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January 28, 2010

**Ex Parte**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: Preserving the Open Internet, GN Docket No. 09-191 and Broadband Industry Practices, WC Docket No. 07-52**

Dear Ms. Dortch:

Verizon and Verizon Wireless respectfully submit the following in the above-captioned dockets: "Preserving an Open Internet; Summary of Verizon's Comments on the FCC's Net Neutrality Notice of Proposed Rule Making".

Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "B. F. Rice".

Brian F. Rice

cc: Jennifer Schneider  
Christine Kurth  
Angela Kronenberg  
Christi Shewman

Attachment



# Preserving an Open Internet

*Summary of Verizon's Comments on the FCC's  
Net Neutrality Notice of Proposed Rulemaking*



## Preserving an Open Internet

*Summary of Verizon's Comments on the FCC's Net Neutrality Notice of Proposed Rulemaking*

On January 14, 2010, Verizon filed comments with the FCC detailing our commitment to preserving an open Internet. Our comments are in response to the FCC's recent Net Neutrality Notice of Proposed Rulemaking. This document is a summary of those comments.

Verizon looks forward to working with policymakers and other stakeholders in developing broadband policies that will ensure broadband availability to all Americans, encourage the widespread adoption of broadband services, and empower consumers to make their own choices.

**For a downloadable PDF file of this document:**

[http://responsibility.verizon.com/email/pdf/open\\_internet\\_nprm\\_summary.pdf](http://responsibility.verizon.com/email/pdf/open_internet_nprm_summary.pdf)

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## Introduction and Summary

The Internet is one of the most remarkable success stories in American history. In less than two decades it has become a ubiquitous presence in our daily lives and a key driver of the United States economy. Everyone agrees the Internet should be open, driven by informed consumer choice, and exist in an environment that allows innovation and investment to continue to flourish. We believe this Internet exists today — in the absence of regulation.

The public Internet is open, giving consumers the ability to access whatever lawful content and applications they want — a result they clearly demand and that broadband access providers must satisfy to avoid the loss of customers (and revenues needed partially to recover the immense costs of network investment) to competitors. The Internet and broadband access services remain in their nascent stages and continue to evolve rapidly in response to new and changing consumer demands. Innovation and investment are thriving in all parts of the Internet ecosystem, from applications and content to networks to devices. Further, competition is only increasing as distinctions among these categories rapidly erode and lose their meaning, and massive investments by broadband access providers lead to still further cross-platform competition among telephone companies, cable companies, wireless providers, and others. In this environment, the Commission identifies no problem that needs to be addressed by the proposed rules or any other justification for regulatory intervention.

Lacking any factual justification for its proposed rules, the Commission is instead left to speculate about alleged economic incentives broadband access providers might have to engage in conduct harmful to consumers. But, as Nobel laureate Gary Becker and former chief economists from both the FCC and the Department of Justice explain in declarations accompanying Verizon's filing, the Commission has it backward. Competitive pressures and the need to attract and keep customers to generate revenues to finance continued investment mean that broadband access providers have strong incentives to satisfy consumer demands, including for public Internet services that provide access to lawful content and applications. The Commission's hypothesized, theoretical concerns provide no economic rationale for the proposed regulations and simply do not apply in this context. In any event, other players throughout the ecosystem have the same hypothesized incentives and abilities to take anticompetitive action and to harm consumers, from those who have their own extensive networks such as Google and Akamai, to application providers who could favor their own preferred content or otherwise limit consumer choices such as Google, Yahoo!, Apple, Microsoft and many others. The Commission cannot justify singling out particular participants in the Internet ecosystem for onerous restrictions, while leaving others similarly situated free of such restraints.

Rather than trying to solve a non-existent problem or locking in place par-

*The entire broadband ecosystem is characterized by competition, investment, and innovation and is serving consumers well.*

*An increased focus on transparency will promote the adoption of best practices and industry guidelines that will help ensure that consumers are in a position to make well-informed choices.*

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ticular approaches to Internet services or network management, the Commission should focus on continuing the Internet's success for future generations of Internet users. That requires an environment in which providers in all parts of the Internet ecosystem continue to have the incentives to invest and innovate. The Commission can best achieve this goal by moving toward a framework focused on informed consumer choice, including the transparency needed to provide consumers with meaningful information. And this framework — or any other rules the Commission adopts here — should apply equally to all providers who participate in the Internet ecosystem.

Prescriptive and arbitrary rules like those proposed here, on the other hand, necessarily will have unintended consequences that will affirmatively harm consumer welfare by discouraging innovation and investment and limiting consumer choices. Indeed, imposing *any* rules in this area will have harmful effects:

1. Any rules will be inevitably vague and ambiguous — increasingly so as technologies and markets rapidly change. The result will be uncertainty and regulatory risk that will deter investment and innovation.
2. Any rules such as those proposed here that impose restrictions only on particular competitors (or classes of competitors) will limit rather than promote competition.
3. Any rules — even general ones — will unavoidably result in regulatory creep and produce a massive infrastructure of arcane rules and procedures that flash freeze innovation

and impose substantial costs that act as a tax on the consumers who ultimately must bear those costs.

While all these problems will arise as a result of any rules in this area, the particular rules the Commission proposes raise their own problems:

**Wireless Broadband:** As noted, the Commission fails to identify *any* example of any problem in the provision of wireless broadband Internet access services that could justify application of the proposed rules to wireless network providers. Even the four wireline broadband principles were not designed to apply in the unique context of wireless services, and neither they nor the proposed expansions of the principles can rationally be extended to the wireless context. *First*, as the Commission has repeatedly found, wireless services are highly competitive, with ongoing investment and innovation that have brought tremendous consumer benefits, and the wireless industry has moved decisively to promote openness in response to consumer demand and technological advancements that allow it to do so. *Second*, wireless services face unique technological and operational constraints, such as having to deal with variable demand at cell sites given the changing volume and mix of subscribers resulting from mobility and the capacity constraints imposed by spectrum. *Third*, wireless broadband services are still in their infancy, and carriers are now making massive investments to begin deploying fourth-generation (“4G”) technologies that will provide far greater speeds and produce the long sought after ubiquitous third (indeed, fourth, fifth and sixth) broadband pipe into the home.

### **Non-Discrimination and Pricing:**

The proposal to impose a broad non-discrimination rule — including the *prohibition* on any charge for various services that might be offered to content or application providers — would, for the first time, interject archaic common carriage concepts into the Internet where they have no relevance. Indeed, the standard proposed here is even more restrictive than traditional *common carriage rules* and would sweep so broadly that it would go well beyond proscribing actions that harm competition and therefore injure consumers. *First*, it is virtually impossible to conceive of what such a rule even means or how it could be applied in the Internet context, where “discrimination” is not unusual. Different traffic has long been treated differently, and pricing models run the gamut from the number of eyeballs attracted to a site to percentage of revenues or other success-based formulas, and from flat rate to usage sensitive arrangements. *Second*, the nondiscrimination rule, and the proposed extreme interpretation of that rule that would prohibit *any* charge for various services that network providers might offer to application or content providers, could render illegal many popular services that consumers and application providers benefit from today, as well as prohibit the introduction of new ones. For example, a literal application of that rule could render application stores illegal. *Third*, the uncertainties and other harms resulting from the rule would only multiply as more and more services integrate components from the Internet.



