

**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

To: The Commission

**COMMENTS OF
THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION**

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Table of Contents

Executive Summaryi

Background2

Discussion3

I. THE COMMISSION SHOULD CONSIDER THE TECHNICAL LIMITATIONS OF BROADBAND INTERNET ACCESS PROVIDERS IN DETERMINING WHETHER NETWORK MANAGEMENT PRACTICES ARE “REASONABLE.”.....3

II. THE COMMISSION SHOULD TAKE STEPS TO ELIMINATE CONTENT DISCRIMINATION THAT IS RESTRICTING CONSUMERS’ ACCESS TO INTERNET CONTENT.....8

III. THE COMMISSION SHOULD NOT IMPOSE ADDITIONAL LIABILITY ON BROADBAND INTERNET ACCESS SERVICE PROVIDERS FOR DETERMINING WHAT IS “LAWFUL.”.....12

IV. THE COMMISSION SHOULD ADOPT STREAMLINED COMPLAINT PROCEDURES.....14

V. THE COMMISSION SHOULD PERIODICALLY REASSESS ITS OPEN INTERNET RULES TO DETERMINE WHETHER THEY SHOULD BE MODIFIED OR ELIMINATED.16

Conclusion17

Executive Summary

The Wireless Internet Service Providers Association (“WISPA”) supports the principles of the open Internet and, in general, supports adoption of the Commission’s six proposed network neutrality rules but believes that the Commission should make some adjustments to ensure the fair treatment of all broadband Internet access service providers.

WISPA is concerned that the proposed rules should more fully account for the differences that networks, their architectures and their limitations play in the context of determining which practices constitute “reasonable network management,” particularly in the case of small, rural and bandwidth-limited access providers. WISPA believes that certain network practices should be deemed *per se* “reasonable” to provide certainty and to discourage the filing of frivolous complaints that will cost broadband Internet access providers time and money to resolve. Examples of *per se* “reasonable” practices would include the following:

- temporarily limiting bandwidth available to users that are using a substantially disproportionate amount of bandwidth compared to – and to the detriment of – other subscribers;
- establishing service levels so that those subscribers who desire to pay an additional fee for more bandwidth can be free to do so;
- providing subscribers with the option to pay for service based on access time or consumption level (*e.g.*, subscribers could pay for service for each minute they are logged in and/or the total number of packets that they upload/download); and
- providing subscribers with the option to pay different rates for accessing the service at “peak” times or non-peak times, thereby incentivizing a subscriber to pay a reduced fee if it reduced congestion by downloading bandwidth-intensive content and applications during non-peak times.

The Commission also should provide guidance on what would constitute network management practices that are *per se* not “reasonable” for a broadband Internet access provider to employ, such as the blocking of lawful content, or, as the Commission has suggested, to “block or degrade VoIP traffic but not other services that similarly affect bandwidth usage and have similar quality of service requirements.”

WISPA is particularly concerned with business practices – such as discriminatory terms and conditions – used by some broadband Internet access service providers to restrict access to some Internet content. Such practices are antithetical to principles of the open Internet. To preserve Internet openness, the Commission should prohibit discriminatory practices that some content providers are exhibiting. The barring of

“wholesale-only” distribution of “premium” content in favor of a retail model that places content decisions with the consumer would ensure that the practices of content providers do not undermine the spirit of an open Internet.

The Commission also should not require broadband Internet access service providers to be the “traffic cop” for traffic that traverses their networks with respect to determinations of whether the content is “lawful.” If, however, a broadband Internet access service provider acts to screen or remove objectionable or unlawful material, the Commission’s rules should establish explicitly that the Commission will not, by administrative sanction, take action against broadband providers that is inconsistent with the immunity afforded under Section 230(c) of the Communications Decency Act. Section 230(c)(1) for actions taken “voluntarily and in good faith” in removing, or disabling access to such material.

WISPA also proposes that the Commission adopt expedited complaint procedures for network neutrality complaints among service providers. Such procedures, modeled on the Part 76 program access rules, can help encourage swift resolution to specific disputes. The Commission should not assess damages, fines or forfeitures for violations of the network neutrality rules due to the case-by-case challenges in interpreting what constitutes a “reasonable” network management practice. In addition, these complaint procedures should not preclude judicial remedies.

