

**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

REPLY COMMENTS OF TIME WARNER CABLE INC.

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November 4, 2010

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Time Warner Cable Inc. (“TWC”) hereby submits its reply comments in the above-captioned dockets to address key issues raised by the Public Notice and commenters regarding specialized services.¹

INTRODUCTION AND SUMMARY

The opening comments reflect widespread skepticism about the highly restrictive regulatory proposals set forth in the Public Notice. Many commenters agree with TWC that there is no basis for adopting any marketing or provisioning ban, capacity guarantees, or disclosure mandates with respect to specialized services; rather, such measures would stifle the development of a beneficial category of services that is only beginning to emerge.² These calls for restraint do not come solely from the providers of these services. Tellingly, even some parties that support net neutrality regulation as a general matter are unwilling to endorse the imposition of regulatory mandates on specialized services. For example, the Open Internet

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

² *See, e.g.*, Ericsson Comments at 6 (stating that “specialized services are likely to serve a valuable purpose in meeting subscriber needs” and thus should not be regulated); National Organizations (Minority Media and Telecommunications Council) Comments at ii (“By artificially limiting the provision of specialized services . . . the FCC would threaten innovation. And it could also prevent offerings that can help close the digital divide from ever reaching the marketplace.”).

Coalition states that it would be “premature to adopt rules pertaining to specialized services,” noting that the “appropriate regulatory response” will depend on how they ultimately evolve.³ Other parties that support rules to promote net neutrality likewise caution against extending similar requirements to specialized services, recognizing that such overreach would have a deleterious impact on innovation and investment.⁴ And the self-styled “Public Interest Commenters” (or “PIC” parties), though ultimately supportive of the Public Notice’s proposals, prefer that the Commission not rush to judgment and thus “strongly urge the Commission not to make any determination with respect to specialized services in this proceeding.”⁵

In contrast to this widespread and diverse opposition to regulating specialized services, a handful of commenters not only support the mandates at issue in the Public Notice but seek to expand on them—despite professing not to understand what these services are, whether they even exist, or how they may be used. For example, Free Press characterizes specialized services as merely “hypothetical” but nevertheless notes its dissatisfaction with the supposedly “limited approaches” described in the Public Notice and argues for even “broader rules regarding robustness” (without defining what that means).⁶ In fact, Free Press goes so far as to suggest that providers of specialized services should be subject to rate regulation and required to file copies

³ Open Internet Coalition (“OIC”) Comments at 4-5.

⁴ *See, e.g.*, Comments of the National Coalition on Black Civic Participation at 2 (stating that limitations on the provision of specialized services “could increase the price of broadband for minority consumers and deter broadband investment in minority, unserved and underserved communities”); Comments of Latinos for Internet Freedom and Media Action Grassroots Network at 12 (urging caution because “it is difficult to assess any potential impact that [specialized services] may have on the public Internet”).

⁵ PIC Comments at 9; *see also id.* at 3 (stating that the Commission should “consider the question of specialized services in a subsequent proceeding should that prove necessary”).

⁶ Free Press Comments at 13-14.

of their service contracts with the Commission.⁷ The Center for Democracy & Technology, despite previously touting the many benefits associated with specialized services,⁸ urges the Commission to “actively police” providers’ practices in connection with specialized services, including by monitoring and reporting on network operators’ bandwidth consumption.⁹

Such pleas for regulation lack any legal or factual basis. Proponents of regulating specialized services fail utterly to show that the Commission has authority to adopt any of the requirements under consideration, and they likewise are unable to demonstrate that such requirements are remotely necessary. While these parties’ calls to impose net neutrality mandates are undercut by the limits on the Commission’s statutory authority and the absence of any real-world harms that require remediation, their arguments for extending regulation to specialized services are even more speculative and attenuated. As a strong majority of commenters recognize, the Commission as a general matter should not seek to regulate based on purely speculative theories of harm, and it plainly should not do so based on the implausible hypotheses that animate proposals to regulate specialized services.

Rather than devoting resources to the exploration of rules that risk extinguishing an entire category of beneficial services just as they are being introduced, the Commission should adhere to its successful policy of vigilant restraint and allow the marketplace to continue evolving to the

⁷ *Id.* at 17.

