

**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  
CENTER FOR MEDIA JUSTICE, CONSUMERS UNION,  
MEDIA ACCESS PROJECT, AND NEW AMERICA FOUNDATION**

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## SUMMARY

The question is not “whether,” but “when.” The public interest organizations submitting these comments maintain that the Federal Communications Commission must act to preserve the open Internet, and that it should do so now. The record developed during this proceeding is clear, and the need for the rules proposed by the Commission becomes even more clear with each disclosure of additional broadband Internet access service provider misconduct. Content-based and application-based discrimination and prioritization threaten the structure and functioning of this transformative communications medium. The Commission should adopt the common sense rules that it has proposed, subject to minor modifications that would improve and clarify the final rules, as they are essential to promoting free expression, economic opportunity, civic participation, civil rights, and social equality online and in society at large.

There is widespread agreement on the value of the open Internet and on the appropriateness of the Commission’s four original open Internet principles. Yet, there is disagreement regarding the need for formal rules, the likely effect of such rules, and the authority supporting the Commission’s adoption and enforcement of rules giving effect to these principles. Opponents of the rules claim, incorrectly, that there is no need for them because the competitive marketplace will allay concerns regarding discrimination and degradation of free expression on the Internet. To the contrary, the record demonstrates that there is no effective competition in broadband Internet access services, and that the market structure, market power, and incumbents’ advantages require open Internet rules. Even if competition existed in this access marketplace, each individual broadband Internet access provider would be unlikely to have the incentive to act in ways that elevate promotion of long-term benefits for the Internet ecosystem over short-term individual profits. However, because this access market is not competitive, protections from broadband Internet access service misconduct are all the more vital.

Opponents of Commission action also claim that there is neither statutory authority nor constitutional underpinning for such rules, and no telling what they will do if adopted. However, the Communications Act unequivocally gives the Commission power to adopt nondiscrimination and transparency rules, and the Commission should move swiftly to employ its Title II powers to provide these protections. Furthermore, it is equally clear that open Internet policies and the rules proposed by the Commission would advance the First Amendment's goals of promoting free speech and expression. The evidence in these dockets demonstrates that the Commission should adopt its proposed rules, including both the nondiscrimination rule – subject only to narrowly defined “reasonable network management” exceptions – and the transparency rule. Adoption of all of the proposed rules, modified in some respects as suggested in the Public Interest Commenters' initial submission in these dockets, would serve as a necessary component to preservation of the open Internet.

Finally, such rules would act as a spur to investment, innovation, and adoption of broadband services, not a hindrance thereto. There is no merit to vague and ultimately unfounded warnings about the potential unintended consequences of such rules, which would in fact preserve and enhance the net positive value created by innovation at the edge of the network without dampening network investment levels. Sensible and flexible “rules of the road” for the open Internet would help to ensure that this public resource and vital communications platforms remains open and available on equal terms to all who would use it to create, disseminate, and access information. The Public Interest Commenters urge Commission adoption of these vital rules without delay.

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Media Access Project, on behalf of the Center for Media Justice, Consumers Union, and New America Foundation (collectively, the “Public Interest Commenters”) respectfully submit these reply comments in response to the Commission’s *Notice of Proposed Rulemaking* (the “*NPRM*”) <sup>1</sup> and other submissions filed in the above-captioned dockets. As indicated in initial comments submitted by these organizations, <sup>2</sup> the Public Interest Commenters enthusiastically support the Commission’s proposed rules to preserve the open Internet. There is widespread agreement in the record on several principles and on aspects of the Commission’s proposed rules. For the relatively few instances in which disagreement persists, these reply comments demonstrate the inefficacy of the arguments and suppositions most frequently used to oppose the crucial safeguards the Commission proposed in the *NPRM*.

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<sup>1</sup> In the Matter of Preserving the Open Internet; Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, *Notice of Proposed Rulemaking*, 24 FCC Rcd 13064 (2009) (“*NPRM*”).

<sup>2</sup> See Comments of Public Interest Commenters, GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010) (“PIC Initial Comments”).

## INTRODUCTION

The rules that the Commission proposed in the *NPRM*, once modified and clarified according to suggestions in the PIC Initial Comments and other submissions,<sup>3</sup> would upon adoption represent a limited but necessary step towards protecting and extending the vitality of the Internet as a transformative communications medium. As indicated in the PIC Initial Comments, the proposed rules are narrow in scope. Yet, they are essential to promoting free expression, economic opportunity, civic participation, civil rights, and social equality – both online and in our society more generally, as it comes increasingly to rely on broadband infrastructure as a driver of commercial, educational, political, and societal engagement.

Ironically, some of those opposed to open Internet rules falsely suggest that the Commission attempts here to regulate “the Internet,” but many of the same entities then call for rules governing content and applications currently unregulated by the Commission. In the name of false equivalence, these parties suggest new regulations for goods and services in the Internet marketplace – a market that is entirely dissimilar to the one for last-mile and middle-mile communications facilities, which falls squarely within the Commission’s purview. In fact, the proposals set forth in the *NPRM* would not regulate the Internet, but merely would seek to ensure the openness of communications facilities over which the Commission has clear authority. The Commission’s adoption of the *NPRM*’s proposals would ensure that citizens, consumers, businesses, educational institutions, and other users of broadband Internet access facilities can retain unfettered access on fair terms to a diversity of viewpoints and resources.

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<sup>3</sup> See, e.g., *id.* at v-vi, 3, 31-32 (suggesting changes to proposed nondiscrimination rule); see also Comments of Free Press, GN Docket No. 09-191, WC Docket No. 07-52, at 82 (filed Jan. 14, 2010) (“Free Press Comments”) (suggesting changes to proposed “reasonable network management” definition).

The proposed rules would mitigate both current harms and potential dangers to increased deployment and adoption of broadband Internet access services. Of course, the open Internet rules are not the sole answer to questions about future investment in infrastructure, nor to questions regarding uptake and adoption of broadband Internet access services. Some opponents of the rules deploy incautious rhetoric, caricature, and outright misrepresentation to suggest that simple nondiscrimination rules – akin to those under which the Internet developed and flourished – would slow broadband innovation and adoption. These vague and ultimately unfounded warnings are unconvincing in light of record evidence demonstrating the net positive value created by innovation at the edge of the network, and considering the minimal impact that nondiscrimination rules historically have made on network investment levels.

Moreover, as the Commission’s National Broadband Plan (“NBP” or “Plan”)<sup>4</sup> recognizes, broadband deployment and adoption depends on a mixture of private and public investments and programs, backed by sound governmental policies. It is only with the correct mixture of private initiative and public involvement that we as a nation can ensure that broadband Internet access services are not just prevalent, but universal.<sup>5</sup> Likewise, it is only with the adoption of sensible, minimally invasive but maximally effective “rules of the road” that we can ensure the public Internet is free of the bottlenecks and gatekeepers that hold sway in other communications platforms – not just open for the most part, for most people, or for much of the time, but truly open and available on equal terms to all who would use this public Internet infrastructure to create, disseminate, and access information.

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<sup>4</sup> Federal Communications Commission, “Connecting America: The National Broadband Plan” (rel. Mar. 16, 2010) (“NBP”).

<sup>5</sup> *See, e.g., id.* at xi (“Fueled primarily by private sector investment and innovation, the American broadband ecosystem has evolved rapidly.... But broadband in America is not all it needs to be. Approximately 100 million Americans do not have broadband at home.”).

The reply comments that follow briefly review the initial comments and subsequent submissions in these dockets, analyzing some of the more prevalent – though frequently overstated and consistently meritless – objections claiming that the Commission’s proposed rules are unnecessary, unauthorized, unconstitutional, or unproductive. Despite the raft of arguments floated by those opposing the proposed rules, the Commission can adopt its open Internet protections with confidence that such rules will preserve the open character and architecture of the Internet while simultaneously aiding in deployment and adoption.

## DISCUSSION

### **I. The Commission’s Proposed Open Internet Rules, Including the Nondiscrimination Rule, Must Apply to all Broadband Internet Access Service Providers.**

As indicated in the PIC Initial Comments and elsewhere, the Commission should apply the open Internet rules proposed in the *NPRM* to all broadband Internet access service providers. The rules should cover both wireline and wireless broadband Internet access providers, regardless of the technological platform used to deliver such services.<sup>6</sup> The Commission thus should adopt and enforce a single set of principles and open Internet rules to preserve the character and functionality of broadband Internet access, and thereby preserve and enhance users’ ability to use or access lawful content, services, applications, and devices of their choosing.

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<sup>6</sup> See PIC Initial Comments at 18-19; see also Comments of Comments of Media Action Grassroots Network, ColorOfChange.org, Presente.org, Applied Research Center, Afro-Netizen, National Association of Hispanic Journalists, Native Public Media, and Rural Broadband Policy Group, GN Docket No. 09-191, WC Docket No. 07-52, at 11-15 (filed Jan. 14, 2010) (“Media Justice Comments”); Free Press Comments at 125-126; Comments of the Open Internet Coalition, GN Docket No. 09-191, WC Docket No. 07-52, at 36-39 (filed Jan. 14, 2010) (“OIC Comments”); Comments of the Center for Democracy & Technology, GN Docket No. 09-191, WC Docket No. 07-52, at 51-52 (filed Jan. 14, 2010) (“CDT Comments”); Comments of Rural Cellular Association, GN Docket No. 09-191, WC Docket No. 07-52, at 1-4 (filed Jan. 14, 2010) (“RCA Comments”); Comments of CenturyLink, GN Docket No. 09-191, WC Docket No. 07-52, at 22 (filed Jan. 14, 2010) (“CenturyLink Comments”); Comments of Google Inc., GN Docket No. 09-191, WC Docket No. 07-52, at iii (filed Jan. 14, 2010) (“Google Comments”).

One of the arguments most frequently deployed against the adoption of rules, however, especially for wireless broadband Internet access service<sup>7</sup> but for wireline service<sup>8</sup> as well, is that competition makes such rules unnecessary. These arguments are unavailing because there is no effective competition for broadband Internet access service. Even if there were, such competition would not prevent effectively or efficiently all of the problems that the open Internet rules address. Furthermore, both to benefit consumers and allow for appropriate oversight, the Commission must ensure that providers comply with baseline transparency rules regarding network management practices. While some commenters suggest leaving open Internet protections to the competitive market, surely there must be a well-functioning and information-rich marketplace first in order for competition to provide any discipline to bad actors and harmful practices.

Even while acknowledging relevant differences between wireline and wireless architectures, the Commission still must ensure that the same basic open Internet principles and rules apply to both categories of service. The Commission must take this step because of the increasing ubiquity, tremendous benefits, and inherent importance of wireless broadband Internet service, but also because of the extent to which the Commission apparently intends to rely on wireless as a facilities-based broadband competitor nationwide and as a potential option for

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<sup>7</sup> *See, e.g.*, Comments of AT&T, Inc., GN Docket No. 09-191, WC Docket No. 07-52, at 140-141 (filed Jan. 14, 2010) (“AT&T Comments”); Comments of CTIA, GN Docket No. 09-191, WC Docket No. 07-52, at i-ii (filed Jan. 14, 2010) (“CTIA Comments”); Comments of Qualcomm Inc., GN Docket No. 09-191, WC Docket No. 07-52, at 7 (filed Jan. 14, 2010) (“Qualcomm Comments”); Comments of Motorola, Inc., GN Docket No. 09-191, WC Docket No. 07-52, at 11 (filed Jan. 14, 2010) (“Motorola Comments”); Comments of Sprint Nextel Corporation, GN Docket No. 09-191, WC Docket No. 07-52, at 1 (filed Jan. 14, 2010) (“Sprint Comments”).

