

**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 SKYPE COMMUNICATIONS S.A.R.L.

SKYPE COMMUNICATIONS S.A.R.L.

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SUMMARY

Commenting parties, representing a wide array of interests including public interest organizations, state regulators, Internet companies, carriers, small businesses, educators and academics, musicians and other recording artists, and leading venture capitalists and entrepreneurs, and over 13,000 individuals from all over the country support codifying the six principles proposed in the *Notice of Proposed Rulemaking*. These parties recognize that the proposed safeguards represent a balanced, “multi-modal” approach to competition and innovation policy that encourages competitive service offerings from not only traditional access providers, but also from new players at the edge of the network. Adopting enforceable safeguards in this proceeding will foster competition and innovation throughout the Internet ecosystem.

The comments contain no new arguments against clear, enforceable openness policies and no new arguments or facts that have not been made to the Commission since it began considering the issue of an open Internet. The time is ripe for the Commission to move quickly toward a policy that will provide greater certainty to all concerned in the broadband Internet ecosystem and will set consumers free to use their broadband connections to access, organize, and disseminate knowledge.

Unfortunately, the recent D.C. Circuit decision in the *Comcast* case creates significant uncertainty for consumers and innovators. Skype supports the Commission seeking comment on the impact of the decision, so that the

Commission can act expeditiously and restore certainty to the broadband marketplace by clarifying its authority and enacting enforceable safeguards that protect an open Internet.

In these reply comments, Skype also addresses the issues summarized below:

- Openness safeguards should apply across all broadband access technologies, including wireless, not only because a consistent, technologically neutral policy across all networks reflects consumer expectations and would wisely not bias investment in favor of particular technologies, but also because the wireless broadband market is not as competitive as the wireless industry often claims.
- As the Commission enacts enforceable openness policies and considers its authority over broadband access services generally, it should make clear that it is regulating broadband *access networks* and not edge providers of Internet applications and content.
- Skype software is optimized to operate in low-bandwidth environments and does not consume significant network resources.
- Collaborations between software application providers and wireless carriers can promote openness principles by better enabling a virtuous cycle that can increase the number of subscribers to wireless networks and incent purchase of data plans while offering consumers innovative new products and services.

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On April 6, 2010, the United States Court of Appeals for the District of Columbia Circuit (“DC Circuit”) issued its long awaited decision in Comcast’s appeal¹ of the Federal Communications Commission’s (“FCC” or “Commission”) first effort to protect consumers under the 2005 *Broadband Policy Statement*.² The Court ruled that the FCC did not have authority to prevent Comcast from secretly degrading peer-to-peer traffic on its network. Unfortunately, the immediate impact of the *Comcast* decision is that consumers are left without a means for redress when they are unable to access desired applications and content over broadband Internet access services. The Court’s decision and the negative impact it has on the broadband ecosystem require that the FCC move

¹ *Comcast v. FCC*, No. 08-1291, Slip Op. (D.C. Cir. Apr. 6, 2010) (“*Comcast*”).

² *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Policy Statement, FCC 05-151 (rel. Sep. 23, 2005) (“*Broadband Policy Statement*”).

quickly to reestablish its policy regime to promote an open Internet. Skype agrees with Chairman Genachowski's recent statement before the Senate Commerce Committee that the Communications Act, as amended in 1996, enables the Commission to implement a regime to protect the free flow of information across the Internet.³

Skype urges the Commission to issue without delay a public notice seeking comment regarding the impact of the *Comcast* decision and the Commission's statutory authority over broadband Internet access services. We are concerned about the possibility of the Commission surviving another legal attack on a decision grounded in Title I. However, Skype believes that the Commission should examine carefully all of its statutory options, including both Title I and Title II. Although the Commission has the authority to reexamine its decision in the *Cable Modem*⁴ and *Wireline Broadband*⁵ Orders, Skype is not advocating a return to the Computer III non-structural safeguards on the telecommunications component of broadband access services, nor is it seeking unbundling or other wholesale access requirements as part of the reexamination. The broadband access market has moved away from consumers accessing the

³ *Reviewing the National Broadband Plan*, Hearing Before the Senate Commerce Committee, Written Statement of FCC Chairman Julius Genachowski, April 14, 2010, at 4-5.