⁸ Comments of the Center for Democracy & Technology, GN Docket No. 09-191, WC Docket No. 07-52, at 47-48 (filed Jan. 14, 2010) (describing numerous examples of the benefits of managed services, including guaranteed highly secure connectivity between branch offices of a large business, highly reliable telemedicine transmissions between medical facilities that could permit remote participation in real-time medical procedures, provision of a speedy link for consumers to download or stream HD movies, and fully reliable two-way communications between a patient’s home medical devices and the hospital facilities where those devices could be remotely monitored and calibrated).

⁹ Center for Democracy & Technology Comments at 1.

maximum benefit of consumers. If the Commission nevertheless remains determined to pursue more active steps to promote its Internet openness goals—despite the compelling policy and legal reasons against doing so—it should at most continue its work to develop voluntary commitments among stakeholders. To the extent the Commission nonetheless does proceed with adopting new rules, it should limit their scope to services that meet a clear and narrow definition of broadband Internet access service, allowing specialized services to develop unencumbered.¹⁰ Such an approach would reduce the uncertainty associated with net neutrality rules while also assuaging concerns about the difficulties of defining specialized services at this time.

DISCUSSION

TWC has explained that each of the Public Notice’s individual proposals suffers from its own particular flaws, but they are united by their lack of any apparent legal foundation.¹¹ The opening comments submitted by parties supporting regulation of specialized services either ignore this fundamental obstacle or advance theories that cannot withstand scrutiny. And they likewise fail to advance any legitimate policy basis for imposing regulations at this time, when the marketplace for specialized services is only beginning to take shape.

I. THE COMMISSION DOES NOT POSSESS LEGAL AUTHORITY TO REGULATE SPECIALIZED SERVICES

As TWC has explained, the Public Notice is conspicuously silent as to whether the Commission has authority to adopt any of the proposed rules for specialized services.¹² Following that lead, parties that endorse those proposals generally fail to address whether the Commission can lawfully adopt them; rather, the Commission’s legal authority in this context is

¹⁰ TWC Comments at 18.

¹¹ *See generally id.* at 16-33.

¹² *Id.* at 14.

simply presumed. Such nonchalance on the matter is striking given the intense jurisdictional debate that has followed in the wake of the D.C. Circuit’s *Comcast* decision and the Commission’s subsequent broadband classification inquiry. And as TWC has explained, the substantial questions that exist concerning the Commission’s authority to adopt net neutrality regulations of any kind are particularly acute with respect to specialized services,¹³ making regulatory proponents’ unwillingness to confront the issue all the more problematic.

While a few jurisdictional theories emerge from the opening comments, they are poorly developed and plainly meritless. The PIC parties—despite their stated preference that the Commission not adopt rules at this time¹⁴—assert that the Commission can regulate in this context pursuant to Title II due to “the fundamental transmission character of specialized services.”¹⁵ But they provide no facts in support of that blanket characterization. As TWC described at length in the Commission’s broadband classification inquiry, a service’s classification turns on a functional, technical analysis of its “factual particulars.”¹⁶ The PIC parties concede that “Congress intended the Commission to make particularized determinations about regulatory classification on a case-by-case basis rather than issue blanket determinations about vague undefined categories.”¹⁷ Yet they then disregard that guidance and urge the Commission to sweep all specialized services under Title II without reference to any facts and without identifying any specific telecommunications service within these services. In fact, the

¹³ *Id.* at 14-16.

¹⁴ *See supra* at 2.

¹⁵ PIC Comments at 10; *see also id.* at 11 (urging the Commission to rely on its “authority generally to regulate transmission services as Title II offerings”).

¹⁶ *See generally* Comments of Time Warner Cable Inc., GN Docket No. 10-127, at 14-28 (filed July 15, 2010) (“TWC Broadband Classification Comments”); *see also Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 991 (2005).

¹⁷ PIC Comments at 10.

PIC parties state that “it is not at all clear what specialized services themselves might be,”¹⁸ thereby conceding the absence of any basis for classifying such services as “telecommunications services.”

