

**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 TIME WARNER CABLE INC.**

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Time Warner Cable Inc. (“TWC”) hereby submits its comments in response to the Commission’s September 1, 2010 Public Notice in the above-captioned dockets.<sup>1</sup> The Public Notice addresses two issues that the Commission first raised in the Notice of Proposed Rulemaking regarding “net neutrality”—namely, the potential applicability of such requirements to managed or “specialized” services, and the appropriate treatment of mobile wireless Internet access services.<sup>2</sup> Despite its ostensibly modest purpose of seeking the “further development of these issues in the record,”<sup>3</sup> the Public Notice airs a series of remarkably intrusive proposals that would undercut, rather than promote, the objectives set forth in the NPRM. Far from protecting broadband providers’ ability to “experiment with new technologies and business models in ways that benefit consumers,”<sup>4</sup> as the NPRM pledged to do, these ill-conceived proposals would undermine investment, innovation, and experimentation in the emerging marketplace for specialized services.

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

<sup>2</sup> *Preserving the Open Internet; Broadband Industry Practices*, Notice of Proposed Rulemaking, GN Docket No. 09-191, WC Docket No. 07-52 (rel. Oct. 22, 2009) (“NPRM”).

<sup>3</sup> Public Notice at 2.

<sup>4</sup> NPRM ¶ 103.

While TWC remains committed to working with Congress, the Commission, and relevant stakeholders to address any genuine concerns with respect to net neutrality, there can be no serious argument that “specialized services” warrant regulatory intervention. The Public Notice itself is unable to identify any actual threat posed by specialized services; in fact, it does not even indicate what this category includes. Rather, it posits that any rules the Commission might adopt could be subject to future evasion if providers of broadband Internet access services attempted to shift resources to specialized services with overlapping functionalities. But such compound conjecture cannot provide the foundation for regulation. Rather than chasing perceived loopholes in its proposed net neutrality framework based on alarmism and speculation, the Commission should refrain from imposing such unnecessary and burdensome rules in the first place, or at a minimum, tailor any rules in a manner that addresses only demonstrated harms to competition or consumers without impeding investment. However it proceeds, the Commission should reject the restrictions on specialized services contemplated by the Public Notice, as those measures not only have no factual or legal basis but would deny consumers important benefits.

### **INTRODUCTION AND SUMMARY**

The Public Notice begins with the premise that a consensus has emerged in support of adopting net neutrality rules—implying that the only matter left to be resolved is how those rules should apply to specialized and mobile wireless broadband services.<sup>5</sup> In fact, the record is far more divided regarding the wisdom and legality of such mandates, as TWC and many others

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<sup>5</sup> Public Notice at 1 (claiming that the discussion thus far has “narrowed disagreement” on various aspects of the Commission’s proposed net neutrality framework, including the benefit of “enforcing high-level rules of the road through case-by-case adjudication”); *see also* FCC Chairman Julius Genachowski Statement on Open Internet Public Notice at 1 (rel. Sept. 1, 2010) (“We have moved from a world of four disputed and unenforceable open Internet principles . . . toward the acceptance of six enforceable rules.”).

have identified serious flaws in the proposed rules.<sup>6</sup> But even assuming *arguendo* that the Commission (or, more appropriately, Congress) will impose some form of net neutrality requirements on broadband Internet access services, the Commission should emphatically reject calls to regulate specialized services, as the NPRM itself recommended.<sup>7</sup>

1. The NPRM’s proposal to exclude specialized services from the scope of any new net neutrality mandates was—and remains—fundamentally sound. As the NPRM recognized, specialized services “differ from broadband Internet access services in ways that recommend a different policy approach.”<sup>8</sup> The NPRM also noted the Commission’s interest in addressing such services in a manner that would “allow providers to develop new and innovative technologies and business models and to otherwise further the goals of innovation, investment, competition, and consumer choice.”<sup>9</sup> Promoting such services is important, the NPRM explained, because “[t]he existence of these services may provide consumer benefits, including greater competition among voice and subscription video providers, and may lead to increased deployment of broadband networks.”<sup>10</sup>

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<sup>6</sup> As a general matter, TWC believes that the Commission can more efficiently and reliably ensure that consumers have the online products and service they want by continuing to rely on the marketplace, rather than imposing net neutrality requirements that would restrain investment and innovation and thereby reduce consumer options, among other unintended consequences.

<sup>7</sup> NPRM ¶¶ 108, 149.

<sup>8</sup> *Id.* ¶ 149; *see also id.* ¶ 108 (stating that because such managed services are distinct from broadband Internet access services, “none of the principles we propose would necessarily or automatically apply to these services”).

<sup>9</sup> *Id.* ¶ 149.

<sup>10</sup> *Id.* ¶ 148.

The record developed in response to the NPRM demonstrated widespread support for this application of the Commission’s longstanding policy of vigilant restraint.<sup>11</sup> Not surprisingly, opponents of net neutrality regulation uniformly opposed extending new requirements to specialized services. But even some of the most prominent supporters of net neutrality rules questioned the need for regulation of specialized services and warned against rules that might hinder their development.<sup>12</sup>

The Public Notice, however, signals a troubling shift toward embracing regulation of specialized services in addition to “best efforts” Internet access services. It introduces the prospect of intrusive regulation of specialized services based solely on the unfounded speculation that such services—which the Public Notice does not define—*might* result in some type of consumer harm. As discussed at length in response to the NPRM, such speculation as a legal matter cannot serve as the basis for rules, and particularly not for the extreme sort of restrictions that the Public Notice contemplates. The Public Notice’s hypotheses are flawed in any event, as they not only ignore the absence of any evidence of harm but overlook providers’ strong market-based incentives to ensure that their customers have a quality online experience—whether they

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<sup>11</sup> Reply Comments of Time Warner Cable Inc., GN Docket No. 09-191, WC Docket No. 07-52, at 77 (filed Apr. 26, 2010) (“TWC Net Neutrality NPRM Reply Comments”) (citing various comments, including from staunch proponents of net neutrality regulation, supporting the exclusion of specialized services from the proposed rules).

<sup>12</sup> *See, e.g.*, Comments of Google Inc., GN Docket No. 09-191, WC Docket No. 07-52, at 74-75 (filed Jan. 14, 2010) (“Google Net Neutrality NPRM Comments”) (stating that the Commission’s “chief challenge here is to allow broadband providers to offer certain non-Internet access services in ways that do not detract from incentives to continue providing open and robust broadband Internet access,” and acknowledging that permitting such services without net neutrality regulation would “heighten[] incentives to invest in broadband infrastructure generally”); Comments of the Center for Democracy & Technology, GN Docket No. 09-191, WC Docket No. 07-52, at 47 (filed Jan. 14, 2010) (“CDT Net Neutrality NPRM Comments”) (observing that separate classification of managed services provides an avenue for network operators to experiment with a range of service offerings that might otherwise be unfeasible for network operators to offer on the public Internet for technical or business model reasons).

are using a specialized service or best-efforts Internet access. In fact, far from promoting the public interest, regulating specialized services based on speculative concerns would reduce investment and innovation and deprive consumers of the resultant benefits.

Despite the absence of any evidence to indicate that regulation of specialized services is necessary, the Public Notice seeks comment on a range of unreasonable restrictions, going so far as to suggest the possibility of an outright ban on marketing or even providing any specialized services that include functionalities that also can be provided via a broadband Internet access service. There can be no serious argument in favor of such rules.

