

**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
_____)	

REPLY COMMENTS OF VONAGE HOLDINGS CORP.

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Executive Summary

Vonage files these Reply Comments in response to the Public Notice issued by the Commission seeking to expand the record on the application of open Internet rules to “Specialized Services” and wireless mobile platforms. As Vonage described in its initial comments, the Commission should proceed cautiously with respect to “Specialized Services” to ensure that any exemption granted does not undermine the Commission’s goals of promoting innovation and competition. Vonage also believes that open Internet principles should apply equally across all broadband access platforms, including wireless services.

Vonage’s positions are widely supported by other commenters in this proceeding. These Reply Comments will demonstrate that Vonage’s proposed definitions of “Broadband Internet Access” and “Specialized Services,” and the broader policies they are intended to reinforce, are workable, supported by the record, and necessary to prevent broadband Internet access service provider discrimination. Further, the Commission has the authority to undertake these measures, should remain focused on the importance of transparency, and should not give serious consideration to those parties that continue to call for oversight of content and Internet-based applications, which are red herrings merely intended to derail the important policy work the Commission has undertaken in this proceeding.

Vonage appreciates the Commission’s focus on these areas, and supports the Commission’s goal of preserving the open Internet.

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I. INTRODUCTION

Vonage Holdings Corporation (“Vonage”) files these Reply Comments in response to the Public Notice issued by the Federal Communications Commission (“FCC” or “Commission”) in the above-referenced proceeding on the Commission’s development of rules to preserve an open Internet.¹ Vonage outlined in its Further Comments that the Commission should proceed cautiously with respect to Specialized Services, and offered suggested definitions for “Broadband Internet Access” and “Specialized Services,” which are intended to clarify the types of services that should and should not be subject to the Commission’s open Internet policies. Vonage’s Further Comments also support approaches “A” (Definitional Clarity), “B” (Truth in Advertising) and “D” (Non-exclusivity for Specialized Services) set forth by the Commission in the Public Notice. Adoption of these three approaches should ensure: 1) any exemption for Specialized Services does not swallow the rule; 2) broadband access service provider market power does

¹ *Further Inquiry Into Two Under-Developed Issues in the Open Internet Proceeding*, GN Docket No. 09-191 & WC Docket No. 07-92, DA 10-1667 (rel. Sept. 1, 2010) (“Public Notice”). The Public Notice seeks to update the record under the 2009 Notice of Proposed Rulemaking in the above referenced dockets. *See Preserving the Open Internet, Broadband Industry Practices*, Notice of Proposed Rulemaking, GN Docket No. 09-191 & WC Docket No. 07-92, FCC 09-93 (rel. Oct. 22, 2009) (“NPRM”).

not result in consumer harm; and 3) competition is not diminished through exclusivity arrangements.

Vonage's Further Comments support the imposition of the proposed open Internet policies on mobile wireless broadband access services. Consumers using wireless broadband services expect to reach applications and content of their choosing; they do not expect the provider to limit or preclude access because the device in question happens to be wireless. Vonage understands that differences exist between wireline and wireless networks, but the proposed rules provide flexibility with respect to "reasonable network management" that can account for such differences. If different network management practices are indeed required in light of the ways in which wireless networks operate, this carve-out should offer adequate protection for the network operator.

Vonage's positions are widely supported by other commenters in this proceeding. These Reply Comments will demonstrate that Vonage's proposed definitions and the broader policies they are intended to reinforce are workable, supported by various parties, and necessary to prevent broadband Internet access service provider discrimination. Further, the Commission has the authority to undertake these measures, should remain focused on the importance of transparency, and should not give serious consideration to those parties that continue to call for oversight of content and Internet-based applications, which are red herrings merely intended to derail the important policy work the Commission has undertaken in this proceeding.

