

**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

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**COMMENTS OF WINDSTREAM COMMUNICATIONS, INC.**

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Windstream Communications, Inc., on behalf of itself and its affiliates (collectively “Windstream”), submits the following comments in response to the Federal Communications Commission (“Commission”) *Public Notice* seeking further comment on two “under-developed issues”: the application of open Internet rules to mobile wireless broadband Internet access services, and the relationship between open Internet protections and “specialized” services.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

Current Commission policy—applying the four principles set out in the *Internet Policy Statement*<sup>2</sup> to all broadband Internet access services, wired and wireless, fixed and mobile—has

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<sup>1</sup> *Further Inquiry into Two Under-developed Issues in the Open Internet Proceeding*, Public Notice, GN Docket No. 09-191, WC Docket No. 07-52, DA 10-1667 (Rel. Sept. 1, 2010) (*Public Notice*).

<sup>2</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CC Docket Nos. 02-33, 01-337, 95-20,

established a delicate balance, preserving the openness of the Internet while maintaining incentives for broadband providers to make the substantial investments necessary to achieve the nation's ambitious broadband deployment goals. Imprudent Commission action with respect to either of the issues raised in the *Public Notice*—the treatment of wireless broadband Internet access services or of specialized services—would upset this balance, suppressing innovation and investment throughout the Internet ecosystem, while at the same time undermining the Commission's principal goal of ensuring an open Internet.

As discussed at length in its reply comments in the Commission's *Third Way* proceeding, Windstream, which has invested about \$700 million over the past four years to deploy and enhance broadband Internet service in rural America, strongly opposes disparate regulatory treatment for wireless broadband Internet access services.<sup>3</sup> While the imposition of "open Internet" rules to any broadband services would be unnecessary and not in the public interest—and Windstream challenges the Commission's assertion that there is a consensus in favor of applying these rules to fixed or wireline platforms—the Commission should not double its potential error by departing from its tradition of technological neutrality and regulatory parity and exempting wireless broadband Internet platforms from any new regulatory framework it may adopt.

As the Commission has acknowledged, wired and wireless broadband Internet access services compete with each other across various segments of the broadband marketplace. To

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98-10, GN Docket No. 00-185, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986, 14988 (2005) (*Internet Policy Statement*).

<sup>3</sup> Reply Comments of Windstream Communications, Inc., GN Docket No. 10-127 (August 12, 2010).

regulate wireless services differently would injure consumers by distorting the competitive marketplace and encouraging regulatory manipulation. The alleged “unique characteristics” of wireless services are largely illusory and do not justify subjecting wired services—which are, ironically, more open—to more stringent rules. Furthermore, to regulate these services differently would be to diverge from the Commission’s long history and many commenters’ support of regulatory parity and scrupulous avoidance of favoring any single broadband Internet technological platform.

With regard to “specialized” services, the correct approach at this time is to continue to allow services to evolve without regulatory intervention. Unrestrained growth and development of specialized services advances the National Broadband Plan’s goals, while regulation would deter investment in broadband, undermining the national purposes outlined in the Plan and placing a greater burden on the Universal Service Fund to subsidize deployment. Mere conjecture that specialized services place the “open Internet” at risk is an inadequate basis for regulation; in fact, discouraging specialized services is more likely to harm than to protect the “open Internet.” The prospect of new revenues from specialized services encourages broadband providers to improve their networks—a development that benefits “open Internet” users who can use greater network capacity due to dynamic allocation of bandwidth.

If the Commission nevertheless deems it necessary to delve into the regulation of specialized services, it should ensure that its regulatory regime does not discourage meaningful broadband deployment in rural areas. Any regulations should apply equally to all broadband technologies, both wired and wireless. The Commission also should avoid regulation, such as

restrictions on dynamic capacity allocation or requirements of equal access, that would disproportionately burden providers seeking to deploy broadband services in high-cost areas.

## **II. THERE IS NO CONSENSUS IN FAVOR OF APPLYING “OPEN INTERNET” PROPOSALS TO FIXED OR WIRELINE BROADBAND PLATFORMS.**

The *Public Notice* asserts that discussion generated by this proceeding “appears to have narrowed disagreement on many of the key elements of the framework proposed in the *NPRM*,” including that “some form of anti-discrimination protection is appropriate, at least on fixed or wireline broadband platforms.”<sup>4</sup> Though the *Public Notice* wishes to limit the present inquiry to “two under-developed issues,” Windstream is compelled to note that the apparent impression underlying this narrowed inquiry—that a general consensus favors the application of “open Internet” proposals, at least with respect to fixed and wireline broadband platforms—is inaccurate.

The purported evidence in the *Public Notice* of this “narrowed disagreement” is a handful of select comments and reply comments submitted by a variety of interested parties more than six months ago. A *minority* of the comments cited in the *Public Notice* actually support the imposition of the proposed regulations on any broadband providers.<sup>5</sup> The Commission also references a more recent legislative framework proposal developed by Verizon and Google.<sup>6</sup> For

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<sup>4</sup> *Public Notice* at 1.