Finally, WISPA also offers other proposals designed to ensure that the Internet remains open, including periodic Commission re-assessments of the Internet industry to determine whether and to what extent network neutrality rules can be eliminated or modified in the future.

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The Wireless Internet Service Providers Association (“WISPA”), pursuant to Section 1.415 of the Commission’s Rules, provides these Comments in response to the Notice of Proposed Rulemaking (“*NPRM*”) in the above-captioned proceedings.¹ In general, WISPA supports adoption of the Commission’s six proposed network neutrality rules but believes that the Commission should make some adjustments to ensure the fair treatment of all broadband Internet access service providers. Of particular concern, business practices of certain Internet content providers threaten to harm consumers who may be unable to receive some Internet content because their broadband Internet access service provider cannot obtain access or can only obtain access on discriminatory terms and conditions. WISPA also believes that the Commission should provide identifiable classes of small, rural and bandwidth-limited access providers with greater flexibility in establishing and employing “reasonable network management” practices in recognition of their network limitations. WISPA also offers other proposals designed to ensure that the Internet remains open, with periodic assessments of the Internet industry to determine whether and to what extent network neutrality rules can be eliminated or modified in the future.

Background

WISPA was founded in 2004 and represents the interests of more than 300 wireless Internet service providers (“WISPs”), vendors, system integrators and others interested in promoting the growth and delivery of fixed wireless broadband services to Americans. WISPA has participated in many aspects of the National Broadband Plan proceeding in an effort to inform the Commission of the significant barriers that inhibit WISPs’ ability to deploy and provide service and to present proposals that will enable consumers and businesses in rural, unserved and underserved areas to obtain affordable access to broadband services. WISPA also has participated in proceedings at the National Telecommunications and Information Administration and the Rural Utilities Service to advocate broadband stimulus funding policies, rules and procedures that would direct financial support to areas of the country that are most in need of broadband services.

WISPA estimates that more than 2,000 WISPs operate in the United States today. WISPA’s ongoing research reveals that WISPs cover more than 2,000,000 square miles in all states. Using primarily license-free frequencies authorized under Part 15 of the Commission’s Rules and “licensed-lite” services in the 3650-3700 MHz band under Part 90 rules, WISPs provide fixed wireless broadband services to more than 2,000,000 people in residences, businesses, hospitals, public safety locations and educational facilities. While there is no “typical” WISP, many WISPs operate small networks consisting of a few hundred subscribers. The communities they serve are often in rural and remote areas of the country that are not served by other terrestrial technologies such as DSL and cable and where access to affordable and sufficient middle mile and second mile facilities may be lacking. Other WISPs serve business

¹ *In the Matter of Preserving the Open Internet; Broadband Industry Practices*, Notice of Proposed Rulemaking,

customers in urban and suburban areas in competition with nationwide broadband Internet access service providers.

WISPA is pleased that the Commission is inviting public comment on proposed rules regarding the ability of consumers to access the Internet. As bandwidth needs increase and content, application and service providers develop new business models, broadband Internet access providers will be challenged by capacity constraints and other limitations as they seek to manage their networks. This is especially true for WISPA's members, many of which operate in rural and underserved areas.

Discussion

WISPA is aware that the Commission's authority to adopt open Internet rules pursuant to its ancillary jurisdiction is an unresolved question.² Assuming the Commission has such authority, WISPA makes the following recommendations on how the Commission should fashion its rules to promote fairness, certainty and transparency.

I. THE COMMISSION SHOULD CONSIDER THE TECHNICAL LIMITATIONS OF BROADBAND INTERNET ACCESS PROVIDERS IN DETERMINING WHETHER NETWORK MANAGEMENT PRACTICES ARE "REASONABLE."

The six network neutrality rules proposed by the Commission would be subject to "reasonable network management."³ WISPA supports adoption of this qualification and the proposed definition of "reasonable network management."⁴ As the Commission correctly states,

GN Docket No. 09-191 and WC Docket No. 07-52, rel. Oct. 22, 2009 ("*NPRM*").