⁴ *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling, FCC 02-77, 17 FCC Rcd 4798 (2002).

⁵ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order, FCC 05-150, 20 FCC Rcd 14853 (2005).

Internet through narrowband Internet service providers who are not affiliated with carriers. In today's market, carriers are the ISPs. Given this reality, Skype's support of the Commission's proposed net neutrality rules, including a nondiscrimination rule, is based on the belief that the rules will substitute for the function that used to be exercised by the independent ISP, which assured that consumers have unimpeded access to the Internet. The Commission must be able to implement a carefully crafted, targeted openness policy regime to address inappropriate and harmful conduct in the delivery of broadband Internet access services. That regime must encourage innovation and investment in all segments of the broadband ecosystem, as well as provide consumers with appropriate safeguards and effective remedies so that they can enjoy unfettered access to the Internet.

It is unacceptable for carriers to ask the Commission to sit on its hands while consumers are left with no recourse. Contrary to their claims, a rule prohibiting discrimination is not the same as the access rights accorded competitive carriers under section 251 or ISPs under the Computer II and Computer III regimes. The approach advocated by Skype (and other edge-based Internet applications) accords Skype no special entitlements; instead it safeguards our consumers' conversations by giving them effective recourse if carriers discriminate. It is a consumer-centric approach designed to grow the entire ecosystem. The Commission will continue to be the expert agency charged by Congress with oversight of the broadband market. The Commission's

commitment to promoting an open Internet requires immediate review of its 2002, 2005, and following decisions to establish a new regulatory framework for services provided over this essential communications infrastructure.

I. THE PROPOSED RULES HAVE BROAD SUPPORT AND SHOULD BE ADOPTED BY THE COMMISSION WITHOUT UNDUE DELAY.

Commenting parties, representing a wide array of interests including public interest organizations, state regulators, Internet companies, carriers, small businesses, educators and academics, musicians and other recording artists, and leading venture capitalists and entrepreneurs, and over 13,000 individuals from all over the country support codifying the six principles proposed in the *Notice*.⁶

⁶ See, e.g., Comments of Clearwire Corporation at 4, 7, 11, and 14 (“Openness is in Clearwire’s DNA. It has built its network based on an open standard, and has committed to adhering to the four principles set forth in the Commission’s *Internet Policy Statement*... As a threshold principle, carriers should offer full transparency to customers, applications, content and service providers about their network management practices, and how those practices may affect their experience. ... Clearwire agrees with the Commission that nondiscrimination is an appropriate principle to consider for this open Internet proceeding...”); Comments of XO Communications, Inc., at 3-5, 12 (“Codified rules will help ensure that legacy broadband providers cannot pursue a strategy of profits through customer “ownership” instead of a strategy of investment, network expansion and innovation.”); Comments of Netflix at 4 (“Netflix believes that the codification of the existing network neutrality principles, together with the addition of nondiscrimination and transparency, create an effective framework for preserving an open Internet.”); Comments of Sling Media, Inc. at 1 (“Codifying the existing *Internet Policy Statement* principles in a technology-neutral manner, in addition to new proposed rules governing nondiscrimination and transparency, will protect consumers’ ability to run applications and services of their choice...”); Comments of the Center for Democracy & Technology at 22, 23 and 31 (“CDT agrees that codifying the four existing principles will protect innovation and online free expression, including civic participation and democratic engagement. ... CDT strongly agrees that a nondiscrimination principle is an essential component of a framework to protect the Internet’s open nature. ... CDT also strongly supports the Commission’s inclusion of a transparency principle among the proposed rules.”); Comments of Computer and Communications Industry Association at 5 (“CCIA states that it fully supports the Commission’s adoption of the six principles