II. COMMENTERS SUPPORT VONAGE'S POSITIONS

A. "Broadband Internet Access" Should Be Defined Broadly and "Specialized Services" Should Be Defined Narrowly

A number of commenters in this proceeding have supported a broad definition of broadband Internet access, and a narrow definition of Specialized Services. Consistent with this approach, Vonage's Further Comments contain proposed definitions of "Broadband Internet Access" and "Specialized Services." Specifically, Vonage proposed that the Commission define "Broadband Internet Access" broadly as:

The provision or resale of access to a transmission medium that provides Internet Protocol data transmission between an end user and the Internet. For purposes of this definition, broadband Internet access does not include (i) dial-up access requiring an end user to initiate a call across the public switched telephone network to establish a connection, (ii) Internet Protocol-based applications, services, and content that utilize data transmission, but do not provide a transmission medium, and (iii) Specialized Services.²

As Vonage previously described, this definition is workable, broad, and clear. It informs all parties of the types of services that should and should not be covered by the open Internet policies. Vonage believes that a number of parties share the overall goal that this definition seeks to establish: a clear and workable definition intended to cover those services of concern to the Commission.³

Further, Vonage proposed a narrow definition of “Specialized Services” as:

Any communication service by wire or radio that:

- (a) provides broadband data transmission:*
 - (i) between an end user and a limited group of parties or end-points; or*
 - (ii) for a limited set of purposes or applications;*
- (b) is not intended, marketed, or widely used as a substitute for broadband Internet access service, either individually or together with other managed or specialized services offered by the same provider; and*
- (c) either:*
 - (i) does not traverse the public Internet at all; or*
 - (ii) is allocated bandwidth on last-mile transmission facilities that is separate from bandwidth allocated to broadband Internet access service, such that usage spikes for the managed or specialized service do not affect the amount of last-mile bandwidth available for broadband Internet access service, and only to the extent the provider also offers a broadband Internet access service that complies with Part 8 of the Commission’s rules and that can be purchased on a stand-alone basis by an end user without having to purchase any other products or services as a condition of that purchase.⁴*

² See Vonage Further Comments, at 5.

³ See, e.g., Comments of Free Press, at 10-11; Comments of Information Technology Industry Council, at 3.

⁴ See Vonage Further Comments, at 6-7.

Again, Vonage’s proposed definition of “Specialized Services” is intended to clarify those services that do not compete with broadband Internet access services, and are not otherwise likely to supplant or disrupt the Commission’s goals of a strong, open, consumer-friendly Internet. While it remains to be seen which parties support or oppose this proposed definition, the goal of drawing a narrow limitation on open Internet rules is consistent with the views of those commenters in this proceeding that agree that the Commission should tread carefully with respect to Specialized Services. In fact, the Computer and Communications Industry Association goes so far as to suggest that Specialized Services not be exempted from the open Internet rules at all.

For these reasons, CCIA continues to oppose exempting so-called “specialized services” from the Open Internet rules. It joins the request of other parties that the Commission take no action with respect to these yet-undefined services until further evidence is presented to support adoption of a different regulatory solution for them. CCIA therefore recommends that the Commission take its proposed “Definitional Clarity” approach in which “the Commission could address the policy implications of such services *if and when such services are further developed in the market.*”⁵

Vonage agrees that the Commission should tread carefully on the question of Specialized Services, and its proposed definitions are consistent with a number of other parties that agree that such services should be defined to limit the ability for broadband Internet access providers to circumvent the open Internet rules.⁶

B. Wireless and Wireline Broadband Internet Access Services Should Be Treated Similarly

Vonage further notes that, aside from the expected objections by most wireless broadband Internet access service providers and their trade association and partners, a wide variety of commenters appear to agree that there is no reason to treat wireless broadband differently from wireline broadband, and support the approach of including such services within the scope of the

⁵ Comments of CCIA, at 4 (emphasis in original).

⁶ See, e.g., Comments of Center for Democracy and Technology, at 3-4; Comments of Free Press, at 10-11; Comments of Information Technology Industry Council, at 3.

open Internet rules to the same extent applied to wireline broadband providers. A number of commenters noted that consumer expectations concerning the functionality and capabilities of wired and wireless services support applying the Commission's proposed rules to wireless broadband networks. "Consumers expect to use the device of their choosing and to download applications, as well as to view the same legal content they access on a PC. Within a short time, the typical consumer may not even distinguish between 'online,' 'cell phone,' 'telephone,' and 'cable.' To users, they're all forms of communication that can be accessed from a single device."⁷ The Open Internet Coalition agrees that consumers are increasingly indifferent as to the broadband technology they use, and that "[c]onsumers expect the same openness policies to apply across all broadband networks, and the Commission's policies should reflect such preferences."⁸

Wireless providers continue to claim that limits in technology dictate that they should be treated differently, and exempt from open Internet rules including any requirement that they undertake network management in a "reasonable" manner. Many commenters dispense with this argument; for example, as CDT said, "The Commission should categorically reject, ... the claim that mobile wireless operators need unconstrained freedom to play favorites and hence should be entirely exempt from openness rules. There is simply no basis for the assertion that wireless providers would need to discriminate among traffic based on content-based factors such as its source, ownership, or application."⁹ Vonage agrees. While network platforms may run on different technologies, there is no basis to give wireless providers a free pass to engage in discrimination outside the bounds of "reasonableness," especially given that the spectrum they use to provision their networks is a scarce American resource, and is regulated by the Commission on behalf of the American public in a way that supports their benefit.