*First*, while TWC shares the Public Notice's interest in definitional clarity as a means of avoiding the chilling effects of regulatory uncertainty, the Commission should reject any effort to manipulate the applicable definitions in a manner designed to expand the reach of new regulation. In particular, if the Commission were to define broadband Internet access services *broadly* and limit specialized services to those that have a "different scope or purpose" as the Public Notice suggests, it would foster significant confusion about the relevant boundary between regulated and unregulated services and thus chill innovation with respect to specialized services. And to the extent that the Commission ultimately limits broadband Internet access providers' flexibility to offer service enhancements and prioritization, applying such restrictions to specialized services would risk destroying their central rationale in some cases.

*Second*, the proposed marketing restrictions are highly problematic. Limiting how providers can market specialized services that include functionalities similar to broadband Internet access would undermine the widely shared interest in empowering consumers by ensuring that they have meaningful information about their communications services. Further, such a rule would clearly be unlawful: Apart from the apparent lack of any statutory basis, the

proposed flat ban on speech would not survive any level of First Amendment scrutiny. Similar concerns would apply to any rule that would require providers to offer broadband Internet access on a stand-alone (in addition to bundled) basis—a requirement that is unnecessary in any event, given providers’ clear incentives to maintain such offerings.

*Third*, there is no need to require additional disclosures in connection with specialized services. While TWC agrees that service providers should clearly describe their offerings and explain any relevant limitations, there is no reason to presume that existing customer communications are wanting or that future disclosures will be inadequate. Moreover, to the extent that the Commission itself seeks to gain additional information regarding specialized services, it can rely on existing data collection programs and, if necessary, issue a Notice of Inquiry to solicit further information on particular types of services.

*Fourth*, there likewise is no demonstrated reason to mandate non-exclusivity for specialized services. Indeed, exclusive arrangements are often pro-competitive, and this nascent marketplace is not sufficiently developed to support a contrary finding. Relatedly, the suggestion that providers of specialized services must offer *identical* terms to all parties exceeds even the requirements applicable to common carriers, and thus is clearly inappropriate.

*Fifth*, perhaps most troubling of all the regulatory approaches described in the Public Notice is the notion that the Commission should prohibit or severely restrict broadband Internet access service providers from offering certain specialized services. This proposal amounts to the imposition of line-of-business restrictions comparable to those that previously applied to the Bell Operating Companies—but without the predicate findings of anti-competitive conduct that gave rise to those earlier restrictions. Remarkably, the Commission seems willing to entertain a flat ban on broadband Internet access service providers’ introduction of enhanced service offerings

that are identical to services *already* offered by other entities—such as content delivery networks—despite the absence of any explanation (much less the cogent explanation required by the Administrative Procedure Act) as to why broadband Internet access providers alone should be barred from introducing competitive offerings. Just as the NPRM failed to justify singling out broadband Internet access providers for net neutrality mandates, the Public Notice continues to advance a myopic view of the Internet ecosystem that cannot be squared with the Commission’s stated objectives.

*Sixth*, the Commission is not equipped to determine the appropriate allocation of resources among various broadband service offerings (such as between “specialized” and “best efforts” services), and any attempt to do so would severely chill investment and innovation. Such interference with the technical operation and management of a broadband network would be unprecedented and well outside of the Commission’s proper role or expertise. In fact, the micromanagement contemplated by some proposals set forth in the Public Notice represents the antithesis of the “light touch” that the Chairman and others espoused in launching the underlying NPRM.

**2.** The Public Notice also requests comment on the appropriate treatment of mobile wireless broadband services, seemingly suggesting that they are uniquely situated. TWC urges the Commission to take a broader view than the approach suggested by the Public Notice. While TWC appreciates wireless providers’ interest in avoiding net neutrality mandates, the arguments advanced in favor of restraint in the wireless context apply equally to other broadband offerings. In particular, like wireless broadband services, cable broadband services are spectrum-constrained and increasingly will need to depend on network management to ensure a positive customer experience. The Commission is right to seek comment on how to preserve providers’

discretion to respond to applications that could harm the network or cause significant congestion, but the Public Notice overlooks the fact that such flexibility to engage in competitively neutral network management practices should extend to *all* broadband Internet access providers.

## DISCUSSION

### I. THE COMMISSION SHOULD ADHERE TO ITS ORIGINAL PROPOSAL TO REFRAIN FROM REGULATING SPECIALIZED SERVICES

Although the Public Notice proceeds from the view that the record with respect to specialized services is “under-developed,” TWC believes that the Commission already possesses information sufficient to conclude that there is no factual or legal basis for subjecting such services to new net neutrality mandates. In any event, the Public Notice and the comments on which it relies fail to explain why rules are necessary or how their adoption would be consistent with the important goals of promoting broadband investment and innovation, and they are silent as to the Commission’s legal authority to regulate in this context. The same arguments that counsel against net neutrality regulation as a general matter apply equally—and in some respects even more so—in the case of specialized services.

#### A. Specialized Services Do Not Result in Any Demonstrable Harm Warranting Government Intervention.

TWC and others have explained that a persistent flaw in the arguments favoring net neutrality mandates is the absence of any concrete, real-world problem to be solved.<sup>13</sup> While that basic principle should preclude the adoption of such rules for broadband Internet access services, it applies with even greater force to specialized services, given that it remains entirely

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<sup>13</sup> See, e.g., Comments of Time Warner Cable Inc., GN Docket No. 09-191, WC Docket No. 07-52, at 26-30, 35-38 (filed Jan. 14, 2010) (“TWC Net Neutrality NPRM Comments”); TWC Net Neutrality NPRM Reply Comments at 6-9; Comments of Time Warner Cable Inc., GN Docket No. 10-127, at 47-48 (filed July 15, 2010) (“TWC Broadband Classification Comments”).

unclear how such services will evolve. The case for regulating specialized services is premised on multi-layered speculation: The Public Notice first must speculate about which services might function as “substitutes for the delivery of content, applications, and services over broadband Internet access service,”<sup>14</sup> and it then must speculate about harms that might ensue. Yet such theorizing occurs in a complete vacuum, as the record fails to identify any services (whether available now or planned for the future) that could supplant broadband Internet access.<sup>15</sup> And far from showing that specialized services actually pose a threat to consumers, the record compiled to date confirms the likely benefits of such services.<sup>16</sup>

As TWC and others have explained at length, the Commission cannot reasonably impose burdensome net neutrality mandates based on purely hypothetical harms.<sup>17</sup> Both the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) have cautioned against this very approach. The FTC, for instance, has noted “the inherent difficulty in regulating based on

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<sup>14</sup> Public Notice at 2.

<sup>15</sup> In contrast to the prospect of specialized services that could provide some functionalities offered by broadband Internet access services, it appears that *existing* Internet Protocol (“IP”)-based voice and video services might fall within the “specialized” service rubric. Many of those services are subject to existing Commission regulation, and there has been no allegation, much less any showing, that those regulatory frameworks are inadequate or that consumers are being harmed. While the Public Notice does not focus on IP-enabled voice or video services, the Commission should clarify that they remain outside the scope of this proceeding.

<sup>16</sup> *See, e.g.*, CDT Net Neutrality NPRM Comments at 47-48 (describing numerous examples of the benefits of managed services, including guaranteed highly secure connectivity between branch offices of a large business, highly reliable telemedicine transmissions between medical facilities that could permit remote participation in real-time medical procedures, provision of a speedy link for consumers to download or stream high-definition movies, and fully reliable two-way communications between a patient’s home medical devices and the hospital facilities where those devices could be remotely monitored and calibrated); *see also* NPRM ¶¶ 148-49 (noting likely benefits of specialized services).