These parties recognize that the proposed safeguards represent a balanced, “multi-modal” approach to competition and innovation policy that encourages competitive service offerings from not only traditional access providers, but also from new players at the edge of the network. Adopting enforceable safeguards in this proceeding will foster competition and innovation throughout the Internet ecosystem. As one carrier stated: “Adoption of the proposed rules will bring much-needed clarity and create a solid footing for increased investment and growth by all broadband network providers, helping to stimulate even greater positive ‘spillover’ effects created by the development of new applications and services based on IP technologies.”⁷

Without enforceable openness safeguards in place, consumers and innovators face significant uncertainty as to the viability of applications in the marketplace. Though some have said that the issue of openness is a “solution in

outlined in the NPRM. ... Codification of these principles is a necessary and appropriate step in ensuring that the Internet remains an open, competitive environment as the market structure of access, application, and content providers begins to take more definite shape.”); Comments of NATOA at 2 (“We applaud the Commission’s decision to defend and promote the open nature of the Internet by codifying its existing four Broadband principles. We further support codifying additional principles relating to non-discrimination and full transparency regarding the network management practices of network owners and operators.”); Comments of Public Knowledge, Consumers Union, Media Access Project, New America Foundation, and Center for Media Justice at 1 (“Rules founded upon the codified principles set out in the *NPRM* are undeniably necessary for preserving the essential character of the open Internet and the tremendous value it engenders.”); *see also More than 13,000 Americans File Comments Asking the FCC to Protect an Open Internet*, Press Release from Free Press, January 14, 2010 at <http://www.freepress.net/node/76022>.

⁷ Comments of XO Communications at 4; *see also id.* at 12 (“Clear rules guaranteeing openness are most likely to increase overall investment and innovation throughout “the Internet ecosystem,” and to promote other social benefits.”).

search of a problem,” the reality for innovative developers of software applications is far different. For example, for over two-and-a-half years, Skype has persisted in developing an iPhone application that takes full advantage of an iPhone user’s 3G data connection, and expects to release this iPhone app in the coming weeks.⁸ A major reason for the delay was the policies of AT&T and Apple, which allowed the blocking of voice apps that used the iPhone’s 3G network. And while this example involves Skype, a relatively large application provider better equipped to face uncertainty in the marketplace, the number of smaller start-ups who cannot persist in the face of such product development delays is unknowable. All the while, it is consumers who suffer, as they are denied the benefits of application-layer innovation.

Unfortunately, the D.C. Circuit decision in the *Comcast* case creates even greater uncertainty for consumers and innovators. Skype supports the Commission seeking comment on the impact of the decision, so that the Commission can act expeditiously and restore certainty to the broadband marketplace by clarifying its authority and enacting enforceable safeguards that protect an open Internet. While the openness policies proposed by the Commission would not remove all uncertainty from the marketplace,⁹ the policy

⁸ iPhone users can download a Skype application today; however, this app works only with WiFi connections and not with the 3G data connection that the user has paid for.

⁹ Under the Commission’s proposed openness policies, network operators and edge providers alike would face some uncertainty associated with the contours of “reasonable network management.” However, such contours will become clearer over time with

regime would spread any remaining uncertainty across the entire broadband ecosystem instead of allowing network operators to do as they please while edge providers face all of the risk of uncertainty as to whether their applications will be blocked or otherwise restricted.

There are, of course, some broadband access providers and others who oppose the policies proposed by the Commission. Many of their concerns, however, are accommodated by the proposed safeguards, and Skype and other parties in favor of enforceable policies view such concerns as reasonable. Most notably, there appears to be broad consensus that network operators should be able to engage in reasonable network management to address congestion on their networks and to block spam, viruses and various types of illegal content.¹⁰ There is also broad consensus that wireless networks may have different network management challenges depending on the technology employed and that “reasonable network management” should be considered in that light.¹¹ In short, the proposed six principles, with their case-by-case consideration rather than

case-by-case consideration, similar to any number of areas of law in which legal standards are defined over time via a common law, case-by-case approach.