Most parties also agree with Vonage's assessment that the Commission's proposed inclusion of "reasonable network management" should be sufficient to enable providers across

⁷ Comments of Scott Jordan, Ph.D. and Gwen Shaffer, Ph.D., at 18-19.

⁸ Comments of the Open Internet Coalition, at 7.

⁹ Comments of Center for Democracy and Technology, at 5.

various platforms with different network management concerns to address technical characteristics in a meaningful way so long as those means are “reasonable.” “Though wireless networks may possess different technological characteristics, those characteristics — including reliance on spectrum and the mobile nature of some wireless connections — should not exempt wireless networks from network neutrality principles. Rather, a flexible reasonable network management standard will permit wireless network owners to adequately manage their traffic while ensuring that the open Internet continues to flourish, regardless of the technology used to access it.”¹⁰ Vonage agrees. The imposition of open Internet policies on wireless providers is not a bar against management of their networks. It is an assurance that their management techniques are reasonable given the circumstances, and are undertaken with an eye towards the benefit of the American public.

III. THE COMMISSION MUST PREVENT APPLICATION DISCRIMINATION, AND SUPPORT TRANSPARENCY ON WIRELESS BROADBAND NETWORKS

A number of comments filed in the initial round of this proceeding were surprising, and further demonstrate the critical importance of applying the Commission’s proposed rules to wireless broadband services.

A. Calls for the Promotion of Application Discrimination Should Be Rejected

Foremost among these comments was Verizon’s suggestion that it should be able to block the ability of its subscribers to access certain VoIP applications that compete with Verizon’s own services. The fact that Verizon would even suggest that it should play this gate keeping role clearly demonstrates the economic incentive for network operators to limit offerings that compete with their own services and reinforces the need to apply the Commission’s non-

¹⁰ Comments of Free Press, at 10. *See also* Comments of the Open Internet Coalition, at 6-7; Comments of the National Cable and Telecommunications Association, at 10-11 (“Any differences between wireless and wireline broadband technologies, or among different wireline technologies, are more appropriately addressed in the manner in which net neutrality rules are applied, taking into account the network management challenges faced by a provider using a particular technology, rather than by excluding wireless carriers from the rules completely.”).

discrimination rule to wireless broadband networks.¹¹ Specifically, Verizon stated in its comments:

if Verizon Wireless offers a Voice over Internet Protocol (VoIP) service, it will comply with all applicable E911, CALEA, CPNI and other regulatory requirements related to such service. If a competing VoIP service is available on the Internet that does not comply with these requirements, then the network operator should not be obligated to support that service, and/or it should be able to charge that VoIP provider for any services that the network operator provides to fill in those requirements. At the very least, the Commission should clarify that wireless broadband providers need not provide access to competing voice service applications that interfere with the licensee's own regulatory compliance.¹²

While Verizon's purported concern over adherence to regulatory requirements is admirable, it is not appropriate for Verizon to judge and enforce regulatory standards, especially for services that it competes against. Due to competitive concerns, the Commission has rejected previous similar suggestions by incumbents that they should fulfill a regulatory enforcement role. For instance, when the Commission adopted its slamming rules, local exchange carriers suggested that they should be able to verify that a long distance carrier submitting a request to change a customer's long distance service actually has the customer's authorization to request this change. The Commission rightly rejected the local exchange carriers' suggestion that they should have this role, noting:

Although we agree that verification by executing carriers of carrier changes could help to deter slamming, we find that permitting executing carriers to verify independently carrier changes that have already been verified by submitting carriers could have anticompetitive effects. We have concerns that executing carriers would have both the incentive and abil-

¹¹ Of course, a number of parties in this proceeding have noted the economic incentives that network operators have to block or hinder applications or services that compete with those operators' own services. *See, e.g.*, Comments of the New Jersey Division of Rate Counsel, at 5-7 (filed Jan. 14, 2010); Comments of Google, Inc., at 17 (filed Apr. 26, 2010) ("In these circumstances, where incentives skew broadband providers' decisions so that they diverge from the larger public interest, sound policy dictates an appropriate FCC role."). *See also NPRM*, at ¶¶ 72-73.