<sup>8</sup> *See, e.g.*, AT&T Comments at 86-87; Comments of Comcast Corp., GN Docket No. 09-191, WC Docket No. 07-52, at 9-11 (filed Jan. 14, 2010) (“Comcast Comments”); CenturyLink Comments at 2; Comments of U.S. Chamber of Commerce, GN Docket No. 09-191, WC Docket No. 07-52, at 1, 7 (filed Jan. 14, 2010).

unserved areas. As a result, the Commission must ensure that users have comparable experiences on the Internet no matter the technology used to access it.

A. *There is No Effective Competition for Broadband Internet Access Service, Either Among Wireline and Wireless Providers as Distinct Categories, nor Between Wireline and Wireless Providers.*

As the Public Interest Commenters and others have explained at length in this proceeding<sup>9</sup> and other Commission dockets,<sup>10</sup> historical data, present trends, and recent developments all suggest that there is a lack of effective competition in the market for broadband Internet access service. The conclusion holds true for intramodal competition among wireline or

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<sup>9</sup> See, e.g., OIC Comments at 71-72; Comments of the Ad Hoc Telecommunications Users Committee, GN Docket No. 09-191, WC Docket No. 07-52, at 8 (filed Jan. 14, 2010) (“Ad Hoc Comments”). As the Ad Hoc Comments explain:

“Opponents of net neutrality regulation claim that the broadband Internet access market is itself highly competitive and that any nondiscrimination rule is therefore unnecessary because discriminatory practices would be constrained by competitive marketplace forces. Other opponents have argued that emerging competition from wireless Internet access services further obviates the need for net neutrality rules....

“[T]he competition that these arguments rely on does not yet exist, and when or whether it will evolve is still unknown. At present, in most markets, there are no more than two consumer broadband Internet access service providers and in many cases only a single such provider.... The wireless broadband alternatives that some hold up as sources of competition are still in their infancy, and many questions remain about how they will eventually develop. Both the Justice Department and NTIA have noted the many uncertainties with respect to wireless broadband competition, including when (or even whether) the new spectrum necessary for wireless broadband expansion will be made available, whether the incumbent wireline providers or independent companies (*i.e.*, new competitors) will acquire that new spectrum, and the extent to which broadband wireless will evolve to be a direct substitute for wireline broadband for the majority of customers. Thus, the notion that there are ‘competitive marketplace forces’ sufficient to force monopoly or duopoly incumbents to operate in a non-discriminatory and competitively neutral manner is not borne out by marketplace realities.”

*Id.* at 8-9 (internal citations omitted).

<sup>10</sup> See, e.g., Comments of Public Knowledge, Media Access Project, the New America Foundation, and U.S. PIRG, GN Docket No. 09-51, at 2, 15 (filed June 8, 2009); Comments of Free Press, GN Docket No. 09-51, at 4-5, 40-49 (filed June 8, 2009); Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, and Public Knowledge, WT Docket No. 09-66, at 7-21 (filed Sept. 30, 2009) (“Public Interest Mobile Wireless Competition Comments”).

wireless providers using the same type of platform, and also for intermodal competition between wireline and wireless providers that might theoretically compete against one another.

1. Wireline Broadband Internet Access Competition.

As the National Broadband Plan and the resources it cites suggest, instances in which multiple wireline providers are present in a specific market and offer comparable services are relatively rare.<sup>11</sup> As the Plan reports, in somewhat understated tones, “[g]iven that approximately 96% of the population has at most two wireline providers, there are reasons to be concerned about wireline broadband competition in the United States. Whether sufficient competition exists is unclear and, even if such competition presently exists, it is surely fragile.”<sup>12</sup> Furthermore, there may be serious flaws underlying the assertion that *any* wireline broadband Internet access is available to large portions of this 96% of the population – especially if such figures are meant to suggest that robust, high-speed wireline broadband services of a particular speed and capacity are available in such places.

Wireline broadband competition is not only fragile, but it is imperfect and potentially incapable of disciplining the market even in areas where there may be two service providers. Recent news reports indicate that Verizon is “nearing the end of its program to replace copper phone lines with optical fibers that provide much higher Internet speeds,” meaning that Verizon will leave such major population centers as the City of Baltimore, downtown Boston, and

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<sup>11</sup> See NBP at 37. The Plan notes, damning with faint praise, that “[t]he lack of a large number of wireline, facilities-based providers does not *necessarily* mean competition among broadband providers is inadequate.” *Id.* (emphasis added). It goes on to report that while modern economic analyses do not *always* hold that collusion will occur in such situations, such analyses still “do not tell us what degree of competition to expect in a market with a small number of wireline broadband providers combined with imperfect competition from wireless providers.” *Id.*

<sup>12</sup> *Id.* The Plan reports that the percentage of the population with two wireline choices is 78%, while at least another 13% have just one wireline option, and at least 5% have no wireline broadband Internet access service available to them. See *id.*, Exhibit 4-A.

Alexandria, Virginia, without FiOS.<sup>13</sup> This development should be unsurprising, as “Verizon never committed to bringing FiOS to its entire local-phone service area”; while the company “has introduced FiOS in 16 states,... the deployment is concentrated on the East Coast, and Verizon is selling off most of its service areas in the Midwest and on the West Coast.”<sup>14</sup>

Meanwhile, cable providers routinely proclaim that “that broadband facilities have been deployed and high-speed Internet service is *available* to more than 92% of the nation’s households.”<sup>15</sup> Of course there is no definition in the National Broadband Plan or elsewhere of what qualifies as “broadband” service, much less the “high-speed” broadband service that the cable industry’s DOCSIS 3.0 architecture promises to deliver.<sup>16</sup> Cable and telephone industry claims may be greatly overstated in any event, especially with respect to the availability of wireline infrastructure capable of delivering the speeds set in the NBP as a target for universal broadband service. Industry bases these availability estimates on faulty assumptions and unproven assertions regarding the availability of cable modem services in all areas where cable television is available; the incorrect belief that even DOCSIS 2.0 technology has been deployed fully throughout this cable television system footprint; and the drastic overstatement of DSL capabilities in areas where availability and minimum speed estimates depend on DSL rather than cable modem service, among other flawed suppositions.<sup>17</sup>

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<sup>13</sup> Peter Svensson, “Verizon winds down expensive FiOS expansion,” Ced Magazine.com (Mar. 26, 2010), <http://www.cedmagazine.com/News-Verizon-FiOS-expansion-032610.aspx>.

<sup>14</sup> *Id.*

<sup>15</sup> Comments of the National Cable & Telecommunications Association, GN Docket No. 09-191, WC Docket No. 07-52, at 36 (filed Jan. 14, 2010) (emphasis in original) (“NCTA Comments”).

<sup>16</sup> *See* NBP at 42.

<sup>17</sup> *See* Testimony of S. Derek Turner, Research Director, Free Press, before the United States House of Representatives Committee on Energy and Commerce Subcommittee on Communications, Technology and the Internet, “The National Broadband Plan: Deploying

In sum, the state of wireline broadband deployment and availability is unclear. Even where wireline broadband of suitable speed and capacity is available, effective competition is rare. Even though wireline competition between two providers of high-speed broadband Internet access service may be shown to exist in some markets, it would be premature at best to conclude that effective competition exists in other geographic markets where telephone incumbents intend to compete against cable only by offering slower speeds over DSL facilities.<sup>18</sup> Unfortunately but also unsurprisingly, the markets in which nothing more than such asymmetrical, lopsided “competition” will take place include less densely populated rural and less affluent urban areas, both of which are so often left behind when incumbents roll out advanced services.

## 2. Wireless Broadband Internet Access Competition.

The poor status of competition in the wireless market is much the same, despite the fact that there typically are a few more service providers in the mix in each market. Wireless incumbents and opponents of the proposed open Internet rules touted in this proceeding the number of wireless providers present in most markets and the allegedly robust competition that results from their mere presence.<sup>19</sup> As several of the Public Interest Commenters and others demonstrated in the Commission’s ongoing Mobile Wireless Competition proceeding, the U.S. wireless market in fact highly concentrated according to objective, widely accepted market analysis guidelines, with a shrinking number of large providers capturing more and more of the market share. This is especially the case in the market for wireless data services, including as

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Quality Broadband Services To The Last Mile,” at 4-5 (Apr. 21, 2010), *available at* [http://energycommerce.house.gov/Press\\_111/20100421/Turner.Testimony.04.21.2010.pdf](http://energycommerce.house.gov/Press_111/20100421/Turner.Testimony.04.21.2010.pdf).

<sup>18</sup> See Free Press Comments at 53; see also NBP at 42, Exhibit 4-G (illustrating the projected share as of 2012 of U.S. households with access to various cable and telephone company wireline broadband Internet access technologies).

<sup>19</sup> See, e.g., Comments of T-Mobile USA, Inc., GN Docket No. 09-191, WC Docket No. 07-52, at 7 (filed Jan. 14, 2010) (“T-Mobile Comments”).

broadband Internet access service, which is increasingly dominated by the “big two” wireless providers AT&T and Verizon Wireless.<sup>20</sup>

Beyond this concentration analysis, whether or not effective intramodal competition is theoretically possible among four or five wireless providers in a particular geographic marketplace is not the determining factor. The Commission historically has examined not merely market structure, but also provider conduct, consumer behavior, and market performance when assessing the level of competition for mobile wireless communications services. Indicators in all of these categories suggest that the wireless market as a whole, including the market for wireless broadband Internet access services and other wireless data services, is not competitive. Providers routinely engage in parallel pricing, charge supracompetitive overages, shroud the true costs of services sold in bundles, and impose early termination penalties untethered to their actual costs – all while maintaining high profit margins and under-investing in their networks.<sup>21</sup>

CTIA claims earnestly in its initial comments that open Internet rules are not necessary for wireless broadband Internet access services because “[w]ireless service providers are regulated by their customers.”<sup>22</sup> That might be true in a well-functioning market, in which customers had better access to information and faced lower switching costs,<sup>23</sup> along with the ability to select and access lawful content, applications, and devices of their own choosing rather than only the carriers’ choice. It is decidedly not the case in the current market for wireless

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<sup>20</sup> See Public Interest Mobile Wireless Competition Comments at 7-8; Reply Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, and Public Knowledge, WT Docket No. 09-66, at 16-17 (filed Oct. 22, 2009) (“Public Interest Mobile Wireless Competition Reply Comments”).

<sup>21</sup> See Public Interest Mobile Wireless Competition Comments at 10-16; Public Interest Mobile Wireless Competition Reply Comments at 14-16, 17-25.

<sup>22</sup> CTIA Comments at 3.

<sup>23</sup> See *infra* note 37 and accompanying text.

broadband Internet access service, and customers need the protection that the Commission's sensible open Internet rules will provide.

Indeed, even where the dominant national wireless carriers compete vigorously for customers – exerting some discipline on the price and quality of wireline and wireless broadband Internet access – they simultaneously limit competition and consumer choice in the adjacent markets for mobile devices, applications, content, and services. Unlike wireline broadband Internet access service providers, which have rarely sought to leverage their terminating access monopoly to dictate the design and capabilities of devices and applications that run over their networks, wireless ISPs have attempted to make this vertical integration a central feature of their business model. Without regard to the level of intramodal competition, which is limited to begin with, the dominant carriers have a common interest in leveraging their collective control over network access to limit choice and extract rents from firms seeking to compete in the adjacent markets for devices, applications, content, and services.

