

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

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

**Comments of
The United States Telecom Association
On the
Further Inquiry Into Two Under-Developed Issues
In the Open Internet Proceeding**

The United States Telecom Association (USTelecom) files these comments in response to the Commission’s Public Notice of September 1, 2010 seeking comment on what it describes as two under-developed issues in these proceedings.¹

Introduction and Summary

Although the *Public Notice* is nominally focused on two specific issues, it does not change the core problems associated with Commission action that would fundamentally alter the light-touch regulatory model that has incited the U.S. Internet eco-system to flourish over the past decade. Specifically, USTelecom continues to

¹ *Further Inquiry Into Two Under-Developed Issues in the Open Internet Proceeding*, Public Notice, DA 10-1667 (September 1, 2010) (*Public Notice*).

believe that moving forward with Internet regulation as is being considered in this proceeding would undoubtedly discourage investment in broadband networks necessary to achieving the core goals of the National Broadband Plan.

In particular, to the extent the *Public Notice* is to be read as suggesting that there is some growing agreement in support of having the Commission adopt new Internet Regulation rules “at least on fixed or wireline broadband platforms,” USTelecom must strongly disagree. The *Public Notice* itself recognizes that given the rapidly evolving nature of the Internet, promulgating rules that freeze innovation at a particular point in time “may have consequences that are difficult to foresee”²—but then appears to propose doing just that despite the fact that the technologies underlying, and services offered over, wireline broadband networks very much continue to evolve rapidly.

Indeed, rather than any “narrowed disagreement” on Commission action in this proceeding, there is a growing recognition that Congress is the proper venue for deciding in the first instance whether, and if so how, to modify today’s light-touch regulatory model. As Chairman Genachowski recently correctly stated about the options available to the Commission for regulating broadband, “[t]here is no clean solution because we have a Communications Act that wasn’t written for broadband.”³ The Commission should heed this recognition and the directions of at least 300 Members of Congress and defer to the legislative branch before moving forward with regulating the Internet.

If, however, the Commission were to move forward with Internet regulation despite the acknowledged lack of legislative guidance, it must be particularly mindful here of the law of unintended consequences referenced in the *Public Notice*. The *Public*

² *Public Notice* at p. 2.

³ Washington Post, “For FCC Chief a frustrating disconnect” by Celia Kang (October 3, 2010).

Notice itself is replete with ambiguity reflecting the simple fact that under the existing *status quo* there have been virtually no “violations” that could guide the Commission in defining a problem requiring regulatory intervention. Instead, the Commission is left to speculate about how the Internet eco-system (including applications and managed services) and Broadband networks (both wireline and wireless) might develop, and to lock in Internet Regulation based solely upon the accuracy of such speculation. In drawing these lines, the Commission must exercise extreme care not to create competitive advantages in the market that could negatively impact the development of any broadband networks and the types of services they could deliver to the benefit of consumers.

Of course, the damage that could result from being wrong—such as diminished broadband deployment and job losses—would likely be irreparable.

I. The Public Notice Persuasively Demonstrates the Premature Nature of this Proceeding.

In describing the possible harms that the Commission is seeking to address, the *Public Notice* is left to using the words “may” or “could” no less than eight times because, with the oft repeated two or three exceptions—none of which relate to specialized services and each of which were resolved quickly – parties favoring the adoption of new rules simply cannot point to any threats of harm that have been demonstrated in the absence of these Internet regulations.

These ambiguities and conditional statements are the manifestations of the inappropriate *ex ante* nature of this inquiry. Because some parties are urging the adoption of rules based upon conjecture and fear-mongering, rather than actual facts, such rules are as likely—and probably more so – to do harm as they are to do good. In

particular, speculative decisions in a market where technology and business-models are changing daily – and where broadband networks are being put to more and varied uses -- are certain to deter innovation and investment in those parts of the Internet ecosystem disproportionately burdened by those rules.

In this regard, there is little doubt that wireline broadband networks are continuing to evolve. For example, the ways in which wireline broadband networks can be best utilized to unleash the enormous social benefits of services such as telemedicine are still being developed, but the full benefits of these services to society may not be possible over traditional “best-efforts” Internet access. The *Public Notice* implicitly recognizes the difficulty and dangers in establishing rules in regards to an Internet ecosystem with rapidly evolving technologies and business models when it acknowledges that “the Commission could address the policy implications of such services if and when such services are further developed in the market.”⁴ But in appearing to suggest that it is prepared to move forward with burdensome regulations on broadband networks that would limit the types of innovative services those network owners could provide to their subscribers, the Commission risks ignoring its own advice.