¹⁰ *See, e.g.*, Comments of the Open Internet Coalition at 41-42; Comments of Google Inc. at 68-73; Comments of Public Knowledge et al. at 35.

¹¹ Though the implementation may be different for wireless broadband networks, there is no need to exempt such networks from the openness rules entirely. *See* Comments of Skype at 5-7, Comments of Google Inc. at 77-82; Comments of Public Knowledge et al. at 18 (“[T]he metes and bounds of what constitutes reasonable network management may and likely will differ depending on the broadband platform . . .”).

detailed, prescriptive rules, are a measured approach to establishing a balanced policy for the Internet.

It is also important to note that despite some lengthy comments opposing this balanced policy framework, the comments contain no new arguments against clear, enforceable openness policies and no new arguments or facts that have not been made to the Commission since it began considering the issue of an open Internet. The time is ripe for the Commission to move quickly toward a policy that will provide greater certainty to all concerned in the broadband Internet ecosystem and will set consumers free to use their broadband connections to “access, organize, and disseminate knowledge.”¹²

II. THE PROPOSED RULES SHOULD APPLY TO WIRELESS NETWORKS.

Skype previously has shown that openness safeguards should apply to all broadband access networks, including wireless. With the growing popularity of wireless broadband access and the rise of smartphones and other wireless-enabled computing devices, many Skype users – and consumers generally – are subscribing to wireless broadband services. This trend toward wireless is especially true for young, minority, and rural broadband consumers. These consumers increasingly expect similar Internet experiences across all broadband connections.

¹² Federal Communications Commission, *Connecting America: The National Broadband Plan*, at xi (March 2010) (Executive Summary), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296935A1.pdf.

Openness safeguards should apply across all broadband access technologies, including wireless, not only because a consistent, technologically neutral policy across all networks would wisely not bias investment, but also because the wireless broadband market is not as competitive as the wireless industry often claims.¹³ A new study by economists Joseph Cullen and Oleksandr Shcherbakov, submitted in this proceeding by the Open Internet Coalition, illustrates one important way in which the wireless market falls short of the competitive ideal – the high switching costs faced by wireless consumers.¹⁴

Cullen and Shcherbakov examined switching costs, which arise from investments made by a consumer that are specific to a particular carrier that must be re-incurred when that consumer switches carriers. Switching costs arise from investment in carrier-specific handsets, learning, and contractual obligations. Cullen and Shcherbakov estimate that the effective switching cost for a consumer switching between carriers is approximately \$230. This switching cost estimate is a composite of both explicit switching costs such as early termination fees and implicit costs such as the cost of the time spent switching to

¹³ See Reply Comments of Skype Communications, S.A.R.L., WT Docket 09-66, at 6-14 (filed Oct. 22, 2009); Comments of Skype at 5-13; Comments of Google Inc. at 79.

¹⁴ Joseph Cullen & Oleksandr Shcherbakov, *Measuring Consumer Switching Costs in the Wireless Industry*, April 5, 2010, Attachment to Reply Comments filed by the Open Internet Coalition, GN Docket No. 09-191, WC Docket No. 07-52 (Apr. 26, 2010).

a new service, setting up a new billing arrangement, time spent without a phone during the switch, etc.

The high switching costs faced by consumers is further evidence that while the wireless market is more competitive than many other telecom markets, it is far from the competitive ideal. The Commission's policies should reflect the view that we can do better by giving consumers more competitive choices, both by adopting policies that encourage new facilities-based entrants but also by adopting openness rules that spur multi-modal competition from edge providers of communications applications.