<sup>5</sup> *Id.* at 1-2, fn.5-6. Of the commenters cited, only the Communications Workers of America, Free Press, the Public Interest Commenters, and the Center for Democracy and Technology support the imposition of the proposed regulations on any broadband providers.

<sup>6</sup> *Id.* at 1, fn.4.

Verizon, an opponent of the Commission’s proposed regulations, and Google, a business partner of Verizon in the delivery of mobile wireless services, the joint proposal represents a compromise that would protect Verizon and Google’s mobile wireless offerings from network management regulations. These citations offer meager support for the proposition that the Commission’s proposals are generating broad-based support.

In contrast, a wide variety of parties offer strong opposition to application of “open Internet” rules to fixed and wireline providers. For example, the National Cable & Telecommunications Association, representing a wide range of cable providers and programmers, states that it “supports Congress’s longstanding policy of leaving the Internet unregulated.”<sup>7</sup> The United States Telecom Association, which represents broadband service providers, manufacturers and suppliers, asserts that “regulating the Internet would delay the arrival of life-enhancing technological advances in health care, education, the economy and beyond by sending a distinct chill through the investment climate.”<sup>8</sup> Likewise, *The Washington Post* states in a September 28, 2010, editorial that the Commission’s anti-discrimination proposals should be “shelved,” and that the Chairman will “jeopardize [the Commission’s goals]—and stifle further investments by ISPs—with attempts to micromanage what has been a

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<sup>7</sup> National Cable & Telecommunications Association, Network Management – Full Brief, available at <http://www.ncta.com/IssueBriefs/Network-Management.aspx?view=2> (last visited Oct. 11, 2010).

<sup>8</sup> USTelecom – The Broadband Association, Issues, Preventing Internet Regulation, available at <http://www.ustelecom.org/Issues/PreventingInternetRegulation/PreventingInternetRegulation.html> (last visited Oct. 11, 2010).

vibrant and well-functioning marketplace.”<sup>9</sup> And more than 55 percent of respondents in a recent national survey stated that the federal government should not regulate the Internet at all.<sup>10</sup>

Undeniably there are some Americans and organizations who support “open Internet” regulation. However, just as certainly there are many—and very likely more—who oppose it. Thus, there remains significant disagreement on even the most fundamental elements of the proposed framework, and the record in this proceeding reveals nothing approaching a consensus in favor of the proposals, as applied to wireline and other fixed broadband access services, or any other broadband services.

### **III. THE COMMISSION SHOULD PRESERVE REGULATORY PARITY BETWEEN FIXED AND MOBILE WIRELESS AND OTHER BROADBAND SERVICES.**

With regard to openness rules, as with any other area, the Commission should maintain its existing practice of regulating wireless broadband Internet access service providers under the same framework as their wired counterparts. Given the current state of the broadband marketplace—in which wired and wireless services compete in the same market and use many of the same technologies—alleged “unique characteristics” of wireless broadband Internet access services are largely illusory and do not justify subjecting wired broadband Internet access

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<sup>9</sup> Editorial, *The FCC’s Heavy Hand*, The Washington Post, Sept. 28, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/27/AR2009092703026.html> (last visited Oct. 11, 2010).

<sup>10</sup> PCWorld, *Survey Says US Public Doesn’t Support Internet Regulation*, Sept. 23, 2010, available at [http://www.pcworld.com/businesscenter/article/206101/survey\\_says\\_us\\_public\\_doesnt\\_support\\_internet\\_regulation.html](http://www.pcworld.com/businesscenter/article/206101/survey_says_us_public_doesnt_support_internet_regulation.html) (last visited Oct. 11, 2010) (citing national study commissioned by Broadband For America).

services to more stringent rules. To regulate these services differently would be to diverge from the Commission's long history and many parties' support of regulatory parity and scrupulous avoidance of favoring any single broadband Internet technological platform.

**A. The Alleged “Unique Characteristics” of Some Wireless Internet Access Services Do Not Justify Giving Any Fixed or Mobile Wireless Providers a Structural Regulatory Advantage Over Other Broadband Providers.**

Given the manner in which the broadband marketplace and technologies have evolved, it would be inappropriate to provide special regulatory treatment for any wireless Internet access services. Fixed and mobile wireless and wired broadband Internet services are competitors in the communications marketplace, and disparate regulatory treatment would distort marketplace competition. The alleged differences between wired and wireless networks are at most matters of degree, not kind, and do not justify placing the technologies under entirely different regulatory standards. Any regulations should apply simultaneously and consistently to all types of broadband Internet service providers.