*The DROID smartphone combines cutting-edge hardware from Motorola and Google's Android 2.0 operating system.*

### **Managed or Specialized Services:**

Expanding the wireline broadband principles by applying any rules for the first time to so-called “managed” or “specialized” services also would be especially harmful. *First*, the ability to offer such services — and the revenues they generate — is critical to the business case for making the ongoing investments to deploy broadband more broadly and for increasing capacity and adding new capabilities where it has been deployed. *Second*, as noted above, the dividing line between Internet access and “managed” or “specialized” services is becoming increasingly blurred as more and more services, including services that are provided as private network offerings, integrate content or features from the Internet. *Third*, there is no reason to go down this road. Rather than attempt to define a fixed category of permissible services, the Commission should make clear that any provider of a traditional Internet access service that allows consumers to go where they want and access what they want on the public Internet is free to *also* offer customers any additional options it chooses.

**Network Management:** Likewise, adopting any rules with respect to network management, even a rule that generally permits reasonable network management, would undermine the ability of providers to engage in practices needed to serve and protect consumers. *First*, it is now widely accepted that such practices are critical

to maintaining a well-functioning Internet — among other things, they are necessary to deal with network congestion, optimize service quality, and respond to security threats



**Constant Innovation:** Verizon Wireless recently announced the January 25 availability of the Palm Pre Plus and Palm Pixi Plus, bringing the Palm webOS experience to its customers.

of all types, from viruses and spam to denial-of-service attacks and botnets. *Second*, there is no way to “grow” out of the need for effective network management practices by increasing capacity — for example, providers will need to deal with security threats no matter how large the network. *Third*, network management requires maximum flexibility to address differences in network technologies and constant changes in threats, traffic patterns, and other factors. The proposed rules, however, would inevitably create significant uncertainty as to what would ultimately be deemed reasonable and what would not — uncertainty that itself would have a deleterious effect by requiring engineers to repeatedly clear technical strategies with the requisite squadron of lawyers, inevitably slowing responses to new security threats and other rapidly changing conditions.

The proposed rules not only lack any factual or economic justification and would harm competition and consumers, but they also would be unlawful. *First*, as highlighted during the recent oral argument in *Comcast v. FCC*, the Commission is a creature of statute and can exercise only that authority assigned to it by Congress. Here, no statutory provision gives the Commission any authority — “ancillary” or otherwise — to impose the proposed rules. In fact, the proposed rules would violate, rather than implement, Congress’s statutory directives. *Second*, the Commission’s lack of authority is all the more apparent given that the rules would raise serious constitutional problems under both the First Amendment and the Fifth Amendment’s Takings Clause. *Third*, the absence of any factual or economic basis for the proposed rules would render their adoption arbitrary and capricious.

The Commission should alter its course and not adopt the proposed rules. Existing antitrust and consumer protection rules at both the federal and state levels already provide protection against the potential abuses about which the Commission professes concern. And an increased and comprehensive focus on transparency — not through mandatory prescriptive regulations that cannot keep pace with changes in the marketplace and in consumer demand, but by promoting the adoption of best practices and industry guidelines — will help ensure that consumers are in a position to make well-informed choices that in turn will drive broadband access providers and all other entities to maximize consumer value and meet customer demands.

## The Entire Broadband Ecosystem Is Characterized by Competition, Investment, and Innovation

It is easy to forget that the Internet ecosystem is still in its infancy. Broadband Internet access services in particular are still at their nascent stage. And broadband providers and others are just beginning to experiment with the provision of new, managed or specialized services such as telemedicine, the SmartGrid, video services that integrate content from the Internet, and innumerable other potential offerings. Precisely because broadband Internet access services — and the Internet ecosystem more generally — remain early in their development, it is particularly important that the Commission not impose regulations that would impede or even halt their continued growth and evolution by discouraging investment and innovation or distorting competition.

### *The Internet Today Is Thriving*

The public Internet today is an open platform over which consumers can go where they want and do what they want online. There is no evidence that either Verizon or any other broadband access provider blocks or degrades access to lawful content or applications. And there is every reason to believe this will remain the case going forward because that is what consumers expect and demand. The highly competitive broadband market ensures that network providers will be responsive to customer demand, lest they lose customers and revenue needed to justify the massive ongoing investments they collectively are making in the nation's broadband infrastructure.



*Regulation would impede the growth of nascent services such as the SmartGrid by discouraging investment and innovation.*

Consumers have more choices online than they have ever had. Innovation and investment are occurring in all parts of the broadband ecosystem, whether networks (both backbone and access), applications and content, or devices. Moreover, the lines between these categories are blurring, and the distinction between “edge” and “network” providers is rapidly becoming outmoded and artificial. The result is that all members of the ecosystem increasingly collaborate *and* compete with one another, leading to a virtuous cycle of innovation and competition that benefits consumers.

The increasing overlap within the Internet ecosystem is apparent. For example, many “edge” players have their own extensive broadband networks or take advantage of content delivery networks — which store copies of content on servers at multiple locations so as to circumvent points of congestion on the Internet in order to prioritize delivery of that content. Google, for example, now has one of the largest

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networks in the country with a global reach, and its network is the third largest source of and destination for Internet traffic in the world. Google's network not only carries its own content, but also enables applications such as Google Voice which, from the consumer's perspective, provides many of the functions traditionally performed by network operators. Akamai, an operator of a content delivery network, claims to deliver upward of 15% of all Web traffic. Other examples abound. Offerings such as the iPhone and Kindle are a combination of network functions, applications, and devices. For example, the Kindle is pre-loaded with certain applications, is obviously a "device," and comes with built-in wireless connectivity for which Amazon pays rather than the user. Apple makes both devices and applications and also operates an App Store that acts in ways traditionally associated with networks by providing a means for other application providers to distribute their services to consumers. The development of "cloud computing" amounts to the provision of applications, connectivity, and related services in an integrated fashion.

This innovation and convergence is driven by customer demand and clearly has benefited consumers by providing them more choices, new services, lower prices, and many other benefits. And the combination of technological change and innovation, investment, and competition will ensure that this evolution will continue, all with the aim of meeting consumers' needs and desires. Creating artificial "regulatory silos" — as the proposed rules would do by defining separate categories of

"devices," "applications," "content," and "networks" that are subject to different obligations — would simply obstruct the current of Internet innovation for no good reason.