III. THE COMMISSION'S RULES SHOULD NOT APPLY TO EDGE PROVIDERS OF SOFTWARE APPLICATIONS.

Several parties argue that the proposed rules should apply not just to the network operators that exercise bottleneck control, but also to edge providers of Internet software applications.¹⁵ The Commission should make clear that the proposed openness policies were never intended to, and should not apply to edge providers of software applications.¹⁶

In light of the recent D.C. Circuit court decision in the *Comcast* case, questions have arisen as to the Commission's Title I authority over broadband access services and whether such services should be reclassified as Title II

¹⁵ Comments of AT&T Inc. at 196-206; Comments of Comcast Corp. at 33-36; Comments of Time Warner Cable at 38-40.

¹⁶ See, e.g., Comments of The Open Internet Coalition at 83-86; Comments of Google Inc. at 83-87; Comments of the Voice on the Net Coalition at 1-4.

services. Regardless of how the Commission resolves that issue, it should make clear in this proceeding that neither the proposed rules nor any other Title II obligation applies to edge application providers. The Commission should, as it always has, distinguish between the Internet — the wide array of applications and content that users access — and high-speed *access* to the Internet.¹⁷ Skype urges the Commission not to conflate broadband Internet access services and edge applications providers — though both are part of the broader Internet ecosystem, their positions in the market are vastly different.

The characteristics of the edge applications provider market differ significantly from the network operator market. First, the network operator market is characterized by significant barriers to entry, from rights of way to spectrum licenses to significant capital outlays; in contrast, the edge applications provider market has low barriers to entry, with many new entrants being start-ups, characterized by long-tail economics, with a handful of employees creating new software applications. Second, the edge provider market is subject to truly robust competition, with consumers often being able to choose among dozens of applications rather than a wireline broadband duopoly or a handful of wireless

¹⁷ See Susan Crawford, “Broadband” Blur, March 29, 2010, at <http://scrawford.net/blog/broadband-blur/1328/> (“The problem is that people often use ‘broadband’ as an omnibus term meaning *both* the on-ramps and the applications/content online. . . . The FCC has not applied Title II regulations to applications/content — for good reason. The highway is clearly distinguishable from the cars that use its services.”).

carriers. Third, users of edge applications face negligible switching costs, in contrast with users of broadband access networks.

As the Commission enacts enforceable openness policies and considers its authority over broadband access services generally, it should make clear that it is regulating broadband *access networks* and not edge providers of Internet applications and content.

IV. SKYPE SOFTWARE IS OPTIMIZED TO OPERATE IN LOW-BANDWIDTH ENVIRONMENTS AND DOES NOT CONSUME SIGNIFICANT NETWORK RESOURCES.

In its comments, Qualcomm argues that “VoIP application developers do not have any incentive to conserve bandwidth” and that “[e]ven with optimization, typical VoIP clients can use ten times or more capacity than the native cellular voice technology uses.”¹⁸ Qualcomm concludes that, if applications developers have a “guaranteed right of access to wireless networks,” wireless networks will become congested because third-party applications will become unduly bandwidth-intensive.¹⁹ Similarly, ITIF argues that wireless broadband networks will not be able to accommodate applications “like Skype video calling, which consumes a large amount of network bandwidth.”²⁰

¹⁸ Comments of Qualcomm at 21.

¹⁹ *Id.*

²⁰ Comments of ITIF at 22.

Neither of these concerns is well-founded. Skype has optimized its client to operate in low-bandwidth environments by using 50 percent less network bandwidth than previously required.²¹ Skype's SILK codec optimizes voice performance depending on the characteristics and limitations of the network, hardware, and audio signal. In contrast to Qualcomm's figures, Skype's SILK codec uses a minimum bandwidth of 6 kbps and a maximum bandwidth of 40 kbps, depending on network performance and capacity. Skype's video-capable client operates in the same way, throttling down its rate of transmission based on available network resources, and consuming no more than 384 kbps – well within the speed of a basic DSL connection – for high-quality video.²² In fact, Skype will operate on bare minimum bandwidth, including video as low as 4 kbps, by, for example, prioritizing voice over video.²³