<sup>17</sup> TWC Net Neutrality NPRM Comments at 28-29.

concerns about conduct that has not occurred, especially in a dynamic marketplace”<sup>18</sup>—a warning that is particularly applicable here. In fact, experience shows that even federal agencies with expertise in the relevant area are often limited in their ability to project trends accurately.<sup>19</sup> For example, TWC has explained that in connection with the merger of AOL and Time Warner Inc., the Commission imposed various regulations based on expectations concerning the merged company’s future conduct that proved to be flat wrong, forcing the Commission later to undo its action to avoid further harm to innovation.<sup>20</sup> Other parties—including some proponents of net neutrality—likewise have demonstrated that they are no more adept at such prognosticating, having urged government intervention to address predictions about the fate of the Internet that completely failed to materialize.<sup>21</sup>

Even if it were appropriate to proceed on the basis of hypotheses rather than facts, the Public Notice’s conjecture is fundamentally flawed for all of the same reasons that applied to the NPRM’s misguided speculation concerning providers’ practices with respect to best-efforts Internet access. Indeed, the Public Notice reflects an unwarranted skepticism regarding

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<sup>18</sup> Federal Trade Commission, *Broadband Connectivity Competition Policy: A Federal Trade Commission Staff Report* at 157 (2007) (“FTC Staff Report”); *see also Ex Parte* Filing of the United States Department of Justice, WC Docket 07-52, at 2-3 (filed Sept. 6, 2007) (“DOJ Comments”) (cautioning against “prophylactic ‘neutrality’ regulations” and noting that “[h]owever well-intentioned, regulatory restraints can inefficiently skew investment, delay innovation, and diminish consumer welfare, and there is reason to believe that the kinds of broad marketplace restrictions proposed in the name of ‘neutrality’ would do just that with respect to the Internet.”).

<sup>19</sup> *See* Commissioner Meredith Attwell Baker, *Advancing Consumer Interests Through Ubiquitous Broadband: The Need for a New Spectrum*, 62 FED. COMM. L.J. 1, 9 (2010) (stating that “government should be mindful of its limited ability to predict the evolution of this vital economic engine”).

<sup>20</sup> TWC Net Neutrality NPRM Comments at 35-37.

<sup>21</sup> *Id.* at 37 (explaining how arguments for “open access” mandates proved baseless); Comments of AT&T, Inc., GN Docket No. 09-191, WC Docket No. 07-52, at 80-81 (filed Jan. 14, 2010) (quoting various unrealized predictions about the “death” of the Internet).

broadband Internet access service providers' clear market-based incentives. As explained at length in response to the NPRM, such providers must keep pace with competition by preserving and enhancing the quality of the online experience that they provide to their customers.<sup>22</sup> That rationale eliminates any need for regulation of best-efforts offerings, and it applies to emerging specialized services as well.

Nor is there any basis to presume a market failure that might tip such incentives in another direction. As TWC has explained, the Commission has not yet even proposed a process by which to assess whether any provider has market power (let alone made any actual findings in that regard), leaving it without any reason to expect anti-competitive or anti-consumer practices of any kind.<sup>23</sup> The absence of any analytical framework is even more glaring in connection with any distinct class of specialized services, which remains undefined. Far from supplying any basis to find a market failure in this context, the Commission—as well as the FTC, DOJ, and countless others—has consistently found that broadband Internet access providers face strong and growing competition that will drive continued investment in new infrastructure and service enhancements.<sup>24</sup> For instance, TWC has explained that, since 1996, market forces have led it to increase the maximum download speeds for its residential broadband services ten-fold while significantly reducing the entry-level price of broadband access, and TWC aims to maintain that

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<sup>22</sup> TWC Net Neutrality NPRM Reply Comments at 13-14, 80; *see also id.* at 14 (explaining that it is widely understood that all providers—even including those with monopoly power—have incentives to maximize the use of their networks in order to enhance their value) (citing Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J.L. & TECH. 85, 104 (2003)).

<sup>23</sup> TWC Net Neutrality NPRM Comments at 27.

<sup>24</sup> *Id.* at 9-11 (citing and describing various findings concerning the extent of broadband competition and the consumer benefits that have resulted).

track record.<sup>25</sup> There is no reason to believe that the incentives are any different with respect to specialized services.

The Public Notice appears to rest largely on the concern that if specialized services are not brought within a net neutrality framework, broadband Internet access service providers may seek to evade the burdens of those rules by shifting resources away from best-efforts offerings and leaving the “open Internet” to “wither.”<sup>26</sup> But by their nature, “specialized” services that offer broadband transmission capabilities could not supplant the “public” Internet, as the Commission recognized in the NPRM.<sup>27</sup> Rather, the specialized services on which the Public Notice focuses likely would be designed to deliver enhancements that many customers would not need or be willing to pay for and thus would not be accepted by consumers as effective substitutes for broadband Internet access services. In fact, such services may not include any Internet access functionality at all, meaning that they could not implicate net neutrality concerns in any way. Even if there were some reason to expect these services to evolve differently, it would still make no sense to impose prophylactic regulations now. As the FTC and DOJ explained, such preemptive measures would pose a serious risk of doing more harm than good.<sup>28</sup> Thus, in the unlikely event that profound marketplace changes that pose actual threats to consumer welfare were to occur, then and only then would it make sense to regulate specialized services.

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<sup>25</sup> See Letter of Matthew A. Brill, Counsel to Time Warner Cable Inc., to Marlene H. Dortch, GN Docket No. 09-51, at 2-3 (filed Oct. 29, 2009) (“TWC Broadband Utilization Letter”).

<sup>26</sup> Public Notice at 2.

<sup>27</sup> NPRM ¶¶ 108, 149.

<sup>28</sup> FTC Staff Report at 157; DOJ Comments at 2-3.

**B. The Commission Should Avoid Any Action That Prevents Providers from Innovating and Investing in, and Experimenting with, Specialized Services.**

TWC has explained that in order for the Commission to achieve its core objectives of increasing broadband availability and adoption, it must preserve sufficient flexibility for broadband Internet access service providers to innovate in response to a changing marketplace.<sup>29</sup> The NPRM acknowledged this critical point, stating its interest in “preserving and protecting the ability of broadband providers to experiment with technologies and business models to help drive deployment of open, robust, and profitable broadband networks across the nation.”<sup>30</sup> And the Public Notice recognizes that specialized services “may drive additional private investment in networks and provide consumers new and valued services.”<sup>31</sup> As noted above, even some proponents of net neutrality regulation have cautioned against regulating specialized services in a manner that might impede their development.

It would be difficult to overstate the importance of this cautionary point. As described further below, some of the Public Notice’s specific proposals would have the effect—if not the express intent—of prohibiting providers from offering some specialized services at all, or at least severely restricting their ability to offer those services. Such rules cannot be squared with the Commission’s stated goal of *promoting* such services and their attendant benefits. Rather than hold back the evolution of an emerging class of services, the Commission should emphasize that broadband Internet access service providers are and must remain free to experiment with and develop new services, including in particular the specialized services at issue.

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<sup>29</sup> TWC Net Neutrality NPRM Comments at 50-53.

<sup>30</sup> NPRM ¶ 9; *see also id.* ¶¶ 103, 108 (recognizing that broadband Internet access service providers “must be able to experiment with new technologies and business models in ways that benefit consumers”).

<sup>31</sup> Public Notice at 2.

**C. The Commission May Not Regulate Specialized Services in the Absence of Clear Statutory Authority.**

The concerns that TWC and others have identified regarding the Commission's statutory authority to adopt net neutrality mandates also are particularly acute here. In fact, the Public Notice is conspicuously silent concerning the Commission's jurisdiction in this context, highlighting the significant questions regarding its legal authority to take any of the proposed actions. That omission is problematic as a general matter, but it is all the more so given the unique and burdensome requirements that the Public Notice proposes, which put further strain on the Commission's legal authority in this context.

