

**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

**REPLY COMMENTS OF BENTON FOUNDATION, CENTER FOR MEDIA JUSTICE,  
CONSUMERS UNION, MEDIA ACCESS PROJECT, NEW AMERICA FOUNDATION,  
AND PUBLIC KNOWLEDGE**

November 4, 2010

## Introduction

The undersigned organizations (hereinafter “Public Interest Commenters”) respectfully submit these reply comments in response to the *Public Notice* released by the Commission’s Wireline Competition Bureau and Wireless Telecommunications Bureau in the above-captioned dockets.<sup>1</sup> Public Interest Commenters reiterate that the two issues set forth for comment in the *Public Notice*—the treatment of “specialized services” and the application of Open Internet rules to mobile wireless platforms—are not “under-developed,” as these questions already have been raised and discussed in this proceeding. Rather, as this record has shown, parties have well-developed but conflicting recommendations which the Commission must act swiftly to resolve.

The *Public Notice* posits that differences among parties have narrowed with respect to the other issues raised in these dockets, implying that further rounds of comments on these two issues could lead to a consensus. However, rather than waiting for consensus, the Public Interest Commenters urge the Commission to move swiftly ahead in completing this proceeding based on the current record. As Judge Posner observed more almost 20 years ago when reversing an FCC effort to find “consensus” on the contentious issue of the broadcast financial interest and syndication rules:

The impression created is of unprincipled compromises of Rube Goldberg complexity among contending interest groups viewed merely as clamoring suppliants who have somehow to be conciliated. The Commission said that it had been “confronted by alternative views of the television programming world so starkly and fundamentally at odds with each other that they virtually defy *reconciliation*” (emphasis added). **The possibility of resolving a conflict in favor of the party with the stronger case, as distinct from throwing up one’s hands and splitting the difference, was overlooked.** The opinion contains much talk but no demonstration of expertise, and a good deal of hand-wringing over the need for prudence and the desirability of avoiding “convulsive” regulatory reform, yet these unquestioned goods are never related to the particulars of the rules—rules that could have a substantial impact on an

---

<sup>1</sup> “Further Inquiry Into Two Under-Developed Issues in Open Internet Proceeding,” GN Docket No. 09-191, WC Docket No. 07-52, *Public Notice*, DA 10-1667 (rel. Sept. 1, 2010) (“*Public Notice*”).

industry that permeates the daily life of this nation and helps shape, for good or ill, our culture and our politics.<sup>2</sup>

Certainly it is laudable for the Commission to try to identify points of agreement, and to develop a sufficient record to make meaningful determinations. But at some point, the Commission actually must make a decision as to what rules will best serve the public interest. The Commission has now reached this point. Its own efforts and other efforts to broker a negotiation among stakeholders have failed, and the FCC must now decide whether it will “resolve the conflict” on wireless and managed services “in favor of the party with the stronger case.”

Public Interest Commenters note that the responses to the *Public Notice* provide clear evidence that no further “consensus” will emerge and that the Commission must now decide on rules. With respect to specialized services, broadband Internet access providers generally do not favor any sort of regulation of specialized services, claiming that regulatory restrictions would hamper innovation and deprive consumers of their choice of services. On the other hand, Public Interest Commenters and several others continue to explain how, in the absence of limits, specialized services would cannibalize the open Internet.<sup>3</sup>

Similarly, divergences exist on issues related to wireless broadband Internet access services. Wireless service providers continue to question the need for network neutrality regulation, claiming that the wireless market is highly competitive. In addition, they claim that peculiar characteristics of wireless services, such as spectrum scarcity and sudden usage surges because of mobility of users, mean that congestion has to be managed differently on these

---

<sup>2</sup> *Schurz Comms. v. FCC*, 982 F.2d 1043, 1050 (7th Cir. 1992).

<sup>3</sup> See Comments of Public Interest Commenters, GN Docket No. 09-191, WC Docket No. 07-52, at 9 (filed Oct. 12, 2010) (“PIC *Public Notice* Comments”); see also Comments of Free Press Regarding Further Inquiry, GN Docket No. 09-191, WC Docket No. 07-52, at 10 (filed Oct. 12, 2010) (“Free Press *Public Notice* Comments”); Comments of the Open Internet Coalition, GN Docket No. 09-191, WC Docket No. 07-52, at 4 (filed Oct. 12, 2010) (“OIC *Public Notice* Comments”); Comments of the Center for Democracy & Technology, GN Docket No. 09-191, WC Docket No. 07-52, at 2-3 (filed Oct. 12, 2010) (“CDT *Public Notice* Comments”).