² See *Comcast Corporation v. FCC*, No. 08-1291 (D.C. Cir. Sept. 4, 2008).

³ *NPRM* at ¶135.

⁴ *Id.* ("Reasonable network management consists of: (a) reasonable practices employed by a provider of broadband Internet access service to (i) reduce or mitigate the effects of congestion on its network or to address quality-of-service concerns; (ii) address traffic that is unwanted by users or harmful; (iii) prevent the transfer of unlawful content; or (iv) prevent the unlawful transfer of content; and (b) other reasonable network management practices.")

broadband Internet access service providers must be able to take steps to reduce congestion or to address quality-of-service concerns. Within the constraints of “reasonableness,” WISPA believes that broadband providers should have flexibility to determine what steps they can take to manage network congestion and to ensure quality-of-service. Importantly, the Commission also must consider the characteristics of the broadband Internet service provider’s network, especially constraints that may require more active management to address congestion and quality of service.

The Commission provides examples of practices that may be “reasonable.”⁵ As the Commission fashions its definition, WISPA believes that certain network practices should be deemed *per se* “reasonable” to provide certainty and to discourage the filing of frivolous complaints that will cost broadband Internet access providers time and money to resolve.

Examples of *per se* “reasonable” practices would include the following:

- temporarily limiting bandwidth available to users that are using a substantially disproportionate amount of bandwidth compared to – and to the detriment of – other subscribers;
- establishing service levels so that those subscribers who desire to pay an additional fee for more bandwidth can be free to do so;
- providing subscribers with the option to pay for service based on access time or consumption level (*e.g.*, subscribers could pay for service for each minute they are logged in and/or the total number of packets that they upload/download); and
- providing subscribers with the option to pay different rates for accessing the service at “peak” times or non-peak times, thereby incentivizing a subscriber to pay a reduced fee if it reduced congestion by downloading bandwidth-intensive content and applications during non-peak times.

The Commission also should provide guidance on what would constitute network management practices that are *per se* not “reasonable” for a broadband Internet access provider

⁵ See *NPRM* at ¶137.

to employ. Most importantly, it should not be “reasonable” for broadband Internet access providers to block lawful content.⁶ Similarly, WISPA agrees with the Commission’s suggestion that it would not be “reasonable” for broadband Internet service providers to “block or degrade VoIP traffic but not other services that similarly affect bandwidth usage and have similar quality of service requirements.”⁷

In addition to establishing clear guidelines through the use of *per se* categories of what is or is not “reasonable,” the Commission also must have the flexibility to determine that other network management practices are “reasonable.” As the Commission correctly acknowledges, “[w]hat constitutes congestion, and what measures are reasonable to address it, may vary depending on the technology platform.”⁸ The *per se* guidelines should not exclude other network management methods, not just methods that depend on the technology platform, but also those that account for new technological developments and the specific characteristics of the subject network.

Fixed wireless broadband service providers deliver service using a combination of unlicensed (*e.g.*, 900 MHz, 2.4 GHz and 5.8 GHz), “licensed lite” (3650 MHz) and licensed (*e.g.*, 2.3 GHz and 2.5 GHz) frequencies. Often these different frequencies are used in combination, even within the same network and at the same tower location. As an example, a single tower may use 900 MHz frequencies for residential service, 5.8 GHz for businesses, and a WiMax system in the 2.5 GHz band may also be used to connect other customers. Each of these bands may provide a different amount of bandwidth, a different number of connections, a different power level and different signal propagation and attenuation characteristics that can

⁶ This assumes, of course, that broadband Internet access providers know that particular content is “lawful,” “harmful” or unwanted by the end user. *See* Part III, *infra*. In Part II, WISPA addresses the very serious threat to consumers’ access to content resulting from the practices of certain content providers (as opposed to broadband Internet access providers blocking access).

affect network performance and thus require specific network management techniques. There will also be different technical characteristics based on the backhaul technology, which typically includes fiber and microwave systems.