For example, carriers engage, to different degrees, in the “blocking” and “locking” of devices on their networks. In tandem with this practice, they also deter consumers from purchasing a device directly from a retailer: consumers typically must purchase the “bundled” phone and service plan from the carrier even in such instances, and typically it is not possible to pay a lower price for wireless Internet access service and/or voice service even if the consumer brings her own device to the service. Wireless carriers use these practices to leverage their position as wireless broadband Internet access providers in order to stifle or distort competition and innovation in the adjacent markets for communications equipment, applications, and

services. This type of imperfect (at best) competition in the market for wireless broadband Internet access services and adjacent markets reinforces the need for open Internet rules.<sup>24</sup>

### 3. Intermodal Broadband Internet Access Competition.

As suggested in the PIC Initial Comments and other submissions in these dockets, wireless broadband Internet access is an important service, especially in communities of color and other underserved demographic segments and geographic areas.<sup>25</sup> Nevertheless, wireless broadband Internet access service is not at present, nor will it be in the foreseeable future, a substitute for the types of speeds and capabilities available with wireline broadband Internet access capabilities.<sup>26</sup> Verizon declarant Michael Topper contended that “[m]obile wireless broadband services are a competitive alternative to wireline broadband,” but immediately acknowledged that this alternative is one made available “at relatively lower throughput speeds.”<sup>27</sup> He also suggested that the Department of Justice has “recognized” this “increasing competition,”<sup>28</sup> but failed to note that this recognition came with several caveats. DOJ merely

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<sup>24</sup> See, e.g., Letter from Ben Scott, Policy Director, and Chris Riley, Policy Counsel, Free Press, to Acting FCC Chairman Michael J. Copps, Federal Communications Commission, WC Docket No. 07-52 (April 3, 2009); Skype Communications S.A.R.L., Petition to Confirm a Consumer’s Right to Use Internet Communications Software and Attach Devices to Wireless Networks, RM-11361 (filed Feb. 20, 2007); Tim Wu, “Wireless Net Neutrality: Cellular Carterfone and Consumer Choice in Mobile Broadband,” New America Foundation, Wireless Future Program, Working Paper #17 (February 2007), available at [http://www.newamerica.net/files/WorkingPaper17\\_WirelessNetNeutrality\\_Wu.pdf](http://www.newamerica.net/files/WorkingPaper17_WirelessNetNeutrality_Wu.pdf); Robert M. Frieden, “Wireless Carterfone – A Long Overdue Policy Promoting Consumer Choice and Competition,” New America Foundation, Wireless Future Program, Working Paper #20 (Jan. 2008), available at [http://www.newamerica.net/events/2008/free\\_my\\_phone](http://www.newamerica.net/events/2008/free_my_phone); see also Comments of the Ad Hoc Public Interest Spectrum Coalition, RM-11361 (filed Apr. 30, 2007).

<sup>25</sup> See, e.g., Media Justice Comments at 14.

<sup>26</sup> See, e.g., Ad Hoc Comments at 9; Free Press Comments at 52.

<sup>27</sup> Comments of Verizon and Verizon Wireless, GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010) (“Verizon Comments”), at Attachment C, Decl. of Michael D. Topper, at 37 (“Topper Declaration”).

<sup>28</sup> Topper Declaration at 37 n.212.

suggested during the NBP proceeding that “early developments are mildly encouraging” with respect to intermodal competition, but concluded that it would be “premature to predict whether the wireless broadband firms will be able to discipline the behavior of the established wireline providers.”<sup>29</sup> The same DOJ submission went on to explain that “[w]ithin the next several years ... the limits of wireless broadband will be tested, including the actual delivered speeds, adequacy of in-building coverage, and ability of the networks to accommodate large numbers of users,” noting as well that “unanswered questions remain as to whether these services will be offered at prices and on terms that make them attractive to wireline users.”<sup>30</sup>

Beyond the uncertainty surrounding expected future deployment, service capabilities, and consumer behavior with respect to wireless broadband Internet access service offerings, there are other reasons to doubt the ability of wireless offerings to discipline wireline broadband Internet access. Chief among these is the fact that the largest incumbent wireline local exchange carriers are also the largest wireless broadband providers, with AT&T and Verizon wireless dominating the field. Clearly, the economic incentives of affiliated entities to compete against one another at all – much less compete aggressively on price and service terms – are doubtful at best. DOJ “recognized” this problem as well, although Verizon’s expert testimony did not. As the DOJ submission in the NBP proceeding succinctly summarized the problem, “two of the major providers of these services (Verizon and AT&T) also offer wireline services in major portions of the country, raising the question of whether they will position their [next generation wireless]

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<sup>29</sup> *Ex Parte* Submission of the United States Department of Justice, GN Docket No. 09-51, at 10 (filed Jan. 4, 2010) (“DOJ *Ex Parte*”).

<sup>30</sup> *Id.*; see also NBP at 41 (suggesting that making more spectrum available may solve such problems and answer these questions about the viability of intermodal competition, but acknowledging that “[w]ireless broadband may not be an effective substitute in the foreseeable future for consumers seeking high-speed connections at prices competitive with wireline offers”).

services as replacements for wireline services, either within the regions where they provide wireline services or elsewhere.”<sup>31</sup>

For all of these reasons, effective competition does not exist today in the marketplace for broadband Internet access services, nor is it certain or likely to materialize in the near term. As discussed in the next section of these reply comments, even if robust competition were the norm, it would not be enough to prevent all of the harms at which the *NPRM*'s proposed open Internet rules take aim. At the outset, however, the Commission should assess critically any arguments that competition is enough to discipline broadband Internet access providers without the need for rules to preserve the open Internet. Based on the foregoing discussion and the record evidence in these and other dockets, Public Interest Commenters respectfully submit that the Commission cannot conclude effective competition holds sway in the broadband Internet access marketplace. The competitive conditions on which incumbents and other opponents of the rules base so many of their objections to open Internet rules simply do not exist in the measure that these opponents suggest.

*B. Competition Would Not Obviate the Need for the Proposed Open Internet Rules, Due to the Market Structure, Market Power, and Incentives of Incumbents to Discriminate.*

As the record evidence in this proceeding makes clear, competition alone would not ameliorate all of the harms that the Commission's open Internet rules can and should prevent. First, the Commission's proposed nondiscrimination rule would prevent not just anticompetitive activities, nor only those that might amount to antitrust violations after lengthy legal proceedings, but also the harms that blocking and prioritization would cause to innovation, free

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<sup>31</sup> DOJ *Ex Parte* at 11.

expression in the form of opportunities both to create and access information, political participation, and economic and educational opportunities.<sup>32</sup>

Of course, such harms also may arise from clear-cut anticompetitive behavior, consisting of outright blocking of competitors' services and potential competitive offerings, or the denial of access to lawful content and services of the user's choosing. In either case, however, competition and competitive disciplines would not be enough reliably to prevent such harms, even if there were an abundance of service providers, more transparency, and more freedom of choice than one finds in the actual marketplace for broadband Internet access service. As the Ad Hoc Telecommunications Users Committee and others made clear in their initial comments, "even if broadband Internet access markets were robustly competitive, the proposed rule would still be necessary because that competition cannot constrain the market behavior of broadband Internet access service providers towards non-affiliated content, application, and service providers."<sup>33</sup> This is the case because "once a subscriber chooses a wireline or wireless Internet access provider, her content, application, and service providers are captive to that [network] provider regardless of the competitive choices, if any, available to [the subscriber] before subscription."<sup>34</sup>

The Public Interest Commenters noted this same "terminating access monopoly" problem in initial comments, emphasizing as well that competition offers especially poor protection to minority groups and other market participants with reduced leverage and bargaining power vis-à-

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<sup>32</sup> See PIC Initial Comments at 23; see also Free Press Comments at 75 (explaining harms of prioritization, including application bias); OIC Comments at 75.

<sup>33</sup> Ad Hoc Comments at 9-10.

<sup>34</sup> *Id.* at 10; see also OIC Comments at 72 ("[E]ven if competition among initial broadband Internet access providers existed for users, the Commission more properly should focus on the limitations and unique nature of broadband networks that create an effective 'terminating access' market failure and particular incentives that demand government oversight.").

vis incumbents.<sup>35</sup> These realities, along with the Communications Act itself,<sup>36</sup> all suggest that competition alone is not enough to ensure the provision of vital communications services on reasonable and nondiscriminatory terms. High switching costs experienced by users of wireless and wireline broadband Internet access services only exacerbate these terminating access problems, and make competitive discipline and customer exit even less likely for customers whose broadband Internet access service providers engage in discriminatory conduct or otherwise violate the Commission's open Internet principles.<sup>37</sup>

*C. The Commission Should Adopt a Strong Transparency Rule to Promote Competition and Preserve the Open Internet.*

While competition alone would not suffice to surmount all of these hurdles and harms to open Internet access, by no means should the Commission allow broadband Internet service providers to “compete” on the level of transparency and disclosure they provide to customers and to the Commission. Even though the Commission's adoption of the transparency rules proposed in the *NPRM* could not suffice as a substitute for adoption of a nondiscrimination rule, baseline transparency rules regarding providers' network management practices are a necessary component of a well-functioning market. Providers opposing the adoption of the *NPRM*'s

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<sup>35</sup> See PIC Initial Comments at 24, 26, 29.

<sup>36</sup> See Free Press Comments at 45-49 (noting that the Act authorized the Commission at various times to forbear from applying certain regulations to wireline and wireless telecommunications providers, but not to lift requirements that such carriers offer service and make interconnection available on nondiscriminatory, just, and reasonable terms). Thus, “even if...today's communications marketplace were sufficiently competitive to no longer require unbundling regulations, tariffs, or structural separation[,] nondiscrimination protections would still be needed to ensure consumer access to open platforms.... because network operators have strong incentives to exert power and control in adjacent markets.” *Id.* at 48.

<sup>37</sup> See OIC Comments at 73 and n.107; Comments of Skype Communications S.A.R.L., GN Docket No. 09-191, WC Docket No. 07-52, at 16 (filed Jan. 14, 2010) (“Skype Comments”) (“[E]ven if consumers were well informed as to the closed practices of wireless networks, they may face high switching costs for other reasons, such as early termination fees, handset exclusivity practices, bundling of handsets and service contracts, etc.”); see also PIC Initial Comments at 23.

transparency rule suggest that the Commission should instead create a transparency “principle” but not a rule,<sup>38</sup> or that it should encourage “best practices”<sup>39</sup> and voluntary guidelines<sup>40</sup> rather than adopt any rule.

The Public Interest Commenters believe that any Commission action to accept these suggestions, consequently backing away from a strong transparency rule requiring meaningful disclosure of network management practices, would be a mistake. Allowing broadband Internet access providers to commit voluntarily to transparency, or to make only those disclosures that market forces dictate, sets up a no-win situation for consumers – one in which providers not only get to determine the rules of the game, but whether and when to follow those rules.

Furthermore, as noted in the PIC Initial Comments and elsewhere,<sup>41</sup> the transparency rule proposed in the *NPRM* is not stringent enough because it proposes a reasonable network management exception to the transparency principle itself. The circular reasoning underlying this proposed exception would swallow the rule. Broadband Internet access service providers would need not disclose their supposedly reasonable network management practices if the providers could contend that *non*-disclosure would itself be a reasonable network management practice. The Public Interest Commenters do not suggest that broadband Internet access service providers should be required to divulge sensitive network security information, nor to provide a roadmap for circumventing same. Yet, providers must be responsible and accountable for making meaningful disclosure of any and all network management practices that have the intent or the effect of blocking or degrading access to lawful content, applications, services, and devices of users’ choosing.