II. In the Absence of a Demonstrated Showing of Significant Consumer Harm, the Commission Must Not Adopt Rules that Preclude Innovation and Investment By Any Network Owners.

If the Commission does move forward with Internet regulation despite these concerns, it must ensure that the rules are competitively neutral and as narrowly tailored as possible. Unfortunately, much of the *Public Notice* offers up heavy-handed regulation

⁴ *Public Notice* at p. 3.

that will only serve to deny wireline broadband providers the opportunity to offer services that their customers want.

For example, most of the alternative steps identified in the *Public Notice* simply put network owners – particularly wireline network owners – at a competitive disadvantage as compared to others in the Internet ecosystem in offering innovative services to consumers. Other proposed “fixes” (such as mandating additional deployment) are clearly beyond the authority that the Commission has ever exercised with respect to any industry or service (particularly outside of a traditional rate-of-return regulatory environment) and would deeply involve the Commission in broadband network technology, design and deployment. Such policies would undoubtedly have a negative impact on access to capital by broadband network providers.

The most appropriate proposal offered up by the *Public Notice* in this ever-evolving Internet ecosystem is to “address the policy implications of [specialized] services if and when such services are further developed in the market.” This is precisely the manner in which traditional competition and consumer protection rules are applied in nearly all other markets. Short of that, the Commission should not go beyond working with industry to increase transparency so that consumers can make informed choices among providers of all broadband services. Indeed, the broadband marketplace is providing consumers with an ever-growing range of choices that include both broadband Internet access services offered at increasingly higher speeds *and* more specialized services to meet their individual needs. Thus, there is simply no reason to impose prescriptive “neutrality” regulations on this market, which would only serve to depress

investment and harm consumers by denying them choices that they may otherwise have in services that may better meet their needs.

III. There Should Be No Competitive Advantage in the Commercial Marketplace Arising from Regulatory Disparity.

Public Knowledge and others have asserted that the rules should apply to wireless because that technology will be the primary means of Internet access for most consumers in the near future. But this argument merely serves to underscore that the market for Internet access services is increasingly competitive, with wireline, cable and wireless all competing against each other for customers. These facts are contrary to the concerns identified in the *Public Notice* as potentially requiring rules – concerns that are tied to an alleged absence of competition and “limited choice among broadband Internet access service providers.”⁵ In such an increasingly competitive marketplace, it is particularly inappropriate to impose new rules that freeze innovation at a particular point in time and only impose obligations on some participants in the Internet ecosystem.

For example, the *Public Notice* acknowledges that usage based pricing models could provide benefits to wireless consumers; similarly, arrangements such as the “Kindle model” that allow for innovative technologies and applications to reach the market have widely been considered pro-consumer. However, these types of creative business arrangements are also being developed and explored by wireline providers and would be equally pro-consumer when offered over wired broadband connections. The Commission should not impose sweeping *ex ante* rules on any broadband providers when

⁵ *Public Notice* at p. 3.

they would prohibit such innovative arrangements without any opportunity to evaluate how such services actually develop in the market.

Conclusion

USTelecom appreciates that the Commission through this *Public Notice* appears to acknowledge that the Internet ecosystem is extraordinarily complex and evolving, making predictive judgments particularly difficult and dangerous. But, to be clear, these characteristics are equally applicable to wireline broadband networks and the managed services that providers may offer over such networks in the future. We urge the Commission to pay heed to the concerns acknowledged in the Public Notice as to “consequences that are difficult to foresee,” and defer further action in this proceeding until after it receives legislative guidance from Congress in the form of legislation that is, indeed, “written for broadband.”

Respectfully submitted by,

A handwritten signature in blue ink that reads "Jonathan Banks". The signature is written in a cursive style with a horizontal line underneath the name.

Jonathan Banks
Glenn Reynolds
United States Telecom Association
607 14th Street, N.W.
Washington, D.C. 20005
(202) 326-7271

October 12, 2010