**1. Wired and Wireless Broadband Services Compete in the Same Market and Frequently Use the Same Technologies.**

As the Commission has repeatedly acknowledged, wired and wireless broadband services compete with one another in the marketplace, and will do so more vigorously as time goes on. At present, given the (relatively) limited speeds of 3G networks, wired and wireless providers compete by offering consumers multiple options that provide different tradeoffs among cost, speed, and mobility.<sup>11</sup> And as the spectral efficiency (and speed) of all wireless technologies

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<sup>11</sup> See, e.g., Federal Communications Commission, Connecting America: The National Broadband Plan at 40-41 (rel. March 16, 2010) (National Broadband Plan) (noting that

continues to increase rapidly,<sup>12</sup> 4G and future wireless technologies will pose significant competition to a broad range of wired broadband offerings.<sup>13</sup> As the National Broadband Plan acknowledges, “[t]he ongoing upgrade of the wireless infrastructure is promising because of its potential to be a closer competitor to wireline broadband, especially at lower speeds.”<sup>14</sup>

Given these developments, the National Broadband Plan examined fixed wireless alongside DSL as potential technologies to achieve universal broadband deployment when calculating the Broadband Availability Gap (as the Plan termed the gap to profitability in unserved areas), and the Plan contemplates the development of a Connect America Fund (“CAF”) to subsidize one broadband provider per geographic area.<sup>15</sup> The Plan anticipates that CAF eligibility criteria will be technology-agnostic and that fixed and mobile wireless providers

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“[c]onsumers’ preferences differ depending on how they use their broadband connections and how much they are willing to pay for such use”); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fourteenth Report, WT Docket No. 09-66, FCC 10-81, at ¶ 342 (rel. May 20, 2010) (*Fourteenth Mobile Wireless Competition Report*) (stating that “[m]obile wireless Internet access service could provide an attractive alternative to wireline offerings for consumers who are willing to trade off speed for mobility, and also consumers who are relatively indifferent with regard to the attributes, performance, and pricing of mobile and fixed platforms”).

<sup>12</sup> See National Broadband Plan at 41, Exhibit 4-F.

<sup>13</sup> See, e.g., *id.* at 41 (noting that “[g]iven enough spectrum, however, a variety of engineering techniques—including higher transmitter power, high-gain directional antennas and externally mounted antennae—may make wireless a viable price/performance competitor to wired solutions at far higher speeds than are possible today, further increasing consumer choice”); *Fourteenth Mobile Wireless Competition Report* at ¶ 342 (“[A]dvances in wireless technologies, coupled with increases in the supply of spectrum, have the potential to make mobile wireless service a more viable competitor at higher data speeds at some future date.”).

<sup>14</sup> National Broadband Plan at 41.

<sup>15</sup> See Omnibus Broadband Initiative, *The Broadband Availability Gap* (OBI Technical Paper No. 1) at 65.

will compete with wired providers for support.<sup>16</sup> Fair competition for support would be undermined if different providers were held to different performance standards.

In addition, networks used to support wireless and wireline broadband services are becoming increasingly interchangeable. Wireless companies are increasingly responding to their own capacity limits by offloading their traffic onto wireline broadband networks at the point closest to the end-user. This approach began with PSTN calls, with the deployment of handsets that used the 3rd Generation Partnership Project's Unlicensed Mobile Access standard to shift voice calls seamlessly back and forth between a GSM network and a Wi-Fi link to a wired broadband Internet connection.<sup>17</sup> T-Mobile reports that its customers now make more than 1.6 million voice calls via a Wi-Fi link to a wired connection *every month*.<sup>18</sup> Similarly, several national wireless providers have begun offering business and residential customers "femtocells"—small cellular base stations that provide enhanced wireless coverage (over the carrier's licensed spectrum) of the customer's premises and plug into the customer's *wired* broadband connection to carry PSTN and broadband traffic over the public Internet.<sup>19</sup> The Commission has noted that approximately 350,000 femtocells were shipped in 2009,<sup>20</sup> and one

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<sup>16</sup> National Broadband Plan at 145.

<sup>17</sup> See *Fourteenth Mobile Wireless Competition Report* at ¶ 349 & fn.926-27; <http://www.smart-wi-fi.com/history.php> (providing a history and timeline of UMA services).

<sup>18</sup> See "T-Mobile Extends Wi-Fi Calling Leadership" (Apr. 26, 2010), *available at* <http://www.marketwire.com/press-release/T-Mobile-Extends-Wi-Fi-Calling-Leadership-1162333.htm> (last visited Aug. 9, 2010).

<sup>19</sup> See, e.g., *Fourteenth Mobile Wireless Competition Report* at ¶ 350 & fn.929-31 (describing femtocell offerings from Sprint Nextel, Verizon Wireless, and AT&T).

