

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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

**COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.**

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Qwest Communications International Inc. (Qwest) files these comments in connection with the Federal Communications Commission's (Commission) *Further Inquiry Into Two Under-Developed Issues In The Open Internet Proceeding (Further Inquiry)* regarding the appropriate legal framework for broadband Internet service.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

Before addressing the two narrow issues raised in the *Further Inquiry*, Qwest briefly reiterates its prior comments in this proceeding: In seeking additional input on these issues, the *Further Inquiry* suggests that there may be general agreement that wireline broadband providers should be subject to a new open Internet regulatory framework that would include, among other things, some form of a non-discrimination obligation. Qwest respectfully disagrees. Numerous wireline carriers have opposed such an approach. Qwest has previously addressed in this proceeding the relative merits of the various proposals raised in, or in response to, the *NPRM*.<sup>2</sup> In doing so, Qwest has discussed the policy merits of the Commission's 2005 Internet Policy

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<sup>1</sup> Public Notice, *Further Inquiry Into Two Under-Developed Issues In The Open Internet Proceeding*, DA 10-1667, rel. Sept. 1, 2010; 75 Fed. Reg. 55297, dated Sept. 10, 2010.

<sup>2</sup> *In the Matter of Preserving the Open Internet, Broadband Industry Practices*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 (2009).

Statement Principles (FCC Internet Policy Principles)<sup>3</sup> and a narrowly-tailored transparency principle.<sup>4</sup> As Qwest has also previously discussed in detail, the D.C. Circuit's *Comcast v. FCC* decision<sup>5</sup> calls into question the Commission's authority to adopt the regulatory framework proposed in the *NPRM* for any type of broadband provider.<sup>6</sup> Because of this, the Commission should clarify its regulatory jurisdiction in this area before adopting any new open Internet regulations.

This proposed approach is sound for a number of reasons. To begin with, there can be no dispute that massive investment in broadband infrastructure is needed to accomplish the goals of the Commission's recently released National Broadband Plan. In turn, it is equally indisputable that regulatory uncertainty can cripple private investment. The Commission should therefore resist calls for new regulatory theories and instead seek Congressional definition of its proper role in this industry. In the meantime, Qwest and virtually all major broadband providers have supported the FCC Internet Policy Principles and voluntarily abide by those principles as good policy. The Commission should not attempt to apply to competitive Title I services regulations that are rooted in Title II -- or, as in the case of a strict nondiscrimination obligation, rules that

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<sup>3</sup> *In the Matters of 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*, Policy Statement, 20 FCC Rcd 14986 (2005).

<sup>4</sup> See Comments of Qwest Communications International Inc., GN Docket No. 09-191, filed Jan. 14, 2010 (Qwest *NPRM* Comments); Reply Comments of Qwest Communications International Inc., GN Docket No. 09-191, filed Apr. 26, 2010 (Qwest *NPRM* Reply Comments).

<sup>5</sup> *Comcast Corporation v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

<sup>6</sup> Qwest *NPRM* Reply Comments at 1-3, 7-11, 37.

exceed even the Commission's Title II authority.<sup>7</sup>

With that backdrop, Qwest submits the following comments regarding the two narrowly focused issues raised in the *Further Inquiry*:<sup>8</sup> (1) whether any of six policy tools are needed to address potential concerns related to more lenient treatment of specialized services under any open Internet rules adopted by the Commission; and (2) whether developments since the issuance of the *NPRM* should impact “how, to what extent, and when” open Internet rules should apply to wireless broadband platforms. In general, these comments track Qwest's consistent emphasis in this proceeding that there is a balance of interests at stake here and that the Commission, in any action it takes, must strive to avoid regulatory requirements that would stifle investment and growth in network infrastructure, undermine economic deployment of the robust Internet expected in the future, and negatively impact broadband adoption. Part and parcel of this is the need to ensure that any new openness rules apply on a technology neutral basis to ensure a level playing field among competing broadband providers.

With respect to the questions raised in the *Further Inquiry* regarding specialized services, any such concerns can be adequately addressed by adopting clear definitions of “public

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<sup>7</sup> Relatedly, as Qwest has demonstrated in comments filed in the Commission's separate *Notice of Inquiry (NOI)* proceeding regarding the appropriate legal framework for broadband Internet access service, the Commission should reject the siren call of Title II reclassification advocates suggesting that Title II reclassification offers a more sure-footed path for implementing the Commission's desired broadband policy. See Comments of Qwest Communications International Inc., GN Docket No. 10-127, filed July 15, 2010 at 7-37 (Qwest *NOI* Comments) and Reply Comments of Qwest Communications International Inc., GN Docket No. 10-127, filed Aug. 12, 2010 at 26-32 (Qwest *NOI* Reply Comments) in response to the Commission's *In the Matter of Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd 7866 (2010).