In any event, there is no plausible basis for establishing jurisdiction sufficient to permit adoption of any of the stringent requirements proposed here. TWC already has explained that the Title I theories advanced in the NPRM are too attenuated from any actual statutory responsibilities conferred by the Act to justify imposition of the net neutrality mandates proposed thus far.<sup>32</sup> Because the rationale for regulating specialized services is even more speculative and vague, the nexus between the contemplated restrictions and any actual grants of statutory responsibility necessarily is even less clear and more attenuated. Tellingly, those parties that have otherwise tried to argue for a broad understanding of the Commission's authority to adopt net neutrality rules under Title I have declined to stretch their theories further to encompass managed services.<sup>33</sup>

Any theory premised on Title II would be even less sound. Notably, the Commission specifically excluded managed or specialized services from its recent reclassification inquiry,

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<sup>32</sup> TWC Net Neutrality NPRM Comments at 41-44. TWC also has explained that other Title I theories might permit the Commission to pursue other broadband-related goals. TWC Broadband Classification Comments at 79-88.

<sup>33</sup> See TWC Net Neutrality NPRM Reply Comments at 78.

meaning that it lacks any record on which to establish jurisdiction over specialized services under that flawed approach.<sup>34</sup> In any event, TWC and others have explained at length that the Commission’s proposal to reclassify some part of broadband Internet access as a means of manufacturing authority to impose net neutrality rules suffers from a litany of problems, including a failure to specify the nature of any “telecommunications service” that broadband Internet access service providers purportedly “offer” to end users.<sup>35</sup> The Public Notice does not fill these gaps with respect to specialized services, as it does not supply any basis for identifying a distinct “telecommunications service” within any type of specialized broadband service offering. In fact, given the potential diversity of specialized services, the Commission would be unable to make any blanket determinations with respect to their regulatory classification that might support an assertion of jurisdiction. Rather, it would have to conduct the requisite functional analysis (and thereby seek to establish its legal authority) on a service-by-service basis.

Accordingly, even if there were some reason for the Commission to intervene, it would lack any clear legal basis on which to do so. Just as the Commission should defer to Congress regarding net neutrality generally, that principle applies even more powerfully to the emerging and poorly defined class of specialized services, which the Commission itself recognized in the past should remain fenced off from regulation.

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<sup>34</sup> *Framework for Broadband Internet Service*, Notice of Inquiry, GN Docket No. 10-127, at ¶ 108 (rel. June 17, 2010) (“We do not intend to address the classification or treatment of [managed or specialized] services in this proceeding.”).

<sup>35</sup> TWC Broadband Classification Comments at 34-36; *see also* Reply Comments of Time Warner Cable Inc., GN Docket No. 10-127, at 16 (filed Aug. 12, 2010).

## II. THE COMMISSION SHOULD NOT PURSUE NEW POLICY APPROACHES DESIGNED TO RESTRICT SPECIALIZED SERVICE OFFERINGS

While TWC opposes the imposition of net neutrality mandates on specialized services as a categorical matter, each of the specific “policy approaches” described in the Public Notice presents particular concerns. TWC discusses each of those proposals in turn.

### A. “Definitional Clarity” Is Welcome But Should Not Be a Vehicle for Expanding the Scope of Regulation To Reach Specialized Services.

TWC has long been a proponent of ensuring clarity in any regulatory approach, particularly with respect to net neutrality. TWC has explained that vague rules would chill infrastructure investment and innovation, as broadband Internet access service providers could not take any action without fear of being found in violation after the fact.<sup>36</sup> To that end, TWC agrees that it is important to define “broadband Internet access service clearly,” as the Public Notice suggests.<sup>37</sup>

But TWC opposes the Public Notice’s seeming endorsement of a *broad* definition of that term as a means of expanding the reach of any new mandates.<sup>38</sup> Under this proposed approach, “specialized services” would include only those offerings “with a different scope or purpose” than a broadly defined broadband Internet access service.<sup>39</sup> But such definitional manipulation would only create confusion about what services are subject to regulation, thus undermining the stated goal of achieving clarity. Broadband providers would struggle to determine whether new,

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<sup>36</sup> See, e.g., TWC Net Neutrality NPRM Comments at 3 (citing Larry F. Darby, *The Informed Policy Maker’s Guide to Regulatory Impacts on Broadband Network Investment*, American Consumer Institute, at 1-3 (Nov. 11, 2009) (explaining that net neutrality restrictions and the often extended uncertainty that results from regulation discourages firms from engaging in activity that would otherwise enhance shareholder value)).

<sup>37</sup> Public Notice at 3.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

specialized broadband offerings are sufficiently different in scope or purpose to fall outside the Commission’s expanded definition of broadband Internet access. The difficulty would be compounded by the fact that the analysis could differ by customer, depending on how that customer intends to use the service in question. The result would be to chill innovation, as providers would likely withhold certain functionalities that risk triggering new regulatory restrictions.

More fundamentally, an overbroad definition of broadband Internet access inevitably would sweep in services that include the type of enhancements that are typically associated with specialized services. But as TWC explained in response to the NPRM, it would make no sense to apply net neutrality restrictions—such as proposed restrictions on paid prioritization—to services that exist in large part to deliver such functionalities.<sup>40</sup> For example, many enterprise-level broadband services provide access to web content (among other functions) with quality-of-service commitments that are generally not available in the mass market. Restricting the paid prioritization that enables such offerings would threaten to destroy their viability, needlessly depriving users of the benefits. As noted above, the NPRM recognized this problem, stating that “it may be inappropriate to apply the [proposed] rules . . . to managed or specialized services,” because such services often “differ from broadband Internet access services in ways that recommend a different policy approach.”<sup>41</sup>

While many of the regulatory proposals set forth in the NPRM are ill-advised, expanding the scope of that framework to reach specialized services would greatly exacerbate the problems. The unintended consequences almost certainly would include a significant diminution in investment, innovation, and, in turn, consumer welfare—precisely what the Commission has

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<sup>40</sup> TWC Net Neutrality NPRM Comments at 103-04.

<sup>41</sup> NPRM ¶ 149.

pledged to avoid. Thus, if the Commission adopts any net neutrality mandates at all, TWC urges it to apply those rules only to services that meet a clear and narrow definition of broadband Internet access, a term that can be more readily understood today than the evolving and far more amorphous category of specialized services. Such an approach would allow specialized services to continue to develop unencumbered, producing the benefits associated with these services that were recognized in the NPRM and elsewhere.

**B. The Contemplated Marketing Restrictions Are Not Only Unnecessary But Plainly Unlawful.**

The Public Notice seeks comment on a pair of requirements that would aim to ensure “Truth in Advertising,” but which are unwarranted and unlawful.<sup>42</sup> The first of these would prohibit providers from marketing any specialized service as a broadband Internet access service or as a substitute for such service.<sup>43</sup> Fundamentally, this proposed marketing ban is at odds with the Commission’s parallel efforts (including in this very inquiry) to *increase* the amount of relevant information customers have concerning their communications services.<sup>44</sup> While there is no basis for additional disclosure requirements in this context,<sup>45</sup> there plainly can be no justification for *restricting* the disclosures that providers make in connection with their services, as doing so would only handicap their ability to ensure that consumers understand what they are

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<sup>42</sup> Public Notice at 3.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*; NPRM ¶ 122 (proposing disclosure requirements intended to “allow users to make informed purchasing and usage decisions”); *Consumer Information and Disclosure; Truth-in-Billing and Billing Format; IP-Enabled Services*, Notice of Inquiry, CG Docket No. 09-158, CC Docket No. 98-170, WC Docket No. 04-36, at ¶ 1 (rel. Aug. 28, 2009) (“Truth-in-Billing NOI”) (seeking comment on ways “to protect and empower American consumers by ensuring sufficient access to relevant information about communications services”); *see also id.*, Statement of Chairman Julius Genachowski at 1 (“Today’s notice will help the Commission build a record on ways to ensure that consumers understand what they are signing up for.”).