### ***Broadband Internet Access Services Are Highly Competitive, Subject of Massive Ongoing Investment***

Broadband Internet access services are still in their nascent stages and continue to develop in a competitive manner under the successful hands-off policy pursued by the Commission through the last several Administrations. In a series of orders, the Commission has concluded that broadband Internet access services should be free of common carriage and other Title II regulation based on findings that these services are developing in a competitive manner, that the broadband marketplace is rapidly evolving, and that there are no signs of so-called "market failure."<sup>1</sup> The Commission further observed that heavy regulation of broadband services would impede investment and innovation, whereas a pro-growth, restrained regulatory approach would help encourage the deployment of next-generation broadband infrastructure.<sup>2</sup>

### ***Competition and Investment in Fixed Broadband Networks and Services***

In 2005, when the Commission confirmed that wireline broadband Internet access service is an information service outside the scope of Title II regulation, it found that such services were "offered by two established plat-

forms providers, which continue to expand rapidly, and by several existing and emerging platforms and providers.” As the Commission anticipated, cable, DSL, and next-generation fiber networks have expanded rapidly, and new sources of competition also have emerged, with all available evidence pointing to further increasing competition going forward.

Most consumers in the United States now have at least two facilities-based alternatives for wireline broadband service, cable modem service from local cable operators and DSL or fiber-based service offered by telephone companies. Today, cable modem service is available to more than 92 percent of all U.S. households,<sup>3</sup> and the five major cable operators — which together pass approximately 87 percent of U.S. households — collectively offer cable modem service to approximately 99 percent of the homes they pass. And DSL services are now available to at least 83 percent of U.S. households with local telephone access nationwide. For example, Verizon makes DSL available to approximately 25 million households in its footprint.<sup>4</sup> Within Verizon’s largest local service territories, 96.5 percent of total households in Verizon’s territory are served by wire centers in which both Verizon DSL and cable modem service is available.

Moreover, massive investment is being made to upgrade the networks used to provide broadband services. Verizon is investing more than \$23 billion to pass 18 million premises with its next-generation, all-fiber FiOS network by the end of this year, and has already passed more than 14.5 million of those premises — approximately



45 percent of households in its current landline footprint.<sup>5</sup> Verizon’s fiber network today offers Internet download speeds of up to 50 Mbps and upload speeds of up to 20 Mbps, with much faster speeds possible when consumer demand warrants them. Moreover, such investments will in turn drive innovations in the rest of the Internet ecosystem as it will make possible new applications, higher throughput, and other additional capabilities.

Cable and telephone companies do not merely have overlapping broadband footprints, but are competing aggressively both to retain existing subscribers and to attract new ones. For example, over the past several years, DSL, cable modem, and fiber-based speeds have steadily increased, while prices (particularly on a per megabit basis) have steadily declined, which evidences the head-to-head rivalry between these technologies.

Wireline broadband providers also are competing vigorously to attract new broadband subscribers. Over the past several years, there has been a

***Approximately 97 percent of total households in Verizon’s territory are served by wire centers in which both Verizon DSL and cable modem service is available.***

steady back-and-forth between cable and telephone companies in terms of the percentage of total new subscribers each technology has attracted.



**Healthy Competition:** In January, Sprint introduced a router that connects Wi-Fi-enabled devices to Sprint's new WiMAX high-speed Internet service.

Finally, in addition to fiber, cable, and DSL, there is additional broadband competition from a variety of sources. The United States is perhaps the only country in the world with at least two satellite broadband services widely available. Fixed wireless broadband also is available in many locations, with the potential to reach many more at relatively low cost compared to the deployment of wireline facilities. And, of course, as explained further below, all of these providers face still further emerging cross-platform competition from the new generation of wireless technologies and services now being deployed.

Consumers are benefiting from the rapid evolution in new services, applications, and content that these new investments and deployments have engendered from all providers, including network providers.

### **Wireless Competition and Investment**

Wireless broadband services are characterized by an even greater degree of dynamism, diversity, and product differentiation, all arising from intense competition among numerous service

providers. Driven by increasingly innovative networks, devices, and applications in response to fast-changing consumer demands, the wireless ecosystem has brought expanded and improved wireless services to the American public.

This competition has promoted rapid innovation and diversity among wireless broadband offerings and the associated devices, applications, and content. With massive investment from multiple providers, first-generation networks have given way to second-, third-, and now fourth-generation infrastructure, offering more and better broadband as well as ever-expanding coverage. Even as consumers benefit from increasingly robust service capabilities, prices have dropped at an astonishing rate.

**Numerous and Varied Competitors:** The marketplace for wireless broadband service includes a wide range of providers offering services under a variety of business models, competing aggressively for broadband subscribers. They include not only the four "nationwide" providers — Verizon Wireless, AT&T, T-Mobile USA, and Sprint — but numerous other facilities-based providers. Today, Clearwire offers CLEAR-branded 4G WiMAX high-speed Internet access; the company intends to cover up to 120 million people in more than 80 markets by the end of 2010.<sup>7</sup>

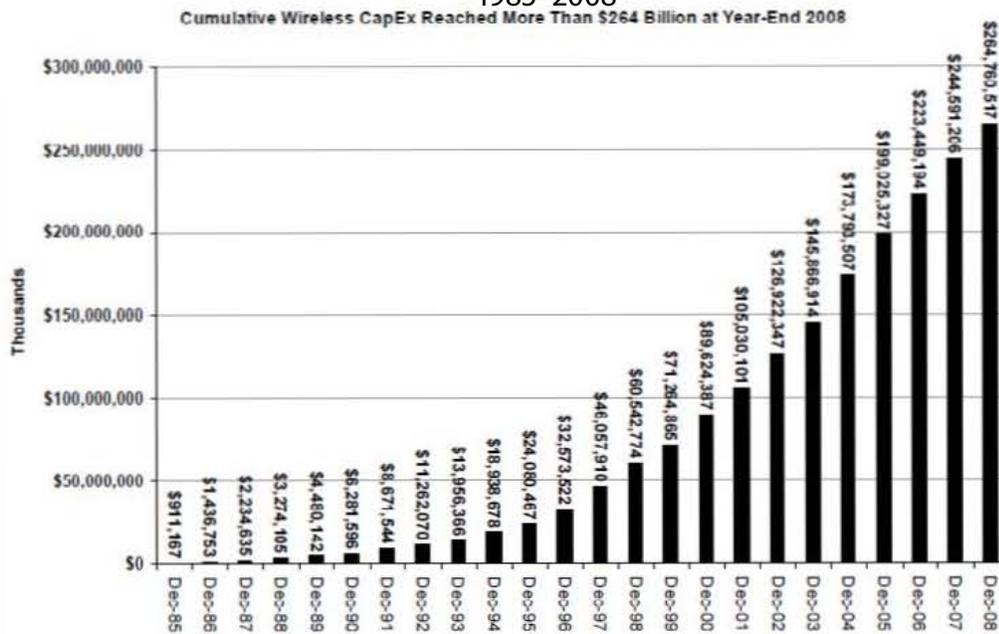
**Network Investment and Expanding Broadband Coverage:** Wireless providers have invested hundreds of billions of dollars in the aggregate to improve and expand their networks. Since 2001, America's wireless carriers have made an average combined

investment of more than \$22.8 billion *per year* to upgrade their networks to facilitate advanced voice and data offerings.<sup>8</sup> Moreover, investment has only grown as the current market structure has evolved:

