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 NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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The National Cable & Telecommunications Association ("NCTA") hereby submits its comments on the Public Notice issued by the Commission in the above-captioned proceeding on September 1, 2010.[1]

INTRODUCTION AND SUMMARY

The Public Notice asserts that "[t]he discussion generated by the Commission's Open Internet proceeding appears to have narrowed disagreement on many of the key elements of the framework proposed in the NPRM,"[2] but notes that "[t]here are two complex issues . . . that merit further inquiry"[3]: (1) "how to maintain the investment-promoting benefits of specialized services" – *i.e.*, services provided over the same last-mile facilities as broadband Internet access service – "while protecting the Internet's openness;"[4] and (2) whether and to what extent any "open Internet" rules should apply to wireless as well as wireline Internet access services.

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

[2] *Id.* at 1.

[3] *Id.* at 2.

[4] *Id.*

The issues on which the Commission seeks further input skip over the fundamental question dividing the parties in this proceeding: Is government regulation needed to ensure the preservation of a vibrant and open Internet? NCTA and the cable industry support the goal of maintaining a vibrant and open Internet, but as we explained in our previous comments, this goal will best be achieved – now and in the future – by continuing the successful and longstanding policy of regulatory restraint. The adoption of rules at this time would do nothing to promote the Commission's objectives and would instead have only the counterproductive effects of stifling investment, innovation, and consumer value.

If the Commission were nevertheless to adopt rules, again as NCTA explained in its previous comments, the best way to deal with the issue of "specialized services" would be to apply any such rules only to a clearly defined broadband Internet access service, and to "treat as outside the scope of its rules any services offered by an ISP other than its broadband Internet access service."[5]

With respect to applying any rules to wireless as well as wireline services, NCTA agreed with the Commission's proposal that any rules it adopted should apply to wireline *and* wireless services:

> *First*, as the Commission suggests, if the goal is to prevent those who provide access or serve as gateways to Internet content and application from engaging in conduct that might make certain content or applications unduly inaccessible in a way that threatens the openness of the Internet, it would be arbitrary and capricious – and ineffective – to subject only wireline ISPs to such rules while exempting providers of wireless access or other Internet gateways that serve millions of users and have similar potential to affect accessibility of content and applications. As Commissioner Copps pointed out, "we need to recognize that the gatekeepers of today may not be the gatekeepers of tomorrow." *Second*, principles of regulatory parity dictate that marketplace outcomes not be unfairly and uneconomically skewed by artificial regulatory advantages.[6]

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[5] NCTA Reply Comments at 18.

[6] NCTA Comments at 46.

This is still the best approach and the right answer to the questions posed by the Commission in its Public Notice, and it applies beyond just the equal treatment of wireline and wireless Internet access. As we have previously noted, if there is a consumer need for regulation in connection with the provision of Internet access service, that need applies with equal force to search engines and other gateways for consumer access to Internet-based content or other applications and services. In particular, any transparency or disclosure rules that the Commission imposes on broadband Internet access services would also be appropriate for such entities.

I. ANY RULES SHOULD APPLY ONLY TO A CLEARLY DEFINED BROADBAND INTERNET ACCESS SERVICE.

In our previous comments, we supported many of the broad principles for the provision of broadband Internet access service on which the Commission now suggests that a consensus is emerging:

> First, that broadband providers should not prevent users from sending and receiving the lawful content of their choice, using the lawful applications and services of their choice, and connecting the nonharmful devices of their choice to the network . . . . Second, that broadband providers should be transparent regarding their network management practices. Third, that with respect to the handling of lawful traffic, some form of anti-discrimination protection is appropriate…. Fourth, that broadband providers must be able to reasonably manage their networks, including through appropriate and tailored mechanisms that reduce the effects of congestion or address traffic that is unwanted by users or harmful to the network.[7]

We did not – and still do not – endorse the notion that rules and regulation are necessary to promote and ensure adherence to these principles. After all, they are the hallmark of Internet access service today – and the end-to-end openness of the Internet has flourished in the absence

[7] Public Notice at 1.

of any such Internet-specific rules and regulation. Nevertheless, NCTA agrees that these principles should – and will – *continue* to guide and define broadband Internet access service.