<sup>8</sup> In doing so, Qwest's comments assume, *arguendo*, and without waiving relevant arguments, that the Commission possesses jurisdictional and legal authority to take the action being discussed. Qwest incorporates by reference here its prior comments regarding the constitutional and other arguments relating to the Commission's limited jurisdiction and legal authority in this area. See Qwest *NPRM* Comments at 54-60; Qwest *NOI* Comments at 3-4, 50-51; Qwest *NPRM* Reply Comments at 7-10; Qwest *NOI* Reply Comments at 26-32.

broadband Internet access services” and “specialized services.” Specifically, the Commission should narrowly define the public Internet functionality that would be covered by any new open Internet rules. As discussed in greater detail below, this step would adequately address any potential concerns that open Internet protections for broadband Internet access may be weakened by specialized service offerings. As for a potential non-exclusivity obligation in connection with specialized services, that should be rejected as it cuts against what should be more lenient treatment of specialized services under any new open Internet framework. Similarly, rather than allowing only a limited pre-defined set of specialized services, the Commission should strive to exempt a broadly defined category of specialized services from any new rules. There is also no demonstrated need for a guaranteed capacity requirement for broadband Internet access services. Regarding the potential for Truth in Advertising or other disclosure requirements, it remains to be seen whether such steps will be required to address the concerns raised in the *Further Inquiry*. In all events, the extent of the Commission’s authority to act in those areas will have to be established based on a fully developed record, with a specific proposal in hand, and applying the well-established standard for Title I ancillary jurisdiction.

Regarding wireless broadband services, the *Further Inquiry* asks whether there is any basis for subjecting wireline and wireless broadband providers to disparate treatment when it comes to potential new open Internet rules. There is none, and, thus, such an approach would be arbitrary and capricious. At most, the reasons given in the *NPRM* and the *Further Inquiry* for disparate treatment for wireless broadband platforms emphasize the need to allow broad flexibility for various technology platforms to apply different network management practices depending on the limitations of their platform. Additionally, all of the potential concerns identified in the *NPRM* and the *Further Inquiry* apply equally to wireline broadband networks.

The Commission's recognition of how these concerns impact wireless providers, if anything, only further supports the case for proceeding with caution as the Commission contemplates new regulation for any broadband provider. In no event do these concerns create a basis for arbitrarily choosing to regulate one platform differently from another.

## II. DISCUSSION

### A. In Light Of *Comcast v. FCC*, The Commission Should Re-Evaluate Its Approach To Network Openness Regulation And Consider Seeking Congressional Action

As Qwest previously detailed in its reply comments,<sup>9</sup> the Commission's best course of action, in light of the holding in *Comcast v. FCC*, is to step back and re-evaluate its proposed approach to open Internet regulation. The D.C. Circuit expressly rejected the Commission's proffered grounds for enacting the regulatory framework proposed in the *NPRM*. The Commission therefore should consider seeking legislation to more clearly define the Commission's appropriate role in any further Internet regulation. If it does so, the Commission will continue to be well served by the fact that Qwest and virtually all major broadband providers support the FCC Internet Policy Principles and voluntarily abide by those principles as good policy. At the very least, *Comcast v. FCC* demonstrates that any action the Commission takes in this proceeding should be narrowly tailored to fit within its limited Title I authority. *Comcast v. FCC* reinforces the long-established limits of that authority and demonstrates that the Commission should not attempt to adopt purported solutions rooted in Title II -- or, as in the case of a strict nondiscrimination obligation, solutions that exceed even its Title II authority. The alternative is to adopt rules that would be cast in doubt immediately and would subject the industry to years of uncertainty as the inevitable legal challenges play out.

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<sup>9</sup> Qwest *NPRM* Reply Comments at 7-11.

