

**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

**COMMENTS OF THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL**

October 12, 2010

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The Information Technology Industry Council (“ITI”)<sup>1</sup> hereby files these comments in response to the Public Notice released on September 1, 2010 in the above-referenced dockets.<sup>2</sup>

**I. Introduction And Summary**

As explained in its previous filings in this proceeding, ITI’s membership includes firms from virtually every part of the Internet ecosystem, including companies that design and provide the applications, content, software, hardware and network equipment used by providers and purchasers of broadband Internet access (“BBIA”) service. This diversity of membership means that ITI members have a corresponding diversity of business interests. For example, ITI members that sell network equipment stand to benefit from a regulatory framework that maximizes network investment whereas ITI members that sell applications, services and content stand to benefit from a regulatory framework that most effectively addresses the risk that

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<sup>1</sup> ITI represents over 40 of the nation’s leading information technology companies. For more information on ITI, including a list of its members, please visit <http://www.itic.org/whoweare/2010-member-companies>.

<sup>2</sup> See *Further Inquiry Into Two Under-Developed Issues In The Open Internet Proceeding*, GN Docket No. 09-191, WC Docket No. 07-52 (Sept. 1, 2010) (“Public Notice”).

network owners might discriminate in favor of affiliated applications, services and content.

These comments represent an attempt to reconcile these interests by proposing a balanced framework for specialized services and mobile wireless Internet access services.

## **II. Specialized Services.**

In the Public Notice, the Commission expresses concern that providers of BBIA service that also provide specialized services, to which Open Internet regulations would not apply, may have the incentive and opportunity to evade Open Internet regulation, to divert resources away from BBIA services or to engage in unreasonable discrimination. *See* Public Notice at 2-3. The Commission seeks comment on the most effective means of addressing its concerns and, in particular, suggests consideration of six regulatory mechanisms:

- A clear definition of BBIA service;
- A stand-alone offer rule under which BBIA service providers that offer customers a bundle of BBIA service and specialized services also offer BBIA service on a stand-alone basis, separate from specialized services;
- A capacity allocation rule under which BBIA service providers would be required to allocate a minimum, and possibly expanding, level of capacity to BBIA service;
- A disclosure rule under which information regarding specialized services would be disclosed to enable third parties to assess the effect of specialized services on, for example, the market for BBIA service;
- A nondiscrimination rule under which BBIA service providers that enter into commercial arrangements with affiliated or unaffiliated specialized service providers would be required to make such arrangements available to third parties; and
- A line-of-business rule under which BBIA providers would be permitted to provide only those specialized service offerings that have the characteristics defined by the FCC.

If the FCC does proceed with establishing regulations governing specialized services, it should seek to strike the proper balance between providing BBIA service providers the opportunity and incentive to invest in new and innovative services while at the same time addressing perceived

concerns regarding the effect of BBIA service providers' offer of specialized service. This balance could be achieved by adopting a complementary subset of the proposals set forth in the Public Notice, subject to the adjustments discussed below.

In general, rules intended to address perceived harms associated with the BBIA providers' provision of specialized services should begin with appropriate definitions of BBIA and specialized services. BBIA service should be defined to consist of high-speed connections to customers that enable customers to transmit data to and receive data from any point on the public Internet. The FCC should clarify that providers of BBIA service are free to provide any other services *via* infrastructure shared with BBIA service, including services that utilize prioritization or other means of delivering quality of service through some or all of the shared transmission path, and services that use Internet Protocol and/or services that provide access to Internet content, applications, or services. The FCC should adopt a definition of specialized services that is limited to wireline services that encompass these functionalities.<sup>3</sup> Moreover, the FCC should clarify that specialized services shall not be subject to the rules adopted in this proceeding except as expressly described below.

If the FCC decides to adopt regulations addressing concerns associated with BBIA providers' offer of specialized services, it should do so by establishing three basic requirements. *First*, it would be appropriate to adopt a stand-alone offer rule, along the lines proposed in the Public Notice, under which BBIA service providers would be required to offer BBIA service on a stand-alone basis. This rule addresses the concern that a BBIA service provider might have the

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<sup>3</sup> The regulations concerning specialized services discussed in these comments should be understood to apply only to wireline providers of BBIA services. Thus, references in this section of the comments to BBIA service providers and to the specialized services they offer encompass solely wireline providers of BBIA services and the wireline specialized services they offer.

incentive to evade Open Internet regulations by offering BBIA service solely or usually as part of a bundled offering that includes one or more specialized services. If a provider were to take such an approach, it might be difficult for customers and regulators to monitor the characteristics of BBIA. In contrast, where BBIA is offered on a stand-alone basis, it is easier to monitor the characteristics of the service and to determine, if necessary, whether the service complies with any applicable Open Internet regulations.

*Second*, the FCC should also require that a BBIA service provider continue to provide customers at least the level of capacity provided as of a date certain. This requirement addresses the concern that a BBIA service provider might have the incentive and ability to divert network capacity away from BBIA service to other services, such as specialized services, that are not subject to Open Internet regulations. The FCC should revisit the adequacy and necessity of this requirement on a regular basis. In so doing, the FCC should recognize that BBIA service providers have historically invested aggressively to increase the capacity of their networks and to provide customers with connections to the Internet that have consistently increased in speed and reliability.