<sup>20</sup> *Id.* at ¶ 350.

analyst has predicted that there will be almost six femtocell base stations for every larger base station by 2014.<sup>21</sup>

As the Commission has noted, wireless companies' attempts to offload traffic onto wired broadband connections have greatly increased with the recent explosion of smartphone usage.<sup>22</sup> "Wireless" handsets now account for 35 percent of all Wi-Fi hot spot connections, and are projected to account for half of all hot spot connections by 2011.<sup>23</sup> About 40 percent of iPhone traffic in the United States is transmitted via a Wi-Fi connection supported by a wired network<sup>24</sup>—due in part to policies that encourage and sometimes require users to employ Wi-Fi enabled by wired facilities, rather than the 3G network, for the most data-intensive applications.<sup>25</sup> To ease network congestion, AT&T also has begun deploying Wi-Fi "hot zones" in Times Square and other urban areas, in which AT&T phones will automatically switch over

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<sup>21</sup> See "Berg Insight Forecasts 70 Million Users of Femtocells Worldwide by 2014" (Aug. 21, 2009), available at [http://berginsight.com/News.aspx?m\\_m=6&s\\_m=1](http://berginsight.com/News.aspx?m_m=6&s_m=1) (last visited Aug. 9, 2010).

<sup>22</sup> See *Fourteenth Mobile Wireless Competition Report* at ¶ 348 (noting that "with the recent growth of wireless data traffic, Wi-Fi provides a means for providers to offload some data traffic from their wireless networks").

<sup>23</sup> *Id.* at ¶ 348, fn.924.

<sup>24</sup> *Id.* at ¶ 348, fn.925.

<sup>25</sup> For example, Apple and AT&T have specified that Apple's new FaceTime video-calling application for iPhone 4 can be used only over a Wi-Fi connection, not AT&T's 3G network. See iPhone 4 Features, available at <http://www.apple.com/iphone/features/facetime.html> (last visited Aug. 11, 2010).

from the 3G network to Wi-Fi supported by the wireline network.<sup>26</sup> These practices enable “a very large data off-load in a venue where traditionally data would go over our old voice and data network,” according to an AT&T official.<sup>27</sup> Verizon, likewise, is pursuing measures that use Wi-Fi connections to place more and more so-called wireless traffic directly onto the wireline network. As a former Verizon Wireless marketing executive recently stated, “Two years ago, all the carriers thought Wi-Fi was a threat” to their cellular networks. “Now it’s a lifeline.”<sup>28</sup>

The result of these developments is that for a very large percentage of broadband communications—including approximately 40 percent of iPhone traffic—there is *no technological difference* between the broadband connectivity used to support traditional wireline broadband service and the connectivity used to support a “wireless” handset’s broadband service. Traffic to and from a handset sold by a wireless provider may never touch the wireless provider’s cellular network at all; instead, the customer’s handset automatically switches modes and offloads the communication via Wi-Fi onto a *wired* broadband connection. There is no network or other difference between the “wireless broadband Internet connectivity” provided by AT&T over an iPhone at a Wi-Fi access point and the “wireline broadband Internet connectivity” provided by Windstream to a subscriber connecting a netbook or other device to a HomePortal wireless gateway. Both types of communications may be carried from a Wi-Fi access point to

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<sup>26</sup> Niraj Sheth, “AT&T Sets Up Free Wi-Fi in Times Square To Ease iPhone Load,” *Wall St. J.* (May 24, 2010), available at [http://online.wsj.com/article/NA\\_WSJ\\_PUB:SB10001424052748704113504575265323937207404.html](http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748704113504575265323937207404.html) (last visited Aug. 8, 2010).

<sup>27</sup> *Id.*

<sup>28</sup> Peter Burrows, “AT&T Mulls Plans to Deal with iPhone Data Demand,” *Bloomberg BusinessWeek* (Dec. 21, 2009), available at [http://www.businessweek.com/technology/content/dec2009/tc20091221\\_605613.htm](http://www.businessweek.com/technology/content/dec2009/tc20091221_605613.htm).

the public Internet over a wired connection. The only difference is that in the first case, a wireless company has sold the equipment that connects to the Wi-Fi access point. This is a very thin reed on which to rest the creation of separate regulatory regimes for wired and wireless broadband Internet services.

Finally, the recent “developments” cited by the Commission as motivating this further inquiry do not justify treating wireless broadband providers differently from wired providers. First, as the Commission notes, some wireless providers have recently introduced pricing plans based on the amount of data a person uses.<sup>29</sup> But multiple wired broadband providers also have experimented with similar pricing plans over the past several years, and continue to do so.<sup>30</sup> Thus, to the extent that this development “may reduce mobile broadband providers’ incentives to employ more restrictive network management practices that could run afoul of open Internet principles,” as the Commission suggests, this result would be true of wired broadband providers as well. Second, the Commission cites the recent Verizon-Google proposal, which would largely exclude wireless broadband Internet services from “open Internet” requirements.<sup>31</sup> Yet as discussed above, this proposal is between partners in the delivery of mobile wireless services and apparently is designed primarily to protect their mobile wireless offerings from “open Internet”

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<sup>29</sup> *Public Notice* at 4, fn.23.

<sup>30</sup> *See, e.g.*, Bloomberg Businessweek, Time Warner Cable Expands Internet Usage Pricing, March 31, 2009, *available at* [http://www.businessweek.com/technology/content/mar2009/tc20090331\\_726397.htm](http://www.businessweek.com/technology/content/mar2009/tc20090331_726397.htm) (last visited Oct. 11, 2010) (detailing Time Warner Cable’s plans to test tiered pricing in three cities); Frontier Communications, Free 5 GB of Internet Usage, *available at* <http://www.frontier.com/5GB/> (last visited Oct. 11, 2010) (noting that Frontier is considering tiered usage plan pricing and “wants to start to educate customers about this usage”).