<sup>45</sup> *See infra* Section II.C (discussing the Public Notice’s proposed disclosure requirement).

purchasing. The Public Notice does not suggest that it would be misleading to identify any overlapping functions shared by a specialized service and broadband Internet access; rather, the goal of such a marketing restriction apparently would be to curtail the flow of *truthful* information as a means of precluding the offering of such services.

Remarkably, the Public Notice raises the prospect of this flat ban on speech without any consideration of whether the Commission has authority to adopt such a prior restraint. It does not. There is no basis in the Communications Act for prohibiting broadband Internet access service providers from informing consumers that a specialized service may provide some of the same functionalities as broadband Internet access. And even if the Commission could point to a plausible statutory basis for imposing such a restriction, the First Amendment would not permit such a ban on truthful and non-misleading speech. The Public Notice is silent about the constitutional implications of its proposal, even though the Commission has consistently acknowledged that rules governing advertising and customer disclosures in the broadband context can raise First Amendment concerns and must pass muster under *Central Hudson* and its progeny.<sup>46</sup> In fact, the restriction at issue may well be subject to strict scrutiny, given its focus on the marketing speech's content and its impact on customers.<sup>47</sup>

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<sup>46</sup> See, e.g., Truth-in-Billing NOI ¶¶ 21-22 (seeking comment on how any proposed disclosure requirements “meet[] the requirements of the three prongs of the *Central Hudson* test” and “harmonize with Commission precedent in this area and relevant case law”); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 566 (1980) (holding that a regulation of commercial speech will be found compatible with the First Amendment if: (1) there is a substantial government interest; (2) the regulation directly advances the substantial government interest; and (3) the proposed regulation is not more extensive than necessary to serve that interest).

<sup>47</sup> See, e.g., *Boos v. Barry*, 485 U.S. 312, 321 (1988) (holding that a restriction on speech that focuses “on the content of the speech and the direct impact that speech has on its listeners . . . must be considered content-based” and thus subject to strict scrutiny).

In any event, the proposed marketing ban could not be justified under *any* standard. First, it would not directly and materially advance a legitimate—much less an “important” or “compelling”—governmental purpose. To the extent that the asserted goal of this restriction would be to protect the public Internet against the encroachment of specialized services, there is no evidence whatsoever that such a threat is genuine. As discussed above, the Public Notice offers only speculation about what might happen, which the Supreme Court has repeatedly made clear cannot support any governmental attempt to restrict speech.<sup>48</sup> Given the absence of any real-world harms, there is no remote justification for the proposed ban on speech (nor for the other restrictions discussed further below).

Moreover, the proposed restriction is far more restrictive than necessary and thus not tailored in any way to address whatever governmental interests might be at stake. At least as it is described in the Public Notice, the marketing ban is both vague and overbroad, as it would seem to outlaw any communication that even suggests that a specialized service is similar in function to broadband Internet access. Just as providers would be hard-pressed to predict whether the Commission would consider a specialized service a regulated form of broadband Internet access, they would be unable to gauge whether their descriptions of the functions offered by a specialized service would be deemed efforts to promote a substitute for broadband Internet access, resulting in the sort of chilling effect on protected speech that is contrary to basic First

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<sup>48</sup> See, e.g., *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (restrictions on speech must be based on something more than “mere speculation and conjecture”); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (“When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”); see also TWC Net Neutrality NPRM Comments at 48.

Amendment principles.<sup>49</sup> This fear of being found in violation would inevitably cause providers to refrain from offering certain functionalities that resemble best-efforts Internet access, refrain from informing prospective customers of such functionalities, or both. The upshot would be to curtail product development and to impede the flow of information in the marketplace, without countervailing benefits.

The Public Notice also poses the related question of whether to “require providers to offer broadband Internet access as a stand-alone service, separate from specialized services, in addition to any bundled offerings.”<sup>50</sup> As with the marketing restriction discussed above, it is unclear what authority the Commission might possess to impose such a requirement. In fact, the jurisdictional limits would appear to be even more pronounced here. A requirement to offer broadband Internet access on both a stand-alone and a bundled basis necessarily requires a provider to set both bundled and unbundled prices, which in turn would seem to constitute a form of rate regulation that is outside of the Commission’s authority (and which some Commission officials have foresworn in this context).<sup>51</sup> Further, the compelled provision of stand-alone broadband Internet access raises some of the same concerns associated with the Public Notice’s separate proposal, discussed below, to require providers to guarantee capacity for such services.<sup>52</sup>

Nor is it clear what actual problem such a proposal aims to solve. TWC anticipates that it will offer a stand-alone broadband Internet access service for the foreseeable future, and there

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<sup>49</sup> See, e.g., TWC Net Neutrality NPRM Comments, Ex. A, Laurence H. Tribe & Thomas C. Goldstein, *Proposed “Net Neutrality” Mandates Could Be Counterproductive and Violate the First Amendment*, at 4 (Oct. 19, 2009) (“Tribe & Goldstein”).

<sup>50</sup> Public Notice at 3.

<sup>51</sup> See, e.g., Austin Schlick, General Counsel, Federal Communications Commission, *A Third-Way Legal Framework For Addressing the Comcast Dilemma*, at 8 (May 6, 2010).

<sup>52</sup> See *infra* Section II.F.

remains no reason to believe that TWC or any other providers of broadband Internet access will cease doing so. Once again, speculative theories are not an appropriate basis for regulating a well-functioning and still-nascent marketplace. In fact, the Commission has repeatedly observed that bundling Internet access with other services—and, in particular, competition in connection with such bundled offerings—both reduces prices and improves the quality of service.<sup>53</sup> Accordingly, there is no reason for the Commission to micromanage providers’ bundling practices.

**C. There Is No Basis for Imposing New Disclosure Obligations on Providers of Specialized Services.**

At the same time that it proposes to restrict the information that providers can offer to customers about their services, the Public Notice raises the prospect of additional disclosure obligations focused on specialized services. It offers no detail concerning the potential scope of any such rules, stating only that providers would be required “to disclose information sufficient to enable consumers, third parties, and the Commission to evaluate and report on specialized services.”<sup>54</sup> Of course, such a requirement is incompatible with the marketing ban discussed above. But more generally, given the well-documented voluntary practices of providers, the absence of any real-world evidence of harm, and the existence of generally applicable consumer protections against misleading claims, there is no basis for new disclosure mandates or reporting requirements.

The record already before the Commission confirms that there is no demonstrated need for additional disclosure requirements concerning specialized services. Independent of any

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<sup>53</sup> See, e.g., *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 22 FCC Rcd 19633 ¶ 2 (2007); Truth-in-Billing NOI ¶ 3.

<sup>54</sup> Public Notice at 3.

regulation, there is broad agreement regarding the importance and value of transparency for consumers. TWC and other broadband Internet access service providers undertake a variety of measures to provide consumers with a wealth of detailed information about their services and have worked actively with the Commission to develop disclosure and educational tools (concerning broadband performance measurement and other issues) that could benefit consumers.<sup>55</sup> These practices—which have become commonplace in the absence of regulation—have been documented on various occasions in this and parallel proceedings.<sup>56</sup> Moreover, service providers are constantly working on ways to improve their disclosure practices to make sure that their customers stay informed. Accordingly, TWC has expressed (and here reiterates) its support for the adoption of best practices that would facilitate this process, in lieu of any formal mandates.<sup>57</sup>

Further, there is no reason to conclude that the substantial information already made publicly available for the benefit of consumers is insufficient for the unnamed “third parties” referenced in the Public Notice.<sup>58</sup> Moreover, if the Public Notice envisions new disclosures to “upstream” providers of applications and content, TWC already has explained that such an overly burdensome disclosure regime would be both unnecessary and potentially harmful, at

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<sup>55</sup> See generally Comments of Time Warner Cable Inc., CG Docket No. 09-158 *et al.*, at 5-13 (filed Oct. 13, 2009); Reply Comments of Time Warner Cable Inc., CG Docket No. 09-158 *et al.*, at 5-6 (filed Oct. 28, 2009); TWC Net Neutrality NPRM Comments at 71-72; Letter from Steven F. Morris, Vice President and Associate General Counsel, National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 09-158 (filed Feb. 26, 2010) (describing cable operators’ commitment to disclosure issues, including its involvement with SamKnows).