**Diverse Broadband Plans and Price Competition:** Wireless broadband providers offer a diverse array of data plans that have fallen in price, both on an absolute scale and on a dollar-per-mega-byte basis. In addition to traditional

## Cumulative Wireless Industry Capital Expenditure

1985–2008



Source: CTIA Semi-Annual Survey

*To continue the success of the Internet, the Commission should focus on preserving and promoting incentives for investment and innovation and enabling informed consumer choice.*

The breadth and depth of network coverage is a principal basis on which wireless providers compete with one another, as evidenced by Verizon Wireless’s recent “There’s A Map for That” campaign comparing its 3G coverage to AT&T’s.<sup>9</sup> Verizon Wireless’s 3G network now covers 284 million people. Sprint offers 3G service to more than 270 million people. AT&T offers 3G service utilizing a different technology to nearly 350 markets<sup>10</sup> and is taking steps to upgrade its current network to provide faster speeds.

post-paid plans, providers increasingly offer pre-paid options, volume-limited broadband offerings, and all-you-can-eat bundles, as well as a variety of speed “tiers”<sup>11</sup> — in 2004, AT&T offered a data plan of \$19.99 for the first 8MB of data, while in 2009, it offered a 200 MB mobile broadband plan for \$40, a reduction from \$2.50 per MB to \$0.20 per MB. Similarly, in 2004, Sprint offered a \$40 data plan for 20MB, but its 5GB mobile broadband plan in 2009 was priced at \$60, a reduction from \$2 per MB to \$0.12 per MB.

*In 2007, the FTC found no “significant market failure or demonstrated consumer harm from conduct by broadband providers.”*

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### **Devices, Applications, and Content:**

The other parts of the wireless broadband ecosystem — including devices, applications, and content — are also characterized by fierce competition, growing diversity, and increasing product differentiation. As CTIA recently noted, U.S. consumers have access to more than 630 different wireless handsets and devices, compared to, for example, fewer than 150 in the U.K.<sup>12</sup> On June 6, 2009, there were over 93,000 downloads from Palm Pre’s menu of 18 applications.<sup>13</sup> Within eleven days, by June 17, 2009, the menu of available Palm Pre applications had increased to 30, and Palm Pre users had completed over 660,000 downloads.<sup>14</sup> Likewise, Apple customers have downloaded over 2 billion apps in the 14 months since its App Store opened.<sup>15</sup>

### ***Cross-Platform Competition — Rollout of 4G Wireless***

Even as wireless broadband use is already thriving, deployment of 4G networks is just getting started and will soon be widespread; these more robust wireless networks will facilitate increased competition across both mobile and fixed platforms. In 2008, Verizon Wireless invested over \$9 billion for spectrum in the 700 MHz auction. The company will initiate commercial LTE service in the 700 MHz band this year, with coverage to approximately 100 million people in 30 markets during 2010. The company projects the LTE network will be built out nationwide by the end of 2013. AT&T will be starting LTE trials in 2010, with commercial deployment beginning in 2011. Sprint has recently brought 4G to 27 markets and plans to bring service to multiple additional markets dur-

ing 2010. Clearwire, which boasts far greater spectrum holdings nationwide than Verizon Wireless, AT&T Mobility, and T-Mobile,<sup>16</sup> has begun to roll-out 4G service — it has launched service in at least fourteen markets with over 10 million people and plans to cover 120 million people in 80 markets by the end of 2010. Cable companies such as Comcast and Time Warner have already begun or announced plans to resell Clearwire’s 4G service. Regional providers are also upgrading — MetroPCS, for example, plans to begin deployment of its LTE network in the second half of 2010.

Providers are investing aggressively in next-generation wireless broadband service, and the roll-out of 4G will provide a competitive option to wireline broadband for many consumers. Indeed, 4G providers already are advertising their services as wireline replacements. Clearwire, for example, advertises its 4G WiMAX service as “a wireless alternative to DSL or cable internet service.”<sup>17</sup> All else being equal, consumers clearly prefer the benefits of mobility, and 4G’s anticipated typical speeds of 5–12 Mbps will bring wireless capabilities much closer to (and in some cases push them past) many of the fixed broadband options that consumers use today and sufficient for the average user. Thus, just as with voice telephony, in which wireless services initially were a complement to wireline services but have now become commonplace alternatives as increasing numbers of consumers “cut the cord,” the rollout of 4G will put even greater competitive pressure on wireline providers, who will need to offer advantages — in terms of price, capabilities, and/or other attributes — to

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offset the advantages of mobility. The result will be a virtuous cycle of still further competition across platforms in which innovations, prices, and other new capabilities over one platform will force responses by the others, all to the benefit of consumers.

***The Commission Identifies  
No Problem that Needs to be  
Addressed and Provides No Valid  
Rationale for Its Proposed Rules***

Against a backdrop of increased competition, innovation, and investment, the Commission faces a particularly high hurdle in justifying intrusive regulatory intervention in the broadband marketplace. The *NPRM* does not provide the requisite justification. Despite the Commission's repeated insistence that it will be data-driven, it identifies no data or facts that demonstrate an existing problem that needs to be remedied. Its speculation concerning broadband providers' hypothetical incentives and abilities to act in a manner that harms consumers ignores the competitive constraints providers face and in any event is wrong as a matter of economic theory. And it offers no basis to single out network providers for regulation when other members of the Internet ecosystem have the same hypothetical incentives and abilities the Commission attributes to network providers.

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## Focus on Preserving and Promoting Investment, Enabling Informed Consumer Choice

### *The Commission Must Preserve and Promote Incentives to Invest and Innovate*

In order for the Internet to continue to meet consumers' needs and satisfy evolving demands, the Commission and other policymakers need to preserve incentives for continued investment and innovation in all parts of the ecosystem, including networks. Massive additional investment will be required to deploy advanced, intelligent networks that will be needed to support and provide the services consumers expect and want. That is obviously true with respect to the deployment of *new* networks. But the need for investment also applies to *existing* networks, where carriers are consistently adding capacity, speed, and new capabilities and service offerings. Increased intelligence and capabilities for networks will become even more essential as the Internet and other broadband services continue to evolve and are put to more uses (e.g., the Smart Grid). So, while continued investment is important in all parts of the ecosystem, continued network investment is critical to the Internet's continued success.

As of now, broadband access providers have been and plan to continue making just such investments. According to one recent study, broadband providers invested more than \$64 billion in 2008 to preserve, upgrade, and extend their networks.<sup>18</sup> Verizon alone has been spending in the neighbor-

hood of \$17 billion per year to build, maintain, and protect the health of its networks. Indeed, Verizon invested more in capital expenditures between 2004 and 2008 — more than \$80 billion — than any other company in the United States in any industry, and in 2009 it continued to be one of the largest investors in capital expenditures. It should be evident that reducing the incentives for broadband providers to make these investments would harm consumers.