**B. In Addressing The Two Narrow Issues Raised In The *Further Inquiry*, The Commission Should Avoid Outcomes That Would Stifle Network Investment And Broadband Adoption**

If and when the Commission adopts open Internet rules, it should recognize the balance of interests at stake here and, in any action it takes, strive to avoid regulatory requirements that would stifle investment and growth in network infrastructure, impede economic deployment of the robust Internet that will be expected in the future, and negatively impact broadband adoption. Part and parcel of this is the need to ensure that any new openness rules apply on a technology neutral basis to ensure a level playing field among competing broadband providers. In the discussion below, Qwest applies these principles to the two narrow questions raised in the *Further Inquiry*.

**1. Any of the concerns raised in the *Further Inquiry* regarding specialized services can be addressed by providing definitional clarity**

The *Further Inquiry* generally asks which policies for specialized services “will best protect the open Internet and maintain incentives for private investment and deployment of innovative services that benefit consumers.”<sup>10</sup> The *Further Inquiry* recognizes that specialized services “may drive additional private investment in networks and provide consumers new and valued services.”<sup>11</sup> But, it also suggests that there may be three general areas of potential concern: (1) that broadband providers may bypass open Internet requirements by deploying specialized services that are substantially similar to but do not technically meet the definition of broadband Internet access; (2) that broadband providers may constrict or fail to expand network capacity for broadband Internet access services; or (3) that broadband providers may otherwise

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<sup>10</sup> *Further Inquiry* at 4.

<sup>11</sup> *Id.* at 2.

engage in anti-competitive conduct with respect to specialized services.<sup>12</sup> At the outset, it should be noted that each of these concerns is entirely speculative. As the Commission itself recognizes in the *Further Inquiry*, it should be particularly cautious about prescribing rules in this area of rapid technological and market change as there is a substantial danger of causing unintended consequences -- and this is particularly so where the rules would be based upon hypothetical concerns. In all events, any potential concerns that open Internet protections could be weakened by specialized services can also easily be addressed by clearly defining the broadband Internet access services that would be subject to any new open Internet rules. At the same time, requiring non-exclusivity in specialized services, allowing only a limited pre-defined set of specialized services, or imposing a guaranteed capacity requirement for broadband Internet access are all entirely unnecessary steps and would clearly strike the wrong policy balance. Finally, the extent of the Commission's authority to act with respect to any Truth in Advertising or other disclosure requirements for specialized services would have to be established based on a fully developed record, with a specific proposal in hand, and applying the well-established standard for Title I ancillary jurisdiction.

**a. The Commission should narrowly define “public broadband Internet access”**

As previously discussed, it is critical that the Commission create a broadly defined category of specialized services, and the best way to accomplish that is to narrowly define the public Internet functionality that would be covered by any new open Internet rules.<sup>13</sup> If the Commission does that and provides definitional clarity along the lines of what Qwest and other

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<sup>12</sup> *Id.* at 3.

<sup>13</sup> See Qwest *NPRM* Comments at 24-28; Qwest *NPRM* Reply Comments at 6, 27-29 and commenters noted in footnote 99 of the *NPRM* Reply Comments. This is, of course, in addition to other important clarifications discussed in Qwest previous comments. See Qwest *NPRM* Comments, *generally* and Qwest *NPRM* Reply Comments, *generally*.

parties have suggested, it will also adequately address any potential concerns that open Internet protections could be weakened by specialized services.

It is critical that the Commission create a broad exemption for specialized services and that they be saddled with no new regulation. This stems from the Commission's recognition in the *NPRM* that "[t]he existence of these [specialized] services may provide consumer benefits, including greater competition among voice and subscription video providers, and may lead to increased deployment of broadband networks."<sup>14</sup> It is because of these pro-investment and pro-competitive characteristics of specialized services that the *NPRM* appears to anticipate a more lenient regulatory status for these services than broadband Internet access services. Accordingly, it will be important that the Commission not narrowly limit the types of services that would qualify as specialized services as some have suggested. Consistent with this, Qwest and other parties have detailed in their comments the many different types of services that would need to be included in any specialized services definition.<sup>15</sup> Qwest also proposed that the Commission establish an open-ended catch-all category of specialized services.<sup>16</sup>

Relatedly, a narrow definition of public broadband Internet access services will best accomplish the goal discussed above -- the creation of a broad category of specialized services -- and is preferred over an alternative approach in which the Commission would try to establish a fixed definition for specialized services.<sup>17</sup> If this approach is taken, it will be necessary to ensure

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<sup>14</sup> *NPRM*, 24 FCC Rcd at 13115-16 ¶ 145.

