

**Comments of the Section of Antitrust Law  
Of the American Bar Association  
In Response to the  
Federal Trade Commission's  
Request for Public Comment  
Regarding Broadband Connectivity Competition Policy**

March 2007

The Section of Antitrust Law (the "Section") of the American Bar Association ("ABA") is pleased to submit these comments to the Federal Trade Commission (the "Commission") in response to its request for public comment dated December 7, 2006, regarding issues related to broadband Internet access, including "net neutrality." The views expressed are being presented on behalf of the Section only. These views have not been approved by the House of Delegates or the Board of Governors and, accordingly, should not be construed as representing the policy of the ABA.

**Summary of Recommendations**

Net neutrality raises a host of social, political and economic issues. The Section does not offer any opinion on the social or political issues. Our comments focus solely on the economic advisability of regulating broadband Internet access through the use of non-discrimination statutes, regulations or policies. We generally believe that regulation should not be introduced absent a finding that there is pervasive otherwise anticompetitive conduct that cannot be addressed by the antitrust laws. We believe that, absent extraordinary circumstances, non-discrimination regulation is not advisable economically. We believe that the better approach is to allow the market to operate freely, subject to the requirements of the antitrust laws. A market unencumbered by regulation will maximize innovation and consumer welfare, encouraging networks to invest more in innovation and ultimately facilitating improvements to the infrastructure that will benefit all consumers. The Section has not undertaken its own extensive analysis of the markets at issue, and it does not, at this time, offer any independent conclusion on the ultimate issue of whether competition in the broadband market is so deficient that regulation is necessary. We note, however, that the FCC, which closely monitors the structure and characteristics of the broadband industry, has concluded that there is adequate competition in the broadband area. If that conclusion is correct, then regulation should not be introduced.

**Analysis**

Most Internet content and applications are stored on servers. These servers are, in turn, connected to Internet backbones. Users connect to Internet backbones through Internet service providers. Information is transmitted over the Internet using a protocol called Transmission Control Protocol/Internet Protocol (TCP/IP). The TCP/IP protocol segments data into a number of parts, or packets. The packets travel over conduits, sometimes referred to as

“pipes.” The nature of the pipe determines how many packets can travel and how fast. For example, a fiber optic cable can transmit more data more quickly than a copper cable. The next generation of Internet conduits is being built today. That exercise commands substantial investment from the private sector.

All packets are generally treated equally once they are delivered to the public Internet. As a consequence, for example, lawyer/client communications and transmissions of X-rays and other medical information needed to treat emergency medical conditions are handled no more urgently than spam. Perceived shortcomings in this model have generated private, specialized content delivery networks that many major online content and applications providers use today. These networks allow content and application providers to bypass certain parts of the public Internet in connecting with end users. For example, Google has deployed its own extensive local caching network, consisting of dozens of data centers throughout the country.<sup>1</sup> Yahoo!, Monster.com and others turn to companies like Akamai<sup>2</sup> and Netli<sup>3</sup> for such services.<sup>4</sup> For example, Victoria’s Secret used Akamai’s caching servers to help make the live webcast of its 2000 fashion show viewable even to users with a narrowband connection.<sup>5</sup> Other Internet companies offer proprietary routing strategies that can improve the delivery of content or applications.<sup>6</sup> Broadband providers could similarly offer priority delivery of traffic for higher-definition video, online gaming, software delivery or telemedicine providers. An online gaming company that wishes to enhance its users’ experience by having data regarding their online games transmitted very quickly could, in theory, use any of these strategies. The gaming company could build its own private network, as companies like Google have. It could outsource with a service like Akamai or Netli. It could also contract with a network provider. The network provider may agree to move packets from the online gaming company to destinations more quickly than it would other packets. In many respects, the Internet is not

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<sup>1</sup> See, e.g., G. Gilder, *The Information Factories*, WIRED (October 2006) (discussing “the latest and most advanced of about two dozen Google data centers, which stretch from Silicon Valley to Dublin” and their 450,000 constituent servers).