Therefore, a key question for the Commission is how to ensure that it maintains and increases incentives for investment. Like any other firm, a network provider's decision to invest depends on whether the business case can justify a particular level of investment given the risks entailed. Revenues from the fees that consumers pay to use traditional Internet access services that enable consumers to go where they want and do what they want online are a critical component of the business case for broadband investments. The revenues from these fees paid by consumers for Internet access services alone, however, are not sufficient to justify the required ongoing investment. Network providers must be able to develop and offer additional innovative services — whether private network offerings or those that may be integrated with Internet content — that help differentiate themselves in the market and provide an opportunity to compete for addi-

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tional revenue streams to support the business case for broadband deployment. The flexibility to offer such new services is critical to justify continued investment to deploy and to expand capacity. Offering such services does not deny consumers the option of choosing traditional Internet access services, but instead expands the range of choices. Both with respect to more traditional Internet access services and additional services, competition thrives and consumers benefit when network providers have the flexibility to experiment with and offer differentiated products and different business or pricing models that may better serve consumers and that permit the continued robust investment needed to build out broadband. The Commission should encourage such flexibility — not throw obstacles in its path.

### ***The Commission Should Promote Informed Consumer Choice***

Rather than adopting prescriptive rules, the Commission can better ensure the continued growth and success of all parts of the Internet ecosystem by promoting a framework that focuses on enabling consumers to make informed decisions about the services available to them, so that those decisions can then drive the continued evolution of the broadband ecosystem to better meet consumer needs. As the Commission noted in its *NPRM*, “access to accurate information plays a vital role in maintaining a well-functioning marketplace that encourages competition, innovation, low prices, and high-quality services.” Transparent and meaningful disclosures to consumers enable them to make educated choices

and thereby facilitate competition. Importantly, the need for transparency applies to providers throughout the broadband space — whether providers of networks, applications and content, or devices. In particular, application and content providers should be expected to disclose practices that may affect a consumer’s use of the Internet.

Simply put, a policy framework that is focused on promoting investment and innovation that leads to more consumer choices and disclosures of meaningful information that allows consumers to make educated decisions among those choices is the best way for the Commission to ensure the continued success of the Internet.

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## Proposed Rules Would Be Affirmatively Harmful to Consumers' Interests

*Any prescriptive rules will have unintended consequences that harm consumers.*

The proposed rules would have the unintended effect of thwarting the continued growth and development of the Internet. Indeed, they would be inimical to the goals the Commission has recognized as national priorities in the context of the National Broadband Plan: they would deter investment in the deployment of broadband facilities, discourage broadband adoption, and reduce the capabilities of broadband networks to support critical new services such as the Smart Grid, telemedicine, and cybersecurity.

While, as discussed below, the particular rules that the Commission has proposed would result in significant harms, in fact *any* prescriptive rules applied to network providers inevitably will have unintended consequences that harm consumers. This is true for at least three reasons.

1. Rules in this area would inevitably be vague and ambiguous, and the resulting uncertainty would deter investment and innovation and adoption of practices that would benefit consumers. As the Commission itself appears to recognize, any rules it adopts would have to be highly general, because specific rules could not even capture the wide range of *existing* variations in technologies, services, and other market characteristics and even attempting to do so would serve only to freeze innovation in its tracks.
2. General prescriptive rules of the kind the Commission proposes miss

the mark. They sweep much too broadly and would prohibit or restrict practices that are procompetitive and pro-consumer. As discussed below, for example, by prohibiting *any* form of discrimination, the proposed rules would preclude innovations in pricing and business models that could provide consumers more choices and benefits. The Commission could avoid such overinclusiveness only by adopting narrowly targeted rules that proscribe only conduct that is shown, on a case by case basis, to harm competition and therefore consumers — but, for the reasons discussed above, such specific targeted rules likely would become outmoded in short order.

3. Adoption of any rules inevitably will lead to “regulatory creep” and impose significant new costs on consumers. For example, the Commission’s proposed rules already impose one form of price regulation by prohibiting network providers from charging content and application providers anything for quality of service and other enhancements. As this inevitably leads to increased prices for consumers — who will have to bear all network costs — there will be cries for regulating those subscription prices as well.

Adopting prescriptive rules such as those proposed here that inhibit investment and innovation threaten to inflict equally large (indeed, larger) welfare losses on consumers.

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### ***Applying Net Regulation to Wireless Broadband Services Would Harm Consumers***

The Commission's wireline broadband principles were not designed to apply to wireless services,<sup>19</sup> and neither they nor the proposed rules can rationally be extended to wireless broadband services, which are unique in several important respects.

First, wireless services are subject to particularly intense and growing competition, with ongoing investment and innovation that has brought tremendous benefits to consumers. As discussed above, wireless broadband services are highly competitive. Given the diversity of consumer preferences, consumer welfare is maximized when consumers are free to choose from among a range of different types of user experiences. It surely cannot be the case that consumers would benefit if the market became more homogenized and they had *fewer* choices. Yet that is what application of the proposed rules to wireless broadband services portends.

A second reason extending the proposed rules to wireless broadband services would make no sense and would be particularly harmful is that such services face unique technological and operational constraints. These constraints increase the costs of regulations that hinder efficient network management practices, which are particularly important to the provision of wireless broadband service. Rules that prohibit discrimination while allowing "reasonable" network management nonetheless would create uncertainty

and confusion as to whether particular network management practices were permissible. Thus, the costs of extending net neutrality rules to wireless broadband will be particularly high.

Finally, it would make particularly little sense to risk the significant harms from net neutrality rules at this juncture in the wireless industry's development. Carriers are just now embarking on the massive investments needed to deploy 4G technologies, which will provide greater speeds and additional broadband pipes into the home. Adopting the proposed rules would call into question whether network providers could earn sufficient returns to justify this investment — a result that would discourage 4G deployment and the resulting innovation competition, and broader benefits for the United States economy that it will create.

### ***Proposed Non-Discrimination Rule Would Hamper Innovation and Investment, Harm Consumers***

The Commission's proposed non-discrimination rule would, for the first time, interject archaic common carriage concepts and price regulation into the Internet. Indeed, the Commission's proposed rule is extraordinarily broad, going beyond even traditional common carriage regulation by prohibiting *all* discrimination, rather than simply "unjust or unreasonable" discrimination<sup>20</sup> and prohibiting *all* charges to application or content providers for any kind of service enhancement. In so doing, the proposed rule would go well beyond merely restricting conduct that is affirmatively anticompetitive and therefore harms consumers to reach "discrimination" or

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differentiation that is pro-competitive and benefits consumers. As a result, imposing such a rule would serve only to discourage investment and innovation, distort competition, and limit consumer choice.