<sup>15</sup> See, e.g., Qwest *NPRM* Comments at 24-27. Verizon *NPRM* Comments at 8; Comcast *NPRM* Comments at 60-61; American Cable Association *NPRM* Comments at 17-18; OPASTCO *NPRM* Comments at 11-14 (filed Jan. 14, 2010 in GN Docket No. 09-191 and WC Docket No. 07-52).

<sup>16</sup> Qwest *NPRM* Comments at 28.

<sup>17</sup> See, e.g., AT&T *NPRM* Comments at 96-102; CWA *NPRM* Comments at 24-25; Verizon *NPRM* Comments at 80-81.

that the definition of public broadband Internet access excludes some services that may entail some level of public Internet connectivity -- such as business enterprise services. And, the record already demonstrates a solid approach to defining public broadband Internet access services. To begin with, the Commission, in the *NPRM*, excludes private network functionality from the definition of last mile broadband Internet access facilities to be covered by any new rules.<sup>18</sup> Additionally, the *NPRM* appears to recognize that private network versus public Internet functionality should be defined by whether a given facility is used to create a communications path for the purpose of accessing the public Internet and not whether public or private IP addresses are utilized. Against this backdrop, Qwest and other parties have articulated how the Commission might narrowly define the public Internet (versus private network) functionality that would be covered by any new open Internet rules.<sup>19</sup> The common characteristic of these proposed definitions is that public broadband Internet access would be narrowly defined as open-ended Internet connectivity. Provided an appropriate definition of public broadband Internet access can be developed, these proposals provide a potential good starting point.

Definitional clarity along these lines will also, in turn, adequately address the potential

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<sup>18</sup> In doing so, the Commission implicitly recognizes that private network functionality should be encouraged.

<sup>19</sup> See, e.g., Qwest *NPRM* Comments at 27-28; CWA *NPRM* Comments at 9-11 (proposed definition sweeps too broadly; should be revised to encompass only “access to all or substantially all publicly accessible end points that have an” IANA IP address); AT&T *NPRM* Comments at 96-102 (proposing to distinguish open-ended Internet connectivity and all content, applications and services that flow over that connectivity from all else and adopting a rule that limits application of new rules to those services); Verizon *NPRM* Comments at 79-81 (any rules adopted by the Commission “should be limited by their terms only to traditional wireline public Internet access services -- i.e., services that are expressly sold as offering the public access to all lawful endpoints on the public Internet -- as well as providers of lawful content, applications, and services on the public Internet.”). See also Cablevision *NPRM* Reply Comments at 13 (“The Commission should define managed services broadly to encompass any service other than general best efforts Internet access offered to residential customers.”) (filed Apr. 26, 2010 in GN Docket No. 09-191 and WC Docket No. 07-52).

concerns discussed in the *Further Notice*. For example, it is self-evident that use of such a definition would prevent broadband providers from bypassing open Internet rules by labeling broadband Internet access services as specialized services.

**b. The Commission should not impose a non-exclusivity requirement, narrowly limit permitted specialized services, or impose a guaranteed capacity requirement for broadband Internet access**

The Commission should, in no event, impose a non-exclusivity obligation in connection with specialized services, allow only a limited pre-defined set of specialized services, or a guaranteed capacity requirement for broadband Internet access. As noted, the Commission appears to recognize that specialized services should be subject to more lenient treatment under any new open Internet framework. A requirement that commercial arrangements with affiliates or third parties for the offering of specialized services be offered on “the same terms and conditions to other third parties” is, essentially, a non-discrimination obligation. It therefore suffers from all the same policy and legal challenges that Qwest and other parties have detailed in connection with a potential non-discrimination obligation for public broadband Internet access services.<sup>20</sup> But, its value is even more questionable for specialized services -- a special category of services that would not be subject to the rules applicable to broadband Internet access expressly “in order to 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>21</sup> There is overwhelming evidence in the record suggesting that, under a framework where specialized services remain unregulated, these services will increase investment in

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<sup>20</sup> See Qwest *NPRM* Comments at 54-60; Qwest *NOI* Comments at 3-4, 50-51.