networks. They claim, therefore, that network neutrality rules would hamper these efforts, but their claims are not justified. Public Interest Commenters and others have demonstrated the need for network neutrality rules to apply to wireless services, explaining that issues caused by congestion could be addressed through flexible reasonable network management rules. Cable operators and other industry commenters, for their part, agree with Public Interest Commenters that there should be only one Internet, whether accessed by wire or wireless, and these commenters support the adoption of a consistent decision applicable both to wired and wireless broadband platforms.<sup>4</sup>

These differences also permeate responses to specific questions raised by the Commission. For instance, Public Interest Commenters have shown that the Commission should require greater disclosures to consumers. Wireless network providers, such as AT&T<sup>5</sup> and Verizon,<sup>6</sup> claim that they provide their consumers with adequate information about rates, terms of service, and extent of coverage in accordance with the CTIA Consumer Code. However, the Public Interest Commenters have provided ample evidence in the docket of the inadequacy of voluntary disclosure guidelines and a “race to the bottom” mentality.<sup>7</sup>

Public Interest Commenters submit that these differences will continue to persist despite the several rounds of comments the Commission has conducted. Therefore, we urge the Commission to issue an order based on the current record in these proceedings. However, we

---

<sup>4</sup> See Comments of the National Cable & Telecommunications Association, GN Docket No. 09-191, WC Docket No. 07-52, at 11 (filed Oct. 12, 2010) (“NCTA *Public Notice* Comments”) (“[I]f any such rules are adopted for broadband Internet access, specialized services, or both, they must be applied in a competitively neutral manner to all broadband platforms, wireline and wireless.”).

<sup>5</sup> Comments of AT&T Inc., GN Docket No. 09-191, WC Docket No. 07-52, at 71 (filed Oct. 12, 2010) (“AT&T *Public Notice* Comments”).

<sup>6</sup> Comments of Verizon and Verizon Wireless on Under-Developed Issues in the Open Internet Proceeding, GN Docket No. 09-191, WC Docket No. 07-52, at 9 (filed Oct. 12, 2010) (“Verizon *Public Notice* Comments”).

<sup>7</sup> See, e.g., Reply Comments of Center for Media Justice, Consumers Union, Media Access Project, and New America Foundation, GN Docket No. 09-191, WC Docket No. 07-52, at 17 (filed Apr. 26, 2010) (“PIC Open Internet Reply Comments”).

take this opportunity to explain briefly below the flaws evident in certain arguments put forth in this latest round of comments on the *Public Notice*.

**I. Comments Filed by Proponents of a Separate “Specialized Services” Category Do Not Provide a Clear Definition of “Specialized Services” nor Demonstrate Any Need to Create a Separate Regulatory Category.**

As Public Interest Commenters noted in initial comments on the *Public Notice*, to date no one has offered a clear and comprehensive definition of “specialized services.”<sup>8</sup> Commenters calling on the Commission to recognize specialized services as some sort of separate category did little to resolve this issue or provide any clear and comprehensive definitions in this latest round of submissions. In particular, AT&T and Verizon references to their VoIP or MVPD services as examples of “specialized services”<sup>9</sup> only further underscore that the Commission should not define “specialized services” as a separate regulatory category, but instead should regulate these services under Title II or Title VI, as appropriate, on the basis of the functions and the offering made to users—not the technology used to offer these services.<sup>10</sup> Although AT&T proposed a lengthy list of possible “specialized services,”<sup>11</sup> it is entirely unclear how the vast majority of these would not fall under existing regulatory categories and be treated as managed telecommunications services for enterprise customers or wholesale access on wireless networks.

In addition, concerns voiced by AT&T<sup>12</sup> and others<sup>13</sup> that a nondiscrimination rule would prohibit them from offering managed services to enterprise customers or potentially to residential customers are unfounded. AT&T’s Managed Internet Service (“MIS”), and other analogous

---

<sup>8</sup> See PIC *Public Notice* Comments at 3, 6-7.

<sup>9</sup> See, e.g., AT&T *Public Notice* Comments at 2-3, 8; Verizon *Public Notice* Comments at 57

<sup>10</sup> See Comments of Center for Media Justice, Consumers Union, Media Access Project, New America Foundation, and Public Knowledge, GN Docket No. 09-191, WC Docket No. 07-52, at 33 (filed Jan. 14, 2010) (“PIC Open Internet Comments”).

<sup>11</sup> See AT&T *Public Notice* Comments at 6.

<sup>12</sup> See AT&T *Public Notice* Comments at 6-8.

