart from whether sweeping net neutrality proposals could survive First Amendment scrutiny, they likely would undermine rather than achieve their stated purposes.