<sup>21</sup> *NPRM*, 24 FCC Rcd at 13116 ¶ 149.

broadband network deployment and upgrades.<sup>22</sup> These services are provided over the same networks that provide broadband Internet access and will provide an essential revenue source for broadband providers in at least some circumstances and, thus, will help increase broadband investment. Moreover, there is no credible evidence in the record of broadband providers having an incentive to disadvantage their broadband Internet access customers or to engage in anti-competitive behavior. Indeed, to the contrary, the record suggests that broadband providers will be incented to allocate adequate bandwidth capacity to all categories of services to maximize potential revenue recovery. This is further demonstrated by the discussions of two-sided markets in the Factual Record Appendix to Qwest's initial comments and in the *NPRM*.<sup>23</sup>

For similar reasons, the Commission should not limit broadband providers to a narrow set of specialized services offerings. As discussed above, in order to meet the intended purposes of a specialized services category, the Commission should strive to exempt a broadly defined category of specialized services from any new rules rather than narrowly limiting specialized services. Qwest and other parties have described the potentially broad scope of valuable and innovative services that may be deployed.<sup>24</sup>

Nor should the Commission impose a guaranteed capacity requirement for broadband Internet access services. For all the reasons discussed above, there is no demonstrated need for a requirement that broadband providers provide some sort of guaranteed capacity for broadband Internet access services. As noted, there is no evidence that broadband providers would be incented to disadvantage their broadband Internet access customers or to engage in anti-competitive behavior. To the contrary, sound economic theory suggests just the opposite -- that

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<sup>22</sup> See *Further Inquiry* at 2 and n. 9.

<sup>23</sup> Qwest *NOI* Comments, Factual Record Appendix at 27-28; *NPRM*, 24 FCC Rcd at 13091 ¶ 66.

<sup>24</sup> See *supra*, n. 15.

broadband providers will be incented to allocate adequate bandwidth capacity to all categories of services to maximize potential revenue recovery. Thus, it is premature, at best, for the Commission to consider regulating the engineering minutia of how specialized services share architecture with public broadband Internet access.

**c. The extent of the Commission's authority to implement Truth in Advertising or other disclosure requirements for specialized services would have to be established based on a fully developed record**

The *Further Inquiry* also asks whether Truth in Advertising or other disclosure requirements should be employed to address any of the potential concerns discussed above. Again, as demonstrated above, definitional clarity alone should be adequate to address any of the potential concerns mentioned in the *Further Inquiry*. Additionally, as Qwest has detailed in its initial comments, the Commission must pay close attention to constitutional and other legal limitations on its ability to impose disclosure obligations on Title I services.<sup>25</sup> And, for all the reasons detailed above, there is a significant question whether Truth in Advertising or disclosure obligations would be necessary as a policy matter for the competitive services at issue. Nor do any of the parties whose comments are cited in the *Further Inquiry* on this point demonstrate such a need.<sup>26</sup> But, regardless, the extent of the Commission's authority to act in those areas will have to be established based on a fully developed record, with a specific proposal in hand, and applying the well-established standard for Title I ancillary jurisdiction.

**2. There is still no basis for distinguishing between wireline and wireless broadband providers when it comes to open Internet regulations**

The *Further Inquiry* suggests in prefatory comments that there is general agreement that an open Internet framework should apply to wireline broadband providers that would include,

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<sup>25</sup> See Qwest *NPRM* Comments at 56-60; Qwest *NOI* Comments at 50-51.

<sup>26</sup> See *Further Inquiry* at nn. 16 and 17.

among other things, a non-discrimination obligation of some form. By doing that, while also seeking additional comment on the general question of “how, to what extent, and when” openness principles should apply to mobile wireless platforms, the *Further Inquiry* once again inquires whether there is any basis for subjecting wireline and wireless broadband providers to disparate treatment when it comes to potential new open Internet rules. As Qwest and others have previously demonstrated, there is no basis for doing so, and, thus, such an approach would be arbitrary and capricious.<sup>27</sup> At most, any purported differences between wireline and wireless broadband suggest that any new rules must allow broad flexibility for various technology platforms to apply different network management practices depending on the limitations of their platform. The *NPRM* raised the question of whether there are differences between mobile wireless broadband platforms and wireline platforms that justify differences in whether or how any Internet openness principles are applied.<sup>28</sup> Qwest reiterates here the reasons why these purported differences are distinctions without a difference. The *Further Inquiry* raises additional such questions. These relate to wireless broadband provider offerings of usage-based pricing, the extent to which wireless providers should be permitted to prevent or restrict the distribution or use of applications that cause network management challenges, and the potential for non-harmful attachment of third party devices. As discussed in more detail below, there is also no difference between wireless and wireline networks on these scores. To be clear once again, Qwest does not here advocate for a new open Internet framework like that described in the