¹² Comments of Verizon and Verizon Wireless, at 35-36.

ity to delay or deny carrier changes, using verification as an excuse, in order to benefit themselves or their affiliates.¹³

Similarly under Verizon's proposal, Verizon would also have both the incentive and the ability to use the pretext of enforcing regulatory compliance in order to block or hinder competing VoIP services to benefit Verizon's VoIP services.

Further, Verizon's suggestion that it should be able to charge to "fill in" regulatory requirements is unclear. Given that Verizon has no obligation to ensure that services provided on its broadband network are compliant, there is no reason for Verizon to "fill in" regulatory requirements in the first place. Indeed, the supposition that allowing its data bandwidth to be used by such an application would somehow "interfere" with Verizon's own regulatory compliance is speculative and improbable. Moreover, if such interference actually did occur, steps to remedy it would certainly be "reasonable network management."

B. Transparency is the Hallmark of the Open Internet, and Should Not be Circumscribed

Similarly, several parties make unavailing arguments that transparency requirements should be limited for wireless broadband networks. For example, Verizon provides a detailed explanation concerning its efforts to increase transparency to enable device and application developers to facilitate third-party devices and applications, but concludes that "there is no need for additional technical disclosure requirements to enable third parties to develop innovative devices and applications either for Verizon Wireless' networks *or more generally*."¹⁴ Thus, while Verizon acknowledges the importance of transparency, it apparently does not believe that it is important enough to be a formalized requirement. Further, Verizon's conclusion that there is no need for additional disclosure requirements fails to recognize that there are other network operators besides Verizon, and that it is entirely possible that they do not share Verizon's commitment to application and device transparency. Just because Verizon is transparent now, doesn't

¹³ *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, Second Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 1508, 1568 (1998).

¹⁴ Comments of Verizon and Verizon Wireless, at 42 (emphasis added).

mean that all operators are, or will remain so in the future, absent a requirement to meet specific disclosure requirements.

The Internet Innovation Alliance, for example, states “[t]he only information that should be disclosed about device and application requirements and certification processes is information that is necessary to fully inform the consumer of issues that are relevant to their purchase and usage decisions.”¹⁵ While IIA’s focus on consumer-specific disclosure is commendable, it misses the larger objective of promotion of applications and devices in a manner that use network resources efficiently and effectively, and makes clear that Verizon’s characterization that “all is well” with respect to transparency and technical disclosures for application and service providers is not a view supported across the industry. Vonage agrees with the numerous commenters, including forward-thinking wireless operators that recognize the importance of transparency. For example, Clearwire states “that as a threshold principle, carriers should offer full transparency to customers, applications, content and service providers about their network management practices, and how those practices may affect their experience.”¹⁶ Vonage agrees—while customer disclosures are important, equally important are transparency principles that would foster the development of wireless applications and devices. Further, existing network management disclosures are often anything but clear or consistent. “Providers of Internet access service currently disclose little information about active impediments placed on user communications.”¹⁷

Transparency is the lynchpin to an open Internet. The work of content, application, and service providers will be bolstered if they are able to ascertain how wireless network providers manage traffic and tailor their products to work most effectively with the existing management practices. In the same regard, the transparency principle will serve the paramount objective of safeguarding “the benefits of the Internet for American consumers” by empowering them to understand and compare the limits that different providers may place on the exercise and enjoy-

¹⁵ Comments of the Internet Innovation Alliance, at 3.

¹⁶ Comments of Clearwire, at 2.