*First*, a prohibition on “discrimination” in the Internet context inherently lacks meaning and would be virtually impossible to interpret or apply because different forms of traffic have long been treated differently. For example, the use of content delivery networks and caching services and differing arrangements between networks for handing off traffic depending on the type of traffic involved mean that not all traffic is treated equally on the Internet today. Business, government, and other commercial customers have always had the flexibility to negotiate customized deals with providers of broadband Internet access services that can include customized practices concerning network management, security, prioritization, and many other aspects of their services. Similarly, pricing models vary widely, including success-based formulas such as revenue sharing and a wide range of arrangements from flat rate to usage sensitive prices. It is unclear what the Commission is intending to prohibit and, even if were, the Internet marketplace is evolving rapidly and it is impossible to predict what practices or models will best meet customer demand and be economically efficient. Moreover, the Commission itself readily concedes that many types of discrimination are pro-competitive and can provide benefits to consumers, yet the proposed rule makes no effort to distinguish those types of discrimination that are beneficial or benign and to cabin its prohibition to only

those actions that can be shown in a specific case to harm competition and therefore consumers. Thus, imposing a sweeping prohibition that is based on, but is even more stringent than, outdated common carriage concepts cannot be justified and will serve only to stifle experimentation and innovation.

*Second*, the nondiscrimination rule, including the express prohibition on *any* charge to application or content providers for enhanced service, would appear to prohibit — or at the very least create significant uncertainty and confusion about — many pricing and business models, services, and network management practices that consumers and application and content providers benefit from today, as well as restrict the introduction of new ones. The proposed prohibition on business arrangements between broadband access providers and content/application providers also could have the effect that *all* network costs would have to be recovered from charges to consumers in many instances where that otherwise might not be the case.

*Third*, the uncertainties and other harms resulting from the proposed nondiscrimination rule would only multiply as more and more specialized services integrate components from the Internet. For example, as video services or a provider’s “storefront” increasingly integrate selected content from the Internet (e.g., a service focused on children’s content that incorporates particular videos from the Internet aimed at children), a nondiscrimination rule that required that all content and application providers be offered access to such services on identical terms could well preclude the

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provider from integrating any Internet-delivered content at all — a result that would again reduce consumer choices and benefits.

### ***Limits on “Managed” Services Would Stifle Innovation, Competition and Consumer Choice***

The *NPRM* raises questions about whether and how its proposed rules should apply to a broadband provider’s own “managed” or “specialized” services. The answer to that is simple. Regardless of what else it does here, the Commission should not impose any limitations on these services, and instead should make clear that any network provider that offers traditional Internet access also should be free to provide consumers with the option of choosing any additional services that the provider cares to offer, without regulatory limitations or restrictions. That result clearly is in consumers’ best interests. It will give them additional and new options that they can choose to take (or not) in addition to (or even instead of) traditional Internet access, whether it be video services, telemedicine, tailored storefronts or other offerings focused on particular groups such as seniors or children (in much the way that some wireless phones are tailored to such groups), etc. Consumer demand and market forces can then determine which services do or do not succeed. Conversely, applying any rules for the first time to so-called “managed” or “specialized” services would cause significant harms.

*First*, as discussed above, broadband access providers need broad flexibility to offer their own differentiated services — regardless of what term is used

to describe them such as “managed” or “specialized” or something else — in order to support a business case for making ongoing investments to deploy broadband more broadly, and to increase capacity and add new capabilities where it has been deployed. While the revenues earned from charging consumers for public Internet access are a critical component of the business case, they simply cannot justify the required investments standing alone.

*Second*, the dividing line between Internet access and “managed services” is becoming increasingly blurred as more and more services integrate content or features from the Internet or connect directly or through a proxy with the Internet. Any attempt to define a fixed category of permissible services inevitably will create ambiguities and limit development of innovative new services that do not fit neatly within any definition adopted today. Such innovations, of course, benefit consumers by offering them even more choices. But the Commission’s proposed rules leave significant ambiguity about whether such services would be subject to restriction.

*Third*, rather than trying to define or predetermine a fixed category of “permissible” services in some static or artificial way, the Commission should make clear that any provider that offers traditional Internet access that allows consumers to access any lawful content and applications also is free to offer consumers the option of purchasing any and all additional services that the provider chooses to provide: that will give consumers additional choices and allow market forces to determine what services best meet consumer demand.

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## ***Network Management is Needed to Serve and Protect Consumers***

Broadband providers unquestionably need to engage in network management to provide the quality service that customers demand. Any rule that limits providers to “reasonable” network management practices, while seemingly benign, will have unintended and harmful consequences. Because it will subject engineers to the risk of sanctions for guessing wrong as to what regulators might later deem reasonable, such a rule will engender uncertainty and undermine the ability of providers to engage in practices needed to serve and protect consumers.

*First*, there is now widely established consensus among virtually all concerned that network management is critical to maintaining a functioning Internet and to respond to a variety of issues that are growing more complex over time. Examples include the need to manage capacity constraints caused by the rise in traffic volumes due to growth in uses such as streaming video, gaming, and P2P file exchanges; protect users and the network from unlawful or harmful content; and optimize service, including for latency-sensitive applications such as telemedicine. As described above, the need for network management is particularly acute in the context of wireless broadband services due to the complications introduced by mobility and a variety of other technical constraints. Moreover, network management is critical to important national priorities such as cybersecurity, fighting illegal content, and protecting

children online. Although the Commission appears to recognize the importance of such goals, and proposes to include exceptions that would purport to permit network management practices for these purposes, the practical effect of the proposed rules would be to undermine the ability to serve these goals. The rules also would slow down responses because engineers likely would have to consult with the requisite squadron of lawyers who themselves would be hamstrung by inherently uncertain standards in trying to evaluate and predict whether the Commission would in hindsight deem a particular technical response to be “reasonable” under all of the circumstances of a particular case. Moreover, the regulatory uncertainty and the possibility that new techniques could not be deployed would undermine incentives to invest and innovate to better address these concerns.

*Second*, there also appears to be a widespread recognition that the need for effective network management cannot be eliminated simply by adding capacity — for example, security threats always need to be dealt with no matter what the capacity of the network. Moreover, the demands placed on broadband networks have historically grown to match and then exceed added network capacity. And, in any case, effective network management can be more cost-efficient than adding costly capacity. It makes no economic sense to impose rules that require the addition of more capacity than would be needed if existing capacity could be used more efficiently.

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*Third*, network management is an extraordinarily complex undertaking that requires maximum flexibility, and, as noted above, imposing any rules in this area, even ones that seem reasonable, necessarily will limit this flexibility and have harmful unintended consequences. Even network providers have different views as to the optimal approach, and the best approach may differ for different networks. Consumer welfare is best promoted by allowing network operators to have wide berth to experiment and use different techniques, recognizing that competitive market forces will cause them to use those approaches that best create consumer value. The proposed reasonableness standard would leave tremendous uncertainty at best — fraught with risks from inaccurately predicting the Commission’s view on the “reasonableness” of a particular method. Because the threats to networks, capacity challenges, and service issues are constantly changing, the development of legal guidance for engineers would be impractical and continuously out of date. At the same time, the Commission clearly could not practically or effectively impose specific, detailed rules (indeed, doing so would be even more damaging). Thus, the inevitable result would be an over-lawyered process that reduces flexibility and experimentation and is ineffective at handling new security threats and rapidly changing conditions that network engineers must deal with in the real world— a result that would harm consumer welfare.

