

William H. Johnson  
Vice President & Associate General Counsel



1320 North Courthouse Road  
Ninth Floor  
Arlington, VA 22201  
Phone 703-351-3060  
Fax 703-351-3658  
will.h.johnson@verizon.com

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**VIA ELECTRONIC FILING**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

**Re: *Open Internet Remand Proceeding, GN Docket No. 14-28;*  
*Framework for Broadband Internet Service, GN Docket No. 10-127***

Dear Ms. Dortch:

In 2010, the Commission recognized that specialized services “differ from broadband Internet access service and may drive additional private investment in broadband networks and provide end users valued services, supplementing the benefits of the open Internet.”<sup>1</sup> Understanding the pro-investment and pro-consumer potential of specialized services, the Commission exempted specialized services from the scope of its open Internet rules while promising to “closely monitor” such services “for anticompetitive or otherwise harmful effects.”<sup>2</sup> Last year, the Commission proposed to follow this same approach in the NPRM initiating this proceeding.<sup>3</sup>

The marketplace has demonstrated the wisdom of this decision. Since the 2010 order, broadband providers have continued to offer innovative services to customers while also increasing the capabilities of consumers’ broadband Internet access services. These specialized services by definition are offered in addition to traditional Internet access. Because the services are distinct, other Internet companies can continue to offer their online content, applications, and services to

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<sup>1</sup> *Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, ¶ 112 (2010) (“*Open Internet Order*”).

<sup>2</sup> *Open Internet Order* ¶¶ 113-14.

<sup>3</sup> *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, ¶ 60 (2014) (“*NPRM*”).

consumers over the open Internet without fear of being blocked or throttled. At the same time, specialized services provide consumers with additional options that they can choose from.

Moreover, there is no evidence in the record (or elsewhere) that the Commission's reasoned, deliberate approach to specialized services has resulted in anticompetitive or harmful behavior by broadband providers. In fact, broadband Internet speeds, availability, and investment have steadily increased under this approach. Nonetheless, some argue that the Commission should place new restrictions on specialized services by imposing a strict definition on the term or applying new rules to limit the emergence of these services.<sup>4</sup> The Commission should reject these arguments. New restrictions are not needed and would undercut broadband providers' incentives and ability to innovate and develop offerings that better meet consumers' demands.

***The Commission's current approach to specialized services provides flexibility for continued innovation.*** In the 2010 *Open Internet Order*, the Commission wisely allowed flexibility for broadband providers to develop and offer specialized services. The Commission refrained from formally defining specialized services but described them as "services that share capacity with broadband Internet access service over providers' last-mile facilities."<sup>5</sup> The Commission also stated that specialized services "differ from broadband Internet access service."<sup>6</sup> Thus, the specialized-services exemption does not apply to a service that satisfies the technical definition of broadband Internet access service, provides the "functional equivalent" of broadband Internet access service, or "that is used to evade" the Commission's open Internet rules.<sup>7</sup>

The Commission should continue this approach. Specialized services "are still very much in their infancy"<sup>8</sup> and any attempt to further define them in a strict or predetermined way would be futile. It would require the Commission to predict what services may develop in the future to meet consumers' needs, decide how such services would be offered, and determine now whether they may pose a threat to consumers or competition. This is an impossible task. As Alcatel-Lucent explained, "[t]he specialized services demanded by consumers 12 months from now may not even exist today, given the dynamic nature of the application, web service and cloud service marketplace."<sup>9</sup> Any definition the Commission adopted would quickly become outdated as new innovative services develop.

***Restrictions on specialized services are not needed and would undercut incentives to invest in innovative services.*** Public Knowledge and Jon Peha claim that new limitations on specialized services are needed because of hypothetical concerns about how specialized services

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<sup>4</sup> See Letter from Harold Feld et al., Public Knowledge, to Secretary Marlene H. Dortch, FCC, GN Docket Nos. 10-127 & 14-28, at 22-24 (Dec. 19, 2014) ("Public Knowledge Letter"); Jon M. Peha, Appropriate Rules for Managed or Specialized Services, GN Docket No. 14-28 (Jan. 5, 2015).

<sup>5</sup> *Open Internet Order* ¶ 112.

<sup>6</sup> *Id.*

<sup>7</sup> See 47 C.F.R. § 8.11(a).

<sup>8</sup> See Comments of Cisco Systems, GN Docket Nos. 10-127 & 14-28, at 15 (July 17, 2014).

<sup>9</sup> Comments of Alcatel-Lucent, GN Docket Nos. 10-127 & 14-28, at 18 (July 15, 2014).