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<sup>38</sup> See, e.g., AT&T Comments at 190; CenturyLink Comments at 15.

<sup>39</sup> See, e.g., Comcast Comments at 46.

<sup>40</sup> See, e.g., CTIA Comments at 46-48.

<sup>41</sup> See PIC Initial Comments at 39; Free Press Comments at 115.

Opponents of the Commission's open Internet rules are overly fond of saying such rules are a solution in search of a problem, but this is simply not the case. The problems are demonstrable and apparently on the increase, based even on a cursory glance at the headlines. Too often, the only search comes in the form of attempts to unearth provider misconduct and violations of the open Internet principles, because such violations are rarely if ever disclosed until broadband Internet access service providers are caught with their hands in the cookie jar. Comcast's infamous blocking of BitTorrent, which the company ceased only after it had been confronted with evidence of its activity and given up its initial denial of the practice,<sup>42</sup> is but one example.<sup>43</sup> Recent events have provided several more.

In the weeks before submission of these reply comments, news surfaced regarding Windstream's practice of redirecting search queries to Windstream's own search portal.<sup>44</sup> Just before the reply deadline, details of apparent peer-to-peer blocking and throttling by RCN came

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<sup>42</sup> See Formal Complaint of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd 13028, ¶¶ 6-9 (2008) ("*Comcast Blocking Order*"), vacated by *Comcast Corp. v. FCC*, No 08-1291 (D.C. Cir. Apr. 6, 2010) ("*Comcast v. FCC*"), available at <http://pacer.cadc.uscourts.gov/common/opinions/201004/08-1291-1238302.pdf>.

<sup>43</sup> AT&T disingenuously has suggested that with respect to Comcast's erstwhile blocking of BitTorrent, "the company took steps to address the complaint long before the FCC ruled." See Marguerite Reardon, "Is Net Neutrality Dead? (FAQ)," CNET (Apr. 6, 2010), [http://news.cnet.com/8301-30686\\_3-20001886-266.html](http://news.cnet.com/8301-30686_3-20001886-266.html). Of course, as indicated above, Comcast first denied the practice altogether, and only began taking steps to address the problem after several press accounts appeared and after the Commission had received thousands of complaints about the practice. See *Comcast Blocking Order* ¶ 10; *id.* ¶ 54 & n.244.

<sup>44</sup> See Matthew Lasar, "Windstream in windstorm over ISP's search redirects," Ars Technica (Apr. 6, 2010), <http://arstechnica.com/telecom/news/2010/04/windstream-in-windstorm-over-dns-redirects.ars>; Karl Bode, "Windstream Quickly Fixes Google Toolbar Hijack," DSLReports.com (Apr. 6, 2010), <http://www.dslreports.com/shownews/Windstream-Quickly-Fixes-Google-Toolbar-Hijack-107768>.

to light as well.<sup>45</sup> Ironically enough, though not all facts are known at this point, RCN's behavior appears to be the same type of "management" practice in which Comcast engaged<sup>46</sup> – perpetrated this time by a provider that competes head to head with Comcast in several major metropolitan markets<sup>47</sup> – but in an environment in which the Court of Appeals for the D.C. Circuit has cast doubt on the Commission's ability to prohibit such blocking or degradation of lawful content and applications.

Based on the admittedly anecdotal yet sufficiently alarming evidence that Comcast and RCN engaged in the same discriminatory management practices, during roughly the same time period, with neither company telling their customers, it should be clear that broadband Internet access providers do not compete effectively either on network nondiscrimination or transparency. Unfortunately for broadband Internet access service users, network management practices that clearly violate one or more open Internet principles are increasingly common, and potentially far more prevalent than we may know in the absence of effective disclosure requirements. The search for such misconduct is made all the more difficult by providers that fail to acknowledge practices violating the open Internet principles that the *NPRM* proposes to codify. The Commission must adopt flexible but strong transparency rules as proposed in the

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<sup>45</sup> See Nate Anderson, "Just like Comcast? RCN accused of throttling P2P," Ars Technica (Apr. 20, 2010), <http://arstechnica.com/tech-policy/news/2010/04/just-like-comcast-rcn-accused-of-throttling-p2p.ars>.

<sup>46</sup> See *id.*; see also Nate Anderson, "Hammer drops at last: FCC opposes Comcast P2P throttling," Ars Technica (July 25, 2008), <http://arstechnica.com/old/content/2008/07/hammer-drops-at-last-fcc-opposes-comcast-p2p-throttling.ars>.

<sup>47</sup> See, e.g., "About RCN," <http://www.rcn.com/dc-metro/about-rcn> (last visited Apr. 22, 2010) (identifying Boston, Chicago, District of Columbia metro area, and Philadelphia as four of RCN's six service territories).

*NPRM*,<sup>48</sup> modified along the lines suggested in the PIC Initial Comments<sup>49</sup> and other submissions in this docket.<sup>50</sup>

*D. The Same Open Internet Rules Should Apply to All Broadband Internet Access Service Providers, Including Both Wireline and Wireless Providers.*

The Commission should act to ensure that wireless and wireline broadband Internet access platforms alike are subject to the same open Internet rules and general principles, including the nondiscrimination rule proposed in the *NPRM*. This is the appropriate outcome for the promotion of social equality and civil rights: namely, because mobile and wireless broadband Internet access are not just beneficial complementary services for users who can afford wireline too, but also serve as an important broadband gateway for individuals who frequently must choose between wireless and wireline broadband options.<sup>51</sup>

The National Broadband Plan seeks, of course, to promote first-rate broadband deployment and widespread adoption in unserved and underserved communities. It does not and could not suggest that such communities will need to subsist on typically slower and less adaptable services. Certain wireless broadband Internet access services may be less adaptable for economic, educational, and civic engagement opportunities, depending especially on the device use to access these services, insofar as handheld mobile devices may contain fewer word

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<sup>48</sup> See *NPRM* ¶¶ 118-120.

<sup>49</sup> See PIC Initial Comments at 63-66 (calling for standardized and prominent disclosures to broadband Internet access service provider customers regarding prices, actual speeds delivered and service guaranteed, technical capabilities and service limitations such as usage caps and overage charges, and any traffic or network management practices). Public Interest Commenters also proposed rules requiring providers to submit the same information to the Commission, along with additional detailed information regarding any network management practices that block, degrade, or prioritize data. See *id.* at 66-67.

<sup>50</sup> See, e.g., OIC Comments at 88-92; CDT Comments at 31-36; *cf.* Comments of Cisco Systems, Inc., GN Docket No. 09-191, WC Docket No. 07-52, at 3 (filed Jan. 14, 2010) (“Cisco Comments”) (supporting creation of transparency principle in addition to maintenance of original four Internet Policy Statement principles).

<sup>51</sup> See, e.g., Media Justice Comments at 14.

processing options or other capabilities needed to create and share economic, educational, and expressive content online. Yet, without suggesting that certain unserved and underserved communities will need to settle for scaled-back access, the Plan does place great weight on the potential for wireless broadband both to serve as a facilities-based competitor to higher-speed wireline offerings and as a means for achieving certain universalization goals.<sup>52</sup> Private investors may posit that there is no business case for deploying more robust broadband facilities in high cost or low income areas. Still, the Commission could not defensibly assert that certain communities deserve fewer broadband opportunities than others, thereby cementing rather than removing impediments to empowerment and equality in historically marginalized areas. Such policies would widen digital divides rather than close the availability gap between those who do have access to an evolving level of telecommunications and information services and those who do not have meaningful access to comparably advanced communications capabilities.<sup>53</sup>

Just as the Commission could not condone any such policy of settling always for less capable broadband Internet access in some communities, it could not justify any policy suggesting that certain communities or categories of broadband Internet users – such as those who rely predominantly or exclusively on wireless – are entitled only to a less open, more discriminatory Internet experience. The Commission must instead seek to ensure that users who access the Internet on wireless devices, ranging from handhelds to netbooks, are protected by the same general principles and open Internet rules as those using wireline services.

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<sup>52</sup> See NBP at 43; *see also id.* at 137 (discussing the Plan’s universalization goal for actual download speeds of at least 4 Mbps and actual upload speeds of at least 1 Mbps in relationship to potential 4G wireless infrastructure investments beyond those currently contemplated by providers).

<sup>53</sup> See 47 U.S.C. § 254(b)(3), (c)(1).

The principles and rules that the Commission ultimately adopts can and should be the same for wireline and wireless networks, even if the definition of “reasonable network management” differs on a categorical or case-by-case basis depending on legitimate differences between different network architectures.<sup>54</sup> As with any reasonable network management definition that the Commission may adopt generally, exceptions made available to wireless broadband Internet access providers must permit only those practices that reasonably and legitimately relate to managing congestion, and do so in ways that do not favor particular content, services, or applications of network operators, their affiliates, or their preferred providers.

It is critical to consumer protection goals and to preserving the social and economic value of the Internet that its functionality and “rules of the road” not change based on the technology used to gain access. Broadband Internet users should have the same freedom to use and access Internet resources whether their devices reach the Internet over a WiFi connection to a wired LAN or, moments later, connect over a wireless carrier’s network. From a consumer perspective, today there is one Internet. The Commission should not encourage a policy environment in which the substance and utility of “the Internet” to which consumers purchase access is highly variable and unpredictable. Such a policy would quickly devolve into yet another digital divide between those who are savvy or affluent enough to acquire “true” Internet access, and other populations who end up with a closed, channelized, and hobbled version of the Internet.

The opportunity to avoid the evolution of two competing Internets – one wired and open, the other wireless and closed – will be lost if the Commission does not clarify a common

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<sup>54</sup> See *supra* note 6.

framework before true broadband-speed 4G networks are widely deployed over the next two years. As a regulatory matter, this should not be controversial. The Commission has previously determined that establishing a common framework for all broadband Internet access providers serves the public interest.<sup>55</sup> As explained in Part II below, the common framework in this case should acknowledge the core transmission component of broadband Internet access, not rely on misperceptions and unfulfilled predictions about the nature of the service offered to end-users. Nevertheless, treating all methods used to access the Internet in consistent fashion for regulatory purposes remains a laudable goal.

The Commission also should be careful to adopt uniform rules and principles because of the increasing prevalence and potential benefits of hybrid networks and cognitive devices that seamlessly transit both wireline and wireless Internet access networks in tandem or in series. As Commissioner Baker quite correctly noted in press interviews given in the weeks prior to the reply comment filing date in these dockets, an approach to open Internet protections that places wireline and wireless broadband offerings in separate “silos” is rapidly becoming untenable in the face of advancing technology and the backhaul component to wireless networks.<sup>56</sup>

For example, industry surveys show that data traffic on carrier-serviced smartphones is increasingly migrating to WiFi where available. According to the latest AdMob Mobile Metrics

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<sup>55</sup> Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, WT Docket No. 07-53, *Declaratory Ruling*, 22 FCC Rcd 5901, ¶¶ 55, 70 (“*Wireless Framework Order*”); *see also id.*, Concurring Statement of Commissioner Michael J. Copps (“Now that IP-based wireless services are classified as Title I information services, the inescapable logical implication of our 2005 decision is that the right to attach network devices – as well as the other three principles of our policy statement – now applies to wireless broadband services.”).