<sup>13</sup> See, e.g., Comments of TW Telecom, GN Docket No. 09-191, WC Docket No. 07-52, at 11-13 (filed Oct. 12, 2010).

services, provide “customers the option (for an additional fee) to designate certain packets for special handling on AT&T’s network.”<sup>14</sup> However, AT&T’s contention that this type of “end user driven” prioritization would be prohibited by a non-discrimination rule is a red-herring. AT&T’s MIS service recognizes designations made by users for special handling within such users’ own broadband connections. That functionality does not make AT&T’s service equivalent to the type of network owner-driven “paid prioritization” of specific Internet content and applications on the open Internet, which was contemplated by the Commission in the Open Internet Notice of Proposed Rulemaking and posited there as a violation of the proposed Open Internet rules. As the Commission noted in that NPRM,

We understand the term “nondiscriminatory” to mean that a broadband Internet access service provider may not charge a content, application, or service provider for enhanced or prioritized access to the subscribers of the broadband Internet access service provider....<sup>15</sup>

Thus, nothing in the Open Internet rules would prevent providers from continuing to offer services to enterprise customers, or even from providing residential customers similar tools to manage the priority of certain applications within their own broadband connections.<sup>16</sup> This type of end-user driven prioritization is markedly different, however, from network operator prioritization of third-party traffic that flows to the broadband providers’ customers.

---

<sup>14</sup> See AT&T *Public Notice* Comments at 20.

<sup>15</sup> See In the Matter of Preserving the Open Internet; Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, *Notice of Proposed Rulemaking*, 24 FCC Rcd 13064, ¶106 (2009).

<sup>16</sup> See Barbara van Schewick, “New Neutrality: What a Non-Discrimination Rules Should Look Like,” at 9-10 (Oct., 2010), available at <http://www.tprweb.com/images/stories/2010%20papers/van%20Schewick%20TPRC%202010%20What%20a%20non-discrimination%20rule%20should%20look%20like.pdf>.

## II. Arguments for Excluding Wireless Broadband from Open Internet Rules Rely on Arbitrary Distinctions, While Arguments Against Wireless *Carterfone* Principles Fail to Acknowledge Feasible Technical Solutions.

A number of commenters responding to the *Public Notice* agree that creating a regulatory distinction between wired and wireless broadband access would be arbitrary and would distort marketplace competition.<sup>17</sup> For example, as Windstream points out “[t]he alleged differences between wired and wireless networks are at most matters of degree, not kind, and do not justify placing the technologies under entirely different regulatory standards.”<sup>18</sup> Wireless carriers have consistently argued they have unique capacity constraints given limited spectrum and mobility,<sup>19</sup> but wired broadband providers are certainly not immune from capacity constraints<sup>20</sup> and yet have managed to address issues of congestion without blocking specific applications or content.

Wireless carriers fail as well, in their initial comments on the *Public Notice*, to provide any substantive explanations for their supposed inability to manage their data networks in a non-discriminatory, application-neutral manner in order to address congestion. Although a number of wireless commenters argue that usage-based pricing alone will be inadequate to reduce sudden spikes in usage or congestion at a particular cell site,<sup>21</sup> they fail to provide any justification for throttling or blocking specific applications rather than utilizing less discriminatory methods. As detailed in New America Foundation/Columbia Telecommunications Commission report (“NAF/CTC Report”) filed previously in these dockets, there are a number of network

---

<sup>17</sup> See Comments of Windstream Communications, Inc., GN Docket No. 09-191, WC Docket No. 07-52, at 2-3 (filed Oct. 12, 2010) (Windstream *Public Notice* Comments”).

<sup>18</sup> *Id.* at 7.

<sup>19</sup> See, e.g., Verizon *Public Notice* Comments at 32.

<sup>20</sup> See Windstream *Public Notice* Comments at 13; Comments of Time Warner Cable Inc., GN Docket No. 09-191, WC Docket No. 07-52, at 33-34 (filed Oct. 12, 2010).