<sup>31</sup> *Public Notice* at 4, fn.25.

regulation. This self-interested proposal should not be viewed as a sign that consensus has formed around placing rules on more open, wired networks, while effectively rewarding the already less open wireless networks with a lighter regulatory touch.

## **2. Alleged Differences Are Matters of Degree and Do Not Warrant Different Regulatory Treatment.**

Even where differences between wireless and wireline broadband Internet platforms currently exist, the differences are matters of degree and not kind. While wireless providers have spectrum scarcity and network management issues, wireline and cable providers have to manage finite network capacity as well—and these capacity constraints are compounded by the wireless providers’ strategy of offloading PSTN and broadband traffic onto wired broadband networks wherever possible. Wireline carriers have faced massive increases in consumer demand for bandwidth in recent years. In July 2006, Windstream’s 568,000 Internet customers generated an average of 2.1 Gbps of total downstream Internet traffic—an average of 3.7 Kbps per customer. Comparatively, in October 2010, Windstream’s 1.3 million broadband customers are generating an average of 40.7 Gbps of downstream Internet traffic—an average of 31.3 Kbps per customer, a more than eight-fold increase per customer and a nearly 19-fold increase in overall downstream traffic. Deploying additional fiber and upgrading electronics to handle this increased demand may not be the same process as acquiring new spectrum in an auction, but these measures are hardly so inexpensive and inconsequential to warrant dismissing wired providers’ need to manage capacity on their networks. This is particularly true when comparing the network-management needs of wired and fixed wireless providers, because many of the “unique characteristics” that allegedly justify the disparate treatment of wireless—the challenges of

predicting traffic patterns, handing off sessions from cell site to cell site, and managing interference in a limited-spectrum environment<sup>32</sup>—are irrelevant in the fixed wireless context.

Placing wireless broadband Internet access providers under a less stringent regulatory regime—or postponing a decision on these providers’ status while moving forward with regulation of broadband services offered by their wired counterparts—would effectively penalize the wired broadband providers that have invested the most in ensuring optimum performance for their customers (whether that performance be measured by degree of network openness or degree of speed) and place wired providers at a government-created competitive disadvantage. Wireline broadband providers would have to meet capacity constraints with additional investment, while their wireless competitors would be allowed to address capacity constraints with further network management. Such a policy would discourage the very private investment that the National Broadband Plan seeks to foster.<sup>33</sup> And by imposing disparate compliance costs, this policy would compromise wired broadband Internet access providers’ ability to obtain CAF funding, if the Commission intends to implement the National Broadband Plan’s recommendation that wireless and wireline providers compete for these funds in the future.<sup>34</sup>

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<sup>32</sup> See, e.g., Reply Comments of CTIA—The Wireless Association®, GN Docket No. 09-191, WC Docket No. 07-52, at 35-36 (April 26, 2010); Comments of Verizon and Verizon Wireless, GN Docket No. 09-191, WC Docket No. 07-52, at 61-62 (Jan. 14, 2010); Comments of AT&T Inc., GN Docket No. 09-191, WC Docket No. 07-52, at 157-58 (Jan. 14, 2010).

<sup>33</sup> See National Broadband Plan at 9 (noting that the Plan recommends ways that governments can “unleash private investment” in broadband).

<sup>34</sup> See *id.* at 145 (recommending that the “eligibility criteria for obtaining support from [the Connect America Fund] should be company- and technology-agnostic so long as the service provided meets the specifications set by the FCC”).

To the extent that wireless providers claim special technological constraints, at most they should be permitted to seek waivers of specific rules within a uniform regulatory regime, consistent with current Commission practice governing waivers to rules of general applicability.<sup>35</sup> In that context, wireless providers would bear the burden of proof, and any differential treatment should be provided on a narrow, case-specific basis in response to a specific, well-documented demonstration of need. The regime would presume parity among technologies, and only modify the presumption in cases of proven need.

**B. Imposing the Proposed Rules Only on Wired Broadband Internet Access Services Would Be Contrary to Commission Precedent and the Many Comments in This Proceeding that Have Recognized the Importance of Preserving Regulatory Parity Among Broadband Services.**

Any differential regulation of wireless and wireline broadband Internet access services also would run contrary to the Commission's history of regulatory parity. The Commission has long acknowledged, in many contexts, the importance of regulating like technologies and services alike. Regulatory parity across different broadband services "encourage[s] all potential investors in broadband network platforms, and not just a particular group of investors, to be able to make market-based, rather than regulatory-driven, investment and deployment decisions. This is particularly true for new technologies and services that provide voice, video, Internet access, and other broadband applications."<sup>36</sup>

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<sup>35</sup> See 47 C.F.R. § 1.3.