¹⁷ Comments of Free Press, at 112 (filed Jan. 14, 2010).

ment of those benefits.¹⁸ Without this information, consumers have little ability to know if a wireless broadband provider's network management practices would hinder their planned use of the service. The transparency principle is also critical for consumers, content, application, and service providers to exercise their rights under the other proposed substantive principles.¹⁹

IV. THE FCC HAS AUTHORITY TO REGULATE SPECIALIZED SERVICES AND REQUIRE STAND-ALONE BROADBAND

A number of commenters have questioned the Commission's authority to regulate Specialized Services and to require stand-alone broadband in conjunction with such services.²⁰ As Free Press acknowledged, a requirement that providers offer open broadband Internet access services on a stand-alone basis, separate from any specialized services, "is essential to maintain meaningful consumer choice and to support incentives and market conditions that will facilitate robust open Internet access services. This is particularly true in the current market for broadband services, characterized by limited or nonexistent competitive choices; poor competition greatly limits subscriber choice over specialized services, and any form of mandatory bundling of open Internet access services with one or more specialized services would create unanticipated harm for competition and the viability of robust open Internet access services."²¹ The Information Technology Industry Council concurs that a stand-alone broadband service requirement is a necessary component to address concerns associated with broadband Internet access providers'

¹⁸ See NPRM, at Statement of Commissioner Copps.

¹⁹ Because of the importance of the transparency principle, the Commission should modify its proposed transparency principle to make clear that it is not subject to reasonable network management. Instead, the Commission should specifically exempt those network management practices that should not be disclosed to the public because of law enforcement, public safety, and homeland and national security concerns, rather than place them under a more generalized "reasonable network management" exemption. See Vonage Opening Comments, at 23.

²⁰ See, e.g., Comments of Time Warner Cable, Inc., at 14; Comments of Verizon and Verizon Wireless, at 58.

²¹ Comments of Free Press, at 14.

provision of Specialized Services.”²² Vonage agrees, and believes that the Commission has ample authority to do so.

First, the Commission addressed a similar question in the *Computer Inquiries* when it differentiated between “enhanced services” that combined computer processing with basic telecommunications service (e.g., dial-up Internet access) and “basic” telecommunications transmission services. To address the potential harm from the ILECs that provided basic telecommunications transmission service favoring their own enhanced services over services provided by nonaffiliated enhanced service providers, the Commission required ILECs to offer basic service to all enhanced service providers at the same rates and terms that it offered to their own affiliated enhanced service providers.²³ A similar approach can be adopted with respect to “Specialized Services” and a stand-alone broadband requirement specifically.

Further, as Vonage stated in its initial comments in this proceeding, under the Communications Act, the Commission has “ancillary jurisdiction” such as that set forth in section 4(i) of the Act, 47 U.S.C. § 154(i), that authorizes it to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”²⁴ In order to exercise this authority the Commission must satisfy two criteria: first it must act under the “general grant of jurisdiction under Title I of the Communications Act, which ... encompasses ‘all interstate and foreign communication by wire or radio;’”²⁵ and second, the Commission’s action must be “reasonably ancillary to the effective performance of [its] various responsibilities.”²⁶ There is little dispute that rules intended to promote the

²² See Comments of the Information Technology Industry Council, at 3.

²³ See, e.g., *Second Computer Inquiry*, Final Decision, 77 FCC2d 384, ¶ 231 (1980); *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report and Order, 16 FCC Rcd. 7418, ¶ 4 (2001) (describing the Commission’s access requirements under *Computer II*).

²⁴ *American Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005).

²⁵ *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167 (1968) (quoting Section 2(a) of the Act, 47 U.S.C. § 152(a)).

²⁶ *Id.* at 178.

broadband services market and associated requirements for stand-alone broadband would affect interstate communication by wire or radio and therefore fall within the Act's general grant of jurisdiction to the Commission. The rules also meet the second criteria for exercise of ancillary jurisdiction. Specifically, the Commission has the power to adopt rules governing Specialized Services as reasonably ancillary to the effective performance of the Commission's regulatory responsibilities over common carriers under Title II of the Act, over broadcasting under Title III, and over cable television under Title VI.

The proposed stand-alone broadband services provision is directly related to the substantive grants of authority in Title II and elsewhere over the networks by which broadband services are delivered. These networks and the broadband Internet access services and Specialized Services provided over them are increasingly becoming conduits for the delivery of voice and video services that compete with traditionally regulated telecommunications, cable, and broadcast services. The Commission has used its ancillary authority on numerous recent occasions to justify the application of Title II obligations on certain information service providers, even though those entities are not common carriers and do not provide telecommunications services.²⁷ For example, Section 201 could provide a substantive "statutory tether" for the requirement that

