

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191
	)	
Broadband Industry Practices	)	WC Docket No. 07-52
	)	
	)	

**Reply Comments of TDS Telecommunications Corp.**

Kathleen Wallman  
Kathleen Wallman, PLLC  
9332 Ramey Lane  
Great Falls, VA 22066

April 26, 2010

**TABLE OF CONTENTS**

Summary ..... i

I. Introduction and Overview ..... 1

II. Adoption of the Proposed Nondiscrimination Rule with Respect to Managed Services is Untimely ..... 3

III. Promulgation of the Proposed Nondiscrimination Rule is Imprudent Because of the Adverse, Even if Unintended, Consequences of its Adoption for Managed Services.. 3

IV. The Notice Properly Identifies Managed Services as Unclassified and They Should Remain So..... 4

V. A Blanket Prohibition Against Discrimination is Unwarranted ..... 6

VI. Conclusion ..... 7

## Summary

The comments filed in the above captioned dockets reflect thoughtful and often sharply conflicting views of whether and how the Commission should adopt its proposed nondiscrimination rule. They already have been the catalyst for informative and productive conversations among parties with opposing views, which TDS Telecom intends to continue to pursue. Nevertheless, two aspects of the record in particular strongly militate against adoption of a nondiscrimination rule.

First, the April 6, 2010 decision of the District of Columbia Circuit in *Comcast Corp. v. FCC* broadly affects most of the issues in the above captioned dockets. The decision counsels a cautious and deliberative approach. The Commission should not proceed to weighty issues such as classification of broadband Internet services or managed services without issuing a new notice of proposed rulemaking.

Second, with respect to managed services, even the foremost proponents of the nondiscrimination rule urge that now is not the time to bring managed services under any rule against discrimination. TDS Telecom agrees. The flexibility of the Commission's current deregulatory approach to managed or specialized services has enabled TDS Telecom to offer its rural customers products such as Voice over Internet Protocol ("VoIP") and Internet Protocol Television ("IPTV"). These and other like products are impossible to offer unless the packets associated with them can be prioritized. In parts of its service area, TDS Telecom is either the only provider of such services or is an important competitive provider of them. Further, the revenues earned from managed services are an important element of TDS Telecom's regular reinvestment in the maintenance and growth of its networks to serve more customers.

The proposed rule would outlaw the prioritization required for providing managed services. For that reason, TDS Telecom continues to oppose its adoption. Suggestions in some comments

that managed services provided in certain ways – with managed services data physically or virtually sequestered from “regular” Internet traffic – would be exempt are conceptually inventive and demonstrate welcome flexibility, but afford no comfort. Data associated with managed services would still need to be tagged or identified as such for prioritization by the carrier – the packets do not label themselves passively. Moreover, limiting the flexibility of contemporary and future network design and innovation to sequestering topologies would be a mistake during the emergent phase of managed services.

For the same reason, the Commission should decline to treat the regulatory classification of managed services as a foregone conclusion by adopting the classification most like the functionality of the underlying service. Classification by presumption has implications for innovation and competition that may produce unintended and adverse consequences. The Notice correctly identifies managed services as currently unclassified; they should remain so.

Some commenters have suggested that managed services enable carriers to avoid investments in the “regular” Internet that would serve the interests of non-managed services customers. It is argued that as long as carriers are allowed to offer managed services they can allow service on the “regular” Internet to deteriorate due to increasing congestion. This is unfounded. By and large, the same facilities that enable managed services also support the “regular” Internet. Investing in one means investing in both. Further, if what the proponents mean is that the entire network should be engineered so that managed services are unnecessary for enhanced QoS, this would require extravagant and inefficient levels of investment. Moreover, this approach overlooks the fact that the pipes that comprise the Internet, no matter how capaciously they may grow dynamically and over time to meet demand, still can carry only a finite amount of traffic at any given point in time. Thus, the delivery of managed services that depend upon defined QoS will always unavoidably rely, at any given moment, in some measure, upon prioritization.

For all these reasons, TDS Telecom continues to oppose adoption of any nondiscrimination rule.

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191
	)	
Broadband Industry Practices	)	WC Docket No. 07-52
	)	
	)	

Reply Comments of TDS Telecommunications Corp.