### ***Internet Regulation Could have Significant Harmful International Ramifications***

Up to now, the United States has taken a hands-off approach to the Internet, leading to an explosion of growth and innovation. That approach also has set an example for the rest of the world that, while obviously not always followed, has nevertheless served as a benchmark and provided a basis for the U.S. to urge other nations to take a similar approach. Indeed, the FCC itself, under the leadership of former Chairman Kennard, pointed to its own example of the absence of regulation of the Internet as a model for foreign regulators to follow:

The Internet has evolved at an unprecedented pace, in large part due to the absence of government regulation. Consistent with the tradition of promoting innovation in new communications services, regulatory agencies should refrain from taking actions that could stifle the growth of the Internet. During this time of rapid telecommunications liberalization and technology innovation, unnecessary regulation can inhibit the global development and expansion of Internet infrastructure and services. To ensure that the Internet is available to as many persons as possible, the FCC has adopted a “hands-off” Internet policy. We are in the early stages of global Internet development, and policymakers should avoid actions that may limit the tremendous potential of Internet delivery.<sup>21</sup>

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However, the current and immediate past Coordinators for International Communications and Information Policy at the Department of State have expressed concern that adopting “net neutrality” rules would set a harmful example for other countries: “the Network Neutrality proceeding has attracted extensive attention around the world. I think it is fair to say that the level of international interest is very nearly universal. In some countries it is being interpreted as an initiative by the United States to regulate the Internet. And we are concerned that in some countries it may be used as a justification for blocking access for purposes of preventing unwelcome political, social, or cultural information from being disseminated to their citizens.”<sup>22</sup>

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## The FCC Lacks Authority to Impose the Proposed Rules

From a legal standpoint, the threshold question is whether and to what extent the FCC has authority to impose the proposed regulations in the first instance. In its NPRM, the Commission asserts that it has the authority to create and enforce far-reaching net neutrality regulations pursuant to its so-called “ancillary authority.” But the Commission’s assertion of broad ancillary authority to impose the proposed regulations is a bridge too far. The FCC is a creature of statute and thus can only exercise authority delegated to it by statute. To be sure, as the Supreme Court has recognized, the Commission has authority to take certain actions that, while not explicitly authorized in the Communications Act, are needed to carry out those functions that expressly *have* been delegated to it, and courts have upheld various exercises of the Commission’s ancillary authority. But, as the courts also have made clear, that authority is necessarily cabined. The Commission cannot simply take any action it views to be in the public interest so long as it involves the regulation of communications. Instead, the Commission’s exercise of authority must be “ancillary” to some other provision of the Communications Act that does confer express substantive responsibility on the Commission. Thus, to justify an exercise of ancillary authority, the Commission must (1) identify a “primary” substantive statutory provision to which the proposed action is ancillary, (2) demonstrate that the action is needed for

the effective performance of that primary provision, and (3) ensure that the action is not otherwise inconsistent with the Act. *See, e.g., United States v. Southwestern Cable, Co.*, 392 U.S. 157, 178 (1968); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (“*Midwest Video II*”).

The Commission cannot satisfy this standard. Its proposed rules would impose the equivalent of (indeed, a stricter version of) common carriage regulation on broadband Internet access services, a result that is contrary to the legislative scheme. While this is most clearly true of the proposed non-discrimination obligation, it also is true of other proposed requirements, which essentially duplicate requirements imposed historically to give effect to core common carriage duties.

Moreover, the Commission’s ancillary authority does not encompass actions that are otherwise inconsistent with the Communications Act. Yet the Commission’s proposed rules would be just that. That is most clearly true of the nondiscrimination requirement: the duty to accommodate all comers on an undifferentiated basis on the same terms and conditions is the very hallmark of common carrier regulation. But the Act makes clear that information services may not be subject to such common carriage regulation, and the Commission has repeatedly found, and the Supreme Court has affirmed, that broadband Internet access is an information service.

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### ***The Proposed Rules Would Not Withstand Constitutional Scrutiny***

The Commission's authority to adopt rules that raise a substantial constitutional problem is limited where no statute unambiguously requires it to do so.<sup>24</sup> Courts have consistently held that agencies may not use their discretion to interpret ambiguous statutes to impose constitutionally problematic rules.<sup>23</sup>

### ***Proposed Net Neutrality Rules Violate the First Amendment***

Notwithstanding the rhetoric of some proponents of Internet regulation, it bears emphasis that the First Amendment does not regulate private parties — it protects them. The First Amendment comes into play only when *the government* imposes restrictions affecting speech. Net regulations therefore cannot be justified on the theory that they further First Amendment rights or values. To the contrary, the proposed rules would constitute precisely the type of state action that endangers First Amendment rights. Broadband Internet access providers, like newspapers, other publishers, and members of the media generally, engage in protected speech. The proposed rules would restrict the free speech of those private parties in violation of the First Amendment.

Although the sweep of the Commission's proposed rules is far from clear, the Commission's rules could infringe broadband providers' First Amendment rights both directly, by regulating the speech in which providers engage, and indirectly, by increasing costs as-

sociated with broadband providers' means of communication. The Commission has not provided evidence of any government interest that would warrant rules that limit speech in that manner beyond mere speculation about hypothetical future possibilities, and the kinds of broad proscriptive rules proposed here are not even arguably narrowly tailored to achieve legitimate goals. Speech-limiting restrictions of that sort therefore could not be sustained under any form of First Amendment scrutiny. And the serious First Amendment questions raised by the proposed rules confirm that the Commission lacks the authority to promulgate them.

### ***The Rules Would Result in an Uncompensated Taking***

Because the rules would compel network operators to dedicate their networks (or a portion of them) to the use of others on terms to which the operators would not agree, the rules unquestionably would take private property. Indeed, the Commission's entire rationale for the rules is that network providers in the future might not allow others to use their networks absent governmental compulsion. The Act, however, does not specifically direct the Commission to take property in this way. Nor do the proposed rules make any provision for just compensation. The Commission accordingly lacks authority to adopt such requirements.