As the Commission indicates, however, no consensus has yet emerged on the "form of anti-discrimination protection" that is appropriate in the provision of broadband Internet access service. Internet service providers are, of course, subject to the antitrust laws, which protect against discriminatory conduct that harms competition and consumers. In the absence of any pattern of harmful discriminatory conduct – anticompetitive or otherwise – by ISPs, there is no need for further regulations. Such restrictions would needlessly constrain business arrangements and innovative developments that would otherwise enhance the value of broadband Internet access service to content and application providers and to consumers.

In particular, the specific rule proposed by the Commission in its initial Notice of Proposed Rulemaking would extend the scope of prohibited "discrimination" to any arrangements under which ISPs receive any compensation from a content or application provider. That rule would not promote the public interest in Internet openness and competition and is far outside the bounds of any emerging consensus on nondiscrimination. If there is a new consensus that is beginning to emerge, it is that ISPs should be permitted – indeed, encouraged – to offer new and innovative services that can be provided along with broadband Internet access service.[8] Encouraging innovation and consumer choice should guide the Commission's approach to specialized services as well as to its development of any nondiscrimination rules for broadband Internet access service.

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[8] *See, e.g.*, D. Post, "Internet 'Censorship,' part 2 — Google, Verizon, and Net Neutrality," *The Volokh Conspiracy*, Aug. 11, 2010, http://volokh.com/2010/08/11/internet-censorship-part-2-google-viacom-and-net-neutrality/. As Professor Post, a proponent of preserving a ubiquitously available "net neutral" end-to-end ("E2E") Internet, has written, "if Verizon can figure out a way to provide additional services to some of its subscribers using the Internet infrastructure in a way that does not compromise the traffic over the E2E inter-network, why should we want to stop them from doing that?"

A. Services Provided by Cable Operators and Telephone Companies That Do Not Use the Public Internet Should Not – and May Not – Be Subject to the Proposed Open Internet Rules.

As a threshold matter, it should be clear that services that are provided over an ISP's last-mile facilities and that do not use the public Internet – even if they may use Internet Protocol (IP) for the transmission of voice, video or data – should be wholly outside the scope of any rules being considered in this proceeding. These services would, of course, include the video programming services offered by cable operators – services which are delivered by cable operators from their headends over their cable systems. Congress has enacted a comprehensive regulatory framework governing the provision of such services – Title VI of the Communications Act – and that framework not only does not contemplate but in fact *precludes* the application of common-carrier type regulation, such as the restrictions proposed or suggested by the Commission.[9]

Thus, the Commission could not adopt "nondiscrimination" rules that prevented cable operators from directly entering into contractual arrangements with content providers (*i.e.*, programmers), nor could it indirectly restrict such arrangements by requiring, for example, that content services on the Internet be delivered with the same quality of service as content services on the cable system. In particular, the Commission could not adopt rules that had the effect of limiting the amount of capacity on a cable system that may be used for the provision of cable service. Wholly apart from the restrictions imposed by Title VI, such common carrier type regulations would directly constrain the speech of cable operators in a manner that violated their well-established First Amendment rights.[10]

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[9] 47 U.S.C. § 541(c).

[10] *See, e.g.*, *City of Los Angeles v. Preferred Communications*, 476 U.S. 488 (1986); *Leathers v. Medlock*, 499 U.S. 439 (1991); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994).

B. Services That Do Use the Internet But Are Separate From Broadband Internet Access Service Should Be Deemed "Specialized Services" Not Subject to the Proposed Open Internet Rules.

Even services that *do* rely on the Internet for their delivery to consumers should be treated as "specialized services" outside the scope of the "open Internet rules" where such services are not part of a provider's offering of "broadband Internet access service" – which we believe is most clearly and properly defined as a mass market residential broadband Internet access service that provides connectivity to all or substantially all published IP addresses.

The Public Notice suggests that "Open Internet protections may be weakened if broadband providers offer specialized services that are substantially similar to, but do not technically meet the definition of, broadband Internet service."[11] At this early stage of development, when specialized services themselves are still largely speculative and inchoate, there is no basis for believing that they will ever adversely affect the vitality and openness of broadband Internet access service. To the contrary, the robustness of broadband Internet access service shows no sign of abating. That being the case, it would not only be premature but also counterproductive to establish a prophylactic rule that limits in advance the ability of ISPs and content and application providers to offer Internet-based services outside the scope of broadband Internet access service.[12]

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[11] Public Notice at 2.