<sup>36</sup> *In re Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II Non-Dominant Computer Inquiry Rules with Respect to Broadband Services*, 23 FCC Rcd 12260, 12287-88 ¶¶ 51-52 (2008) (footnotes omitted).

In its various broadband Internet classification orders, the Commission has scrupulously avoided favoring one technological platform over another, recognizing that doing so would distort a developing marketplace to the detriment of consumers. When the Commission addressed wireline broadband Internet access services, it adopted the same regulatory classification as it had for cable modem services to “further[] the goal of developing a consistent regulatory framework across platforms by regulating like services in a similar functional manner.”<sup>37</sup> BPL-based broadband services were also brought under the same rules for exactly the same reason.<sup>38</sup>

When it comes to wireless broadband, the Commission has continued to recognize the importance of bringing fixed and mobile wireless technologies under the same regulatory umbrella as wired technologies. In the *Wireless Broadband Order*, the Commission cited “the Congressional goal of promoting broadband deployment and encouraging competition in the provision of broadband services, by ensuring regulatory parity among all broadband Internet access services—regardless of whether they are offered through wireline, cable, or wireless technology.”<sup>39</sup> The Commission specifically warned of the dangers of treating wireless broadband services differently: “Without a consistent approach toward all Internet access providers (both within the wireless industry and across diverse technologies), and absent a

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<sup>37</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, Report and Order, 20 FCC Rcd 14853, ¶ 1 (2005).

<sup>38</sup> *See United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281, ¶ 2 (2006).

<sup>39</sup> *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, ¶ 55 (2007) (*Wireless Broadband Order*).

showing that an application of common carrier regulation to only one type of Internet access provider will promote the public interest, *the possibility of full and fair competition will be compromised.*”<sup>40</sup>

Moreover, the terms of the Commission’s existing broadband openness principles apply to all modes of broadband Internet transmission, wired or wireless.<sup>41</sup> According to the Commission, the principles are intended to “ensure that *broadband networks* are widely deployed, open, affordable, and accessible to all consumers.”<sup>42</sup> Consistent with this approach, in 2007 the Commission adopted rules for the 700 MHz spectrum auction that included open access commitments applying to the C Block—commitments that Verizon Wireless accepted when it placed winning bids for almost the entire swath of C Block spectrum.<sup>43</sup>

A wide variety of commenters in this and the *Third Way* proceedings—including public interest groups,<sup>44</sup> fixed wireless providers,<sup>45</sup> and others<sup>46</sup>—also have supported the preservation

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<sup>40</sup> *Id.* (emphasis added).

<sup>41</sup> *Internet Policy Statement.*

<sup>42</sup> *Id.* at 14988 (emphasis added).

<sup>43</sup> See *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands et al.*, WT Docket No. 06-50, Second Report and Order, 22 FCC Rcd 15289, 15501, ¶ 206 (2007); 47 C.F.R. § 27.16(b) (stating that “Licensees offering service on spectrum subject to this section shall not deny, limit, or restrict the ability of their customers to use the devices and applications of their choice on the licensee’s C Block network, except (1) Insofar as such use would not be compliant with published technical standards reasonably necessary for the management or protection of the licensee’s network, or (2) As required to comply with statute or applicable government regulation”).

<sup>44</sup> See, e.g., Comments of ACLU, GN Docket No. 10-127, at 5 (July 15, 2010); Comments of Center for Democracy and Technology, GN Docket No. 10-127, at 18-19 (July 15, 2010); Comments of Center for Media Justice, Consumers Union, Media Access Project, and New America Foundation, GN Docket No. 10-127, at 20-25 (July 15, 2010); Comments of Center for

of regulatory parity among broadband Internet access service providers. NCTA asserts in its initial comments in this proceeding that “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.”<sup>47</sup> Qwest adds in its reply comments:

[N]one of the concerns outlined in the *NPRM* or in the initial round of comments create a basis for arbitrarily choosing to regulate wireline broadband platforms while treating wireless broadband platforms differently. All broadband providers, regardless of the technology platform, face significant network management challenges and require flexibility in operating their networks. The fact that these significant concerns expressed by the Commission and others are faced by wireline providers as well only illustrates the need for the Commission to proceed with caution with any new regulation in this area.<sup>48</sup>

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Media Justice, Consumers Union, Media Access Project, New America Foundation, and Public Knowledge, GN Docket No. 09-191, WC Docket No. 07-52, at 19 (Jan. 14, 2010).

<sup>45</sup> See, e.g., Comments of Clearwire Corporation, GN Docket No. 10-127, at 6-7 (July 15, 2010); Comments of Clearwire Corporation, GN Docket No. 09-191, WC Docket No. 07-52, at 10 (arguing that rules should be “crafted in a technology agnostic manner”).