<sup>2</sup> AKAMAI, EDGEPLATFORM (2007), <http://www.akamai.com/html/technology/edgeplatform.html> (Akamai’s network consists of “20,000 servers deployed in 71 countries,” which allows them to “optimize routes and replicate content for faster, more reliable delivery.”).

<sup>3</sup> NETLI, SERVICES: OVERVIEW, <http://www.netli.com/services/> (Netli’s network helps Internet content and application providers “mitigate the substantial risks that the Internet’s current infrastructure presents to companies attempting to Web-enable business processes and applications” by offering “global sub-second response times, secure delivery, and control of Web applications.”).

<sup>4</sup> AKAMAI, ABOUT AKAMAI, OUR CUSTOMERS (2007), <http://www.akamai.com/html/about/customers.html>; AKAMAI, TECHNOLOGY OVERVIEW, EDGEPLATFORM (2007), <http://www.akamai.com/html/technology/edgeplatform.html>.

<sup>5</sup> AKAMAI PRESS RELEASE, AKAMAI HELPS HANDLE HIGH-VOLUME TRAFFIC DURING RECENT VICTORIA’S SECRET ONLINE FASHION SHOW (June 1, 2000).

<sup>6</sup> For example, Internap has a “portfolio of patented and patent-pending route optimization solutions that address the inherent weaknesses of the Internet and overcome the inefficiencies of traditional IP connectivity options.” Internap Network Services Corp., Form 10-Q (SEC filed Aug. 8, 2006) (Internap’s services are used for “business-critical applications such as e-commerce, customer relationship management (CRM), video and audio streaming, voice-over-IP (VoIP), virtual private networks (VPNs), and supply chain management.”). Keynote Systems uses measurement computers (called agents) to assess the various factors that may affect the delivery of different kinds of traffic such as video streams, thereby enabling Internet content and applications providers to “eliminate application bottlenecks” and “enhance overall end-user experience.” KEYNOTE, SERVICE LEVEL MANAGEMENT, PERFORMANCE TUNING (2007), [http://www.keynote.com/solutions/slm\\_performance\\_tune.html](http://www.keynote.com/solutions/slm_performance_tune.html).

neutral with regard to speed of end-user access,<sup>7</sup> nor are all packets treated equally across the entire Internet. The length of time it takes for information to move from one location to another over the Internet depends in part on the arrangements that content and applications providers and their ISPs make and the choices made by end users and their ISPs to receive traffic.

Although the movement for broadband regulation has not coalesced around a single definition of the problem,<sup>8</sup> many of the broadband regulation proposals focus on the ability of networks to discriminate between packets or delivery times. They would require that all packets be treated equally on the Internet and that no packet be given a more advantageous delivery system. Some advocates believe these non-discrimination approaches are necessary to cure a perceived ability to abuse market power. These advocates believe that such market power may be exercised by leveraging control over the “last mile” of pipe that goes into a consumer’s house.<sup>9</sup> By controlling the gateway, the gatekeeper can arguably dictate what content the individual sees and does not see. Under this theory, a gatekeeper could, for example, enter into an exclusive dealing arrangement with one premium movie channel whereby only the video from that channel will be distributed over that network provider’s pipes. This gatekeeper might also enter into an exclusive dealing arrangement with a single search engine. This market power may have been obtained through mergers and acquisitions and changes in Federal Communications Commission rules. These advocates also question the ability of antitrust to deal with abuses of market power given decisions like *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*.<sup>10</sup> Among other holdings, the Court in *Trinko* held that an Incumbent Local Exchange Carrier did not violate the antitrust laws when it refused to provide to a Competitive Local Exchange Carrier the same quality of access to its facilities as it afforded its own customers. The Court also indicated that it did not recognize, and had never recognized, the essential facilities doctrine, which could be used as a tool to check anticompetitive leveraging.<sup>11</sup> In essence, these proponents of net neutrality legislation believe that the market is susceptible to exercises of market power and that the antitrust laws provide an inadequate resolution.