<sup>56</sup> *See* Howard Buskirk, Jonathan Make, and Kamala Lane, “Baker Says Exempting Wireless Wouldn’t Eliminate Her Net Neutrality Qualms,” *Communications Daily* (April 1, 2010) (quoting Commissioner Baker as stating that “networks are all becoming hybrids .... [I]f you start siloing wireless as opposed to wireline, what do you do when you actually look at the way a network operates?... How many networks are pure wireless networks? None.”).

Report, 36 percent of iPhone traffic in the U.S. traveled over WiFi in November 2009.<sup>57</sup> WiFi-enabled smartphones are merely the leading edge of a trend toward more consumer-friendly and spectrum-efficient devices and hybrid networks that integrate available wired and wireless networks into a seamless source of bandwidth.<sup>58</sup> In February, at its annual *Techfest* in Redmond, Microsoft publicly demonstrated software (referred to by the company as “Maui” software) that provides one potential method for increasing consumer welfare and spectrum efficiency if users can connect the device of their choice to various networks. Maui is simply software that allows a device to select, from second to second, the most cost-efficient, battery-efficient, and/or spectrum-efficient path for the device’s mobile data uploads and downloads. This intelligence at the device level permits a seamless handoff between networks, without a degradation of Internet connectivity, provided that networks are open and nondiscriminatory. Adoption of the open Internet rules proposed in the *NPRM* will promote attainment of such benefits.

*E. The Commission Can Apply Open Internet Principles Feasibly to Wireless Networks.*

The Commission should clarify that its basic *Carterfone* principles apply to wireless ISPs,<sup>59</sup> permitting consumers to choose devices that transit a variety of networks. Furthermore, the Commission certainly should not thwart consumer expectations and reduce consumer welfare by allowing carriers to block or degrade on their networks any lawful applications, content, or services to which a device would have access over a WiFi or wireline connection.

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<sup>57</sup> AdMob Mobile Metrics Report, November 2009, available at <http://metrics.admob.com/wp-content/uploads/2009/12/AdMob-Mobile-Metrics-Nov-09.pdf>.

<sup>58</sup> For a discussion of hybrid networks and their benefits, see Mark MacCarthy, “Rethinking Spectrum Policy: A Fiber Intensive Wireless Architecture,” Aspen Institute Roundtable on Spectrum Policy (March 2009); see also Reply Comments of the Public Interest Spectrum Coalition, GN Docket Nos. 09-157 & 09-51, at 15-17 (filed Nov. 5, 2009) (“PISC Spectrum Reply Comments”).

<sup>59</sup> See, e.g., PISC Spectrum Reply Comments at 7-8.

Internet users and consumers hardly can be expected to understand, let alone accept, a policy outcome in which they are subjected to radically different rules and different limitations with respect to Internet access depending on the platform over which their device most efficiently chooses to operate. The Commission therefore must adopt uniform open Internet rules for wireline and wireless networks, not facilitate or condone a situation in which wireline broadband Internet access networks retain an open character while wireless networks are walled off to open Internet principles and options.

Despite AT&T's assertions to the contrary, application of the open Internet rules to wireless networks is not "infeasible,"<sup>60</sup> although it may be necessary to phase in rules over a period of time and to account for different network constraints with appropriately calibrated reasonable network management exceptions. As the Public Interest Commenters demonstrated in separate comments<sup>61</sup> and an engineering report<sup>62</sup> filed in these dockets, it would be both feasible and beneficial for consumers if the Commission were to adopt platform agnostic principles and rules that put the choice of devices, applications, content, and services in the hands of consumers.<sup>63</sup> Notwithstanding the potential technical challenges asserted by AT&T, there is nothing about the technology of today's 3G and emerging 4G wireless data networks that would preclude compliance with the Commission's six Open Internet policy principles. The *Any Device and Any Application* report describes how the same technologies in use in today's non-

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<sup>60</sup> See AT&T Comments at 143-144; *id.* Exh. 2.

<sup>61</sup> See Comments of New America Foundation, Columbia Telecommunications Corporation, Consumers Union, Media Access Project, and Public Knowledge, GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010) ("NAF/CTC Comments").

<sup>62</sup> See Andrew Afflerbach, Ph.D., P.E. and Matthew DeHaven, Columbia Telecommunications Corporation, "Any Device and Any Application on Wireless Networks: A Technical Strategy for Evolution" (Jan. 13, 2010), attached as Appendix A to NAF/CTC Comments ("*Any Device and Any Application*"), available at [http://wirelessfuture.newamerica.net/sites/newamerica.net/files/profiles/attachments/NAF\\_CTC\\_NN\\_Comments.pdf](http://wirelessfuture.newamerica.net/sites/newamerica.net/files/profiles/attachments/NAF_CTC_NN_Comments.pdf).

<sup>63</sup> See NAF/CTC Comments at 2-4; *Any Device and Any Application* at 14-18.

interoperable wireless environment can become almost completely interoperable within a relatively short timeframe (twelve to eighteen months maximum),<sup>64</sup> assuming that the Commission adopts open Internet principles properly mandating such an evolution.

In sum, Public Interest Commenters continue to hold that any prioritization or congestion management techniques should place such choices on the demand-side, allowing consumers to make choices rather than permitting broadband Internet access service providers to make unreasonable network management choices or otherwise impede basic end-to-end Internet access service. Such an approach is not technically infeasible, and it would permit consumers rather than broadband Internet access service providers to decide how to access lawful content, applications, and services. Just as the Bell monopoly opposed *Carterfone* principles on the basis that the company needed end-to-end control of the network, the new but similarly self-interested AT&T argues incorrectly that technical limitations require preservation of broadband Internet access service providers' terminating access monopoly.

## **II. The Commission Has Authority to Promulgate Open Internet Rules That Protect Consumers and Broadband Users, But Should Clarify the Source of Its Authority.**

The Public Interest Commenters, along with other proponents of the *NPRM's* proposed rules as well as opponents of the Commission's proposals, discussed at length in initial comments the subject of Commission authority to enact such rules. The PIC Initial Comments

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<sup>64</sup> See NAF/CTC Comments at 6; *Any Device and Any Application* at 36. The report also describes a continuum of four different degrees of "Any Device" interoperability, concluding that all are technically feasible (particularly on 4G networks) and should be accommodated. This evolution should begin with existing 3G wireless technologies and ultimately, through software-defined radios, evolve to permit the interoperability of all devices on any carrier's network. See *id.* at 40. Finally, the report also describes the feasibility of application-neutral network management practices that can address problems of periodic congestion in particular cells or sectors primarily through demand-side pricing tiers and premium-service offerings that prioritize uses based on consumer choice, rather than discriminating among content, applications, or services based on carrier preferences. See *id.* at 44- 48.

concluded with the Commission's own assessment<sup>65</sup> that it has the authority to adopt straightforward open Internet rules along the lines proposed in the *NPRM*. Public Interest Commenters echoed other participants in the proceeding who grounded their understanding of this oversight role in the Commission's longstanding, undisputed authority over the transmission or telecommunications component of wire and radio communications facilities.<sup>66</sup>

Nevertheless, the initial comments that Public Interest Commenters submitted did suggest that the Commission could, and likely should, be prepared to consider classification of broadband Internet access services as Title II services.<sup>67</sup> The D.C. Circuit Court of Appeals recent decision in the Comcast/BitTorrent case makes such considerations all the more relevant, or even imperative.<sup>68</sup> Notably, the court did not conclude that it would be impossible for the Commission ever to exercise ancillary authority over broadband Internet access service providers' network management techniques such as the techniques that Comcast admittedly used to block lawful content and applications in the events leading up to this decision. The D.C. Circuit did rule, however that the Commission had failed to make a showing of ancillary authority in the order challenged by Comcast.<sup>69</sup> It also suggested that none of several statutory statements and mandates relied upon by the Commission in the challenged order could serve in this instance as a firm ground for the exercise of ancillary authority over broadband Internet access service providers.<sup>70</sup>

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<sup>65</sup> See *NPRM* ¶¶ 83-87.

<sup>66</sup> See PIC Initial Comments at 6; see also Free Press Comments at 31; OIC Comments at 82; CDT Comments at 20-21; Google Comments at 43-49.

<sup>67</sup> See PIC Initial Comments at 5-6; Free Press Comments at 32; CDT Comments at 22.

<sup>68</sup> See *Comcast v. FCC*, *supra* note 42.

<sup>69</sup> See *id.* at 3.

<sup>70</sup> See *id.* at 16-36.

The Commission’s authority to oversee broadband Internet access facilities, and thereby to protect Internet users from such harmful provider conduct, is essential to the continued vitality of our Twenty-First Century communications infrastructure. It is essential also to the realization of Congress’s and the Commission’s goals set forth in the National Broadband Plan. By turning to Title II, and grounding there its authority to protect consumers and promote vital broadband programs and policies, the Commission would foster regulatory certainty regarding the basis for regulating the facilities used to provide broadband Internet access service – not in any sense regulating content, services, applications, nor “the Internet” itself, but instead preserving its fundamental character.

The Commission also quite appropriately should reconsider in this context decisions rendered by prior administrations, made on the basis of different sets of facts and heretofore unfulfilled expectations. The present Commission should undertake this analysis in light of changed circumstances, evolutions in broadband Internet access service offerings, and historical perspective on the outcome of predictions and promises made in the 2002 *Cable Modem Order* and the 2005 *Wireline Framework Order*.<sup>71</sup> As the Supreme Court itself has made clear, the Commission need not meet any higher burden of proof in order to reverse prior decisions in response to new facts and analysis.<sup>72</sup> In its recent *Fox Television Stations* “fleeting expletives” decision, the Court made clear that there is “no basis in the Administrative Procedure Act or in [its] opinions for a requirement that all agency change be subjected to more searching review,”

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<sup>71</sup> See Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (2002) (“*Cable Modem Order*”); Appropriate Framework for Broadband Access Over Wireline Facilities, *Report & Order & Notice of Proposed Rulemaking*, 20 FCC Rcd 14853 (2005) (“*Wireline Framework Order*”).

<sup>72</sup> See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) (“*Fox Television Stations*”).

and that while “the agency must show that there are good reasons for the new policy[, ] it need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one.”<sup>73</sup>

A. *Challenges to Commission Authority Over Broadband Internet Access Services Affect Not Only the Open Internet Proceeding, But All of the Commission’s Broadband Initiatives and Objectives in the National Broadband Plan.*

Questions of authority implicate not only the Commission’s ability to preserve the open Internet and prevent discriminatory conduct by broadband Internet access service providers, but also the Commission’s ability to advance the broadband availability, adoption, and consumer protection mandates and initiatives articulated in the National Broadband Plan and elsewhere. Public Interest Commenters suggest therefore that the Commission move to consider the proper classification of broadband Internet access services, and to clarify the Commission’s oversight authority for the purpose of preserving the open Internet and promoting a range of broadband goals.

Because the Public Interest Commenters believe that the jurisdictional issues are best addressed comprehensively, it is not necessary or advisable here to explore all of the topics that such an analysis would include. The Public Interest Commenters note that uncertainty about the Commission’s authority over broadband Internet access services calls into question the Commission’s ability to facilitate achievement of the various “national purposes” articulated by Congress for the National Broadband Plan.<sup>74</sup> Moreover, such uncertainty jeopardizes the Commission’s ability to implement universal service reforms, adoption programs, consumer transparency and truth-in-billing initiatives, privacy safeguards, and competition policy measures

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<sup>73</sup> *Id.* at 1810-1811 (emphasis in original).