These types of unfounded arguments demonstrate why it is important for the Commission to make clear that it should never be reasonable for any network operator, including wireless network operators, to block, throttle or degrade

²¹ See Reply Comments of Skype Communications S.A.R.L., GN Docket Nos. 09-157 & 09-51, at 11-13 (filed Nov. 5, 2009) (describing Skype's SILK codec); see also Jonathan Rosenberg, *Skype and the Network*, Presentation at the FCC Open Internet Workshop: Technical Advisory Process Workshop on Broadband Network Management, December 8, 2009, at 6, available at http://www.openinternet.gov/workshops/docs/ws_tech_advisory_process/Skype-FCC.pdf ("Rosenberg Presentation"); Jonathan Christensen, *Advances in Audio*, March 12, 2010, at http://share.skype.com/sites/en/2010/03/advances_in_audio.html.

²² See <https://support.skype.com/faq/FA1417/How-do-I-know-if-I-have-sufficient-bandwidth> (last visited April 7, 2010).

²³ Rosenberg Presentation at 8.

particular applications without regard to the actual network capacity such applications are consuming.²⁴ Not all video applications, or peer-to-peer or VoIP applications, consume the same amount of bandwidth or place the same demands on network capacity. If there are particular VoIP applications that, as Qualcomm suggests, consume too many network resources, throttling *all* VoIP applications, including those that do not consume significant resources, is an unacceptable response.

V. COLLABORATION BETWEEN NETWORK OPERATORS AND APPLICATIONS DEVELOPERS CAN PROMOTE OPENNESS PRINCIPLES.

Skype's experience as an edge provider of software applications demonstrates that a virtuous cycle of innovation among all parts of the broadband ecosystem benefits consumers. Innovative software applications drive demand for broadband access, leading to greater deployment. Meanwhile, faster broadband networks lead to greater innovation by application developers like Skype's high quality video communication software. Similarly, innovative new equipment drives demand for broadband and innovation in apps, and so on throughout the entire ecosystem.

For example, as part of its communications software, Skype developed the SILK wideband speech codec, discussed above, which delivers high-quality sound for Skype calls while optimizing performance even in low bandwidth

²⁴ See Comments of Skype at 8-9.

environments by using 50 percent less bandwidth than previously required. Skype has made the SILK codec available for free download, allowing other software developers, equipment manufacturers, and network operators to support wideband voice applications with little development expense. In other words, the entire broadband ecosystem, and especially consumers, benefit from Skype's innovation and investment in the SILK codec.

Similarly, Skype recently announced a collaboration with Verizon Wireless to bring Skype mobile™ software to Verizon Wireless smartphones.²⁵ This relationship between a network operator and a software application developer promises to benefit both parties, foster openness, and offer consumers innovative new products and services.²⁶ Skype mobile™ allows Verizon Wireless data plan users the ability to call around the globe using their smartphones, while also giving hundreds of millions of Skype users the opportunity to communicate with friends, family and colleagues who use Verizon Wireless in the United States. This collaboration is due in no small part to the Commission's dedication to the goal of openness in wireless networks.

The Skype-Verizon collaboration benefits consumers, who are best served by a virtuous cycle of innovation among carriers, applications developers, and

²⁵ *Verizon Wireless and Skype Join Forces to Create a Global Mobile Calling Community*, Press Release, February 16, 2010. Skype and Verizon Wireless announced their strategic relationship at the 2010 Mobile World Congress in Barcelona, Spain.

²⁶ *Cf.* Reply Comments of Skype Communications S.A.R.L., GN Docket Nos. 09-157 & 09-51, at 8-10 (filed Nov. 5, 2009) (discussing a similar collaboration between Skype and European and Asian carrier Hutchinson 3).

equipment manufacturers. The collaboration between Skype and Verizon Wireless exemplifies this virtuous cycle in that it will increase the number of subscribers to wireless networks, reduce subscriber churn, increase revenues for operators, and incent purchase of data plans, while offering consumers innovative new products and services.

* * *

Respectfully submitted,

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