<sup>46</sup> See, e.g., Comments of Cablevision Systems Corporation, GN Docket No. 10-127, at 37-39 (July 15, 2010); Comments of Charter Communications, GN Docket No. 10-127, at 11-14 (July 15, 2010); Comments of the National Cable & Telecommunications Association, GN Docket No. 10-127, at 84 (July 15, 2010); Comments of Qwest Communications International, Inc., GN Docket No. 10-127, at 53-55 (July 15, 2010); Comments of SureWest Communications, GN Docket No. 10-127, at 20-21 (July 15, 2010); Reply Comments of Cablevision Systems Corporation, GN Docket No. 09-191, WC Docket No. 07-52, at 19-20 (April 26, 2010); Reply Comments of Charter Communications, GN Docket No. 09-191, WC Docket No. 07-52, at 29 (April 26, 2010); Reply Comments of Comcast Corporation, GN Docket No. 09-191, WC Docket No. 07-52, at 17 (April 26, 2010).

<sup>47</sup> Comments of National Cable & Telecommunications Association, GN Docket No. 09-191, WC Docket No. 07-52, at 46 (January 14, 2010).

<sup>48</sup> Reply Comments of Qwest Communications, GN Docket No. 09-191, WC Docket No. 07-52, at 26 (April 26, 2010). See also Comments of CenturyLink, GN Docket No. 09-191, WC Docket No. 07-52, at 22-23 (January 14, 2010).

In sum, consistent Commission policy and the record in this and the Third Way proceeding support the maintenance of regulatory parity among all broadband Internet platforms.

#### **IV. LIMITATIONS ON “SPECIALIZED” SERVICES WOULD STIFLE INNOVATION AND NEW BROADBAND DEPLOYMENT IN RURAL AREAS.**

The Commission is right to recognize that specialized services drive additional private investment in networks and provide consumers new and valued services, and that it should approach its inquiry with an eye toward preserving the incentives for private investment and deployment of innovative services that benefit consumers.<sup>49</sup> To that end, the correct approach at this time is to continue to allow specialized services to evolve without regulatory intervention. Unrestrained growth and development of specialized services advances the National Broadband Plan’s goals, while regulation would deter investment in broadband, undermining the national purposes outlined in the Plan and placing a greater burden on the Universal Service Fund to subsidize deployment. Mere conjecture that specialized services place the open Internet at risk is an inadequate basis to institute regulation; in fact, discouraging specialized services is more likely to harm than to protect the “open Internet.” The prospect of new revenues from specialized services encourages broadband providers to improve their networks—a development that benefits “open Internet” users who can use greater network capacity due to dynamic allocation of bandwidth.

If the Commission nevertheless deems it necessary to delve into the regulation of specialized services, it should ensure that its regulatory regime does not discourage meaningful

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<sup>49</sup> *Public Notice* at 2, 4.

broadband deployment, particularly in rural areas. Any regulations should apply equally to all broadband technologies, both wired and wireless, and the Commission should avoid regulation, such as restrictions on dynamic capacity allocation or requirements of equal access, that would disproportionately burden providers seeking to deploy broadband Internet access services in high-cost areas.

**A. Specialized Services Should Fall Outside the Scope of Any Open Internet Regulation.**

The record in this proceeding makes clear that the Commission should continue to allow specialized services to evolve without regulatory intervention. Specialized services are playing and will continue to play an integral role in advancing the national priorities identified by Congress in the Recovery Act and emphasized by the Commission in the National Broadband Plan. Furthermore, the unregulated growth of specialized services advances the National Broadband Plan's deployment goals by enabling and motivating increased investment in broadband infrastructure. The Commission should not impose regulations with respect to specialized services in response to mere conjecture and irrational fears that specialized services endanger the "open Internet." On the contrary, the unregulated growth of specialized services is much more likely to enhance the "open Internet" than to harm it.

**1. Unrestrained Growth of Specialized Services Advances National Broadband Plan Goals.**

There is substantial agreement in the comments that specialized services are playing and will continue to play an integral and unique role in advancing national priorities set forth in the Recovery Act: civic participation; public safety and homeland security; health care delivery;

energy independence and efficiency; economic growth; and education.<sup>50</sup> Virtual private networks for business, government and public safety users; and telemedicine, distance learning, and smart grid applications are just a few examples of current services that provide immeasurable benefits to consumers and require customized service and prioritization from Internet service providers. It is impossible to predict the potential future services that would also be unable to function without dedicated connectivity and active network management, but the best way for the Commission to ensure the continued development of these beneficial services is to give service providers free rein in this area.

In addition to advancing national priorities, unfettered development of specialized services advances the National Broadband Plan's deployment goals by enabling and motivating increased investment in broadband infrastructure. Where broadband is already deployed, providers are motivated to increase the speed and capacity of their networks to deliver multiple services. In high-cost areas where it is economically challenging for providers to deploy broadband facilities, the prospect for revenues from specialized services in the future may help make it economic for providers to invest in new and enhanced high-capacity networks. And in all areas, allowing specialized services to flourish is likely to lead to increased innovation and competition as providers seek to differentiate themselves with new offerings. In this way, permissive Commission policy with respect to specialized services may help the Commission meet its deployment goals, enhance competition, and reduce strain on the Universal Service Fund's high-cost program by fostering increased private investment in higher-cost areas.