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<sup>7</sup> There are a wide variety of ways in which users may access the Internet. Some access through broadband connections like cable, digital subscriber line (DSL), fiber optic internet services, various types of wireless broadband (e.g., cellular, fixed wireless/WiMax, wifi, 3G mobile wireless, and satellite), and broadband over power lines. Not all have ready access to mass-market broadband, *see, e.g.*, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, FCC NEEDS TO IMPROVE ITS ABILITY TO MONITOR AND DETERMINE THE EXTENT OF COMPETITION IN DEDICATED ACCESS SERVICES (November 2006), <http://www.gao.gov/new.items/d0780.pdf> (“data suggest[s] that facilities-based competitive alternatives for dedicated access are not widely available”), and there remain Internet end users who choose to continue accessing the Internet using narrowband dialup even though broadband access is available to them. Further, broadband services transmit at a wide range of rates. Indeed, within the various types of broadband access, transmission speeds vary widely. There are tremendous differences among the capabilities of the various DSL technologies and specific deployments of those technologies, including ADSL (and ZG.Lite), SDSL, G.SHDSL, HDSL, IDSL, PDSL, RADSL, VDSL, VDSL2 and other xDSL technologies. (At the slow end is IDSL, or ISDN over DSL, with a speed up to 144Kbps. By comparison, VDSL is capable of rates up to 52Mbps, but only for very short distances.)

<sup>8</sup> *See, e.g.*, CONGRESSIONAL RESEARCH SERVICE, NET NEUTRALITY: BACKGROUND AND ISSUES, 1 (May 16, 2006) (noting that “[t]here is no single accepted definition of ‘net neutrality.’”).

<sup>9</sup> The last mile of pipe refers to the actual cable that enters a consumer’s house from the telecommunications company. It is not clear whether the “last mile” of pipe is a bottleneck. *See* Footnote No. 7.

<sup>10</sup> 540 U.S. 398 (2004).

<sup>11</sup> *Id.* at 410-11. *See also* *Kinderstart.com LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2006 WL 3246596 at \*9 (N.D.Cal. Nov. 7, 2006).

Advocates also feel that without broadband regulation, commercial content and applications will overtake “all forms of civic and noncommercial online programming.”<sup>12</sup> Without broadband regulation, the “democratic quality of the Internet” may be jeopardized. “Big, wealthy voices would start to overpower the smaller, poorer ones.”<sup>13</sup> Others contest these claims, arguing that broadband regulation—not its absence—would entrench the big and wealthy speakers, to the detriment of the smaller, newer ones. They note that incumbent content and application providers can speed material to their users through private networks that are not always available to small start ups. Non-discrimination broadband regulation would deter entry by these small start-ups by banning one of the means (*i.e.*, prioritization by a network provider) that they can use to compete with the entrenched players on speed and reliability.<sup>14</sup>

The last Congress has proposed several bills to regulate broadband,<sup>15</sup> including one that would have amended the Clayton Act.<sup>16</sup> Academics and other commentators have published their own suggestions.<sup>17</sup> The current Congress is considering new proposals.<sup>18</sup> In general, these proposals typically ban “secondary line” discrimination.<sup>19</sup> Some would require a network provider that carried a type of data for one company at a particular quality-of-service level and price to offer that quality-of-service level to all similar data services, “without imposing a surcharge.”<sup>20</sup> Other proposals would require a network provider that carried a type of data at a particular quality-of-service level and price to carry all other packets at that quality-of-service level and price, regardless of the type of data service involved.<sup>21</sup> Still other proposals

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<sup>12</sup> Jeff Chester, *The End of the Internet?*, THE NATION (Feb. 1, 2006), <http://www.thenation.com/doc/20060213/chester>.

<sup>13</sup> Editorial, *Protecting Internet Democracy*, NEW YORK TIMES (January 3, 2007).

<sup>14</sup> See, e.g., J. GREGORY SIDAK, A CONSUMER-WELFARE APPROACH TO NETWORK NEUTRALITY REGULATION OF THE INTERNET, 95-96 (Sept. 2006).