<sup>56</sup> See, e.g., FCC Workshop: Consumers, Transparency, and the Open Internet, Jan. 19, 2010, <http://www.openinternet.gov/workshops/consumers-transparency-and-the-open-internet.html>.

<sup>57</sup> TWC Net Neutrality NPRM Comments at 98-99.

<sup>58</sup> Public Notice at 3.

least to the extent it might encompass technical details about a provider's network management practices.<sup>59</sup>

Finally, there is no basis for using this proceeding to impose additional reporting requirements to the Commission concerning specialized services. As TWC has explained elsewhere, the Commission already gathers a variety of information that it can use to gain a fuller understanding of the broadband marketplace.<sup>60</sup> For example, the Commission collects detailed information regarding broadband Internet access and VoIP services through the Form 477, and it collects further information on VoIP services through the Form 499 revenue worksheets. In addition, the broadband stimulus legislation and other initiatives have prompted a substantial amount of information sharing among broadband providers and other parties. While a few parties have suggested that broadband providers should regularly report their bandwidth allocation to the Commission, such requirements are patently burdensome and, in light of providers' continued competitive interest in ensuring sufficient capacity for best-efforts Internet access, wholly unnecessary. If the Commission deems it appropriate in the future to gather additional information about the interplay between specialized services and broadband Internet access services, a Notice of Inquiry would be a more appropriate vehicle than potentially overbroad and needlessly burdensome reporting requirements.

**D. It Would Be Premature at Best To Ban Exclusive Arrangements in the Specialized Services Context.**

For many of the same reasons that the marketing restrictions discussed above are unjustified, the Commission should not pursue a ban on exclusive arrangements in the nascent

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<sup>59</sup> TWC Net Neutrality NPRM Comments at 101-02; TWC Net Neutrality NPRM Reply Comments at 89-90.

<sup>60</sup> *See, e.g.*, Reply Comments of Time Warner Cable Inc., GN Docket No. 09-51, at 17-18 (filed July 21, 2009).

marketplace for specialized services.<sup>61</sup> The Commission has recognized in other contexts that exclusivity can be pro-competitive in some circumstances.<sup>62</sup> And even where it has found otherwise, the Commission at least purported to base its determination on actual evidence concerning the extent of the use of exclusivity clauses and their asserted impact on the marketplace,<sup>63</sup> rather than on pure speculation as would be the case here. Indeed, there is no evidentiary support whatsoever regarding any alleged anti-competitive effects of any exclusive arrangements that may exist, and there is no basis to conclude that exclusive arrangements would be *per se* unreasonable—particularly with respect to arrangements involving unaffiliated third parties.

Moreover, even if there were some cause for restricting exclusive arrangements, it would make no sense to require the provision of specialized services “on the *same terms* to other third parties,”<sup>64</sup> regardless of whether those parties are similarly situated. Even common carriers are permitted to offer different terms to differently situated customers.<sup>65</sup> Yet the Public Notice

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<sup>61</sup> Public Notice at 4.

<sup>62</sup> *See, e.g., Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, 22 FCC Rcd 4252 ¶ 3 (2007) (noting Congress’s determination in the program access context that “some exclusive contracts may serve the public interest” and its resulting decision to avoid instituting an absolute ban on such contracts even for vertically integrated programmers).

<sup>63</sup> *See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 ¶ 26 (2007).

<sup>64</sup> Public Notice at 4 (emphasis added).

<sup>65</sup> *See, e.g., Reservation Telephone Coop. v. FCC*, 826 F.2d 1129, 1136 (D.C. Cir. 1987); *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 737 F.2d 1095, 1133 (D.C. Cir. 1984); *Ameritech Operating Cos. Revisions to Tariff FCC No. 2*, Order, DA 94-1121 (CCB 1994) (ILEC’s disparate rates to different customers may be justified based on cost savings from serving one customer versus another); *ACC Long-Distance v. Yankee Microwave, Inc.*, 8 FCC Rcd 85 (CCB 1993) (change in costs over time justified difference in pricing).

nevertheless suggests that providers of specialized services should be required to offer all wholesale or retail customers identical terms. Such a rule would appear to invalidate commonplace and unobjectionable practices such as volume and term discounts. As TWC's comments in response to the NPRM explained, the Commission plainly cannot hold broadband providers to a stricter nondiscrimination standard than common carriers.<sup>66</sup>

**E. It Would Be Particularly Unlawful and Inappropriate To Pursue Any Kind of Ban on Specialized Service Offerings.**

Of all the possible restrictions mentioned in the Public Notice, the most troubling may be the notion that the Commission should “[a]llow broadband providers to offer only a limited set of new specialized services, such as a telemedicine application that requires enhanced quality of service.”<sup>67</sup> Like the proposals discussed above, such a prohibition on providing broad categories of broadband-based services would be unlawful and wholly unjustified. In fact, to an even greater degree than the proposed *per se* ban on exclusivity and the corresponding nondiscrimination requirement discussed above, the prospect of an outright ban on the provision of specialized services by broadband Internet access service providers would conflict with the pro-investment policies that underlie the Communications Act and the National Broadband Plan and that the Public Notice seeks to advance.<sup>68</sup>

From a legal standpoint, it is far from clear how the Commission could refuse to “allow” broadband Internet access service providers to introduce some, most, or all specialized services. As discussed above, there are substantial concerns about whether the Commission is empowered

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<sup>66</sup> See TWC Net Neutrality NPRM Comments at 62-65.

<sup>67</sup> Public Notice at 4.

<sup>68</sup> See *id.* (“Which policies [relating to specialized services] will best protect the open Internet and maintain incentives for private investment and deployment of innovative services that benefit consumers?”).

to regulate the provision of specialized services at all.<sup>69</sup> But there is even less reason to believe that the Commission could lawfully prevent broadband service providers from providing such services altogether: No provision of the Communications Act remotely authorizes such an action, and the Public Notice does not articulate any jurisdictional theory to support it. To the contrary, such encroachment on network owners' discretion in this manner would run afoul of the Act and all applicable precedent, which compel the Commission to *facilitate* the introduction of new advanced services and the competition that results. Moreover, such a restriction would, like net neutrality regulation in general, jeopardize important First Amendment rights by thrusting the government into broadband Internet access service providers' choices concerning their private speech without any plausible justification or any effort to tailor the rules narrowly.<sup>70</sup> A ban on providing particular services would also implicate the Takings Clause and the Due Process Clause (among other provisions), as it would deprive broadband providers of the use of their property without a sufficient basis.

Put in historical context, a ban on the provision of specialized services would constitute a rare and draconian remedy. Indeed, it would closely resemble a blanket line-of-business restriction of the sort imposed on the Bell Operating Companies in connection with the Modification of Final Judgment in 1982, which later were codified in Section 271.<sup>71</sup> In stark contrast to those antitrust remedies, which a federal court imposed on an alleged monopolist after extensive judicial proceedings, the Public Notice casually raises the prospect of comparable restrictions despite the absence of any allegation (let alone any finding) that broadband providers

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<sup>69</sup> See *supra* Section I.C.