In addition, many WISPs operate networks that deliver less bandwidth or throughput compared to wired or fiber-based networks. For instance, networks with relatively lower capacity or bandwidth become congested more quickly than networks (*e.g.*, fiber networks) with higher capacity. Networks with a higher ratio of connections per unit of bandwidth become congested more rapidly. Networks serving a high percentage of residential customers become more congested at night compared to networks serving business customers at night. Network capacity also is subject to the network- and bandwidth-management practices of providers of middle mile services such as backhaul and transport. For these reasons, some network management techniques (*e.g.*, preferring latency-sensitive traffic over file sharing and streaming) are necessary due to legitimate technical and operational constraints, but the same techniques may be unnecessary in a higher-capacity fiber-to-the-home network where there are fewer technical obstacles to providing sufficient bandwidth for all content, applications and services to quickly reach all end users.

In determining what is “reasonable,” the Commission must consider the network’s technological and practical characteristics. Just as the speed limits on our nation’s roads vary according to the number of lanes, terrain, traffic load and weather, so too should the definition of “reasonable” reflect the different characteristics of networks. The rules of the road for network management should not be strictly governed, but should allow broadband Internet access providers to adjust to conditions that arise and to the different technological limitations that

⁷ *NPRM* at ¶137.

⁸ *Id.*

constrain some network operators but not others. In WISPA's view, the combination of *per se* examples of acceptable "reasonable network management" practices provides certainty, but the rules must also acknowledge – indeed, they should encourage – broadband Internet service providers to incorporate other practices as congestion, quality of service and other legitimate interests require.

WISPA also believes that the Commission should not deem any broadband Internet access service provider's network management techniques to be "reasonable" unless the provider can demonstrate the use of the least restrictive means necessary to accomplish the objective. Providers with market power (*e.g.*, large carriers with middle mile connectivity) should not be permitted to use over-inclusive network management techniques to hinder competition from other service providers. WISPA members are concerned that unless network management techniques are required to be narrowly tailored to accomplish the "reasonable" objective, the Commission would be facilitating anticompetitive abuses in the name of "reasonable network management."

Moreover, middle mile providers are able to block or otherwise limit traffic. Under the Commission's proposed definition of "broadband Internet access service," providers of backhaul and transport services would be exempt from the "reasonable network management" requirements because they do not provide broadband Internet access "directly to the public."⁹ To the extent the Commission subjects broadband Internet access service providers to the network neutrality rules, it also should prevent middle mile providers from engaging in prohibited practices.

⁹ *Id.* at Appendix A, proposed Section 8.3.

II. THE COMMISSION SHOULD TAKE STEPS TO ELIMINATE CONTENT DISCRIMINATION THAT IS RESTRICTING CONSUMERS' ACCESS TO INTERNET CONTENT.

In the *NPRM*, the Commission discusses the possible consequences of broadband Internet service access providers charging access or prioritization fees to content, application and service providers.¹⁰ The Commission also should be concerned about the opposite case where the content, application or service providers charge the access provider a fee for distributing “premium” content on a discriminatory basis. The Commission’s goal of preserving the openness of the Internet must extend beyond regulation (or not) of broadband Internet access service providers.

Recently, WISPs have fallen victim to a new kind of discrimination that prohibits them from distributing the same content that other broadband Internet access service providers, including their competitors, are providing. The Commission can and should take immediate steps to stop this “disturbing”¹¹ discriminatory practice of “walling off” content to ensure that consumers are not limited in what content they access because their broadband Internet access provider cannot obtain such content.

Although it is probably not the only example, the Walt Disney Company (“Disney”) has launched an Internet content service called ESPN360.com, which is essentially a streaming video service for live sporting events and other sports content. Consumers can subscribe to this free service by clicking a few links on the www.espn.com web page.

Some subscribers, however, cannot access the service because ESPN360.com has elected to not make the content available to all broadband Internet access service providers. Rather, it appears that ESPN360.com is only available by agreement between Disney and selected

¹⁰ See *id.* at ¶¶67-74.