²⁷ See, e.g., *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, WC Dockets Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10261-62, 10264 (2005), at ¶¶ 28, 31 (imposing 911 emergency calling capability requirements on VoIP providers by reference to 47 U.S.C. §§ 151, 152(a), and 706); *Universal Service Contribution Methodology*, WC Docket No. 06-122; CC Dockets Nos. 96-45, 98-171, 90-571, 92-237; NSD File No. L-00-72; CC Dockets Nos. 99-200, 95-116, 98-170; WC Docket No. 04-36, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7542 (2006), at ¶ 47 (finding that §§ 151 and 254 "provide the requisite nexus" to impose universal service contribution requirements on VoIP providers); *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information; IP-Enabled Services*, CC Docket No. 96-115, WC Docket No. 04-36, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927, 6955-56 (2007), at ¶ 55 (citing §§ 151, 222, and 706 for the proposition that the "requisite nexus" existed to extend CPNI rules to VoIP providers); *IP-Enabled Services*, WC Docket No. 04-36, WT Docket No. 96-198, CG Docket No. 03-123, CC Docket No. 92-105, Report and Order, 22 FCC Rcd 11275, 11276 (2007), at ¶ 1 (citing §§ 151, 225(b)(1), and 255 as the basis for extending disability access obligations to VoIP providers); *IP-Enabled Services*, WC Docket No. 04-36, Report and Order, 24 FCC Rcd 6039, 6044-47 (2009), at ¶¶ 9-13 (imposing Section 214 common carrier discontinuance requirements on VoIP providers pursuant to §§ 151, 214(a), and 706).

broadband Internet access service providers offer a stand-alone broadband service as a means to regulate broadband Internet access network management practices or limit the effects that Specialized Services will have on broadband networks and the PSTN. The National Broadband Plan highlights the increasingly interlocked and interdependent nature of the public switched telephone network (which is subject to Title II regulation) and broadband networks operated by many of the same providers:

Increasingly, broadband is not a discrete, complementary communications service. Instead, it is a platform over which multiple IP-based services—including voice, data and video—converge. As this plan outlines, convergence in communications services and technologies creates extraordinary opportunities to improve American life and benefit consumers. *At the same time, convergence has a significant impact on the legacy Public Switched Telephone Network (PSTN), a system that has provided, and continues to provide, essential services to the American people.*²⁸

If broadband networks have a “significant impact” on Title II telephone networks, one cannot reasonably view the former in complete isolation from the latter. In light of the record amassed to publish the National Broadband Plan and the clear indications that “convergence” is driving both competition and collaboration between the PSTN and broadband networks, the Commission has a substantial basis to exercise ancillary authority in connection with Section 201, and to ensure thereby that broadband network practices do not adversely affect the PSTN in terms of cost or traffic burden,²⁹ which could, over time, make it impossible for some common carriers to provide Title II-regulated communications services upon reasonable request at just and reasonable rates.

Further, the Commission asserted in its brief to the D.C. Circuit in *Comcast v. FCC* that the potential for disruption to VoIP services that could follow from “network management”

²⁸ National Broadband Plan, § 4.5, p. 59 (emphasis added and citations omitted).

²⁹ The Commission could also consider seeking additional comment (much as it already has in the National Broadband Plan proceeding) to establish other ways in which broadband networks and the PSTN are becoming increasingly intertwined. See Public Notice, *Comment Sought on Transition From Circuit-Switched Network to All-IP Network*, NBP Notice # 25, DA 09-2517 (rel. Dec. 1, 2009).

actions such as those undertaken by Comcast (and others before it) justifies an exercise of ancillary authority in connection with Title II. Specifically, the Commission observed that “VoIP can affect prices and practices (addressed by 47 U.S.C. §§ 201(b) and 205) as well as network interconnections and the ability of telephone subscribers to reach one another ubiquitously (addressed by 47 U.S.C. §§ 256).³⁰ By analogy, the same argument can be made with respect to broadband Internet access services generally and Specialized Services in particular. These services both affect prices and practices of Title II services, as well as interconnections and the ability of subscribers to reach one another. It logically follows that the broadband networks over which consumers make use of such VoIP services must also have a “significant impact” on the PSTN. Again, the D.C. Circuit did not reject the Commission’s attempt to exercise ancillary authority on the merits; instead, the court found that the Commission had failed to advance this as a basis for jurisdiction in the *Comcast Order* and therefore refused to examine this claim. The Commission can and should explore these bases for an exercise of ancillary authority over the management of wireline broadband networks, including the practice of tying broadband service to other services, in connection with Sections 201, 205, and 256 of the Act.