<sup>70</sup> TWC Net Neutrality NPRM Comments at 44-46 (describing constitutional infirmities of net neutrality regulation in general and the Commission's proposed rules in particular); Tribe & Goldstein at 3-4 (same).

<sup>71</sup> *United States v. AT&T*, 552 F. Supp. 131, 223-24 (D.D.C. 1982).

(a) possess market power, or (b) are likely to use such power to the detriment of competition and consumers. And given the largely inchoate nature of the nascent marketplace for specialized services that currently exists, the Commission could not credibly undertake the type of analysis that would be necessary to support a service prohibition (even apart from the absence of direct statutory authority for such a prohibition).

Moreover, such a restriction would undercut competition and harm consumers. As a general matter, line-of-business restrictions have been shown to undermine consumer welfare by limiting the development of competition.<sup>72</sup> It is for precisely that reason that the Commission long ago eliminated its maximum separation requirements, which prevented local exchange carriers from providing “enhanced” services.<sup>73</sup> After a brief and unsuccessful experience with that restriction, the Commission determined that eliminating it “would best serve the public interest by providing greater regulatory certainty to the marketplace, creating an environment conducive to the provision of [customer premises equipment] and enhanced services on a competitive basis, and by removing artificial restrictions on services that may be offered consumers through the use of computer technology where such restrictions are not necessary for meeting our statutory purpose.”<sup>74</sup>

The same is true here. For example, the record makes clear that paid prioritization services are offered by a host of entities other than broadband Internet access service providers,

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<sup>72</sup> See Comments of Verizon and Verizon Wireless, GN Docket No. 10-127, at 16 (filed July 15, 2010) (citing Jerry Hausman, *Valuing the Effect of Regulation on News Services in Telecommunications*, in *Brookings Papers on Economic Activity, Microeconomics* (Martha V. Gottron & Anne Lesser, eds. 1997)).

<sup>73</sup> *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Final Decision and Order, 28 F.C.C.2d 267 (1971).

<sup>74</sup> *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384 ¶ 282 (1980).

such as content delivery networks (“CDNs”).<sup>75</sup> Yet the Public Notice fails utterly to indicate why broadband Internet access service providers alone should be prevented from competing in that arena. As with the NPRM’s proposal to limit net neutrality regulation to broadband Internet access service providers (despite abundant record evidence that these participants in the Internet ecosystem act consistently with net neutrality principles, unlike some other entities),<sup>76</sup> the lack of any empirical or even logical basis for prohibiting facilities-based broadband providers alone from offering specialized services would cause the Commission to run afoul of the Administrative Procedure Act, in addition to the Communications Act and the Constitution.

Finally, a ban on providing specialized services would fly in the face of one of the core tenets of “openness”—namely, the Commission’s interest in supporting “innovation without permission.”<sup>77</sup> Under this particular proposal, that principle would be scrapped for broadband Internet access service providers. It should go without saying that prohibiting the provision of most specialized services would halt broadband innovation and deter investment, thereby harming consumers and holding back broadband deployment. And, as noted above, there is absolutely no record evidence of any harms associated with specialized services, much less the kind of showing that would be required to support the imposition of such a draconian remedy.

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<sup>75</sup> See, e.g., TWC Net Neutrality NPRM Comments at 88-90 (describing CDN offerings).

<sup>76</sup> See generally *id.* at 73-98.

<sup>77</sup> See, e.g., Federal Communications Commission, *Connecting America: The National Broadband Plan* at 58 (Mar. 16, 2010) (“National Broadband Plan”) (stating that an “open Internet” is one in which “inventors and entrepreneurs ‘do not require the securing of permission’ to innovate”) (quoting NPRM ¶ 4); NPRM ¶ 19 (noting that the Internet’s design “has had the effect of empowering entrepreneurs to innovate without needing to seek permission”); *id.*, Statement of Chairman Julius Genachowski, at 1 (“The Internet’s openness has allowed entrepreneurs and innovators, small and large, to create countless applications and services without having to seek permission from anyone.”); see also Google Net Neutrality NPRM Comments at 25, 86 (addressing the importance of “innovation without permission”); Comments of Free Press, GN Docket No. 09-191, WC Docket No. 07-52, at 44 (filed Jan. 14, 2010) (same).

Accordingly, the Commission should not entertain any limitations on the offering of specialized services by broadband Internet access service providers or anyone else; to the contrary, its duty is to promote such offerings for the benefit of consumers.

**F. It Would Be Wholly Unworkable for the Commission To Micromanage the Allocation of Network Capacity Among Different Service Categories or To Prohibit Specialized Services from “Inhibiting” the Performance of Broadband Internet Access Services.**

Finally, the Commission should not attempt to establish a “guaranteed” capacity level for broadband Internet access services.<sup>78</sup> Once again, the Public Notice does not identify any statutory provision that remotely authorizes the Commission to engage in such micromanagement of broadband providers’ allocation of resources. Further, a mandate to “expand[] network capacity allocated to broadband Internet access service”—or, relatedly, to cap the amount of network capacity that specialized services may use—would raise the same constitutional concerns described above.<sup>79</sup> For example, compelling network owners to dedicate a set amount of capacity for the delivery of broadband Internet access service would result in an unconstitutional occupation of broadband networks by the government and unduly interfere with the investment-backed expectations underlying network owners’ efforts to construct and maintain their broadband facilities—key hallmarks of a taking.<sup>80</sup>

In any event, the Commission is simply not equipped to determine what levels of investment are appropriate or efficient or what capabilities should be made available to consumers. Absent an ability to forecast consumer demand, the cost of various inputs (such as the cost of fiber optics, routers, and labor), and several other factors, there would be no way for

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<sup>78</sup> Public Notice at 4.

<sup>79</sup> *Id.*

<sup>80</sup> *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124-25 (1978).

the Commission to make reliable judgments about establishing guaranteed capacity levels. Network owners, in contrast, are uniquely situated to undertake that very analysis, and have consistently done so in an efficient manner. As has been well documented already, market forces have prompted broadband network owners to undertake massive infrastructure investments to the substantial benefit of consumers, all of which the Commission has acknowledged.<sup>81</sup> As noted above, TWC, for example, has detailed how its own significant investments have enabled it to offer consistent increases in transmission speeds without commensurate price increases over the last decade.<sup>82</sup> In fact, these ongoing efforts to expand capacity in the face of rapidly increasing volumes of Internet traffic underscore why this proposal and the others like it are fundamentally unnecessary in the first place: Competition drives increases in broadband Internet access capabilities and will continue to do so, obviating the need for the Commission to assume a central planning function or to otherwise intervene in order to “protect” best-efforts Internet access from any encroachment by emerging specialized services. While network owners certainly do not enjoy unlimited capacity, as described below,<sup>83</sup> they have worked aggressively to keep pace with demand in order to serve their customers.

Moreover, the concept of a “guaranteed capacity” level presumes a unitary approach that is inconsistent with how broadband Internet access is provided today and ignores the fact that broadband providers have responded to customer preferences by offering several different levels of capacity. For example, many TWC customers prefer a low-priced offering that delivers maximum download speeds of 1.5 Mbps, while others have chosen to upgrade to plans that offer

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<sup>81</sup> See, e.g., TWC Broadband Classification Comments at 7-8; National Broadband Plan at 18-20.

<sup>82</sup> TWC Broadband Utilization Letter at 1-5 & tables 2, 3.