*could* create harm.<sup>10</sup> Based on these hypotheticals, they ask the Commission to require broadband providers to seek permission from the Commission before introducing new innovative services. They even suggest that broadband providers should bear the burden of proving the need for such services. In addition to being unjustified, the proposals from Public Knowledge and Jon Peha would essentially regulate specialized services out of existence by undercutting incentives to invest in them in the first place.

Public Knowledge first calls for a “mother may I” approach that would be a radical reversal of how the Internet has operated. Public Knowledge proposes that before a specialized service can be offered, an ISP or other requesting party must “show why the specialized service could not operate on the open Internet.”<sup>11</sup> However, this requirement would reverse the “innovation without permission” principle that, in the words of prominent tech innovators and investors including Mark Cuban, George Gilder, and Jeff Pulver, is “fundamental to the success of the information technology sector in the United States.”<sup>12</sup> The Internet has flourished because policymakers have allowed space for innovation and consumer choice, rather than placing the burden on the innovator to justify offering additional choices to consumers. Replacing this successful policy with an advance-permission requirement would reduce consumer choice, because broadband providers and customers would be loath to invest in innovative new services that could be delayed by years of regulatory approvals.

Public Knowledge also proposes a broad, new functional-equivalence test that would further undermine investment by introducing great uncertainty into whether any service could ever qualify as a permissible specialized service. Under this test, a specialized service cannot be “the functional equivalent of one [service] offered on the open Internet.”<sup>13</sup> While it will often be clear whether a proposed service is the functional equivalent of broadband Internet access service—the Commission’s current test—it will be far less clear whether a service is the functional equivalent of any possible app, website, video service, voice service, or other service that is offered on the open Internet. Even if a service were to pass this test and the gauntlet of regulatory pre-approval, it would be a pyrrhic victory because Public Knowledge’s proposal allows an opposing party to bring a new functional-equivalence challenge “at any time.”<sup>14</sup> As a result, investing in a new specialized service offering would be foolish because the rug could be pulled out from under broadband providers’ and their customers’ feet at any time.

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<sup>10</sup> See Jon M. Peha, A “Most Favored Nation” Approach to an Open Internet, GN Docket No. 14-28, at 9-10 (July 15, 2014) (calling for restrictions on the “specialized services label” based on a hypothetical scenario in which a broadband provider “add[s] a specialized service for access to something that is a substitute for a service that is widely available on the Internet,” such as eBay); Public Knowledge Letter at 23 (claiming that “specialized services have a high potential to be abused by ISPs”).

<sup>11</sup> Public Knowledge Letter at 23.

<sup>12</sup> Letter from Daniel Berninger, Mark Cuban, Charlie Giancarlo, George Gilder, Bryan Martin & Jeff Pulver to Chairman Tom Wheeler, FCC, at 1 (Jan. 23, 2015).

<sup>13</sup> Public Knowledge Letter at 23.

The “strict limits” contemplated by Public Knowledge likely would be the death of innovative new specialized services offerings. Indeed, even the most established specialized services—facilities-based video and voice—arguably would not qualify as specialized services under Public Knowledge’s test because these services could be deemed functional equivalents of over-the-top video and voice services. Recognizing this problem, Public Knowledge begrudgingly proposes to grandfather facilities-based video and voice into the specialized-services category so long as they are subject to their own “existing regulatory structures.”<sup>15</sup> The fact that such grandfathering is necessary shows that Public Knowledge’s proposed approach would stifle the development of innovative, new specialized services and the spillover benefits that such services would have for broadband Internet access service.

Jon Peha’s proposed regulatory framework would also undercut incentives to invest in innovative services. Professor Peha argues that if the Commission’s open Internet rules prohibit paid prioritization, then specialized services should be subject to variants of non-discrimination and no-blocking rules.<sup>16</sup> Under Professor Peha’s approach, if a broadband provider and a customer agree to terms on a new specialized service, then “the same technical and financial terms and conditions” must be offered to “other similarly situated users.”<sup>17</sup> These requirements make no sense. Broadband providers and customers need flexibility to experiment with new specialized service offerings through individualized arrangements. Such experimentation would be impossible if the terms of individual agreements must be made available to all “similarly situated users.” The cumbersome requirements proposed by Professor Peha would undercut the incentives to invest in new services and could delay—or even prevent—their introduction.

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For these reasons, the Commission should continue to monitor the continued evolution of specialized services without imposing new definitions or rules.

Sincerely,



William H. Johnson

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<sup>15</sup> *Id.* at 24.

<sup>16</sup> *See* Jon M. Peha, *Appropriate Rules for Managed or Specialized Services*, at 3-4.

<sup>17</sup> *Id.* at 3-4.