Section 257 of the Act is another basis for the use of ancillary authority to require providers to offer stand-alone broadband. In particular, Section 257 vests the Commission with the authority to “seek and promote the policies of this Act favoring ... vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity.”³¹ Section 257 also provides the Commission authority to remove market entry barriers.³² As recognized by a number of commenters, broadband service bundling prevents competition and market entry because customers are less likely to switch telecommunications service provid-

³⁰ Brief for Respondents, *Comcast Corp. v. FCC*, D.C. Cir., No. 08-1291, at 45.

³¹ 47 U.S.C. § 257(b).

³² *See* 47 U.S.C. § 257(a).

ers if they purchase multiple services from their current provider.³³ For example, in imposing a merger condition requiring standalone broadband offerings, the FCC has found that such conditions “create an opportunity for the development of competitive Voice Over Internet Protocol (VoIP) and help spur innovative communications technologies.”³⁴ These conditions also ensure the merged company does not reduce incentives for consumers to use alternative services such as VoIP.³⁵ Consumer groups agree that the unbundling of broadband from other services, such as traditional wireline telephone service, is advantageous and a potential cost savings for the consumer.³⁶ Therefore, the requirement that providers offer stand-alone broadband is reasonably ancillary to the Commission’s authority to remove market barriers to entry, and encourage competition, technological advancement, and promote the public interest.

Section 706 of the Telecommunications Act of 1996 further provides the Commission with a broad mandate to promote an open Internet and the availability of services required to access it.³⁷ Section 706 provides that the FCC “shall encourage the deployment on a reasonable

³³ See Reply Comments of the Maine Public Advocate, Docket Nos. 05-337 & 96-45, at 11-12 (filed June 8, 2009) (noting that customers that obtain bundled broadband services have no incentive to seek out competitive offerings by other application or service providers).

³⁴ *Verizon Comms. Inc. and MCI, Inc. Applications for Transfer of Control*, Statement of Commission Adelstein, 20 FCC Rcd 18433 (2005). See also *SBC Comms. Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290 (2005); *AT&T Inc. and BellSouth Corp. Applications for Transfer of Control*, 22 FCC Rcd 5662 (2007).

³⁵ *Id.*

³⁶ See Ryan Kim, “Phone Companies Required to Offer Standalone Broadband Service,” *The San Francisco Chronicle*, March 20, 2006 (“We have been pushing for the unbundling of different services that the dominant carriers are offering because the bundling of different aspects is an easy way to inflate prices and force consumers to buy services they otherwise need,” said Janine Kenney, spokeswoman for Consumers Union.”). Section 254 may also provide a basis for exercise of ancillary jurisdiction. Requiring that universal service funding recipients provide a standalone broadband service would ensure that the funding remains competitively neutral and does not negatively impact the telecommunications market. The areas where funding is most likely to be needed are, by definition, lacking competition and the influx of funds and new services could spur competition and access to new services, such as VoIP. Requiring stand-alone broadband, would, therefore, also be reasonably ancillary to the Commission’s universal service funding authority under Section 254 of the Act.

³⁷ Out of an abundance of caution and to ensure the development of a complete record, to the extent that such an interpretation of Section 706 may be viewed as a change in the reading of the statute in light of prior statements (see *Comcast v. FCC*, at 31), the Commission may want to issue a further notice of

and timely basis of advanced communications capability.”³⁸ Congress could not have been more clear in establishing regulatory goals for the Commission to pursue in connection with access to the Internet. In analyzing whether an exercise of ancillary authority is justified, the Supreme Court has indicated that the critical question is whether “the Commission has reasonably determined that its [regulatory action] will ‘further the achievement of long-established regulatory goals.’”³⁹ Yet it would defeat the legislative objective of encouraging user control over what information they receive via Internet access if the Commission could not exercise ancillary authority to adopt rules that vest such control in users rather than operators. It would also defeat the purpose of the statute if the Commission had no power to carry out the mandate of Section 706 – that the Commission “shall’ encourage deployment of advanced communications capability.”⁴⁰ Congress could not have meant to give these objectives the force of law with the expectation that the Commission would then be powerless to carry them out.⁴¹ The Commission should therefore make an express finding as to the substantive delegation of authority conferred by Section 706, thereby further supporting adoption of the proposed rules to require providers of

proposed rulemaking seeking comment on this interpretation and other legal bases for the exercise of jurisdiction in connection with the proposed rules.