*Third*, the FCC should adopt disclosure rules under which information regarding specialized services would be disclosed to enable customers, the FCC and other third parties to monitor and evaluate the relevant characteristics of specialized services. Such disclosure rules would allow customers to make informed service provider choices. Customers should know when and to what extent managed services affect the capabilities of the provider of broadband Internet access service. Disclosure rules would also provide the FCC with information to assess the public policy implications of BBIA service providers' offer of specialized services and, if necessary, to report to Congress regarding such implications.

While these three requirements would sufficiently address the major perceived concerns associated with the provision of specialized services by BBIA providers, the FCC should decline to apply other proposals described in the Public Notice. For example, the FCC should not prohibit a BBIA service provider from offering services that do not fall within the definition of specialized services. There is no basis for concluding that a BBIA service provider's offer of non-specialized services raises any public policy concerns today or in the future. Indeed, it is not even possible to predict what such services might be in the future. The FCC should not needlessly adopt any regulations that undermine investment in the development of new services.

In addition, there is no reason at this time to require that a BBIA service provider offer specialized services on a nondiscriminatory basis. The focus of this proceeding is to ensure that Internet access services continue to provide a platform for investment, innovation and civic engagement. The requirements that BBIA service providers offer Internet access on a stand-alone basis and subject to minimum capacity commitments sufficiently address any perceived concerns regarding the effect of BBIA service providers' offer of specialized services. Establishing affirmative behavioral requirements applicable to specialized services would not advance this objective. Such behavioral requirements could also unnecessarily undermine BBIA service providers' incentive to invest in new innovative services. As a backstop, a rule requiring disclosure by BBIA service providers of the characteristics of their specialized service offerings will allow the FCC and Congress to monitor the effect of specialized service offerings on a going-forward basis.

### **III. Mobile Wireless Internet Access.**

In the Public Notice, the Commission seeks further comment on whether and to what extent it should establish Open Internet rules governing Internet access service provided by mobile wireless providers. In particular, with regard to mobile wireless providers' provision of

Internet access service, the FCC seeks input on the extent to which it should adopt regulations regarding (1) the transmission, restriction or blocking of applications, (2) disclosure requirements, and (3) the attachment of non-harmful third-party devices. *See id.* at 5-6.

Mobile wireless networks differ from wireline networks in important respects. [cites] For example, providers of mobile wireless Internet access service face engineering challenges associated with limited available spectrum and users' mobility that wireline providers do not face. These differences warrant differential treatment of mobile wireless and wireline providers of BBIA service.

If the Commission decides to adopt rules governing the provision of BBIA service by mobile wireless providers, such rules should again balance the need to give network owners the incentive to invest in new and innovative services with the goal of addressing perceived concerns regarding the incentives of mobile wireless providers of BBIA service. The FCC could strike this balance by adopting the following basic principles. *First*, mobile wireless BBIA providers should not, subject to reasonable network management, be permitted to block consumers from accessing lawful content. This requirement promotes the objective that consumers should continue to be able to use Internet access as they generally have in the past -- to access any and all content *via* the public Internet.

*Second*, when acting as a wireless network operator and not as an application distributor or store, a provider of mobile wireless BBIA service provider should not, again subject to reasonable network management, be permitted to block applications that compete with the downstream services offered by the mobile wireless BBIA service provider or by entities with which the mobile wireless BBIA service provider is a partner for purposes of the service at issue. This requirement addresses the perceived concern that a mobile wireless BBIA service provider

might have the incentive to block online applications in order to preserve its market share in the provision of legacy downstream retail services.

*Third*, mobile wireless BBIA service providers should be required to comply with robust disclosure requirements similar to those that should apply to wireline BBIA service providers. These rules should require the disclosure of sufficient information to enable consumers and content, application, service and device providers to make informed choices regarding use of the BBIA service offered by the mobile wireless provider.

Taken together, these three basic requirements would ensure that consumers are able to access the content, applications, and services they seek. Consumers will also be able to monitor the actual performance of their mobile wireless BBIA service, thereby maintaining the preconditions for continued robust competition among mobile wireless providers.

At the same time, qualifying the prohibitions against blocking access to lawful content and against blocking applications that compete with a mobile wireless provider's downstream services with the right to engage in reasonable network management allows network owners to manage network capacity to ensure optimal service for their customers. Moreover, as ITI has explained, the definition of reasonable network management for mobile wireless networks should reflect the special challenges faced by mobile wireless network operators.<sup>4</sup> As ITI has also explained, the FCC should rely primarily on a case-by-case review of specific factual situations to determine what constitutes reasonable network management.<sup>5</sup>

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<sup>4</sup> See ITI Comments, GN Docket No. 09-191, WC Docket No. 07-52 (filed Oct. 12 2010) at 9..

<sup>5</sup> See *id.* at 8.

#### **IV. Conclusion**

The FCC should modify the proposals in the Public Notice in the manner described herein.

Respectfully submitted,

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