<sup>15</sup> Communications Opportunity, Promotion, and Enhancement Act of 2006, H.R. 5252, 109th Cong. (2006); Network Neutrality Act of 2006, H.R. 5273, 109th Cong. (2006); Internet Freedom and Nondiscrimination Act of 2006, H.R. 5417, 109th Cong. (2006); Internet Non-Discrimination Act of 2006, S. 2360, 109th Cong. (2006); Communications, Consumer’s Choice, and Broadband Deployment Act of 2006, S. 2686, 109th Cong. (2006); Internet Freedom Preservation Act, S. 2917, 109th Cong. (2006).

<sup>16</sup> H.R. 5417, 109th Cong. (2006).

<sup>17</sup> See, e.g., Tim Wu, *The Broadband Debate: A User’s Guide*, 3 J. ON TELECOMM. & HIGH TECH. L. 69, 95 (2004); Robert D. Atkinson & Philip J. Weiser, *A Third Way on Network Neutrality*, THE NEW ATLANTIS 47 (2006).

<sup>18</sup> See, e.g., Internet Freedom Preservation Act, S. 215, 110th Cong. (2007) (introduced on January 9, 2007).

<sup>19</sup> The Antitrust Modernization Commission has tentatively recommended that the Robinson-Patman Act be repealed. THE ANTITRUST MODERNIZATION COMMISSION, TENTATIVE RECOMMENDATIONS, 19 (Jan. 11, 2007), [http://www.amc.gov/pdf/meetings/list\\_of\\_recommendations\\_jan\\_11v3.pdf](http://www.amc.gov/pdf/meetings/list_of_recommendations_jan_11v3.pdf).

<sup>20</sup> See, e.g., Net Neutrality Act of 2006, H.R. 5273, 109th Cong. § 4(a) (7) (2006) (specifying that “if the broadband network provider prioritizes or offers enhanced quality of service to data of a particular type, [the broadband network provider must] prioritize or offer enhanced quality of service to all data of that type (regardless of the origin of such data) without imposing a surcharge or other consideration for such prioritization or quality of service”); Internet Freedom and Nondiscrimination Act of 2006, H.R. 5417, 109th Cong. § 3(2) (2006) (providing that “[i]f a broadband network provider prioritizes or offers enhanced quality of service to data of a particular type, it must prioritize or offer enhanced quality of service to all data of that type (regardless of the origin or ownership of such data) without imposing a surcharge or other consideration for such prioritization or enhanced quality of service”); Internet Freedom Preservation Act, S. 2917, 109th Cong. § 2 (2006) (non-discrimination provisions); Internet Non-Discrimination Act of 2006, S. 2360, 109th Cong. § 4 (2006) (non-discrimination provisions).

<sup>21</sup> See, e.g., TIMOTHY WU, THE AT&T NETWORK NEUTRALITY AGREEMENT (Dec. 29, 2006), <http://www.timwu.org/log/archives/81#more-81> (characterizing certain AT&T concessions to the FCC in

include provisions requiring network providers to offer fixed levels of quality and service, at rates prescribed by regulators and at ever increasing speeds.<sup>22</sup> The amendment to the Clayton Act would make it a violation of the antitrust laws for a network to discriminate in quality-of-service between similarly situated content generators.<sup>23</sup>

Fundamentally, these approaches appear to prohibit discrimination much as the Robinson Patman Act does. The Section has recently raised concerns about the Robinson-Patman Act's *per se* ban on discrimination.<sup>24</sup> These net neutrality proposals cannot fairly be viewed as a means of encouraging allocative efficiency or maximizing consumer welfare.<sup>25</sup> Indeed, the result of such regulation likely<sup>26</sup> will be higher consumer prices<sup>27</sup> and fewer

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connection with its merger with BellSouth Corp. as amounting to “one of the stronger, but not the most extreme forms of a basic network neutrality rule”); Internet Freedom Preservation Act, S. 215, 110th Cong. (2007) § 2 (barring charges “on the basis of the type of content, applications, or services”).