In fact, the available evidence suggests that most specialized services would be appropriately classified as information services.¹⁹ For example, the telemedicine, smart-grid, and distance-learning offerings that are frequently mentioned as examples of specialized services entail the *use* of telecommunications in conjunction with various forms of information-processing, rather than the *offering* of a transparent telecommunications functionality on a stand-alone basis.²⁰ So, too, would managed broadband services that offer enterprise customers an inextricable combination of information-processing and data transmission qualify as information services under established precedent.²¹ Any attempt to impose common carrier requirements on providers of specialized information services would clearly violate the Act, under which the categories of information services and telecommunications services are mutually exclusive.²²

Moreover, even if some specialized services offered now or in the future consist of a transparent “telecommunications” pathway, proponents of imposing common carrier

¹⁸ *Id.* at 3.

¹⁹ In addition, to the extent that the Commission regards IP video services as a form of “specialized services,” they would fall under Title VI (assuming they qualify as cable services), rather than Title II.

²⁰ Compare 47 U.S.C. § 153(20), with *id.* § 153(46).

²¹ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 ¶ 15 (2005) (“*Wireline Broadband Order*”).

²² 47 U.S.C. § 153(44) (“A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services”); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 ¶ 41 (2002) (“*Cable Modem Order*”).

requirements ignore the distinct possibility that such services would be offered only on a private carrier basis—*i.e.*, outside the Title II framework. As TWC has shown previously, it would be unlawful for the Commission to compel a cable operator that offers transmission as a private carrier to operate pursuant to Title II, and justifying the imposition of common carrier mandates at a minimum would hinge on a finding of market power.²³ Yet, the Commission has not proposed any framework for conducting a market power analysis with respect to broadband Internet access services, much less for the inchoate examples of specialized services described in the record thus far. Even apart from the absence of any empirical basis, it would strain credulity to assert that a provider of a nascent service in a generally competitive broadband marketplace could be shown to possess market power.

Nor is there any merit to Free Press’s claim that specialized services are somehow subject to the Commission’s decades-old *Computer Inquiry* framework.²⁴ Free Press does not explain the basis for this theory, which it first floated in its comments on the underlying rulemaking.²⁵ In any event, there is no support for the notion that the *Computer Inquiry* rules do or should apply to specialized services. That is most obviously true with respect to specialized services provided by cable operators over their broadband networks, which have never been subject to the *Computer Inquiry* regime.²⁶

²³ TWC Broadband Classification Comments at 37-40.

²⁴ Free Press Comments at 4; *see also* Vonage Comments at 9 (analogizing several of the Public Notice’s proposals to the *Computer Inquiry* requirements).

²⁵ Comments of Free Press, GN Docket No. 09-191, WC Docket No. 07-52, at 107 (filed Jan. 15, 2010).

²⁶ Reply Comments of Time Warner Cable Inc., GN Docket No. 09-191, WC Docket No. 07-52, at 78 n.281 (filed Apr. 26, 2010) (“TWC Net Neutrality NPRM Reply Comments”).

When the Commission adopted those rules, “the core assumption . . . was that the *telephone network* [was] the primary, if not exclusive, means through which information service providers [could] gain access to their customers.”²⁷ Based on those facts, the Commission required wireline telecommunications carriers to separate out the transmission component of their enhanced service offerings and provide it on an unbundled, tariffed basis as a telecommunications service. The Commission consciously chose not to extend that regime to cable operators. As explained in the *Cable Modem Order*: “The Commission has never before applied *Computer II* to information services provided over cable facilities. Indeed, for more than twenty years, *Computer II* obligations have been applied exclusively to traditional wireline services and facilities.”²⁸ More recently, the Commission has confirmed that its *Computer Inquiry* proceedings imposed nondiscrimination requirements on “facilities-based *telecommunications carriers*.”²⁹ Because the Commission expressly refused to “extend” the *Computer Inquiry* rules to cable networks,³⁰ Free Press is simply wrong to assert that specialized broadband services offered by cable operators are subject to those requirements.

²⁷ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 ¶ 36 (2002).

²⁸ *Cable Modem Order* ¶ 43; *see also Wireline Broadband Order* ¶ 85 (stating that the Commission’s “long-standing *Computer Inquiry* regulations . . . apply only to wireline facilities-based carriers”).

