Proposed Amendment to the Net Neutrality Provision
of the House Staff Draft of Broadband Legislation of November 3, 2005

AMENDMENT:

Section 104: Access to BITS.

“(a) [no change]
“(b) [no change]

Add New subsections (c) and (d):

“(c) (1) This section shall be enforced through the filing of a complaint under section 411 by a subscriber. The Commission shall, within 3 days of the filing of such a complaint, direct the BITS provider immediately to cease blocking, interfering with, or impairing the subscriber’s use of the network unless the Commission finds that the BITS provider has made a prima facie showing that such blocking, interference or impairment is necessary to protect national security or the security and reliability of its network.”

“(2) In any ruling on such complaint, the Commission shall presume that the subscriber’s use of the network is legal, and the BITS provider shall bear the burden of proving that any blocking, interference or impairment of traffic is justified under this section.”

“(d) For the purpose of this section, a “subscriber” includes residential and business consumers and providers of information, services, applications and other content over the Internet.”

EXPLANATION:

Section 104 of the House staff draft of Nov. 3 begins with a strong statement of principle (BITS providers may not “block, impair or interfere with” Internet traffic) but then follows it with a variety of “exceptions” that sound reasonable but could ultimately be used to undermine the basic principle. For instance, a BITS provider may protect the “security and reliability of its network”, may prevent “theft”, and may impose network capacity limitations. The most fundamental problem with the current draft is that the network operator retains the right, under this draft, to interpret these exceptions and determine when these exceptions apply. While in some cases these exceptions may reflect legitimate network management needs of the network operators, these terms are not defined and could give the network operator too much freedom to discriminate under the guise of network management.

Section 411 of the staff draft allows subscribers to file a complaint to enforce this provision, but it gives the FCC 180 days to rule on the complaint. By the time the FCC determines whether or not the blocking/impairment/interference is legitimate, the user could suffer irreparable harm, and the provider could be out of business. Furthermore,
the staff draft gives the FCC no guidance as to how to interpret these network management provisions.

Rather than trying to tighten each of the exceptions separately, the above language attempts to address these issues simply. The amendment establishes a presumption that the use of the network is legitimate, and places the burden of proof on the network operator to justify any blocking/impairment/interference. The network operator should not be permitted to decide on its own what is in the best interest of the consumer or provider. The provision requires the FCC to act as an independent check to make sure that the network operator does not abuse its network management rights. As long as the network operator satisfies its burden of proving that the network operator’s action is justified, its network management rights remain fully intact.

Furthermore, the provision requires the FCC to make a preliminary decision within 3 days of the filing of the complaint whether or not the blocking should continue. While the staff draft currently gives the FCC the authority to order a BITS provider to restore service, the FCC is not required to make this decision, and there is no standard by which the FCC must make this decision. The amendment above requires the FCC to make this preliminary decision quickly so that consumers and providers do not suffer irreparable harm from a network operator’s abuse of its network management rights.

Finally, the amendment makes clear that any user of the Internet may file such a complaint, including residential and business consumers and providers of information, services or applications or other content.

What this amendment does NOT do:

1. The amendment does NOT require the network operator obtain pre-approval from the FCC before blocking/impairing/interfering with traffic. The FCC review is only triggered upon the filing of a complaint.

2. The amendment does NOT prevent the network operator from blocking spam, viruses, or threats to national or network security. The network operator can take immediate action to block this unlawful traffic as long as it can justify its action to the FCC within 3 days of the day a complaint is filed.

3. The amendment does NOT prevent network operators from engaging in promotional arrangements with or providing enhanced services to certain application, service or content providers. The amendment retains the provisions of the House Staff Draft that recognize the network operators’ rights to negotiate carriage arrangements with certain providers or consumers at different access speeds.