¹¹ Comments of OPASTCO, GN Docket No. 09-51, filed June 8, 2009, at 46.

broadband Internet access providers that pay Disney a per-subscriber fee. Consumers who subscribe to a broadband Internet access provider that does not have ESPN360.com available are directed to a screen with the following text:

ESPN360.com is available at no charge to fans who receive their high-speed internet connection from an ESPN360.com affiliated internet service provider. ESPN360.com is also available to fans that access the internet from U.S. college campuses and U.S. military bases.

Your current computer network falls outside of these categories. Here's how you can get access to ESPN360.com.

Please select your internet service provider from the list. If you can't find yours, select "Not Found" at the bottom.

Here, the customer is prompted to select an internet service provider from a drop-down list. If the provider is "Not Found," the site presents the following:

Switch to an ESPN360.com affiliated internet service provider or to [sic] contact your internet service provider and request ESPN360.com. [Click here](#) to enter your ZIP code and find out which providers in your area carry offer [sic] ESPN360.com.

Below this paragraph, the site presents a Flash video ("Get Access to ESPN360.com") that includes, among other things, a revolving banner ad exhorting the user to switch to an affiliated provider such as AT&T or Verizon and providing contact information (*e.g.*, "SWITCH to AT&T Yahoo! and get ESPN360.com today..." or "You don't have to wait for ESPN360.com! SWITCH to Verizon High Speed Internet...").

WISPA submits there are at least four problems with this discriminatory business practice. First, to the extent that Disney and other content providers are denying or will seek to deny broadband Internet access providers the ability to obtain access to content, this practice would violate the principle of an open Internet. Consumers would be harmed by their inability to receive such "premium" content from their provider solely because the content provider elects to

not do business with the broadband provider.

Second, in cases where a broadband Internet access provider can obtain access to “premium” content such as ESPN360.com, there is evidence that the content provider is engaging in price discrimination. In other words, a small broadband Internet access service provider serving a few hundred subscribers in a rural community is likely being asked to pay more per user than a national provider like Comcast, which serves millions of subscribers. In areas where consumers have no choice in broadband providers, subscribers may simply be unable to receive ESPN360.com.

Third, where a broadband Internet access service provider is able to provide ESPN360.com, it is forced to pay a monthly fee based on the total number of subscribers to the network, regardless of how many subscribers actually want the content. One WISPA member reported that:

We contacted ESPN and they seemed willing to sell us access. We would be required to sign a contract and pay a monthly fee based on the number of subscribers we reported to have on the network. I don’t remember the exact fee but it seemed very high for the few customers who asked for it, and I also didn’t agree that all of my subscribers should have to pay for this service.

Similarly, the American Cable Association (“ACA”), a trade association representing small cable operators, stated that Disney “forces many broadband providers who are also cable operators to pay a per subscriber fee for their entire subscriber base to receive the Internet-based ESPN360 service, regardless of customer interest in the service. This increases broadband prices for some, and decreases consumer choice for others.”¹² In other words, the majority of subscribers that do not want a “premium” service would be subsidizing the provision of such services for the minority who do, without ever seeing an itemized charge on their invoices. By the same token,

¹² Reply Comments of the American Cable Association, GN Docket No. 09-51, filed July 21, 2009, at 4. *See also* Comments of the American Cable Association, GN Docket No. 09-51, filed June 8, 2009, at 5.

subscribers that want “premium” content will be unable to receive it if their broadband Internet service access provider is denied access, cannot afford to pay for it, or simply decides not to pay for it.

Fourth, Disney is able to direct subscribers of an incumbent broadband Internet access service provider to another provider’s network through the on-screen clicks, yet the incumbent is powerless, under the network neutrality principles, to block or change the content. In other words, a competitor is able to market its service to subscribers of the incumbent provider’s service on the incumbent’s network because the content cannot be blocked, but the incumbent cannot provide the same content to its subscribers because of Disney’s discriminatory business practices. WISPA does not believe that such one-way conduct is consistent with the open Internet principles.