[12] Indeed, insofar as such regulation would inherently constrain the ability of ISPs to select and offer content to their customers in addition to a broadband Internet access service, it, too would infringe First Amendment rights. And as the Supreme Court has made clear, "[w]hen 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." *Turner Broadcasting*, *supra*, 512 U.S. at 664.

C. Specialized Services Should Be Outside the Scope of Regulation.

While recognizing that specialized services – however defined – should generally be outside the scope of any "open Internet rules" that may be adopted in this proceeding, the Commission has nevertheless identified "six general policy approaches" for dealing with such specialized services. For the most part, the regulatory constraints embodied in these approaches – especially the last three approaches – are unnecessary and could hamper the rollout of innovative new services for consumers.

1. *Definitional Clarity.* Insofar as the first proposed approach consists of (1) "defin[ing] broadband Internet service clearly;" (2) defining "specialized services" as those services "which do not meet the definition of broadband Internet access service;" and (3) providing that specialized services "would not be subject to the rules applicable to broadband Internet access service," that is, as described above, exactly the right path. But the Commission's suggestion that broadband Internet access be defined not only clearly but "perhaps broadly" misses the mark. As noted above, the Commission should clearly define broadband Internet service as a mass market residential service that provides connectivity to all or substantially all published IP addresses. A case-by-case approach under a "broad" definition would create uncertainty and delay that would suppress the development of new and valuable consumer services that pose no threat to the vitality of broadband Internet access service.

2. *Truth in Advertising.* This approach would "prohibit broadband providers from marketing specialized services as broadband Internet service or as a substitute for such service, and require providers to offer broadband access as a stand-alone service, separate from specialized services, in addition to any bundled offerings." To the extent that the first part of this proposal would address the *false and misleading* marketing of specialized services as tantamount

to broadband Internet access service if, in fact, the services do not offer access to the full array of Internet sites and content, the Federal Trade Commission and others could deal with such claims under existing law (although there is no reason to expect that any such misleading marketing would occur).

It would, however, be unreasonable for the Commission to establish prophylactic rules that dictate and limit the manner in which specialized services are offered. Some providers may want to offer some or all specialized services on a standalone basis; others may want to package them with broadband Internet access service. It would not be reasonable to peremptorily rule out such bundled offerings or, conversely, to prohibit providers from offering specialized services to consumers who did not also purchase broadband Internet access service. There is no basis for concluding that giving consumers any of these options would threaten or impair what the unregulated marketplace has produced – *i.e.*, the availability of an ever more robust broadband Internet access service.

3. *Disclosure.* This proposed approach would "[r]equire providers to disclose information sufficient to enable consumers, third parties, and the Commission to evaluate and report on specialized services, including their effects on the capacity of and the markets for broadband Internet service and Internet-based content, applications, and services." Provided that this requirement is appropriately tailored to protect proprietary information and prevent fishing expeditions, it could assist the Commission in gaining a further understanding of the complex interrelationships among services provided over broadband networks. Information gathering of this sort – and *not* premature prophylactic regulation – is the proper course given the lack of any concrete evidence that specialized services threaten to impede the availability of broadband Internet access service.

The other three proposed approaches discussed in the Public Notice would impose substantial anticipatory regulatory restrictions on the offering of specialized services. Here, too, a properly crafted disclosure requirement is the more appropriate way to protect against potential threats without stifling innovation and preventing consumers from getting the services they value.

4. ***Non-exclusivity.*** The Commission asks whether it should "require that any commercial arrangements with a vertically-integrated affiliate or a third party for the offering of specialized services be offered on the same terms to other third parties." It should not. Applying such a requirement to specialized services would hamper innovation and the introduction of new services by effectively making the carve-out for specialized services meaningless. So long as ISPs' broadband Internet service offering is subject to whatever rules the Commission may adopt, they should be free to enter into arrangements with affiliates and third parties regarding the offering of specialized services without being subject to any non-exclusivity or other regulatory constraints.