**I. Introduction and Overview**

TDS Telecommunications Corp. (“TDS Telecom”) provides communications services to business and residential customers in 30 states. An important line of business for TDS Telecom and its customers is managed Internet Protocol services (“managed IP services”) which appear to correspond to the category of services that the Commission inquires about in the Notice, referring to them as “managed or specialized services”. TDS’s managed IP services is a suite of services currently marketed to business customers that affords the customer and its employee-users highly flexible control over VoIP services as an alternative to today’s switched telephony.<sup>1</sup> TDS Telecom’s managed IP services offering involves managed bandwidth between the customer’s premises and TDS Telecom’s data center; the bandwidth over the facility is managed to support the

---

<sup>1</sup> For example, TDS Telecom’s managed IP services allow users to forward calls from the office to other numbers, to have an inbound call ring simultaneously or sequentially on multiple numbers, and set up instructions for schedule-dependent call forwarding along with many other features through an on-line interface.

quality of service (“QoS”) needs of the customer’s voice and data applications. Priority is accorded to packets identified as voice traffic to ensure QoS for such traffic as compared to the “best efforts” Internet service available in non-managed offerings by TDS Telecom and other providers. One day, such services may be offered to TDS Telecom’s residential customers as today’s switched telephony increasingly migrates to VoIP.

TDS Telecom also offers Digital Television, which is an Internet Protocol Television (“IPTV”) product that also relies on managed services. IPTV subscribers enjoy television seamlessly delivered over broadband because the packets are managed and prioritized so as to ensure the requisite QoS and reliability with minimized latency and jitter.

TDS Telecom underscores in this reply comment its concern that imposition of a nondiscrimination rule will have an adverse effect particularly upon smaller carriers serving rural customers. TDS Telecom urges that imposition of such a rule is untimely and imprudent. The plain language of the proposed rule flatly prohibits prioritization of packets, a defining feature of managed services that is crucial to carriers’ ability to offer them.<sup>2</sup> Accordingly, TDS Telecom opposes adoption of any nondiscrimination rule.

---

<sup>2</sup> The proposed rule states: “Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner.” *In the Matter of Preserving the Open Internet, Broadband Industry Practices*, GN Docket 09-191, WC Docket 07-52, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, 13129, App. A, § 8.13 (rel. Oct. 22, 2009) (“*Notice*”).

## **II. Adoption of the Proposed Nondiscrimination Rule with Respect to Managed Services is Untimely**

Free Press and Google each have suggested that now is not the time to invent a new regime for managed services.<sup>3</sup> TDS Telecom agrees. Further, although TDS Telecom believes that managed services are best left outside of the net neutrality and regulatory classification regime, if the Commission decides on the basis of the record in the instant proceedings that further examination of managed services is desirable in furtherance of its Net Neutrality policy and rules, it should issue a Further Notice of Proposed Rulemaking. Managed services represent the evolution of broadband-based network services to meet increasingly exacting customer expectations about QoS, and the Commission should adopt a policy and practice of restraint that encourages continued innovation.

## **III. Promulgation of the Proposed Nondiscrimination Rule is Imprudent Because of the Adverse, Even if Unintended, Consequences of its Adoption for Managed Services**

Nothing in the comments of the proponents of the nondiscrimination rule suggests that the proponents intentionally aim to have the Commission adopt rules that would eliminate managed services offerings. But neither is there any assurance that the nondiscrimination rule would not have the effect, even if unintended, of eliminating existing managed services offerings or curtailing innovation in the development of new managed services responsive to customers' needs.

---

<sup>3</sup> Comments of Free Press at 6, 110-12; Comments of Google at 74-77. TDS Telecom acknowledges that Free Press and Google raised this view in the context of articulating their position that existing managed services are comfortably moored within existing regulatory classifications. TDS Telecom disagrees with such proposed regulatory classification treatment, as further described *infra*, page 5.

TDS Telecom's continuing concern in this respect is exemplified by the way in which the comments struggle to define managed services. One commenter, Free Press, has attempted to define managed services by distinguishing them from broadband Internet services in terms of how managed services are provided vis-à-vis "regular" Internet facilities. Managed services can be provided in four ways over such facilities, according to Free Press: physical separation, virtual separation, partially shared capacity, and fully shared capacity. While Free Press does not say definitively whether some or all of these topologies are problematic, it is not practical to treat the same services differently because of the way in which the provider determines they are most efficiently provisioned in light of customers' needs. Moreover, it is not practical to cabin innovation in service offerings by limiting network design to particular topologies that are deemed problematic or approved by the Commission. In any event, the succinct language of the proposed nondiscrimination rule gives no comfort or guidance on any of these points and would leave providers to proceed at their peril in determining which offerings provisioned in which ways would save a managed services offering from a chargeable violation of the nondiscrimination rule.