Taken to its logical extreme, it’s easy to see how the proliferation of “wholesale-distributed” “premium” content could seriously imperil the openness of the Internet and the ability of consumers to have access to content. It is not difficult to imagine this practice becoming so prevalent that the Internet begins to look like a cable system with a “basic” tier of service and multiple “premium” channels of content. If broadband Internet access service providers are unable to obtain content, or if they are forced to pay higher rates on a per-subscriber basis, the Internet will look more and more like a cable system, not the open Internet that has sparked so much innovation and investment.

WISPA disagrees with those who argue that a “strict nondiscrimination rule” would “harm innovation and potentially delay critical infrastructure investment by prohibiting services that prove to be neither anti-consumer nor anti-competitive.”¹³ First, if consumers want to

¹³ See, e.g., letter dated December 15, 2009 from James W. Cicconi, Senior Executive Vice President, AT&T Services, Inc. to Julius Genachowski, Chairman, FCC, GN Docket No. 09-51, at 2 (“AT&T Letter”).

purchase “premium” content, they should be free to do so under a “retail” model whereby the consumer pays the content provider directly for the content. This season, as reported by BusinessWeek, two NBA teams began offering retail subscription packages whereby individual teams sell streaming video of NBA games.¹⁴ WISPA believes that this model appropriately places the choice to receive “premium” content with the consumer, not with the content provider or the broadband Internet access service provider.

To preserve Internet openness, the Commission should look beyond the practices of broadband Internet access service providers and should prohibit discriminatory practices that some content providers are exhibiting. The barring of “wholesale-only” distribution of “premium” content in favor of a retail model that places content decisions with the consumer would prevent the “cableization” of Internet content and would ensure that the practices of content providers do not undermine the spirit of an open Internet.

III. THE COMMISSION SHOULD NOT IMPOSE ADDITIONAL LIABILITY ON BROADBAND INTERNET ACCESS SERVICE PROVIDERS FOR DETERMINING WHAT IS “LAWFUL.”

The draft rules state that broadband Internet access service providers may not prevent users from sending or receiving “lawful content,” running “lawful applications” or connecting and using “lawful devices,” subject to reasonable network management.¹⁵ The proposed definition of “reasonable network management” would allow the access provider to “address traffic that is unwanted by users or harmful” and “prevent the transfer of unlawful content.”¹⁶ WISPA believes, however, that “reasonable network management” rules must account for the protections that federal law affords to ISPs to not face civil liability for actions taken voluntarily

¹⁴ See BusinessWeek, “Comcast Targets ESPN by Streaming Pro Sports Games, December 16, 2009, available at http://www.businessweek.com/technology/content/dec2009/tc20091216_396786.htm (visited January 11, 2010).

¹⁵ *NPRM* at ¶92 and Appendix A.

¹⁶ *Id.* at ¶135 and Appendix A.

and in good faith to restrict access to enumerated types of unlawful material.

If the Commission adopts these rules, it must not impose legal liability on WISPs and other broadband Internet access service providers solely on the basis of their determinations of what is “lawful” and “harmful” except as otherwise required by law. Broadband providers cannot be expected to judge the legality or harmfulness of all content, applications and devices on their networks or to actively monitor all Internet content that traverses their networks. Inevitably, broadband providers may unknowingly exclude content, applications and devices that are lawful, or may unknowingly allow content, applications and devices that are unlawful. Moreover, what is “lawful” content in one jurisdiction may not be “lawful” under the standards of another jurisdiction. Given the global reach of the Internet, broadband providers – which generally act as common carriers – should not be required to be traffic cops for the content their customers receive and, accordingly, the Commission should not subject broadband providers to obligations to remove or disable access to unlawful content in excess of obligations that may otherwise be required by law.

That said, if a broadband Internet access service provider acts to screen or remove objectionable or unlawful material, the Commission’s open Internet rules and its definition of “reasonable network management” should establish explicitly that the Commission will not, by administrative sanction, take action against broadband providers that is inconsistent with Section 230(c) of the Communications Decency Act.¹⁷ Section 230(c)(1) provides that broadband providers are immune from civil liability for actions taken “voluntarily and in good faith” in removing, or disabling access to:

¹⁷ 47 U.S.C. §230(c).