<sup>22</sup> Lawrence Lessig, Professor, Stanford Law School, prepared testimony before the Senate Committee on Commerce, Science and Transportation, Hearing on “Network Neutrality,” at 10 (Feb. 7, 2006) (describing requirement that network providers offer “‘basic internet service’ to all broadband customers,” at a level fixed by the FCC and adjusted “as the uses of the Internet develop”); *see also* ANNENBERG CENTER PRINCIPLES FOR NETWORK NEUTRALITY (Mar. 27, 2006), <http://www.annenberg.edu/news/news.php?id=13> (stating that “[b]roadband network operators should provide ‘Basic Access Broadband’” at “1.25+ Mb/s downstream and less upstream ... moving to increasingly symmetric bandwidth at higher speeds in the future” and that “[t]he specific parameters (speed and latency) of this service will be reviewed on a quadrennial basis.”); Network Neutrality Act of 2006, H.R. 5273, 109th Cong. (2006) at § 4(a) (describing duties to “not block, impair, [or] degrade ... services [available] over broadband networks”); Internet Freedom and Nondiscrimination Act of 2006, H.R. 5417, 109th Cong. (2006) at § 3 (requiring broadband network providers to offer network services on “reasonable and nondiscriminatory terms”); Internet Freedom Preservation Act, S. 2917, 109th Cong. (2006) at § 2 (forbidding broadband service providers from blocking, “impair[ing], or degrad[ing]” service and prescribing “reasonable and nondiscriminatory” terms); Internet Freedom Preservation Act, S. 215, 110<sup>th</sup> Cong. (2007) § 2 (same).

<sup>23</sup> H.R. 5417, 109th Cong. (2006).

<sup>24</sup> ABA SECTION OF ANTITRUST LAW, COMMENTS OF THE ABA SECTION OF ANTITRUST LAW IN RESPONSE TO THE ANTITRUST MODERNIZATION COMMISSION'S REQUEST FOR PUBLIC COMMENT REGARDING ROBINSON-PATMAN ACT STUDY ISSUES, 2 (Apr. 6, 2006).

<sup>25</sup> *See, e.g.*, ALFRED E. KAHN, AEI-BROOKINGS JOINT CENTER, TELECOMMUNICATIONS, THE TRANSITION FROM REGULATION TO ANTITRUST, 19 (July 2006, rev. Aug. 14, 2006) (criticizing proposals to ban discriminatory pricing in broadband delivery as “economically ignorant”). *See also* THE ANTITRUST MODERNIZATION COMMISSION REPORT: INTRODUCTION AND EXECUTIVE SUMMARY (PRELIMINARY DRAFT OUTLINE), 1 (Jan. 10, 2007), [http://www.amc.gov/pdf/meetings/Rep-ExecSum\\_070110circ.pdf](http://www.amc.gov/pdf/meetings/Rep-ExecSum_070110circ.pdf) (“Competition in free markets—that is, markets that operate without either private or governmental anticompetitive restraints—forces firms to lower prices, improve quality, and innovate. Reliance on free markets benefits all consumers in the United States and creates incentives for efficiency and innovation that lead to greater productivity and flexibility in the U.S. economy.”); *cf.* Frank H. Easterbrook, *Contract and Copyright*, 42 HOUS. L. REV. 953, 957 (2005) (“Markets are much better than judges at sifting efficient from anticompetitive practices.”).

<sup>26</sup> Theoretically, forcing sellers to charge a single price could result in both higher prices for some buyers and lower prices for others.

<sup>27</sup> *See, e.g.*, HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 14.6a1 (3d ed. 2005); J. GREGORY SIDAK, A CONSUMER-WELFARE APPROACH TO NETWORK NEUTRALITY REGULATION OF THE INTERNET, 102 (Sept. 2006) (non-discrimination broadband regulation would “foreclose the opportunity of broadband Internet access for millions of potential end-users who could not afford what otherwise would be inexpensive broadband.”).

innovative new services.<sup>28</sup> Moreover, such regulation is likely to slow deployment of broadband networks and delay development of adjacent and companion technologies. To the extent broadband providers can exercise market power as a result of merger or acquisition allowed to proceed because of an enforcement decision, the Clayton Act still remains a mechanism to challenge such decisions by future regulators or by consumers. To the extent broadband providers can exercise market power by virtue of predatory or exclusionary behavior, the activity remains subject to the proscriptions of Section 2 of the Sherman Act. To the extent broadband providers can exercise market power by virtue of historical accident or business acumen, such activity is not illegal.<sup>29</sup> To the extent that legally obtained market power is undesirable in any given market, the question becomes social and political. The competition laws—and the antitrust enforcement agencies and courts that implement them—work effectively to maximize consumer welfare, but they tend to lack the institutional ability to regulate business conduct to achieve other social or political ends. The Section takes no view on such social or political goals other than to question whether antitrust or competition laws are the proper vehicle to express them.