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<sup>27</sup> Under the Administrative Procedure Act (APA), the Commission cannot discriminate among similarly-situated services where (as here) it is unable to articulate a reasonable basis for treating them differently. See Qwest *NPRM* Reply Comments at 24-26, 47-48. See also Qwest *NOI* Comments at 53-55; Qwest *NOI* Reply Comments at 14-22; Comcast *NPRM* Comments at 32; Bright House *NPRM* Comments at 11; CCIA *NPRM* Comments at 15-16; Google *NPRM* Comments at 77-80.

<sup>28</sup> *NPRM*, 24 FCC Rcd at 13068 ¶ 13.

*Further Inquiry* for any provider. But, if the Commission takes that step with regard to wireline broadband providers, it can not and should not subject wireless providers to lesser regulation.<sup>29</sup>

**a. The purported differences between wireline and wireless broadband providers are distinctions without a difference**

In the *NPRM*, the Commission, while concluding that any new rules it ultimately imposes in this proceeding should “apply to all platforms for broadband Internet access,” raised the question of whether there are differences between mobile wireless broadband platforms and wireline platforms that justify differences in how any Internet openness principles should be applied.<sup>30</sup> But, each of the potential concerns raised there and in subsequent comments as purported reasons for lighter regulation of wireless networks apply equally to wireline networks. To summarize again:

**All broadband platforms are dynamic in nature.** Both wireless and wireline networks are shared networks that are dynamic in nature.<sup>31</sup> While wireless networks may require steps to address radio interference or propagation effects such as signaling loss with increasing distance,<sup>32</sup> wireline networks face similar dynamic challenges. For example, bandwidth-gobbling applications such as video regularly interfere with normal network engineering assumptions in unpredictable ways. Signaling loss with distance is also common to wireline technologies such as DSL.

**Capacity issues impact wireless and wireline networks alike.** Several parties argue that, unlike wireline services, wireless services depend on a limited resource -- spectrum -- to deliver service to users and that they cannot simply build additional facilities or expand the size

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<sup>29</sup> This applies, among other things, to any transparency component of any new rules.

<sup>30</sup> *NPRM*, 24 FCC Rcd at 13117-18 ¶ 154.

<sup>31</sup> *Id.* at 13119 ¶ 159.

<sup>32</sup> *Id.*

of existing facilities to increase capacity.<sup>33</sup> But, wireline providers also face capacity limitations that are only solved by costly network build-out. Wireless spectrum is constrained by the spectral channel width of the license a wireless provider operates in. A wireline provider is limited by the spectral characteristics of the copper or fiber cable it uses. And, both wireless and wireline operators can gain access to additional spectrum. A wireless operator does this by means of sectorization of an existing cell site and cell splitting through construction of new cell sites. A wireline operator does this by placing another copper pair or extending additional fiber. In many cases, it is more expensive to deploy additional copper and fiber than it is to build a new cell site. One reason for this is the fact that the propagation of wireless signals can travel along multiple paths to get to the intended target (receiver). In other words, a single cell site can serve tens, hundreds, or even thousands of subscribers. But, in a wireline deployment, the copper or fiber path is fixed and a provider has few if any alternative options other than constructing new facilities at high expense to reach a given user. It is also noteworthy here that wireless providers are actively deploying additional wireless towers and new technology to expand the capabilities of their existing spectrum resources, that new fiber Ethernet backhaul services are increasing wireless bandwidth capacities, and that wireless providers continue to announce new high bandwidth consuming products over their wireless network.<sup>34</sup> Moreover, wireline providers

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<sup>33</sup> See, e.g., T-Mobile *NPRM* Comments at 15-21; CTIA *NPRM* Comments at 38-41 (GN Docket No. 09-191 and WC Docket No. 07-52, filed Jan. 14, 2010).