<sup>21</sup> See Verizon *Public Notice* Comments at 19; AT&T *Public Notice* Comments at 51.

management options for wireless carriers to manage congestion without discriminating among specific applications and content.<sup>22</sup>

In addition, wireless carriers' objections to allowing consumers to utilize any application fail to address the technical solutions provided in the NAF/CTC Report. Although carriers have argued that malicious applications could harm their networks,<sup>23</sup> they have not provided any detailed examples of such harms other than the consumption of high levels of bandwidth. The proposed Open Internet rules clearly would not protect any application that actually harms the network, and carriers have existing means to prevent malicious users or applications from completely disrupting an entire cell site through the management of the "over-the-air" access layer.<sup>24</sup>

Wireless carriers likewise need not permit attachment of devices that actually harm the carrier's network. Yet, various carriers' arguments that third-party certification or "Any Device" principles are infeasible because each carrier has specific technical standards<sup>25</sup> ignore the need for routes to ensure device compliance without requiring manufacturers to go through an unduly onerous or discriminatory carrier-controlled approval process. The NAF/CTC Report addressed all of these points, but despite carriers' mischaracterizations of such positions, that report did not contemplate a sudden shift to an "Any Device" framework; rather, it proposed a gradual, multi-step approach to allow manufacturers time to develop compliant "third party" devices, and to give consumers the ability to utilize devices across a broad range of wireless networks.

---

<sup>22</sup> See Comments of New America Foundation, Columbia Telecommunications Corporation, Consumers Union, Media Access Project, and Public Knowledge, GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010) ("NAF/CTC Comments").

<sup>23</sup> See, e.g., Comments of T-Mobile USA, Inc., GN Docket No. 09-191, WC Docket No. 07-52, at 17 (filed Oct. 12, 2010) ("T-Mobile *Public Notice* Comments").

<sup>24</sup> See NAF/CTC Comments, Appendix A, "Any Device and Any Application on Wireless Networks: A Technical Strategy for Evolution," at 55.

<sup>25</sup> See, e.g., T-Mobile *Public Notice* Comments at 10-11; AT&T *Public Notice* Comments at 47-49; Verizon *Public Notice* Comments at 27-28; see also Comments of Sprint Nextel Corporation, GN Docket No. 09-191, WC Docket No. 07-52, at 20-21 (filed Oct. 12, 2010).

Particularly with respect to 4G or LTE network deployments and devices, the Commission has only a small window of opportunity to facilitate true competition and innovation, and it must use that window of opportunity to adopt sensible wireless Open Internet rules.<sup>26</sup> However, since use of 3G networks and technologies likely will continue for many years in parallel with 4G, the Commission also should not ignore efforts to empower consumers and promote innovation on any of these networks.<sup>27</sup>

Lastly, carriers' arguments that consumers have ample choices in the market ignore the fact that consumers are increasingly stuck with their choices. As the Commission's most recent report on Mobile Wireless Competition found, churn rates are hovering around 2 percent per month for the U.S. wireless market, with churn rates of the two largest national service providers half that of the next two largest providers.<sup>28</sup> It is clear that the ability of carriers to lock consumers to a specific network by locking their device to the network is a considerable factor in limiting the amount of churn in the market.

---

<sup>26</sup> For instance, the LTE standards do not present the interface issues that currently separate 3G technologies such as CDMA and GSM. Those LTE standards provide for detachable subscriber identity cards that would allow users to migrate easily from device to device, but as with GSM sim cards, the devices would need to be unlocked. *See* NAF/CTC Report at 41. Moreover, the Verizon Open Development standards include requirements for detachable cards (known as UICCs) in LTE devices. *Id.*

<sup>27</sup> Although complete interoperability of devices across all 3G networks may not be feasible, there are solutions to allow consumers access to devices that would operate on any GSM or CDMA networks. In particular, the GSM standard was designed to allow devices and consumers to move among competing networks. However, carrier requirements that devices be locked to a particular network have either prevented users from doing so, or made the process unnecessarily difficult. To the extent carriers have specific configurations required on their network, they could at the time of user activation provide any software and firmware updates to customer devices without crippling the device's ability to operate on other GSM networks. *See* NAF/CTC Report at 32. Similarly, a fully-portable CDMA framework could be established, including carrier-specific R-UIM card, comparable to the GSM SIM. This is the standard practice with CDMA devices in China and India, although not as readily available in the U.S. *Id.* at 35.

<sup>28</sup> *See* In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket 09-66, *Fourteenth Report*, 25 FCC Rcd 11407, 11416 (2010).

## **Conclusion**

For the foregoing reasons, the Commission should move expeditiously to clarify its authority over broadband Internet access services, and to adopt sensible Open Internet rules in accordance with the Public Interest Commenters' previous submissions in these dockets.

Respectfully submitted,

/s/ Harold Feld  
Rashmi Rangnath  
Public Knowledge

Amina Fazlullah  
Benton Foundation

Malkia Cyril  
Amalia Deloney  
Center for Media Justice

Parul Desai  
Consumers Union

Benjamin Lennett  
Sascha Meinrath  
New America Foundation

Matthew F. Wood  
Andrew J. Schwartzman  
Media Access Project