#### **IV. The Notice Properly Identifies Managed Services as Unclassified and They Should Remain So**

It is clear from the comments filed in the record that there is a gap in understanding between the proponents and opponents of the nondiscrimination rule with respect to what managed services are and whether they currently exist as offerings. While offerings such as VoIP and IPTV are solidly and routinely identified and marketed as managed services by TDS Telecom and other providers, Free Press states in its

comments that managed services are “hypothetical”.<sup>4</sup> TDS Telecom understands Free Press to mean that it does not regard existing offerings such as VoIP and IPTV as managed services because they mimic the functionality of existing services subject to existing regulatory classifications, *i.e.*, telephony and cable.

TDS Telecom disagrees with this presumptive approach to the regulatory classification about which the Commission has inquired in the Notice. The Notice openly asks whether these hitherto unclassified services should be classified precisely because regulatory classification of IP-based services and products is an incomplete picture in the framework of the Commission’s rules.<sup>5</sup> If the Commission is inclined to undertake a reclassification of these services, it should not do so before issuing a separate notice of proposed rulemaking that develops these issues in light of the April 6, 2010 decision by the United States Court of Appeals for the District of Columbia Circuit in *Comcast Corp. v. FCC*.<sup>6</sup>

Presumptive regulatory classification, even if it seems convenient today, may have unintended adverse consequences down the road. For example, one option of emerging importance to rural providers that want to offer attractive, competitive multichannel video products to challenge satellite’s dominance in rural areas is over-the-top viewing options such as Roku and Boxee. Presumptive classification of such services according to where they seem to “best fit” by approximation into the existing regulatory

---

<sup>4</sup> Comments of Free Press at 6, 111.

<sup>5</sup> Notice at 13116, ¶148.

<sup>6</sup> *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir, April 6, 2010). While the Commission’s extension of time for the filing of these reply comments following the issuance of the *Comcast* decision was prudent and welcome, this extended-time reply round is no substitute for a record founded on a Commission-issued notice explaining its understanding of the state of play following the *Comcast* decision and seeking input on specific issues.

model may not serve consumers or competition because it may hamper deployment of such services.

## **V. A Blanket Prohibition Against Discrimination is Unwarranted**

The proponents of the nondiscrimination rule urge in their comments that the Commission should adopt a blanket prohibition against discrimination, “subject to reasonable network management” rather than a prohibition against unjust or unreasonable discrimination. In light of the comments submitted to date, TDS Telecom renews its position that at a minimum, if a rule is adopted, it should prohibit only unjust or unreasonable discrimination. The only exception identified in the words of the proposed rule is reasonable network management practices. Proponents of the nondiscrimination rule have voiced in their comments a narrow view of what constitutes reasonable network management, urging that the Commission should adopt a very high bar in evaluating what constitutes a reasonable network management and should decline to enumerate or define such practices in advance. This leaves providers in a perilous position: discrimination would be absolutely prohibited, and the only “defense” available would be that the discrimination was undertaken as a reasonable network management practice. Yet any practices that a provider institutes to ensure reasonable QoS should only be evaluated as to their reasonableness *after the fact* on a case-by-case basis, according to proponents of this approach. This very nearly imposes a form of strict liability on the provider for packet prioritization, regardless of any other relevant circumstances of the alleged discrimination, unless the provider has a reasonable network management defense. Leaving out the words “unjust or unreasonable” from the rule against discrimination deprives the Commission of the equitable opportunity to look at other

circumstances that would justify the providers actions. It would be far more reasonable for the Commission to adopt an overall case-by-case enforcement approach pursuant to which the provider could explain why the challenged practice was not unreasonable or unjust that would give the Commission a record upon which to assess whether a particular practice gives rise to harm to consumers or competition. Such an approach also would create a body of precedent to guide managed services providers in their practices and inform potential complainants about what is permitted and what is prohibited.

## **VI. Conclusion**

For all the foregoing reasons, TDS Telecom urges that the Commission not adopt a nondiscrimination rule. The proposed nondiscrimination rule on its face appears to prohibit the prioritization that is inherent to managed services and would cramp innovation that could expand managed services offerings to meet future customer needs. Particularly for smaller providers serving rural customers, subtracting managed offerings from the roster of services that can be provided would detrimentally affect reinvestment in and expansion of broadband networks. This is irreconcilably at odds with current, parallel federal public policy initiatives that are striving for universal deployment and adoption of broadband.

Respectfully submitted,

TDS Telecommunications Corp.

By Its Attorney

//signed//

---

Kathleen Wallman  
Kathleen Wallman, PLLC  
9332 Ramey Lane  
Great Falls, VA 22066  
(202) 641-5387

April 26, 2010