<sup>34</sup> See, e.g., “AT&T upgrades 3G Technology at Cell Sites Across Nation,” <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=30358>; “T-Mobile HSPA+ Network now delivers broadest reach of 4G speeds in U.S.,” <http://forums.t-mobile.com/t5/Coverage/T-Mobile-HSPA-Network-now-delivers-broadest-reach-of-4G-speeds/td-p/425640>; “Verizon’s Ultra-Reliable Fiber Backhaul Links Offer Wireless Companies Reliability, Capacity Advantages Over Traditional Technologies,” [http://www22.verizon.com/wholesale/newscenter/news\\_032609](http://www22.verizon.com/wholesale/newscenter/news_032609); “Qwest Launches New Mobile Ethernet Backhaul Service,” <http://news.qwest.com/wholesale-meb>; “T-Mobile Signs New Backhaul Agreements for Six Major U.S. Markets,” <http://www.t->

incur costs that wireless providers do not. For example, when a customer moves or discontinues service, the equipment used to provide access to that particular location may become stranded whereas, in a wireless network, the equivalent equipment can be used to provide bandwidth to other subscribers and is not stranded.

**The mobility of wireless broadband end users does not distinguish wireless and wireline networks for purposes of the proposed open Internet rules.** It is argued that the number of users sharing capacity in a given area on a wired broadband network is relatively fixed, but that the number and mix of subscribers in a given area on a wireless broadband network constantly changes -- sometimes in highly unpredictable ways.<sup>35</sup> It is said that this characteristic and the resulting need to hand off sessions from cell site to cell site, the need to manage interference, and the need to address issues like signal fading all create complex engineering challenges for wireless broadband network operators that wireline broadband networks do not confront.<sup>36</sup> But, wireline networks must also deal with bandwidth demand swings due to certain applications and content (*e.g.*, video) and user dynamics (*e.g.*, sudden usage increases due to a major weather event). Generally speaking, a wireless network knows which cells handle the most traffic, and the network is engineered to handle that traffic. Time of day, special events, and weather all affect traffic on a wireless network. Wireline networks face these same issues. A small percent of users consume the majority of capacity. Further, as

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[mobile.com/company/PressReleases\\_Article.aspx?assetName=Prs\\_Prs\\_20080920&title=T-Mobile%20Signs%20New%20Backhaul%20Agreements%20for%20Six%20Major%20U.S.%20Markets; "T-Mobile USA's HTC HD2 to Bring a Never-Before-Seen Mobile Experience to Entertainment Fans Across the U.S.," http://press.t-mobile.com/articles/t-mobile-HTC-HD2-1.](http://mobile.com/company/PressReleases_Article.aspx?assetName=Prs_Prs_20080920&title=T-Mobile%20Signs%20New%20Backhaul%20Agreements%20for%20Six%20Major%20U.S.%20Markets;+T-Mobile+USA's+HTC+HD2+to+Bring+a+Never-Before-Seen+Mobile+Experience+to+Entertainment+Fans+Across+the+U.S.,)

<sup>35</sup> See, *e.g.*, CTIA *NPRM* Comments at 39-41; T-Mobile *NPRM* Comments at 22-23 (GN Docket No. 09-191 and WC Docket No. 07-52, filed Jan. 14, 2010).

<sup>36</sup> See, *e.g.*, T-Mobile *NPRM* Comments at 15-24; MetroPCS *NPRM* Comments at 35 (GN Docket No. 09-191 and WC Docket No. 07-52, filed Jan. 14, 2010).

Femtocells get connected to wireline networks, wireless mobility impacts on traffic management, etc. are imposed on wireline networks.<sup>37</sup>

**Factors relevant to the “any device” rule are also distinctions without a difference.**

In the *NPRM*, the Commission also asked whether, because of certain factors, wireless broadband providers should be treated differently for purposes of the “any device” rule proposed in the *NPRM*.<sup>38</sup> And, certain parties echo that theme in their comments.<sup>39</sup> But, the factors discussed in the *NPRM* -- (1) that wireless broadband devices attach to a wireless broadband network through built-in radios/modems that support other services; (2) that different wireless providers have different network standards and “air interfaces;” and (3) the challenges created by tethering -- all have their analogs in the wireline world.<sup>40</sup> First, wireline broadband modems also serve as the conduit for a variety of other services in addition to broadband Internet access as defined in the *NPRM*.<sup>41</sup> Second, wireline networks also have different standard interfaces to manage for devices that connect to their networks. Third, wireline networks also face similar challenges to tethering, the practice by which wireless devices become modems through which other devices access the network. Attempts by end users to use broadband Internet services to create Wi-Fi hot spots or attempts by wireless networks to download wireless data traffic onto wireline networks through Femtocell arrangements create analogous network management problems in the wireline world. Streaming HD video webcams and the like also create

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<sup>37</sup> Femtocells are low-power wireless access points that operate in licensed spectrum to connect standard mobile devices to a mobile operator’s network using residential DSL or cable broadband connections.