Today's Internet infrastructure has been criticized as unprepared to meet consumers' growing appetite for video and other bandwidth-intensive services.<sup>30</sup> To meet that demand, current Internet markets appear to be attracting the high levels of investment that the widespread deployment of next-generation broadband networks demands.<sup>31</sup> Regulation, however, could distort these investment incentives by increasing the risk that the investments, once sunk, will be prohibited from profit-maximizing and useful purposes.<sup>32</sup> If broadband companies did not believe they could maximize the value of the technology by selling premium products to purchasers wishing to acquire them, they would likely invest in other areas.

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<sup>28</sup> It is theoretically possible that the regulation will increase competition among content providers encouraging content innovation or that the regulation will lead to lower conduit prices, spurring the introduction of complementary services like new content.

<sup>29</sup> The Section expresses no opinion on the desirability of the essential facilities doctrine.

<sup>30</sup> See, e.g., Craig E. Moffett, Vice President and Senior Analyst, Sanford C. Bernstein and Co., LLC, testimony before the Subcommittee on Communications, U.S. Senate, 2 (Mar. 14, 2006) (noting the inability of "our telecommunications infrastructure" to handle the "widespread delivery of advanced services, especially video, over the Internet.").

<sup>31</sup> See R. KLUGMAN, PRUDENTIAL EQUITY GROUP, *THE DUST HAS SETTLED: WE THINK IT'S O.K. TO OWN TELECOM STOCKS AGAIN*, 43 (July 20, 2006) (Verizon spending \$18 billion to deploy fiber-to-the-premises to 18 million homes; AT&T spending \$4.6 billion to deploy a fiber-to-the-node network to 19 million homes); NCTA, *2006 Industry Overview* at 4 & Chart 1 (2006) (cable companies have invested over \$100 billion to upgrade their networks for broadband internet services); SPRINT PRESS RELEASE, SPRINT ACCELERATES EV-DO REVISION-A MOBILE BROADBAND UPGRADE (Aug. 3, 2006) (Sprint investing in wireless broadband); Antone Gosalves, *VC Investment in Tech Up \$1 Billion*, INFORMATIONWEEK, <http://www.informationweek.com/management/showArticle.jhtml?articleID=193402335&subSection=> (venture capitalists invested \$1 billion more in the technology sector in the first half of 2006 than in same period in prior year, due largely to investments in internet-related products such as internet television, home entertainment and other multimedia for the home, online advertising, and online social networks).

<sup>32</sup> See, e.g., ALFRED E. KAHN, AEI-BROOKINGS JOINT CENTER, *TELECOMMUNICATIONS, THE TRANSITION FROM REGULATION TO ANTITRUST*, 26 (July 2006, rev. Aug. 14, 2006) (questioning how advocates of broadband regulation "can ... justify such [regulation] applied to cable and telephone companies in the process of constructing extremely expensive broadband highways—except as they are prepared to advocate government financing"). Broadband regulation regimes that empower antitrust judges, juries, or regulators to decide how industry resources may be used are likely to discourage investment by creating uncertainties about the ability of firms to recover their investment in such resources plus an appropriate return.