³⁸ 47 U.S.C. § 1302(a) (emphasis added).

³⁹ *Midwest Video I*, 406 U.S. at 667-68 (citations omitted).

⁴⁰ See also *Ad Hoc Telecomms. Users Committee v. FCC*, 573 F.3d 903, 906-907 (D.C. Cir. 2009) (finding that the “general and generous phrasing of § 706 means that the FCC possesses significant ... authority and discretion to settle on the best regulatory or deregulatory approach to broadband”).

⁴¹ The *Comcast v. FCC* decision does not foreclose reliance upon Section 706 as a “statutory responsibility” upon which an exercise of ancillary authority may rest. The D.C. Circuit’s finding that Section 706 did not provide an adequate basis for adopting the *Comcast Order* was predicated upon a twelve-year-old statement by the Commission that this statute “does not constitute an independent grant of authority,” and the Commission’s failure to provide any explanation for departing from this view in the *Comcast Order*. *Comcast v. FCC*, at 30 (quoting *Deployment of Wirelines Servs. Offering Advanced Telecomms. Capability*, 13 FCC Rcd 24012, 24047 (1998), at ¶ 77). But the intervening years and the decision of the D.C. Circuit itself in *Ad Hoc Telecomms. Users Comm. v. FCC* provide support for the proposition that Section 706 confers substantive authority upon the Commission to develop and enforce regulatory policies governing broadband networks, including the requirement that such services be offered on a stand-alone basis. See *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 906-7 (D.C. Cir. 2009) (“The general and generous phrasing of § 706 means that the FCC possesses significant, albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband.”) (emphasis added).

Specialized Services to also offer stand-alone broadband Internet access service as a proper exercise of ancillary authority.

V. THE PROCEEDING SHOULD REMAIN FOCUSED ON BROADBAND SERVICE PROVIDERS

While the Commission has made clear that this proceeding is intended to review requirements for broadband Internet access service providers,⁴² some commenters continue to push the Commission to similarly regulate application and content providers. Specifically, NECA *et al.* argue that “[n]on-discrimination rules should apply not only to broadband Internet access service providers, but to all providers of Internet-based content, applications, and services, as well as providers of access to the Internet backbone and transport services.”

The Commission should not take the bait on the baseless recommendation by NECA to extend any rules adopted to content, application, and service providers. Such suggestions are obviously motivated by a desire to derail the adoption of the proposed rules or to use such rules as a weapon in collateral regulatory battles on issues such as intercarrier compensation, rather than by a concern over any real risk that content, application, or service providers could exercise bottleneck control over essential facilities or exercise the power associated with terminating access monopolies. There has been no serious allegation (and there could be none) that content, application, or service providers play any significant gate-keeping or exclusionary role; to the contrary, such providers represent the “destinations” rather than the “roads,” rendering the information, performing the act, or delivering the service *as sought by the customer*.

A host of legal concerns would also arise in any attempt to extend the proposed non-discrimination rule to content, application, or service providers. As an initial matter, whereas the Commission clearly has substantive authority pursuant to Titles II and III over the communications networks by which broadband services are delivered as discussed above, there is no substantive statutory grant (and thus no basis for ancillary authority) under which the Commission

⁴² See Public Notice, at 1 (citing NPRM).

could apply the proposed rules to Internet applications, services, or content. Moreover, regulating “nondiscrimination” in the context of content would give rise to significant First Amendment concerns – for example, the Commission could be called upon to consider whether certain content was “nondiscriminatory,” or whether such information should have instead (or also) been rendered to provide more “balanced” content. Thus, there is no basis in law and no reasonable policy basis for the throwaway argument that the proposed non-discrimination rule should be extended to content, application, or service providers. NECA’s request goes beyond the scope of the proceeding and the Commission’s authority, and should be rejected.

VI. CONCLUSION

Vonage appreciates the Commission’s focus on these areas, and supports the Commission’s goal of preserving the open Internet. The Commission should define “Broadband Internet Access” broadly, but proceed cautiously with respect to Specialized Services and ensure that any exemption for such services is coupled with protections to ensure that competition not be thwarted. There is also wide agreement in the record that wireless services should likewise be subject to open Internet principles, and that different management practices may be appropriate amongst different broadband access platforms so long as they remain “reasonable.” Vonage looks forward to working with the Commission on this endeavor, and supports the flexible framework the Commission has proposed.

Respectfully submitted,

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