<sup>38</sup> *NPRM*, 24 FCC Rcd at 13118 ¶ 157.

<sup>39</sup> *See, e.g.*, CTIA *NPRM* Comments at 41-42; Sprint *NPRM* Comments at 26-29.

<sup>40</sup> *NPRM*, 24 FCC Rcd at 13121-22 ¶¶ 163-67.

<sup>41</sup> As the Commission itself recognizes elsewhere in the *NPRM*, wireline broadband networks provide a variety of specialized services over the same network as is used to provide broadband Internet access. *Id.* at 13116 ¶ 148.

analogous network management challenges as they consume large amounts of capacity on a continuous basis.

**b. The *Further Notice* similarly focuses on characteristics of wireless broadband that entail distinctions without a difference**

In the additional questions posed in the *Further Inquiry* about “how, to what extent, and when” openness principles should apply to mobile wireless platforms, the Commission once again focuses on characteristics of broadband networks and offerings that apply equally to wireline and wireless networks.

First, the Commission notes recent wireless broadband provider offerings of usage-based pricing and asks whether the emergence of such business models may reduce mobile wireless broadband providers’ incentives to employ more restrictive network management tools that might run afoul of open Internet rules. But, wireline broadband providers have also begun experimenting with usage-based plans.<sup>42</sup>

The *Further Inquiry* also asks new questions regarding: (1) the extent to which wireless providers should be permitted to prevent or restrict the distribution or use of applications that may intensely use network capacity or otherwise cause network challenges; and (2) the extent to which the non-harmful attachment of third-party devices can be facilitated for wireless networks.

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<sup>42</sup> Both Time Warner Cable and AT&T are reported to have experimented with usage-based plans and others are said to be considering such plans. *See, e.g.*, “Time Warner’s Net-Metering Precedent,” BloomBerg BusinessWeek (June 4, 2008), [http://www.businessweek.com/technology/content/jun2008/tc2008063\\_767960.htm](http://www.businessweek.com/technology/content/jun2008/tc2008063_767960.htm);

(describing Time Warner’s trial program and reporting that “Comcast (CMCSA), the largest U.S. cable company, said it’s evaluating ‘a variety of models, including consumption-based billing...’ and that ‘Verizon Communications (VZ) said it also sees the potential value of billing customers based on the volume of their Web use...’”); “Carriers Eye Pay-As-You-Go Internet,” Wall Street Journal (October 21, 2009), <http://online.wsj.com/article/SB10001424052748703816204574483674228258540.html> (describing AT&T trials).

But, as detailed above and in the prior comments of Qwest and other parties,<sup>43</sup> there simply are no material differences between wireless and wireline networks on this score either. Both wireline and wireless providers face similar capacity management issues and similar network management challenges in the face of bandwidth intensive applications. Similarly, as described above, wireless broadband providers and wireline broadband providers are similarly situated when it comes to the “any device” rule proposed in the *NPRM*.

For all the reasons discussed above, any purported differences between wireless and wireline platforms at most call for recognition that any new rules must allow broad flexibility for various technology platforms to apply different network management practices depending on the limitations of their platform. The Commission’s recognition of how these concerns impact wireless providers, if anything, only further supports the case for the Commission proceeding with caution as it contemplates new regulation for any broadband provider. In no event do these concerns create a basis for arbitrarily choosing to regulate one platform differently from another.

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<sup>43</sup> See Qwest *NPRM* Reply Comments at 24-26, 47-48; Comcast *NPRM* Comments at 32; Bright House *NPRM* Comments at 11; CCIA *NPRM* Comments at 15-16; Google *NPRM* Comments at 77-80. See also Qwest *NOI* Comments at 53-55; Qwest *NOI* Reply Comments at 14-22.

### III. CONCLUSION

For the reasons stated above, the Commission should take the action described herein.

Respectfully submitted,

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October 12, 2010

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be: 1) filed with the FCC via its Electronic Comment Filing System in GN Docket No. 09-191 and WC Docket No. 07-52; and 2) served via email on the FCC's duplicating contractor, Best Copy and Printing, Inc., at [fcc@bcpweb.com](mailto:fcc@bcpweb.com).

/s/Richard Grozier

October 12, 2010