²⁹ *A National Broadband Plan for Our Future*, Notice of Inquiry, 24 FCC Rcd 4342 ¶ 47 (2009) (emphasis added); *see also Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd 7866 ¶ 12 (2010) (“In 1966, the Commission initiated its *Computer Inquiries* ‘to ascertain whether the services and facilities offered by *common carriers* are compatible with the present and anticipated communications requirements of computer users.’”) (quoting *Regulatory & Policy Problems Presented by the Interdependence of Computer & Communications Services*, Final Decision and Order, 28 F.C.C.2d 267 ¶¶ 12, 24 (1966) (emphasis added)).

³⁰ *Cable Modem Order* ¶ 43.

Nor is there any basis for reversing that judgment and extending *Computer Inquiry* mandates to cable operators now, as TWC has explained at length.³¹ As a threshold matter, the Commission would have to force cable operators to become common carriers, and as noted above there is a substantial record demonstrating why that outcome would be unlawful. Moreover, the Commission has been steadily taking steps to eliminate or scale back the *Computer Inquiry* obligations that do apply to facilities-based telecommunications carriers,³² and it would be hard-pressed to justify a wholesale abandonment of that consistent policy. Finally, the *Computer Inquiry* framework does not even make sense as a solution to concerns about Internet openness, since its core goal was not to govern how service providers treat traffic on their networks but instead to ensure that independent providers of information services had access to transmission capacity needed to provide their services.³³

In short, neither the Public Notice nor any commenter identifies any legal basis on which the Commission could impose the requirements at issue on specialized services.

II. THE RECORD FAILS TO SHOW WHY REGULATION OF SPECIALIZED SERVICES IS REMOTELY NECESSARY

Even apart from the absence of legal authority, there is no sound policy reason to pursue the adoption of rules governing specialized services. Proponents of regulation have had every opportunity to present evidence of actual harms that warrant the imposition of any net neutrality

³¹ TWC Broadband Classification Comments at 37-40.

³² See, e.g., *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules With Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260 ¶ 54 (2008); *Wireline Broadband Order* ¶¶ 41-85 (describing at length why continued application of the *Computer Inquiry* rules would be unnecessary and inappropriate).

³³ In fact, Free Press's interest in the *Computer Inquiry* rules is somewhat perplexing, given that the application of that framework would not, in and of itself, lead to the imposition of most of the requirements that the Public Notice contemplates.

mandates, and they have consistently failed to do so. The comments filed in response to the Public Notice are no exception. For instance, Free Press bemoans that the debate over specialized services “has reached an extraordinary level of heat and hyperbole,” and then, as if to prove the point, it claims that the “open Internet remains in peril” without identifying any genuine threats.³⁴ The Computer & Communications Industry Association (“CCIA”) declares that “the record does not support” exempting specialized services from any net neutrality rules, but it likewise fails to provide any evidence of how such services could conceivably threaten Internet openness.³⁵ Instead, such parties engage in the same compound speculation that underlies the Public Notice, theorizing about how specialized services might evolve and how they might impact the public Internet. But as TWC has explained, the Commission cannot reasonably impose burdensome net neutrality mandates based on purely hypothetical harms.³⁶ TWC also has shown that such speculation is misguided in any event, given providers’ strong market-based incentives to ensure that their customers have a quality online experience (whether they are using a specialized service or best-efforts Internet access).³⁷

Rather than make an affirmative case for rules, several of these parties attempt to shift that burden to providers of specialized services to explain why their offerings should *not* be subject to regulation. For example, the PIC parties criticize service providers for not having shown (to the PIC parties’ satisfaction) that there are “valid technical reasons” for offering specialized services separately from best-efforts Internet access services and for not making a

³⁴ Free Press Comments at 4, 6.

³⁵ Computer & Communications Industry Association (“CCIA”) Comments at 1.

³⁶ TWC Comments at 9-10 (noting guidance from the Department of Justice and the Federal Trade Commission).