(A) material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1) [which provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”]

Consistent with Section 230(c), a broadband Internet access service provider’s determinations of whether content, applications or devices are “lawful” or “harmful” must remain entitled to immunity so long as those actions are taken voluntarily and in good faith. In these determinations, the provider’s determination is paramount (“material that the provider or user considers”), and the Commission must not tacitly – and impermissibly – open the door for civil actions seeking relief on the basis of a lack of “reasonable network management” for activities that would be otherwise granted immunity under Section 230. Such a regime would lead to lawsuit after lawsuit by citizens seeking to extract improper damages. For these reasons, WISPA requests that the Commission craft its regulations accordingly.

IV. THE COMMISSION SHOULD ADOPT STREAMLINED COMPLAINT PROCEDURES.

The Commission seeks comment on what, if any, complaint procedures it should adopt to address alleged violations of rules adopted in this proceeding.¹⁸ WISPA proposes that the Commission adopt specific procedures for the filing and resolution of complaints. These procedures should be simple and lead to a rapid conclusion.

With respect to claims among providers of broadband access service or middle mile services, WISPA believes that a streamlined version of the Part 76 program access complaint rules would best balance the interests of the parties and would lead to a quick resolution.

¹⁸ See *id.* at ¶176.

Streamlined rules should be implemented because WISPs are typically self-funded small businesses with few employees. Complying with an onerous and time-consuming complaint, discovery and hearing process would seriously disrupt a WISP's ability to serve its customers, to maintain its network and to expand service to new areas. As is the case under Section 76.1003, complainants should be required to send a pre-filing notice to the broadband Internet access provider at least 10 days before filing the complaint. This notice should be sufficiently detailed so that the recipient can determine the specific nature of the complaint. Only if the dispute is not resolved within the 10-day period (or longer, if the parties agree) can the complaining party file a formal complaint with the Commission. The complaint should likewise describe with the specificity the alleged violations of the network neutrality rules, and should include any relevant documents. The broadband Internet access provider should have 20 days to file an answer. Unless further information is required, the Commission should render a decision within 60 days of the filing of the answer or any required supplemental information. In making a decision, the Commission can rely on input from its Office of Engineering & Technology, including any technical advisory panel it may wish to establish, to help with any technical aspects of the dispute.

The Commission should not assess damages, fines or forfeitures for violations of the network neutrality rules. Often, a decision may turn on an interpretation of what is a "reasonable" network management practice and what is not. In an ever-changing environment involving a quicksilver Internet, what may be "reasonable" in one case may not be "reasonable" in a different one, depending on the capacity of the system, technology and other factors that turn on case-by-case differences. For these reasons, financial penalties would be inappropriate. Moreover, as an alternative to the complaint process, the Commission should preserve the rights

of parties to seek judicial remedies (via injunctive relief or damages) as appropriate.

V. THE COMMISSION SHOULD PERIODICALLY REASSESS ITS OPEN INTERNET RULES TO DETERMINE WHETHER THEY SHOULD BE MODIFIED OR ELIMINATED.

WISPA appreciates that the evolving Internet and innovation will continue to drive changes in content, services, applications and network management techniques. Some current facets of the Internet may become passé while new ideas transform the way broadband Internet access providers deploy, deliver and manage service and the ways consumers benefit from the Internet experience. At the same time, the Commission will be adjudicating disputes over application of the network neutrality rules, providing insight into the way that broadband Internet access providers are adhering to the rules and determining what network management practices are “reasonable” and which are not.

Accordingly, the Commission should revisit its network neutrality rules in three to five years to determine whether and to what extent they should be eliminated or modified. The Commission followed this path with its program access rules, which phased out certain restrictions as market conditions changed. At the same time, the Commission should consider whether its rules have accomplished the desired intent, and if the record supports it, the Commission may want to impose new restrictions.

Conclusion

To the extent the Commission adopts rules to govern the open Internet, WISPA respectfully requests that the Commission incorporate into its rules and policies the recommendations contained in these Comments.

Respectfully submitted,

**THE WIRELESS INTERNET
SERVICE PROVIDERS ASSOCIATION**

January 14, 2010

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