Moreover, by making investment in networks riskier, non-discrimination broadband regulation could deter innovative new broadband providers from entering the market—a result that would present consumers with reduced competition in the broadband network market.<sup>33</sup> The risk that regulation can dull incentives to invest in key Internet infrastructure is not hypothetical. Past regulation appears to have hampered the growth of DSL by eroding incentives to invest; when the regulatory burden was lifted, DSL growth took off.<sup>34</sup>

Non-discrimination broadband regulation poses other concerns. Technology changes rapidly. Legislation now could in fact hamper future innovation by locking in a particular approach to content distribution that may in fact prove anachronistic very quickly.<sup>35</sup> Indeed, in the absence of regulation, the number of competing broadband Internet providers appears to be growing; prices are generally falling even as the quality of service measured in speed and reliability is increasing; the array of technologies for offering new services is expanding; and traditional market definitions are being erased as historically distinct providers compete with each other today to win market share by serving consumers better.<sup>36</sup> Finally, non-discrimination broadband regulation may result in unintended—and anticompetitive—

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<sup>33</sup> See, e.g., Christopher Yoo, *Beyond Network Neutrality*, 19 HARVARD J. LAW & TECH. 1, 9-10 (2005) (noting that broadband regulation could thereby “turn into the cause, rather than the consequence, of market failure.”); ALFRED E. KAHN, AEI-BROOKINGS JOINT CENTER, TELECOMMUNICATIONS, THE TRANSITION FROM REGULATION TO ANTITRUST, 25 (July 2006, rev. Aug. 14, 2006) (noting that “the demand for ‘network neutrality’ could in such circumstances discourage the achievement of the ultimately more important ‘network diversity’”).

<sup>34</sup> See, e.g., THOMAS HAZLETT & COLEMAN BAZELON, REGULATED UNBUNDLING OF TELECOMMUNICATIONS NETWORKS: A STEPPING STONE TO FACILITIES-BASED COMPETITION?, 19-20 (Sept. 2005)(stating that DSL services grew fifty percent faster than historical trends predicted after deregulation); see also Jeffrey Eisenach, Chairman, CapAnalysis, LLC, Telecoms in Turmoil: What We Know and (Mostly) Don’t Know about the Telecom Marketplace in 2006, presentation to the National Regulatory Conference, 13 (May 11, 2006)(noting that in the two years after the FCC broadband deregulation, there was a 40 percent increase in telecommunications investment).

<sup>35</sup> Christopher Yoo, *Beyond Network Neutrality*, 19 HARVARD J. LAW & TECH. 1, 67 (2005).

<sup>36</sup> See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 33 (2005) (“There are numerous technologies and network designs that form, or potentially could form, part of the broadband telecommunications infrastructure of the 21st century,” including cable modem technology, mobile wireless, satellite, fixed wireless, and broadband over wireline.); *id.* ¶ 57 (“We anticipate that, as the availability of cable modem and DSL broadband Internet access services grows with the modernization of network infrastructure and increased service deployment, more households will have the option of choosing between the cable and DSL broadband option. Increased intermodal and intramodal competition will continue to encourage these two broadband providers to deploy broadband Internet access services throughout their respective service areas. In addition, the threat of competition from other forms of broadband Internet access, whether satellite, fixed or mobile wireless, or a yet-to-be-realized alternative, will further stimulate deployment of broadband infrastructure, including more advanced infrastructure such as fiber to the home.”); *id.* ¶ 60 (“We recognize that the attributes of the available broadband platforms vary, particularly as to price, speed, and ubiquity. We expect that customers will weigh these attributes for each platform and make service-related decisions based on their specific needs. For example, a customer may select a broadband Internet access service with a somewhat slower speed than that associated with other service platforms in return for the lower price of the selected service.”); Scott Cleland, NetCompetition.org, Why Competition Obviates Net Neutrality, presentation for the FTC Internet Access Task Force, at 5 (Sept. 26, 2006) (noting that while DSL speeds increased, real DSL prices dropped nearly 50 percent and introductory rates almost 70 percent over the past three years.); J. HODULIK, UBS, IS THE BROADBAND DUOPOLY UNDER THREAT?, 3 (May 10, 2006) (stating that even as prices significantly decreased, wired downstream speeds increased in the last two years from 1-3 Mbps to 3-6 Mbps.).

consequences. For example, non-discrimination broadband regulation would restrict prioritization by networks, but would seem to allow others to speed content and applications to users in other ways. Decision makers considering non-discrimination broadband regulation should take into account the effects of hindering one set of competitors with legal rules that do not restrain others who are able to bypass those rules.