5. ***Limit Specialized Service Offerings.*** This proposal would "[a]llow broadband providers to offer only a limited set of new specialized services with functionality that cannot be provided via broadband Internet service, such as a telemedicine application that requires enhanced quality of service." Such an approach is the exact *opposite* of the optimal approach, which is to allow ISPs to offer *any* specialized services while applying any rules adopted in this proceeding only to broadband Internet access service. It would create massive regulatory uncertainty and stifle the offering of services that provide value to consumers. And there is no evidence or reason to believe that it is necessary to ensure the continued availability of broadband Internet access.

6. *Guaranteed Capacity for Broadband Internet Access Service.* This approach would "[r]equire broadband providers to continue providing or expanding network capacity allocated to broadband Internet access service, regardless of any specialized services they choose to offer," and "prohibit specialized services from inhibiting the performance of broadband Internet access services at any give time, including during periods of peak usage." Neither of these requirements would serve the public interest. To the contrary, neither an arbitrary capacity guarantee for broadband Internet access service nor a vague limitation on specialized services is necessary to ensuring the Internet's continued vitality and robustness.

Cable operators have been working diligently to find the best technological approaches to maximize the quality and value of the services they offer consumers, and, especially in today's highly competitive environment, there is no reason to expect anything else. As cable operators have amply demonstrated with their video service offerings, technological developments can *improve* and *increase* the quantity and quality of digital services while maintaining or *reducing* the capacity allocated to such services. Moreover, operators are developing dynamic bandwidth management techniques that allocate varying amounts of bandwidth to their service offerings in response to transitory demand. To impose arbitrary restrictions on bandwidth use and other technological innovation would only interfere with these technological innovations, result in a less than optimal use of facilities, and make consumers worse off.

Finally, a rule prohibiting specialized services from inhibiting broadband Internet access performance "at any given time" would invite regulatory mischief and accomplish nothing. To expose ISPs to liability (and third-party complaints) whenever there is any arguable "inhibiting" of broadband Internet access service would only serve to inhibit unjustifiably the development and offering of specialized services that would provide value to consumers.

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In sum, with no evidence in sight of any impairment of broadband Internet access service, any regulation of specialized services beyond limited disclosure requirements (and already applicable truth-in-advertising regulations) would be contrary to the public interest.

II. WIRELESS PLATFORMS AND PROVIDERS SHOULD NOT BE EXCLUDED FROM ANY RULES THAT MAY BE IMPOSED ON PROVIDERS OF BROADBAND INTERNET ACCESS SERVICE.

Throughout this proceeding, NCTA has consistently articulated two basic principles with respect to the application of net neutrality principles to wireless providers. First, there is no market failure warranting codification of these neutrality principles as enforceable rules for *any* broadband provider, but, second, if any such rules are adopted for broadband Internet access, specialized services, or both, they must be applied in a competitively neutral manner to all broadband platforms, wireline and wireless.[13] As we have explained, the purportedly unique characteristics of the wireless marketplace and wireless technology advanced as a basis for a blanket wireless exemption are not meaningful legal or policy distinctions.[14] The wireless industry says it should not be subject to net neutrality rules because it is an "innovation, investment and job leader;" that dire prophecies of harm without net neutrality rules failed to materialize; that the existing policy of deregulation has been highly successful; and that its services are subject to competitive pressures. Every one of these arguments is equally applicable to the wireline broadband industry.[15]

The wireless industry's technology-based claims for special treatment hinge on the need to manage limited spectrum, but, as we have previously noted, network congestion issues are not

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[13] *See, e.g.*, NCTA Comments at 45-47; NCTA Reply Comments at 29-31.

[14] Reply Comments at 29-31.

[15] *Id.* at 29-30.

unique to spectrum-based services. They may also occur in shared broadband networks like the one deployed by cable operators.[16] Any differences between wireless and wireline broadband technologies, or among different wireline technologies, are more appropriately addressed in the manner in which net neutrality rules are applied, taking into account the network management challenges faced by a provider using a particular technology, rather than by excluding wireless carriers from the rules completely.