³⁷ *Id.* at 10-12.

sufficiently “comprehensive and compelling case” regarding the nature of specialized services.³⁸ Similarly, CCIA states that specialized services should be subject to net neutrality rules unless and until a provider can obtain forbearance relief.³⁹ As TWC has previously noted, this backwards approach to policymaking—by which regulation is presumed to be the default state of affairs and is lifted only if a service provider can demonstrate an *absence* of harm—would undermine basic tenets of administrative and constitutional law,⁴⁰ as well as the Commission’s interest in supporting “innovation without permission.”⁴¹

Meanwhile, in the midst of this ongoing theorizing about how and when providers of broadband Internet access services and specialized services *might* engage in harmful practices, other participants in the Internet ecosystem continue to inflict actual consumer harm with impunity. Most recently, FOX’s well-publicized blocking of access to its broadcast content by Cablevision’s broadband Internet access subscribers illustrates yet again that the Commission’s myopic focus on broadband Internet access service providers is misplaced. And even Google—which has argued against expanding the reach of “openness” rules or principles beyond broadband Internet access service providers—may now have cause to reconsider that cramped view of the issue, as three of the largest broadcasters in the country have blocked the online versions of their programming from Google TV.⁴² Moreover, in the wireless context, several

³⁸ PIC Comments at 3, 7.

³⁹ CCIA Comments at 4-5 (“If, after the appropriate notice and comment period, the Commission finds forbearance to be warranted, the petitioner will be given relief for the identified service. During the pendency of the petition, as is the case with any request for forbearance, the Open Internet rules will apply to that service.”).

⁴⁰ See TWC Net Neutrality NPRM Reply Comments at 5-6.

⁴¹ TWC Comments at 29.

⁴² Alexei Oreskovic, *Google in talks to unblock access to TV websites*, REUTERS.COM, Oct. 21, 2010, <http://www.reuters.com/article/idUSTRE69K5QS20101022>.

handset manufacturers continue to lock or “brick” consumer devices at the behest of certain wireless providers (such as AT&T)—thus impeding the ability of consumers to switch service providers—in contravention of the principles set forth in the *Internet Policy Statement*.⁴³

These incidents and practices underscore the irrational nature of any effort to single out broadband providers for scrutiny and oversight, including through the proposals in the Public Notice. Citing incidents such as the FOX-Cablevision dispute as well as other limitations by programmers on access to their content, Public Knowledge recently commented that “network neutrality is not the end-all be-all of consumer protection,” recognizing that conduct like FOX’s blocking of certain broadband subscribers’ access to free online content “could threaten the integrity of the open Internet as much as anti-competitive behavior by telecommunications providers.”⁴⁴ Similarly, Commissioner Copps observed: “For a broadcaster to pull programming from the Internet for a cable company’s subscribers . . . directly threatens the open Internet.”⁴⁵ Such observations reinforce TWC’s longstanding point that it would be wholly unreasonable—and thus arbitrary and capricious—to regulate broadband Internet access providers based on hypothetical threats while ignoring actual violations of “openness” principles

⁴³ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd 14986 ¶ 4 (2005) (“*Internet Policy Statement*”) (setting forth the principle that “consumers are entitled to connect their choice of legal devices that do not harm the network,” among others); see also *An Examination of Competition in the Wireless Industry Before the H. SubComm. on Communications, Technology, and the Internet*, 111th Cong. (2009), available at http://energycommerce.house.gov/index.php?option=com_content&view=article&id=1611:energy-and-commerce-subcommittee-hearing-on-an-examination-of-competition-in-the-wireless-industry&catid=134:subcommittee-on-communications-technology-and-the-internet&Itemid=74 (testimony concerning the competitive impact of handset exclusivity arrangements).

⁴⁴ Letter from Harold Feld, Legal Director, Public Knowledge, to the Honorable Julius Genachowski, Chairman, FCC, WC Docket No. 07-52 *et al.*, at 2 (filed Oct. 21, 2010).

⁴⁵ Statement of Commissioner Michael J. Copps on the Continuing Fox-Cablevision Impasse, at 1 (rel. Oct. 20, 2010).

by other entities in the Internet ecosystem, particularly given the broad scope of those principles as set forth in the *Internet Policy Statement*.⁴⁶

CONCLUSION

For the foregoing reasons, the Commission should reject the proposals set forth in the Public Notice.

Respectfully submitted,

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⁴⁶ See *Internet Policy Statement* ¶ 4 (stating that consumers are entitled to the benefits of “competition among network providers, application and service providers, and content providers”); TWC Net Neutrality NPRM Comments at 73-98 (explaining in detail why the Commission should not and cannot limit application of any “openness” mandates to providers of broadband Internet access services).