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<sup>50</sup> National Broadband Plan at 193.

## **2. The Commission Should Not Regulate in Response to Mere Conjecture that Specialized Services Place the Open Internet at Risk.**

In justifying the present inquiry, the Commission cites several “general areas of concern” raised in the initial round of comments.<sup>51</sup> For the most part, these concerns focus on a fear that unregulated specialized services will harm the “open Internet,” because providers will invest more resources and bandwidth into specialized services at the expense of broadband Internet access service to the general public. These fears are entirely unfounded. The record shows no examples of specialized services leading to the marginalization of or decreased investment in broadband Internet access service. As the Telecommunications Industry Association notes, “To date, specialized service offerings have peacefully coexisted with and complemented the public internet, and there is no evidence that this balance is at risk.”<sup>52</sup>

In fact, the unregulated growth of specialized services is much more likely to enhance the “open Internet” than to harm it. Broadband bandwidth distribution is not necessarily a zero-sum game, particularly where providers are able to allocate bandwidth dynamically. Despite the proliferation of specialized services, Internet service providers are constantly upgrading their “open Internet” networks in order to ensure continued consumer satisfaction. To the extent that specialized services place a greater burden on networks and further motivate providers to improve their networks, the result may be more total available bandwidth and upgraded facilities that benefit all users—and the brunt of the cost of the upgrades may be borne largely by the specialized service clients rather than broadband Internet customers. The current system benefits

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<sup>51</sup> *Public Notice* at 2.

<sup>52</sup> Comments of Telecommunications Industry Association, GN Docket No. 09-191, WC Docket No. 07-52, at 40 (Jan. 14, 2010).

all broadband customers, and the Commission should not impose regulations based on mere conjecture and unfounded fears.

**B. To the Extent the Commission Delves into Any Regulation of Specialized Services, the Commission Should Ensure that Regulation Does Not Discourage Meaningful Broadband Deployment in Rural Areas.**

To the extent the Commission further considers the regulation of specialized services, it should aim to ensure that regulatory regime does not impair meaningful broadband deployment in rural and high-cost areas. First, the Commission should make clear that any regulation must apply equally to all technologies. If it instead imposed disparate performance standards, the Commission would compromise the ability of wired broadband providers to compete against wireless providers for CAF funding to support broadband networks in high-cost areas. As discussed at length above, this unequal regulatory treatment would be unjustified and contrary to Commission policy. It also would nonsensically be penalizing those providers that have invested the most in ensuring optimum performance for their customers.

Second, the Commission should steer clear of regulations that would place disproportionate burdens on broadband providers seeking to deploy in rural and high-cost areas. The National Broadband Plan contemplates that the Universal Service Fund would aid the deployment of baseline broadband services in high-cost areas. While this approach is a sensible response to the intention of the Commission not to expand the high-cost program,<sup>53</sup> the infrastructure to support a baseline, minimum service is, by definition, less robust than the highest capacity services that can be and often are provided in lower-cost areas. And even where broadband service would be deployed in rural areas without the assistance of high-cost Universal

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<sup>53</sup> See, e.g., Comments of Windstream Communications, Inc., WC Docket Nos. 10-90, 05-337, GN Docket No. 09-51, at 4, 40-44 (July 12, 2010).

Service funding, broadband providers may not be able to develop a rational economic case for deploying service as robust as that offered in urban or suburban areas because of the low population densities and more difficult cost conditions of rural areas.

In a high-cost environment, regulations that inhibit the ability of providers to select and control their specialized service offerings can be even more burdensome and costly. For example, requiring a provider in a high-cost area that has a specialized service arrangement with a third party to offer the same terms to other third parties might be infeasible for a provider seeking to offer service over a lower capacity connection. This provider might have to decline to offer any specialized services, thus decreasing its revenue and making the economics of deployment substantially more difficult—a result that would be undesirable for the provider, its consumers, and undoubtedly, the Commission. Similarly, restrictions on the ability of a provider to dynamically allocate capacity to support specialized services would have an especially burdensome impact on providers unable to justify deployment of more robust service in rural or high-cost areas, and would make it less likely that provider could offer any specialized services, which bring benefits to consumers and revenue to support further infrastructure deployment.

## **V. CONCLUSION**

Current Commission policy has established a delicate balance, preserving the openness of the Internet while maintaining incentives for broadband providers to make the substantial investments necessary to achieve the nation's ambitious broadband deployment goals. To best preserve this balance, the Commission must maintain regulatory parity among all broadband Internet access services—both wired and wireless—and refrain from imposing regulations on

specialized services. Imprudent Commission action with respect to either of these issues—the treatment of wireless broadband Internet access services or of specialized services—would have negative effects, suppressing innovation and investment throughout the Internet ecosystem, while at the same time undermining the Commission’s principal goal of ensuring an open Internet.

Respectfully submitted,

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