Before I begin, I want to the Commission for inviting me to this workshop and to Maureen Ohlhausen and Greg Luib and the Internet Access Task Force for their hard work. I’d like to give a consumer perspective on net neutrality.

I. What is the Debate over Net Neutrality About?

One of the few things that proponents and opponents of net neutrality will agree upon over the next two days is that the Internet is the most open and robust engine of innovation, commerce, creativity and democratic discourse this country has ever known.

But we don’t agree upon how it became that way. We believe that Internet is what it is today because of an FCC requirement that the on-ramps to our communications system be made available to all content, applications and services on a non-discriminatory basis. Simply put, the net neutrality debate is about that non-discrimination requirement. As Chris told you, that requirement was repealed by the Brand X decision and its FCC progeny.

Rather than new regulation, net neutrality supporters like Public Knowledge seek to have that ban on discrimination reinstated, so that the proprietors of the on-ramps to the Internet will not be able to use their market power to favor services and content in which they have a financial interest, like video, gaming and voice over IP. This closed, cable-like model harms consumer choice and their ability to use the Internet without interference by gatekeepers.

The market power of the incumbent broadband providers is clear: cable and telcos are still dominant providers – controlling nearly 97% of the residential broadband market. Other technologies barely make a dent, and in any event are not substitutes for DSL and cable modem service. Even where a consumer has a choice of DSL and cable, the switching costs may be prohibitive or unattractive, particularly if the service is bundled with other communications services. And remember, the two biggest wireless carriers also dominate the DSL market.
While broadband wireless is held up as the great savior of competition, Tim Wu’s recently released paper demonstrates that instead it is a closed system where music, movie and game downloads and streaming and use of VoiP can be reasons for termination, and devices that attach to the network are hobbled or prohibited by certain carrier restrictions.

Let me address the FCC’s recent Internet access status report, which purports to show increased significantly increased access to broadband as well as increased competition. The methodology of the FCC’s study is so flawed as to make it almost useless. First, the study defines broadband as 200 Kbps, which just about everyone agrees is a ridiculously slow speed. Second, the study assumes that if one resident in a particular zip code has access, then all in that zip code has access, which is patently untrue. I have access to RCN’s broadband service, but I know for a fact that many other residents in 20008 do not have such access.

A better assessment of the broadband market and the potential for discrimination was made in a June 2006 report by the CRS, and I quote:

“To the extent that the broadband network providers seek to maximize their revenues for what they perceive as the killer broadband applications….they will have the incentive to build, operate, and manage their broadband network in a fashion that favors their own applications….With only limited alternatives to the cable and telephone broadband duopoly for the foreseeable future, and with the cable and telephone companies both pursuing largely the same business plan, the broadband providers might have both the incentive and ability to exploit their control over access to end users to restrict competition…and harm consumers.”

II. What is the Debate Not About?

Now that I’ve told you what the net neutrality debate is about, let me tell you what it is not about.

The debate is not about whether consumers should be charged more for greater bandwidth and faster speeds – of course they should.

The debate is not about whether content and service providers should pay for the ability to get to their customers faster – they already pay at the originating and terminating ends. This is about whether the last-mile
provider will deny them the opportunity for better service so as to advantage their proprietary services.

The debate is not about making broadband access a dumb pipe: we do not oppose broadband providers owning applications, content and services that flow over the pipes or engaging in legitimate network management to ensure the proper operation of the network. We just don’t want broadband providers to favor these services, or other services in which they have a financial interest.

The debate is not about a new, undefinable regulatory concept: nondiscrimination appears over 60 times in the Communications Act, and indeed, at least one broadband provider, Verizon, has taken advantage of the FCC’s program access rule, which requires cable operators to make cable programming available to competitors on a reasonably non-discriminatory basis. The program access rules have been in place for 14 years, have largely been self-effectuating and have not resulted in price regulation. Moreover, last year, cable operators sought to ensure that telephone companies did not discriminate against their VoIP services in the draft telecom bill.

A good place to start for a definition of non-discrimination is in the AT&T/Bell South merger conditions, in which ATT agreed not “to provide or sell to Internet content, application or service providers, including those affiliated w. AT&T/Bell South, any service that privileges, degrades or prioritizes any packet transmitted….based on its source, ownership or destination.”

III. What Should the FTC do?

At a minimum, the FTC should investigate and act on allegations of anticompetitive conduct by broadband Internet access providers filed by consumers, content, service and applications providers. As Chairwoman Majoras and Commissioner Kovacic have pointed out in public statements, the FTC has already acted in cases involving discrimination at the infrastructure layer by Internet access providers. We ask that this jurisdiction be extended to the applications layer of our communications system. Because the stakes are so high for those content, applications service providers that are discriminated against, these complaints should be acted upon in an expedited manner.

Secondarily, the FTC should require broadband access providers to disclose,
in simple and non-technical terms, their broadband access and usage terms, including 1) Actual level of bandwidth (throughput); 2) the amount of latency (delay); 3) any limitations on consumers ability to access services and content of their choice; and 4) to what extent certain content and services get preferential delivery. The FTC should bring enforcement actions against those broadband providers who do not disclose, or who misrepresent the features of their service.

Disclosure should not be the only or even primary tool for protecting consumers, as it is cold comfort to those parties that have little or no real competition, and for whom the costs of switching service providers is high. But it can help to complement that FTC’s authority over anticompetitive market practices.

IV. Does FTC Action Obviate the Need for Congress and/or the FCC to Act?

In closing, I want to make clear that although we believe that the FTC can be helpful in preserving net neutrality, any activity it undertakes pursuant to its current authority will not be sufficient to preserve the open Internet. The FCC is better suited to act quickly on complaints, and we will continue to press the agency and Congress to clarify the FCC’s authority to address discrimination by broadband providers. The FCC and FTC often have concurrent jurisdiction, and the public would be well served if that were the case here as well. We would also support Congress giving the FTC specific enforcement responsibility over discrimination claims similar to that provided in HR 5417, the Internet Freedom and Nondiscrimination Act of 2006, which was reported out of the House Judiciary Committee last Congress.

Thank you. I look forward to your questions.