<sup>74</sup> *See NBP* at

that in any way impact or touch upon broadband infrastructure, subsidies, and operator practices.<sup>75</sup>

*B. The Commission Should Move Swiftly to Ground Open Internet Rules in Title II, Acknowledging That Predictions in Prior Classification Decisions Were Rendered Ineffective by Broadband Provider Actions and Marketplace Developments.*

The clear role and function of last-mile broadband Internet access transmission facilities in all instances is to provide transport for the enhanced “information services” and other advanced services that flow over such facilities. Contrary to suggestions in the *Cable Modem Order* and *Wireline Framework Order*,<sup>76</sup> this transport component today underlies but is not inextricably intertwined with the information services themselves.<sup>77</sup> Furthermore, the Commission’s classification and treatment of broadband Internet access services as Title I services has not resulted in growth in either the number of facilities-based competitors or the level of robust competition among and between of wireline and wireless broadband providers.<sup>78</sup>

In addition to those two rationales (centered on the intertwined nature of offerings and the likelihood of facilities-based competition), the third and final rationale advanced by the Commission as a justification for Title I treatment also has been called into question by subsequent developments.<sup>79</sup> Providers have inconsistently embraced and then attacked Title I as

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<sup>75</sup> See, e.g., Letter from Ben Scott, Policy Director, Free Press, to Julius Genachowski, Chairman, Federal Communications Commission, GN Docket Nos. 09-191, 09-51; WC Docket No. 07-52, at 4-5 (Feb. 24, 2010) (“Free Press Letter”); see also Reply Comments of Public Knowledge, NBP Public Notice #30, GN Docket Nos. 09-137, 09-51, 09-47, at 12-13 (filed Jan. 26, 2010) (“Public Knowledge NBP Reply Comments”); Public Knowledge *Ex Parte* Presentation, GN Docket No. 09-51 *et al.* (filed Feb. 19, 2010).

<sup>76</sup> See, e.g., *Cable Modem Order* ¶¶ 33, 40; *Wireline Framework Order* ¶ 9.

<sup>77</sup> See, e.g., Public Knowledge NBP Reply Comments at 8-10.

<sup>78</sup> See *id.* at 10-11.

<sup>79</sup> *Wireline Framework Order* ¶ 146 (describing Commission authority to “ensure[ ] that consumer protection needs are met by all providers of broadband Internet access service...built on...ancillary jurisdiction under Title I”); see Public Knowledge NBP Reply Comments at 11-13.

a ground for the Commission's exercise of authority over certain broadband Internet access services and related programs.<sup>80</sup> For instance, incumbents that now argue against Commission authority to adopt open Internet rules have in the past endorsed the Commission's ability to craft rules, based on ancillary authority over all broadband providers, that would be designed to protect consumers and promote the public interest in the delivery of broadband services.<sup>81</sup> Sometimes these parties opposing the Commission's proposed open Internet rules reverse course within the same proceeding, not just over the course of a few years. While some incumbents and trade associations generally acknowledged in the present docket that at least the first four open Internet principles make for good policy, they argued that the Commission might craft such principles for industry guidance but not enforce them, even upon detection of egregious violations of the very same principles.<sup>82</sup>

Highlighting further inconsistencies in their arguments, some opponents of the rules proposed in the *NPRM* make the unfounded accusation that open Internet supporters want to regulate the Internet. Despite such claims, it is not open Internet rule proponents but the companies most strongly opposed to such rules that have suggested Congress should act to place

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<sup>80</sup> See Free Press Letter at 6 & n.20.

<sup>81</sup> See, e.g., Comments of Verizon, CS Docket No. 02-52, at 29 (filed June 17, 2002) (“Nor should classification of broadband under Title I lead to any erosion of the consumer protection provisions of the Communications Act. First, broadband providers will almost always be providers of telecommunications services too and will provide them to the same customers to whom they provide broadband.”); see also *id.* (“[T]o the extent that the Commission finds that consumer protection provisions are needed in the public interest, it can and should impose them equally on all broadband providers under Title I. Regulating broadband under Title I does not necessarily equate to total deregulation.”); *Petition of SBC Communications for a Declaratory Ruling*, WC Docket No. 04-29, at 41 (filed Feb. 5, 2004) (quoting *United States v. Southwestern Cable Co.*, 392 US. 157, 173 (1968), for the propositions that “Title I affords the Commission ample authority to address these concerns [regarding IP services]” and that “Title I embodies the “comprehensive mandate” that Congress gave the Commission to enable it to manage developments in “a field that was demonstrably ‘both new and dynamic.’”).

<sup>82</sup> See, e.g., AT&T Comments at 1-2; NCTA Comments at 3.

*more* Internet content, services, and applications under governmental jurisdiction.<sup>83</sup> Proponents of the Commission’s open Internet rules never have argued for such expansive governmental authority over the Internet.<sup>84</sup> They explained at length in opening comments in this proceeding that the Commission has no jurisdiction or reason to subject content, application, and service providers to the rules that the *NPRM* proposes, designed as those rules are to address terminating access issues and other problems arising from broadband Internet service providers’ management of transmission networks.<sup>85</sup>

Finally, the same providers that make inconsistent and unsupported arguments regarding the need to regulate the entire Internet ecosystem lately suggest that Congress should or must act before the Commission can move to protect users from discriminatory and anticompetitive broadband Internet access provider practices.<sup>86</sup> The Public Interest Commenters and, most likely, other open Internet rule proponents would welcome legislation clarifying the Commission’s jurisdiction over broadband Internet access service provider network management practices. In the months or years that may pass before such a bill could be enacted by Congress and signed into law, the Commission must take measured steps to ensure that important broadband policy goals are met and that consumers have protection from practices violating the proposed open Internet rules.

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<sup>83</sup> See, e.g., NCTA Comments at 45-49; AT&T Comments at 13-14, 196-207; Verizon Comments at 2-3; see also Prepared remarks of Verizon Executive Vice President Tom Tauke, New Democrat Network Keynote Speech, Mar. 24, 2010 (“Tauke Keynote”), available at <http://policyblog.verizon.com/BlogPost/714/RemarksVerizonEVPTomTaukeatNewDemocratNetwork.aspx> (suggesting that proposed new legislation regulate all providers in the broader Internet ecosystem because “it matters not whether competition is constrained by a network company or an applications providers or anyone else in the system of linkages that add up to the Internet”).

<sup>84</sup> See Free Press Letter at 7.

<sup>85</sup> See, e.g., OIC Comments at 83-86; CDT Comments at 17-20.

<sup>86</sup> See, e.g., Tauke Keynote; Jim Cicconi, “Boxes Tumbling Down,” AT&T Public Policy Blog (Mar. 25, 2010), <http://attpublicpolicy.com/broadband-policy/boxes-tumbling-down/>.

C. *Title II Classification Would Allow Adoption and Enforcement of Appropriate Open Internet Rules, But Not Result in Unduly Burdensome Regulation.*

The Public Interest Commenters join with a broad range of lawmakers, companies, associations, and advocacy organizations calling upon the Commission to examine these classification issues and settle the question of its authority over broadband Internet access transmission facilities. Such an examination is necessary before the Commission can implement the uncontroversial first four open Internet principle first articulated in 2005, adopt additional broadband initiatives and safeguards, and generally prevent abuses in the provision of broadband Internet access services.

Opponents of open Internet rules lodged a series of vociferous protests in response to these suggestions raised by the PIC Initial Comments and other commenters' submissions. Several such submissions indicated that the Commission could and should recognize more explicitly, and treat more appropriately, the unmistakable transmission component of broadband Internet access service. The unfounded predictions and scare tactics adopted by parties opposed even to considering such steps, and opposed to the Commission's proposed open Internet rules more generally, centered typically on the idea that any Title II classification inexorably would lead to heavy-handed utility-style regulation.<sup>87</sup> Opponents of the proposed rules argued that such a correction in the classification of broadband Internet access transmission facilities would be inappropriate for the competitive and dynamic broadband marketplace, and that such Commission action would dampen or choke off investment in broadband infrastructure.<sup>88</sup>

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<sup>87</sup> See, e.g., Letter from Kyle McSarrow, National Cable & Telecommunications Association, *et al.* to Julius Genachowski, Chairman, Federal Communications, GN Docket Nos. 09-191, 09-51; WC Docket No. 07-52, at 1, 5 (filed Feb. 22, 2010).

<sup>88</sup> See *id.* at 6.

As explained in prior sections of these reply comments, there is little if any merit to the premise that the broadband Internet access market is so highly competitive as to police itself effectively and prevent discriminatory practices. Just as importantly, it is wrong to suggest that adoption of the rules proposed in the *NPRM* – including a simple nondiscrimination rule with narrow but flexible exceptions for reasonable network management practices – would entail a return to the full gamut of rules that appeared in the same title as such provisions in the telecommunications services context.<sup>89</sup>

Thus, as explained in greater detail in Part IV below, adoption of open Internet rules by the Commission would not wreak havoc on investment in networks, nor even deter such investment to any measurable degree, and would have the positive economic and societal benefits described in the PIC Initial Comments and other submissions. The positive net effect from preserving the open Internet, with minimal (but likely still positive) impacts on network investment decisions, holds true whether or not the Commission’s oversight mechanisms reside within its Title II authority over the transmission component of wireline and wireless broadband Internet access facilities. The Public Interest Commenters respectfully submit that the Commission should act now to clarify its authority, rather than subjecting each and every broadband deployment, adoption, consumer protection, and open Internet preservation initiative to the threat of litigation over authority.

### **III. The Open Internet Rules Will Promote Free Expression, and Do Not Violate Any Constitutional Rights of Broadband Internet Access Providers.**

#### *A. Preserving the Open Internet Will Promote Free Expression, As Well As Self-Expression and Civil Rights for Typically Marginalized Groups.*

The PIC Initial Comments noted that, far from impinging on First Amendment rights of any broadband Internet users or seeking to regulate the content available to them, rules

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<sup>89</sup> See Free Press Letter at 6; Public Knowledge Reply Comments at 6.

preserving the open Internet would promote and expand access to information and free expression for users of this transformative communications medium. Commission adoption of the *NPRM*'s proposed open Internet rules would increase opportunities for empowerment and self-expression in users' various (and often overlapping) roles as citizens, consumers, students, family members, community leaders, and entrepreneurs.<sup>90</sup> This type of limited but essential governmental action to promote freedom of expression, in the form of access to diverse channels of communication and information, must be paramount. It is the public's First Amendment right to such freedom of expression that takes precedence over any claim of network operator rights to control the speech of others online.

Other commenters filing in support of the Commission's proposed rules concurred that the rules will promote rather than constrict First Amendment freedoms.<sup>91</sup> Commenters noted for the record that the Internet is a "medium that supports and enhances the free expression of citizens and serves as a vehicle for democratic governance and economic activities"<sup>92</sup> –

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<sup>90</sup> See PIC Initial Comments at 24-28.

<sup>91</sup> See, e.g., OIC Comments at 76 ("[T]he importance of protecting 'innovation without permission' by start-ups and non-profit entities does not fit neatly within the rubric of competition law, nor does the social, political, and cultural value of the incredible outpouring of free expression and creativity online."); CDT Comments at 30-31 (describing the vast, speech-enhancing power and potential of the Internet, and explaining that "[d]iscrimination by Internet access providers could directly threaten these speech-enhancing characteristics"); Google Comments at 11-12 (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945) ("Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.")); *id.* at 49-50.