Fifty years of experience with the Robinson-Patman Act counsels skepticism toward *per se* condemnation of price discrimination generally.<sup>37</sup> There is little reason to suspect that current antitrust laws are unequal to the task of challenging anticompetitive conduct in the online environment. As Federal Trade Commission Chairman Deborah Majoras has noted, existing competition laws already bar network providers with market power from anticompetitive conduct.<sup>38</sup> Ultimately, we believe that the competitive process will drive investment and innovation in the Internet. That investment and innovation will inure to the benefit of all consumers. We do not think that imposing non-discrimination statutes, regulations or policies will offer any offsetting benefits economically.

We generally believe that regulation should not be introduced absent a finding that there is pervasive otherwise anticompetitive conduct that cannot be addressed by the antitrust laws. For the reasons set forth above, we believe that, absent extraordinary circumstances, non-discrimination regulation is not advisable economically. We further believe that, under certain rare circumstances, a market may benefit from regulation. The question arises whether the circumstances in the broadband arena are such that it is one of those rare cases in which regulation, rather than reliance on the market, is advisable. The Section has not undertaken its own extensive analysis of the markets at issue, and it does not, at this time, offer any independent conclusion on the ultimate issue of whether competition in the broadband market is so deficient that regulation is necessary.<sup>39</sup> We note, however, that the FCC, which closely monitors the structure and characteristics of the broadband industry, has concluded that there is adequate competition in the broadband area.<sup>40</sup> If that conclusion is correct, then regulation should not be introduced.

In the event that the Commission, Congress, or any other institution undertakes a factual analysis regarding whether circumstances exist that would justify regulation in this industry, we urge that the following factors should be considered: (1) whether the market is susceptible to a durable exercise of market power (which raises subsidiary issues of proper market definition(s)); (2) the extent to which new or competing technologies are likely to evolve, to be viable and to substitute or displace existing ones; (3) whether pricing and quality of service

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<sup>37</sup> ABA SECTION OF ANTITRUST LAW, COMMENTS OF THE ABA SECTION OF ANTITRUST LAW IN RESPONSE TO THE ANTITRUST MODERNIZATION COMMISSION'S REQUEST FOR PUBLIC COMMENT REGARDING ROBINSON-PATMAN ACT STUDY ISSUES, 2 (Apr. 6, 2006).

<sup>38</sup> *See, e.g.*, Deborah Platt Majoras, Chairman, Federal Trade Commission, prepared remarks before the Progress & Freedom Foundation's Aspen Summit, 19-20 (Aug. 21, 2006) (FCC, FTC, and DOJ have power to check anticompetitive conduct in this area).

<sup>39</sup> Nor indeed do we take a position on the relevant market definition. Some contend that the relevant market is the local market for broadband services. *See, e.g.*, Lawrence Lessig, Professor, Stanford Law School, prepared testimony before the Senate Committee on Commerce, Science and Transportation, Hearing on "Network Neutrality," (Feb. 7, 2006). Others state that the relevant market is the global market for online content and applications. *See, e.g.*, HAL SINGER, NET NEUTRALITY: A RADICAL FORM OF NON-DISCRIMINATION 4-6 (Feb. 23, 2007), <http://www.criterioneconomics.com/docs/pittsburghspeech.pdf>.

<sup>40</sup> *See* Footnote No. 36 (FCC report); *but see* Footnote No. 7 (GAO report; raises issues with FCC report).

indicate that the market is behaving well or poorly; and (4) the extent of documented harms to consumers. A market that is not susceptible to a durable monopoly is likely functioning properly and would not require regulatory intervention to correct itself. Similarly, if innovation is particularly brisk, new disruptive products can displace seemingly entrenched monopolies, thus reducing or eliminating the need for regulatory intervention. Declining prices, increasing quality, and the absence of actual harm to consumers suggest that the market is functioning properly and so would not require regulatory intervention. Moreover, if it is determined that certain market failures require that some regulation be introduced, the scope of the regulation should not be greater than necessary to redress the market failures. Finally, if a strong preliminary case can be made that regulation is desirable, the costs, practicality and potentially adverse side effects of regulation should be analyzed against the benefits that are likely to be achieved.