<sup>83</sup> See *infra* Section III (explaining that the capacity constraints that apply to wireless networks also apply to wireline networks).

maximum download speeds of 10, 20, or 50 Mbps. The existence of such diverse offerings is at odds with the notion of a government-mandated minimum capacity level. In the absence of any requirements concerning optimal capacity, the marketplace has developed in a manner that offers a variety of choices that meet the needs of different customer segments. Replacing market-driven results with government-decreed capacity levels could only diminish consumer choice and inhibit service differentiation.

It would be equally untenable for the Commission to prohibit specialized services from “inhibiting the performance of broadband Internet access services at any given time.”<sup>84</sup> This proposal has the same legal infirmities as the corresponding proposal discussed above, and it would be just as unworkable from a practical perspective. Almost any allocation of resources to specialized services could be said to “inhibit” the performance of a provider’s broadband Internet access service, as those resources could have been devoted to the broadband Internet access service instead. As with the proposal to sweep any service with a similar scope or purpose into the broadband Internet access category, an “inhibition” standard could be remarkably elastic in practice. As a result, service providers would be loathe to invest in specialized services, lest they be found to have disfavored or “inhibited” their own broadband Internet access offerings in the process. The chilling effect generated by that uncertainty would exacerbate the constitutional issues noted above and effectively convert this requirement into a ban on specialized services, thereby triggering all of the concerns associated with the proposal of an express prohibition.

For all of these reasons, the Commission need not and in all events should not attempt to assume the role of a nationwide broadband network administrator and dictate how capacity must be allocated between and among services. Such interference with the management and operation

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<sup>84</sup> Public Notice at 4.

of broadband networks is well beyond any reasonable role the Commission could be expected to assume. To the extent that the Commission is inclined to take some action to address capacity limitations, it should ensure that platform owners are able to employ reasonable techniques to manage traffic on their networks, as TWC and others have urged in the underlying rulemaking.<sup>85</sup>

### **III. ANY FLEXIBILITY AFFORDED TO MOBILE WIRELESS PLATFORMS SHOULD BE EXTENDED TO ALL BROADBAND INTERNET ACCESS PLATFORMS**

Although the Commission declared at the outset that all broadband Internet access platforms would be subject to its proposed net neutrality framework,<sup>86</sup> it has contemplated a more flexible approach for mobile wireless broadband providers in light of spectrum constraints that, the Commission observed, pose certain network management challenges.<sup>87</sup> The Public Notice reiterates that sentiment.<sup>88</sup> As TWC explained in response to the NPRM, however, the capacity constraints faced by wireless providers are hardly unique.<sup>89</sup> In particular, cable operators, no less than wireless carriers, operate using a finite amount of capacity, as the

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<sup>85</sup> See generally TWC Net Neutrality NPRM Comments at 65-73; TWC Net Neutrality NPRM Reply Comments at 81-92; see also NPRM ¶ 137 (proposing that broadband Internet access service providers be permitted to take reasonable steps to reduce or mitigate congestion or to address quality-of-service concerns).

<sup>86</sup> See, e.g., NPRM ¶ 154.

<sup>87</sup> See, e.g., *id.* ¶ 172 (“With respect to the identification of reasonable network management practices for mobile broadband, we note that each provider has a finite amount of spectrum available to it.”); see generally *id.* ¶¶ 154-74.

<sup>88</sup> See, e.g., Public Notice at 5 (referring to “concerns about congestion of scarce network capacity [on wireless networks] by third-party devices”).

<sup>89</sup> TWC Net Neutrality NPRM Comments at 68-69; see also Comments of Time Warner Cable Inc., GN Docket No. 09-51 *et al.*, at 2-3 (filed Nov. 4, 2009) (explaining that in contrast to common carriers that design their facilities with excess capacity that can be leased to and used by third parties, cable operators originally deployed their cable systems exclusively to support their own cable television services, resulting in acknowledged capacity constraints).

Commission has previously recognized.<sup>90</sup> Cable operators have service groups that share the available bandwidth on a node-by-node basis. As in the wireless context,<sup>91</sup> network performance within each node depends entirely on the number of users and the types of applications they are running. Excessive usage by one customer thus can have a dramatic impact on the performance experienced by other users within the same node.

Accordingly, if the Commission relies on such limitations as a basis for refraining from imposing certain net neutrality requirements on mobile wireless broadband providers, it should invoke the same rationale more broadly and avoid regulating cable broadband Internet access providers any more extensively. In this respect, the Public Notice's inquiry is unjustifiably narrow. Rather than asking what disclosure practices and device-attachment rules are appropriate in the mobile wireless context,<sup>92</sup> the better question is what types of practices make sense for broadband Internet access service providers more generally.

Even more significant is the issue of broadband Internet access providers' ability to "prevent or restrict the distribution or use of types of applications that may intensively use network capacity, or that cause other network management challenges[.]"<sup>93</sup> Such concerns are

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<sup>90</sup> *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Third Report and Order and Third Notice of Proposed Rule Making, 22 FCC Rcd 21064 ¶ 60 (2007) (noting the capacity constraints faced by cable operators); *Oceanic Time Warner Cable, a division of Time Warner Cable, Inc.; Oceanic Kauai Cable System*, Order on Review, File No. EB-07-SE-352, at ¶ 10 (rel. June 26, 2009) (noting the capacity constraints that result from the traditional broadcast-type technologies used by cable systems).

<sup>91</sup> NPRM ¶ 172 ("The number of users in a cell share the spectrum at any given time and the demands on capacity can vary widely depending on such factors as the number of users within that cell and the applications they are using.").

<sup>92</sup> Public Notice at 5.

<sup>93</sup> *Id.*

vital, as TWC has explained at length in previous filings,<sup>94</sup> and the Public Notice appears to recognize that wireless broadband providers require discretion in responding to network management challenges.<sup>95</sup> But the very same reasons for flexibility in the mobile wireless context apply equally in the cable broadband context. No matter how much capacity a particular platform delivers, and regardless of the transmission technology, there will always be applications that threaten to degrade performance and that may warrant intervention by the network operator.<sup>96</sup> The Commission should recognize that the case for flexibility in responding to potentially harmful applications is not limited to wireless platforms, but rather is a universal issue for all broadband Internet access service providers.

Finally, the Commission should avoid any approach to “app stores” that is either under- or over-inclusive.<sup>97</sup> If a consumer cannot access an application of his or her choosing, it should not matter whether the restriction emanates from a broadband Internet access provider’s policies or those of the application provider. In this regard, the Public Notice’s implicit suggestion that app stores may be immune from any requirements or restrictions imposed on broadband Internet access services repeats one of the central errors in the NPRM by focusing myopically on the latter group, even though other entities in the Internet ecosystem may pose a greater threat to net neutrality. As TWC has explained at length, if the Commission believes that regulation is

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<sup>94</sup> See, e.g., TWC Net Neutrality NPRM Comments at 14-18 (describing the exponential growth of Internet traffic, the types of uses and applications that are driving it, and the challenges that network owners faces as a result); *id.* at 65-69 (explaining the importance of permitting reasonable network management).

<sup>95</sup> Public Notice at 5.

<sup>96</sup> See, e.g., TWC Net Neutrality NPRM Comments at 66-67.

<sup>97</sup> Public Notice at 5.

required to safeguard consumers' access to online applications, then, as a matter of law and policy, it cannot limit such regulation to broadband Internet access providers.<sup>98</sup>

### CONCLUSION

For the foregoing reasons, TWC urges the Commission not to pursue any of the various regulatory approaches described in the Public Notice. The Commission should instead redirect its energies toward facilitating the development of voluntary industry solutions, while allowing the marketplace for specialized services to evolve unencumbered.

Respectfully submitted,

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<sup>98</sup> TWC Net Neutrality NPRM Comments at 73-94; TWC Net Neutrality NPRM Reply Comments at 21-26.