The Commission's initial NPRM appeared to recognize that the appropriate question was how to apply open Internet rules to wireless broadband if such rules were adopted – *not* whether to exempt wireless altogether. The instant Public Notice seeks further specific detail on how to apply open Internet rules to wireless broadband in light of two developments – the initiation of usage-based pricing by some wireless broadband providers and the joint proposal by Verizon and Google to exclude wireless from open network rules except for transparency obligations.[17] These developments provide the context for a series of questions regarding disclosure obligations, the "ability of new technologies and business models to facilitate non-harmful attachment of third party devices to wireless networks," and how best to balance consumer freedom to access applications of their choice with the need to ensure continued network investment.[18]

As with respect to net neutrality generally, the Commission's assessment of these additional questions should be guided by the underlying principle of regulatory parity in order to avoid conferring a regulatory advantage upon one type of broadband provider over another.

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[16] *Id.* at 30 (noting that "Wireline ISPs, of course, also have limited capacity that requires management of congestion.")

[17] Public Notice at 4.

[18] Public Notice at 5.

With respect to transparency, for example, the Commission asks several questions regarding the application of disclosure requirements to wireless broadband providers.[19] For all of the reasons previously explained by NCTA, mandatory disclosure rules are unnecessary and potentially highly counterproductive.[20] If the Commission is going to impose any disclosure obligations, however, it should apply them equally to wireline and wireless providers. There is no rational basis for applying a different, more onerous set of transparency requirements on wireline broadband providers. And, contrary to the Verizon-Google proposal, wireless providers should also be subject to any other network neutrality principles that the Commission determines should be enforceable against wireline ISPs, with technological differences accounted for in determining how – not whether – they should apply.

Several of the Commission's questions regarding wireless devices and applications address the ability of evolving technology and industry standards to provide sufficient protection for consumer choice. The Commission asks, for example, whether "adherence to industry standards for mobile wireless networks ensure non-harmful technical interoperability between mobile broadband devices and networks."[21] To the extent that the Commission concludes that compliance with technical standards and certification mitigates the need for prescriptive open Internet rules for wireless broadband, the same outcome should apply to wireline networks. Wireline broadband devices, too, are subject to industry standards and certification requirements.

Moreover, wireless is not the only industry utilizing technological innovations to address network issues. The cable industry, for example, is utilizing channel bonding and releasing new modems and head-end equipment that will enable maximum download throughput of more than

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[19] *Id.*

[20] *See* NCTA Comments at 41-45.

[21] Public Notice at 5.

300 Mbps.[22] While it is appropriate for the Commission to assess whether factors such as standards compliance and technological innovation mitigate the need for open Internet rules, this assessment must be conducted across all platforms in a neutral and objective fashion. If compliance and technological evolution are found to be sufficient to exempt wireless broadband from regulation, the same reasoning should apply to wireline broadband.

Finally, the Commission asks whether usage-based data pricing can mitigate the need for prescriptive, codified open Internet rules. Specifically, the Commission seeks comment on the extent to which usage based pricing business models mitigate concerns regarding congestion of scarce network capacity by third party mobile devices, or would be sufficient, in conjunction with reasonable network management, to address concerns regarding bandwidth hungry applications.[23] Whether or not usage-based pricing mitigates network congestion concerns, there is no basis for asking the question solely with respect to wireless networks. There would be no rational basis for relieving wireless broadband providers who employ usage-based pricing from the full burdens of regulation while at the same time imposing those burdens on wireline providers that utilize such a pricing model.

Regulatory parity and competitive fairness must be the Commission's touchstones as it assesses whether to adopt net neutrality rules. To the extent the Commission determines that technology or business models should be taken into account in determining the applicability of any such rules, those considerations should be applied to all providers and all platforms. While NCTA continues to believe that no such rules are necessary for broadband Internet access or specialized services, an arbitrary exemption for one broadband technology or sector while others

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[22] Statement of Richard R. Green, former President and CEO of CableLabs, before the FCC Workshop on "Big Ideas," September 3, 2009, at 3.

[23] Public Notice at 5.

are made subject to these requirements would disserve consumers and skew the development of broadband services.

CONCLUSION

For the foregoing reasons and the reasons set forth in our previously filed comments, a policy of regulatory restraint remains the best approach to ensuring and preserving the continued growth, innovation, robustness and openness of the Internet. If any rules were nevertheless to be adopted in this proceeding, they should apply only to a clearly defined broadband Internet access service. And they should apply to all providers of such service, whether wireline or wireless.

Respectfully submitted,

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