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## Other, Less Restrictive Alternatives Would Better Serve Consumers

In deciding whether and how to act in the context of this proceeding, the Commission should focus on maximizing consumer welfare and ensuring that the Internet does not stagnate but instead continues to evolve. The goal cannot be to protect or help a particular group of competitors or a specific portion of the Internet ecosystem. Nor should it be to protect or freeze in place a particular “vision” of the public Internet. The Commission should:

- Facilitate the development of industry standards, self-regulatory codes, and best practices to promote transparency — practices that should apply to all providers throughout the Internet ecosystem, including providers of networks, applications, and devices.
- Avoid mandating particular disclosures or practices through prescriptive regulations, which cannot keep pace with rapid changes in technology and consumer demand. Indeed, any attempt to regulate disclosure will quickly run into problems such as how to determine the level of detail that should be required.
- If, despite all this, the Commission does promulgate rules of any kind, it is imperative that those rules not single out broadband access providers and instead apply to all parts of the Internet ecosystem. Applying rules to only one set of competitors will compound the competition-distorting effects of those rules. The Commission has spent many years

trying to remove the artificial distortions created by separate regulatory silos as telephone companies, cable operators, wireless carriers, and others have increasingly competed with one another. It would make no sense to re-create that silo system of regulation on the Internet, where it is already clear that distinctions between networks, application and content, and devices are rapidly eroding.

## Endnotes

- 1 See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 44 (2005) (“Wireline Broadband Order”); Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (“Wireless Broadband Order”); United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service As an Information Service, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006); Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 272 (2003); Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), Memorandum Opinion and Order, 19 FCC Rcd 21496, ¶ 19 (2004);
- 2 Triennial Review Order ¶ 213; FTTC Order, 19 FCC Rcd 20293, ¶ 9 (2004); MDU Order, 19 FCC Rcd 15856, ¶ 7 (2004); 271 Broadband Forbearance Order ¶¶ 21, 25; Wireline Broadband Order ¶¶ 19, 44.
- 3 Comments of the National Cable & Telecommunications Association at 10, A National Broadband Plan for Our Future, GN Docket No. 09-51 (FCC filed June 8, 2009).
- 4 See Verizon News Release, Verizon’s High Speed Internet Service Now Available in Simpsonville and Woodruff, S.C., Areas (Sept. 2, 2009).
- 5 Verizon Communications, Q3 Investor Quarterly 2009, at 8 (Oct. 26, 2009), <http://investor.verizon.com/financial/quarterly/vz/3Q2009/3Q09Bulletin.pdf?t=633946678688490715>
- 7 Press Release, Clearwire, Clearwire Introduces CLEAR(TM) 4G WiMAX Internet Service in 10 New Markets (Sept. 1, 2009), <http://newsroom.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1326282> (“Clearwire Sept. 1 Press Release”).
- 8 Ex Parte Letter from Christopher Guttman-McCabe, CTIA, to Chairman Julius Genachowski et al., FCC, GN Docket No. 09-51, WT Docket Nos. 08-165, 09-66, Attachment at 4 (July 9, 2009).
- 9 See, e.g., John Paczkowski, Verizon to iPhone Users: “Want Five Times More 3G Coverage? There’s a Map for That,” available at <http://digitaldaily.allthingsd.com/20091005/verizon-to-iphone-users/>.
- 10 Comments of AT&T Inc., GN Docket No. 09-51, 129 (filed June 8, 2009).
- 11 See, e.g., Craig Moffett et al., Bernstein Research, U.S. Wireless: Pre-Paid Pricing... Fifty Is the New One Hundred 1, 19 (April 14, 2009).
- 12 CTIA, Wireless Markets at 11.
- 13 See Donald Melanson, Close to 700,000 Palm Pre apps downloaded to date, *engadget*, June 20, 2009, <http://www.engadget.com/2009/06/20/close-to-700-000-palm-pre-apps-downloaded-to-date>.
- 14 *Id.*
- 15 See Press Release, Apple’s App Store Downloads Top Two billion (Sept. 28, 2009), <http://www.apple.com/pr/library/2009/09/28appstore.html> (“Apple Sept. 28 Press Release”).
- 16 Clearwire Corporation Q4 2008 Earnings Call Transcript, March 6, 2009, <http://seekingalpha.com/article/124559clearwire=coproration-q4-2008-earnings-call-transcript>.
- 17 See <http://www.clear.com/shop/services/home>.
- 18 See Patrick S. Brogan, The Economic Benefits of Broadband and Information Technology, 18 MEDIA L. & POL’Y 65 (2009) available at [http://www.nyls.edu/user\\_files/1/3/4/30/84/187/245/Brogan,%20SPRING%202009,%2018%20MEDIA%20L.%20&%20POL%E2%80%99Y.pdf](http://www.nyls.edu/user_files/1/3/4/30/84/187/245/Brogan,%20SPRING%202009,%2018%20MEDIA%20L.%20&%20POL%E2%80%99Y.pdf).
- 19 See, e.g., Second Report and Order, Service Rules for the 698-746, 747-762, and 777-792 Bands, 22 FCC Rcd 15289, 15363 ¶ 202 n.463 (2007) (“[T]he Commission has not yet made a finding regarding whether to apply open access requirements to wireless broadband services generally, and in this Order, defers that determination to the appropriate pending proceedings.”).
- 20 See, e.g., 47 U.S.C. § 202(a) (“It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services...”) (emphasis added); *Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003) (finding that Verizon Wireless’ practice of offering different terms to some customers but not others did not violate the prohibition against “unjust or unreasonable” discrimination because, in the absence of a tariffing requirement, giving such concessions to customers was a manifestation of competition and benefitted consumers). While the Commission points to the unqualified nondiscrimination requirements in Sections 251 and 271-272 of the Act, NPRM ¶ 109, those requirements concerned horizontal relationships between ILECs and their competitors and rested on Congress’s conclusion that ILECs had monopoly power over bottleneck facilities. As discussed above, no such finding could possibly be made here and, in any case, the proposed rule focuses on vertical relationships between broadband network providers and application and content providers.
- 21 FCC, Connecting the Globe: A Regulator’s Guide to Building a Global Information Community, at Section IX (1999), available at <http://www.fcc.gov/connectglobe/sec9.html>.
- 22 International Innovation and Broadband, Remarks of Ambassador Philip L. Verveer, U.S. Coordinator for International Communications and Information Policy, at House of Sweden, Washington, D.C. (Dec. 3, 2009) available at <http://www.state.gov/e/eeb/rls/rm/2009/133802.htm>; see Ambassador David Gross, Post to Interesting-People (Oct. 15, 2009), available at <http://www.interesting-people.org/archives/interesting-people/200910/msg00121.html>. (“[T]here may be virtually no basis for the United States to object to other governments also creating new rules governing the Internet. . . . It is easy to understand that these other governments will seek to design rules to help their domestic companies at the expense of international and American companies as well as at the cost of the economically efficient design of the Internet. Ironically they are also likely to use the establishment of new US rules regulating the Internet to impose their own restrictions on Internet content — especially focusing on restricting the free flow of information so as to promote their own interests in enhancing Chinese ‘social cohesion’ or other countries that seek to ‘defend against religious defamation.’”).
- 23 *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 173–74 (2001); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574–75 (1988); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979).
- 24 E.g., *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1244 (10th Cir. 2008) (McConnell, J.) (“It is well established that the canon of constitutional avoidance does constrain an agency’s discretion to interpret statutory ambiguities, even when Chevron deference would otherwise be due.”).





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