<sup>92</sup> Media Justice Comments at 7 (citing need for nondiscrimination rules that ensure fairness, equality, and freedom online in communities to be newly empowered by digital inclusion based on broadband technologies); see also Free Press Comments at 134-136; *id.* at 135 (describing a Commission workshop in which "panelists, many of them women and people of color, testified to the importance of an open Internet on their ability to engage in community and political mobilization, to start a new business providing video programming to underserved audiences, and to create community-responsive content that defies stereotypes often prevalent in media").

particularly for historically underserved populations and areas, such as communities of color and rural areas.<sup>93</sup> By reducing gatekeeper control over broadband Internet access facilities, all built using public rights-of-way and public spectrum, the Commission would not impinge on speech but remove barriers to free expression online.

*B. Claims That the Proposed Open Internet Rules Would Violate Network Operators' First and Fifth Amendment Rights Are Without Merit.*

Without fully acknowledging these tremendous gains for free expression that open Internet rules would yield and preserve, both online and more broadly in society, opponents of the Commission's proposed rules challenged them on the ground that such rules would abridge network operators' constitutional rights. Despite strenuous attempts to make such a case in the initial round of comments,<sup>94</sup> neither the arguments regarding operators' First Amendment rights nor their Fifth Amendment rights against uncompensated takings have any merit with respect to any of the proposed open Internet rules, including the nondiscrimination and transparency rules.

1. Broadband Internet Access Service Providers Are Not Speakers When Transmitting the Speech of Others.

First, the Public Interest Commenters note that broadband Internet access service providers do not act as speakers for purposes of First Amendment analysis when such entities merely transmit information of a customer's or another user's choosing. Established provisions in both the Communications Act and the Copyright Act reinforce this understanding that the

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<sup>93</sup> See Media Justice Comments at 4-5, 9; see also Remarks of Commissioner Mignon L. Clyburn At the Workshop on Speech, Democracy and the Open Internet (Dec. 15, 2009), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-295258A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-295258A1.pdf) (“The Internet’s openness is also particularly important for minority voices, which have traditionally encountered a whole host of barriers to reaching audiences through traditional media.... [W]hen it comes to the Internet, the opportunity is here and now. That is, as long as the Internet remains an open platform.”); Google Comments at 10-11 (citing Commissioner Clyburn remarks).

<sup>94</sup> See, e.g., AT&T Comments at 235-48; Verizon Comments at 111-23; NCTA Comments at 49-54.

network operator is *not* acting as a speaker in such instances, but as a conduit.<sup>95</sup> Statutory provisions in both acts provide safe harbors from potential liability for network operators when these entities serve as a conduit for the speech of others, but are not themselves speakers. Section 230(c)(1) of the Communications Act<sup>96</sup> makes clear that no network operator “shall be treated as the publisher or speaker of any information provided by another information content provider.” In similar fashion, Section 512(a) of the Copyright Act<sup>97</sup> stipulates that under various Digital Millennium Copyright Act (“DMCA”) safe harbors, a “service provider shall not be liable...for infringement of copyright by reason of the provider’s transmitting, routing, or providing connections for” material distributed by others over its network.

It is true that broadband Internet service providers, like other communications facilities operators, have First Amendment rights.<sup>98</sup> Any First Amendment protections they may claim, however, only apply when such entities act as speakers – as would be the case for any other individual or entity that alleges a First Amendment violation. The Supreme Court’s most recent cable “must-carry” decisions, beginning with the *Turner I* decision handed down in 1994,<sup>99</sup> stated conclusively that “Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.”<sup>100</sup> Nevertheless, this is the case *only* when such providers produce or distribute

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<sup>95</sup> See CDT Comments at 31 (“[B]roadband providers are not engaging in their own speech through the provision of Internet access – they are simply communications conduits, and as such they do not have First Amendment objections to a requirement that they carry all communications.”).

<sup>96</sup> 47 U.S.C. § 230(c)(1).

<sup>97</sup> 17 U.S.C. § 512(a).

<sup>98</sup> See, e.g., Comments of Bright House Networks, GN Docket No. 09-191, WC Docket No. 07-52, at 15-16 (filed Jan. 14, 2010).

<sup>99</sup> *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (“*Turner I*”).

<sup>100</sup> *Id.* at 636.

original programming, or when they “exercise[ ] editorial discretion over which stations or programs to include” in their space-delimited linear video programming channel lineup.<sup>101</sup>

Cable operators and other broadband Internet service provider service providers exercise discretion over their own speech on the Internet, but do so on such entities’ own websites and in their other communications.<sup>102</sup> However, as Section 230 and the DMCA provisions cited above illustrate, broadband Internet access service providers neither speak nor exercise editorial control when serving as a conduit for the speech of their customers, or for the speech of non-customers who communicate with the ISP’s customers over each such ISP’s access facilities. The *Turner I* Court noted that cable must-carry rules may be understood to regulate speech by reducing the number of channels over which cable operators exercise unfettered control and over which they may transmit their own messages.<sup>103</sup> Conversely, network operators in the broadband Internet context cannot plausibly be characterized as compelled to speak when they carry the data of others in nondiscriminatory fashion and in compliance with the safe harbor provisions described above, nor do they suffer any loss in the number of “channels” over which they may themselves speak. Broadband Internet access service providers have no claim to speak for, control, or edit all sources of information available to their customers who access the public Internet, and cannot

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<sup>101</sup> See *id.* at 637.

<sup>102</sup> See AT&T Comments at 235-236 (“Providers of Internet access service... may include original content in their offerings; they may engage in the editorial organization of content; and they may provide tailored offerings aimed at certain subscriber groups.”). Of course, implicit in AT&T’s contention that Internet access service providers *may* do such things is the fact that they may not, at least at times when they serve as a conduit for others’ speech and exercise no editorial control thereover.

<sup>103</sup> See *Turner I* at 637.

be permitted to conflate network owners' role as speakers for purposes of their own content with their role as conduits for the speech of others.<sup>104</sup>

2. Nondiscrimination Principles and Protections Are Constitutionally Valid No Matter the Level of Competition in the Market.

Part I of these reply comments explained that there is no meaningful competition in the provision of high-speed broadband Internet access services, but demonstrated that even in the presence of such competition, individual subscribers subject to the terminating access monopoly enjoyed by their providers must have the protection of open Internet nondiscrimination rules. Thus, broadband Internet service providers do indeed act as “bottlenecks” for information flowing both to their own customers – and to other providers’ customers as well, as evidenced by the widespread effect that Comcast’s blocking of peer-to-peer applications had on all users’ access to the blocked application.<sup>105</sup> Part II of these reply comments then set forth in brief the case for firmly grounding the Commission’s statutory authority for such rules in its historical and current Title II authority over communications transmission facilities. In no event does such oversight by the Commission violate the First Amendment, because network operators’ status as

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<sup>104</sup> The Commission has rejected on several occasions reasoning similar to that advanced by broadband Internet service providers here. Although the D.C. Circuit recently vacated the Commission’s *Comcast Blocking Order*, the vacated decision’s analyses are still just as persuasive with respect to determinations that prohibiting such conduct “does not prevent [the ISP] from communicating with its customers or others” and does not “dictate[e] the content of any speech.” See *Comcast Blocking Order* ¶ 43 n.203 (citing similar Commission decision regarding the 700 MHz “C Block” spectrum in *Service Rules for the 698–746, 747–762, and 777–792 MHz Bands*, WT Docket Nos. 07-166, 06-169, 06-150, *et al.*, Second Report and Order, 22 FCC Rcd 15289 ¶¶ 217–220 (2007)).

<sup>105</sup> See, e.g., Ryan Paul, “EFF study confirms Comcast's BitTorrent interference,” *Ars Technica* (Nov. 28, 2007), <http://arstechnica.com/old/content/2007/11/eff-study-reveals-evidence-of-comcasts-bittorrent-interference.ars> (discussing Electronic Frontier Foundation, “Packet Forgery by ISPs: A Report on the Comcast Affair” (Nov. 28, 2007), [available at http://www.eff.org/files/eff\\_comcast\\_report.pdf](http://www.eff.org/files/eff_comcast_report.pdf)).

conduits for speech rather than speakers themselves does not depend on the level of competition in the market for communications services.

One would expect that a nondiscrimination requirement for parties transmitting the speech of others would be quite familiar to entities that provide communications services. No court has held that common carrier obligations for traditional telephone companies violate the First Amendment. Without deciding the issue, key Supreme Court opinions on the topic have indicated that, quite obviously, the constitutionality under the First Amendment of such common carrier obligations cannot be dependent on the communications platform or infrastructure in use.<sup>106</sup>

Moreover, and tellingly for purposes of the present discussion, Congress has nowhere suggested that competition among telecommunications service providers obviates the need for nondiscrimination rules protecting traffic that flows over competing networks. Quite to the contrary, in authorizing the Commission to forbear from the application of certain Title II obligations to commercial mobile service provider common carriers, Congress expressly forbade the Commission from lifting any provisions in Sections 201, 202, and 208 of the Communications Act – which together prohibit unreasonable discrimination in the provision of services.<sup>107</sup> It is difficult to conceive of a statute, rule, or reasoned policy that would permit unreasonable and discriminatory network management practices on voice networks merely

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<sup>106</sup> *Turner I*, 512 U.S. at 684 (O'Connor, J., concurring in part and dissenting in part) (“[I]t stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies; such an approach would not suffer from the defect of preferring one speaker to another.”).

<sup>107</sup> *See* 47 U.S.C. § 332(c)(1)(A); *see also* Free Press Comments at 46 (“Congress allowed the discontinuance of regulations so long as they were not needed to ensure a specific desired outcome – *just, reasonable and non-discriminatory treatment*.... Section 332(c)(1)(A) of the Act... specifically forbids the FCC from removing CMRS providers from an obligation to adhere to Sections 201, 202 and 208 of the Act.”).

because multiple wireline and wireless providers offer service in the same geographic market. Likewise, it should be unimaginable to condone such discriminatory practices on broadband Internet access provider networks that will serve as our basic communications infrastructure for the 21st Century.

NCTA relies in its comments on the idea that common carrier principles are inapposite, or perhaps constitutionally infirm, “in a private marketplace for speech.”<sup>108</sup> Naturally, NCTA cites no case recognizing the existence of any such “private” marketplace, because the First Amendment protects public discourse no matter the medium or forum in which it occurs. In fact, “it is the purpose of the First Amendment to preserve an *uninhibited* marketplace of ideas,” protecting freedom of expression in the public sphere; but these protections cannot “countenance monopolization of that market, whether it be by the Government itself or a private licensee.”<sup>109</sup>

Contrary to NCTA’s cramped reading of the Supreme Court’s seminal *Red Lion* decision, the principles of that case are not limited to broadcast media in which government plays a “unique” role.<sup>110</sup> *Red Lion* itself relied on *Associated Press v. United States*,<sup>111</sup> a case regarding newspapers, which the Court historically has treated quite differently from broadcasters. Yet, as the *Associated Press* Court ruled, “[i]t would be strange indeed [ ] if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom.”<sup>112</sup> Thus, “a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally

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<sup>108</sup> NCTA Comments at 55.

<sup>109</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (emphasis added).

<sup>110</sup> See NCTA Comments at 55.

<sup>111</sup> 326 U.S. 1 (1945).

<sup>112</sup> *Id.* at 20.

guaranteed freedom.”<sup>113</sup> This governmental authority and ability to protect free expression is not limited to the broadcast industry at issue in *Red Lion*, or even to instances of anticompetitive behavior at issue in *Associated Press*, but arguably and quite plausibly to any use of “private marketplaces” or private property that is made available to the public for use as a conduit and forum for speech.<sup>114</sup> In the act of providing service to their customers and authorized users, broadband Internet access service providers serve as just such a conduit and forum.<sup>115</sup> Nondiscrimination or common carriage-like protections of the type proposed in the *NPRM* are both necessary to the preservation of the Open Internet and valid under the First Amendment.

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<sup>113</sup> *Id.*

<sup>114</sup> *See, e.g., Marsh v. Alabama*, 326 U.S. 501, 506 (1946) (“Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”); *see also id.* at 506-507 (noting that operation of private facilities may not “unconstitutionally interfere[ ] with and discriminate[ ] against interstate commerce,” especially when such private property is operated pursuant to an express or implied governmental franchise).

<sup>115</sup> NCTA also relies improperly on *Buckley v. Valeo*, 424 U.S. 1 (1976), and similar cases for the proposition that government may not “restrict the speech of some elements of our society in order to enhance the relative voice of others.” *See* NCTA Comments at 63 (quoting *Buckley*, 424 U.S. at 48-49). As explained herein, the open Internet rules would not restrict broadband Internet service providers’ speech, but merely their ability to block or degrade the speech of customers and non-customers alike who make use of such providers’ facilities to access or deliver data via the public Internet. Even the Supreme Court’s expansive holding in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), on which commenters opposing the Commission’s rules may be tempted to rely in this reply comment period, could not plausibly be construed to suggest that every activity in which a corporation or property owner may engage is speech. Yet, other speakers who wish to contract for a “bigger soapbox” of sorts, in order to take advantage of their greater resources that NCTA trumpets, *see* NCTA Comments at 63, might conceivably purchase dedicated transmission capacity from broadband Internet service providers offering them such advantages in the form of telecommunications service offerings. *See* PIC Initial Comments 15-17. Parties who wish to contract for more speed or priority in the distribution of their speech must not be permitted to do so by contracting with broadband Internet access service providers to block and degrade the traffic of other speakers on the public Internet. *See Associated Press*, 326 U.S. at 20 (“Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.”).

3. The Rules Proposed in the *NPRM* Would Not Effect a Taking.

Neither do the rules that the Commission proposed in the *NPRM* constitute an uncompensated taking in violation of the Fifth Amendment. Despite certain broadband Internet access service providers' feints in this direction,<sup>116</sup> the proposed rules could constitute neither a physical taking of property nor a regulatory taking of the variety recognized by the Supreme Court. To prove a physical taking without compensation in violation of the Fifth amendment, complainants must demonstrate at minimum that a "permanent physical occupation" has occurred.<sup>117</sup> The open Internet rules that the Commission proposed in the *NPRM* quite obviously neither intend nor effect any such physical occupation. The fact that electronic data may flow over the facilities of wireline and wireless broadband Internet access service providers does not mean that such traffic effects a permanent physical occupation of those facilities.<sup>118</sup>

The proposed rules also do not constitute a regulatory taking, as the open Internet proposals in the *NPRM* could not be said to deprive broadband Internet access providers of all economically beneficial uses of their broadband facilities.<sup>119</sup> Furthermore, the proposed rules cannot be said to interfere with any reasonable investment-backed expectations.<sup>120</sup> Broadband network operators have been on notice for at least the last decade and a half that the Commission

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<sup>116</sup> See AT&T Comments at 244-248; Verizon Comments at 118-123.

<sup>117</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-27 (1982). The *Loretto* decision found that even a minimal physical occupation could constitute a taking, but it preserved government's ability to adopt laws and regulations that may require some expenditure or the purchase of additional property by regulated parties. *Id.* at 440 ("[O]ur holding today in no way alters the...State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, [and] fire extinguishers .... [s]o long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building....").

<sup>118</sup> See *Cablevision Systems Corp. v. FCC*, 570 F.3d 83, 98 (2009) (holding that alleged "electronic" occupation of communications facilities did not amount to a physical taking in the cable must-carry context).

<sup>119</sup> See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992).

<sup>120</sup> See *id.* at 1034.

would conduct a series of proceedings in order to determine the proper regulatory classification and treatment for broadband facilities, culminating with the milestone of the 2005 adoption of the first four Internet Policy Statement principles. At minimum, the industry has known that the Commission intended to oversee broadband Internet access facilities in a manner designed to promote access to lawful content, applications, services, and choice among providers. For these reasons, the Commission should reject open Internet rule opponents' takings claims along with such opponents' invalid First Amendment claims.

#### **IV. The Commission's Proposed Open Internet Rules Will Promote Innovation, Employment, and Investment in Online Services But Without Creating Disincentives to Investment in Networks.**

Opponents of the Commission's proposed open Internet rules have not stopped at attacking the need for the rules, the Commission's authority to adopt them, and their constitutional validity. They also have deployed a similarly meritless collection of arguments and conjectures regarding the likely economic impact of the rules.<sup>121</sup> The biased economic studies cited by rule opponents cannot withstand scrutiny, nor can they compare to the more rigorous and objective analyses submitted by parties generally supporting the Commission's proposals in the *NPRM*.

At the outset, the Public Interest Commenters emphasize that open Internet rules are the historical norm, with nondiscrimination rules and then open Internet principles in place for most broadband Internet access service providers since the dawn of the Internet era.<sup>122</sup> Preserving this framework actually will promote and drive adoption and innovation by individuals and new

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<sup>121</sup> See, e.g., Comcast Comments at 39-44; CTIA Comments at 24-25; Verizon Comments at 56-57.

<sup>122</sup> See, e.g., PIC Initial Comments at 9; OIC Comments at 16-17; Google Comments at 14 & nn.39-40.

entrepreneurs alike.<sup>123</sup> Continued openness and availability of content, applications, and services that are relevant to – and indeed, created by – people in communities, geographic regions, and demographic groups with lower-than-average adoption rates will spur increased uptake of broadband Internet access service, as its benefits become more readily apparent to individuals in these categories.<sup>124</sup>

Yet, as parties commenting in favor of the proposed rules explained in the initial round of comments, the open Internet architecture in place today does more than result in a better end-user experience, greater adoption, and consequently improved digital empowerment and self-expression for all. That architecture also generates millions of jobs, billions of dollars in revenues, and even trillions of dollars for the nation’s gross domestic product.<sup>125</sup> Just as are the civic and social gains fostered by the open Internet, such systemic economic gains are most worthy of protection from Commission rules that will lightly and appropriately oversee the marketplace to ensure the continuation and expansion of these benefits.

In addition to these somewhat more tangible, visible, and quantifiable economic benefits, the open Internet produces other less easily recognized and “hidden” benefits for the United States economy.<sup>126</sup> A recent study by the Institute for Policy Integrity at the New York University School of Law found that the Internet produces billions of dollars in “free” value for

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<sup>123</sup> See, e.g., Media Justice Comments at 7-8.

<sup>124</sup> See *id.*

<sup>125</sup> See, e.g., Google Comments at 6 and n.8 (noting that “global information technology employment will grow to 42 million jobs by the end of 2013 (from approximately 36 million now)” and that companies such as Amazon, eBay, and Facebook have progressed rapidly from start-up status to employ tens of thousands of individuals); *id.* at 6 (“The U.S. consumer electronics industry is expected to generate more than \$166 billion in 2010”); *id.* at i (“The Net adds as much as \$2 trillion to our Gross Domestic Product”); see also OIC Comments at 2-3.

<sup>126</sup> See Inimai M. Chettiar & J. Scott Holladay, Institute for Policy Integrity, New York University School of Law, “Free to Invest: the Economic Benefits of Preserving Net Neutrality,” January 2010, at 7, available at [http://policyintegrity.org/documents/Free\\_to\\_Invest.pdf](http://policyintegrity.org/documents/Free_to_Invest.pdf).

the American public because of the infrastructure's capacity to promote the sharing of information, but also concluded that network operators may not be compensated for all of the value they help to create.<sup>127</sup> Nevertheless, the way to preserving such positive externalities is not to permit or even promote price discrimination and prioritization of the type that broadband Internet service providers may prefer, as this would transfer wealth away from content producers and consumers. Rather, government should provide additional support for network investment where needed, along with sufficient open Internet protections to ensure the continued creation of such value.<sup>128</sup> In this manner, open Internet rules will continue to promote job growth and overall economic gains within the broad ecosystem of content providers, application providers, and other "edge" businesses and users that rely on broadband connectivity.

Despite the protests of some open Internet rule opponents, the rules proposed in the *NPRM* would not serve as a deterrent to network investment or to hiring by network owners. As demonstrated comprehensively and conclusively in the initial comments filed in these dockets by Free Press, regulatory considerations are but one of many factors that broadband Internet service providers consider when making investment and employment decisions. In fact, and quite unfortunately, even when the largest broadband Internet access providers' revenues increase, these companies' "top priorities are reducing capex, increasing revenues, and getting rid of jobs at every turn" to increase profitability.<sup>129</sup> On the other hand, non-dominant network operators

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<sup>127</sup> See *id.* at vii.

<sup>128</sup> See *id.*

<sup>129</sup> Free Press Comments at 64; see *id.* at 62-64 (collecting data on investment and employment levels for regional Bell operating companies); see also Comments of XO Communications, LLC, GN Docket No. 09-191, WC Docket No. 07-52, at 12 (filed Jan. 14, 2010) ("XO Comments") ("[W]hile legacy network providers may complain that they will not invest if they are required to treat all content, services and applications in a nondiscriminatory manner, their own data shows that the open Internet policies and principles...have not deterred investment."). XO cites comments filed by AT&T and Verizon in the Commission's NBP

and broadband Internet access providers have recognized that open Internet rules actually promote new entry by edge companies and by competitive, facilities-based broadband Internet access providers.<sup>130</sup>

## CONCLUSION

For the foregoing reasons, Public Interest Commenters respectfully submit that the Commission should adopt the rules proposed in the *NPRM*, subject to certain modifications set forth in the PIC Initial Comments. As the record in this proceeding illustrates, there is a need for the proposed rules, and the Commission has authority to adopt them under the present statute. The rules proposed in the *NPRM*, modified as the Public Interest Commenters and other open Internet supporters have suggested, will neither abridge the constitutional rights of network owners nor diminish investment and employment by broadband Internet access providers. In fact, adopting these rules to promote and preserve the open Internet will expand freedom of expression for all, including individuals living in typically underserved communities, demographic groups, and regions of the United States, while increasing the overall economic health of the nation and promoting continued innovation and investment in the broadband Internet ecosystem.

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proceeding, touting the companies' respective \$56 billion and \$80 billion investments during the time period when the Commission's first four open Internet principles were thought to regulate providers' conduct and operation of their networks. *See id.* at 12 n.26.

<sup>130</sup> XO Comments at 12 (“Threats by legacy network owners that they will not invest, often made when they face greater competition and the perceived threat of openness, not only have been repeatedly discredited, but in fact underscore exactly why greater competition is needed and openness must be preserved.”); *see also* RCA Comments at 3-5 (supporting a reasonable nondiscrimination rule); *id.* at 4 (“[I]n the absence of protections against harmful discrimination, service providers capable of wielding market power can engage in practices that undercut the Commission’s goals of promoting investment and innovation, promoting competition, and protecting Internet users.”).

Respectfully submitted,

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