

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 QWEST COMMUNICATIONS INTERNATIONAL INC.

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Qwest Communications International Inc. (Qwest) files these reply 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.¹

I. INTRODUCTION AND SUMMARY

As Qwest demonstrated in its initial comments, because the D.C. Circuit's *Comcast v. FCC* decision² calls into question the Commission's authority to adopt the regulatory framework proposed in the *NPRM*,³ the Commission should clarify its regulatory jurisdiction in this area before adopting any new open Internet regulations. This is the approach best tailored to encouraging the massive private investment in broadband infrastructure that is needed to accomplish the goals of the National Broadband Plan. In all cases, the Commission should not attempt to apply to competitive Title I services regulations that are rooted in Title II. And, the Commission must ensure that any new openness rules apply on a technology neutral basis to ensure a level playing field among competing broadband providers.

¹ 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.

² *Comcast Corporation v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

³ See Comments of Qwest Communications International Inc. at 2, 5.

Relatedly, the record in this proceeding still fails to establish a rational basis for the Commission to subject wireline broadband services to greater regulation than their wireless counterparts. Qwest does not dispute the contention of commenters such as CTIA, who states “the Commission would best serve the public interest by continuing to apply a light regulatory touch to wireless broadband services.” Yet it is equally true that continued innovation and investment throughout the broadband ecosystem depend upon the same continued “light touch” regulatory approach in the wireline context. A host of commenters -- including Qwest, the National Cable & Telecommunications Association (NCTA), Windstream Communications, Inc. (Windstream), Charter Communications (Charter), and CenturyLink -- document the technical, marketplace, and legal problems that would result if the Commission were to impose new regulations disproportionately on wireline broadband services. Indeed, as explained more fully below, subjecting wireline and wireless broadband services to differing regulations would distort rather than enhance the broadband marketplace.

Finally, regarding specialized services, no party in their initial comments demonstrates credible concerns associated with those services that can not be adequately addressed by adopting clear definitions of “public broadband Internet access services” and “specialized services.” Accordingly, the Commission should reject the other potential policy tools described in the *Further Notice*. As discussed more fully below, Qwest also echoes the comments of other parties questioning the Commission’s legal authority to adopt the policy tools proposed in the *Further Inquiry*.

II. WIRED BROADBAND SERVICES SHOULD BE SUBJECT TO NO GREATER REGULATION THAN THEIR WIRELESS COUNTERPARTS.

A. Wireline Broadband Networks Face the Same Types of Capacity and Other Technical Challenges As Those Experienced by Wireless Networks.

The record in this proceeding still fails to establish a rational basis for the Commission to subject wireline broadband services to greater regulation than their wireless counterparts.

Contrary to the claims of certain wireless carriers that mobile wireless networks alone are “subject to a unique confluence of unpredictable and unrelated” influences, wired networks likewise require flexibility to manage traffic “to ensure high quality services to consumers and overall network reliability.”⁴ The fact that a company uses fixed copper, coaxial and/or fiber lines to make broadband available to the public does not reduce its need for tools to meet end-user demand for high-bandwidth applications and services, and to manage security and other network risks.

As NCTA observes, “network congestion issues are not unique to spectrum-based services.”⁵ High-bandwidth applications like streaming video place ever-growing demands on wireline networks. Indeed, a study released after the initial comment deadline to the *Further Inquiry* found that the popular Netflix “Watch Instantly” service accounts for 20 percent of all non-mobile Internet usage during the prime-time viewing hours of 8-10 pm in the United States - - a stunning figure, considering that Netflix introduced this service only in 2007.⁶ Other bandwidth-intensive applications commonly used in fixed locations include telemedicine, video

⁴ Comments of 4G Americas, LLC at Attachment at 33 and also at 1.

⁵ Comments of NCTA at 11-12. *See also* Comments of Charter at 10 (“We understand that wireless works within defined spectrum, but all networks must engineer around capacity constraints”).

⁶ John C. Abell, *Netflix Instant Accounts for 20 Percent of Peak U.S. Bandwidth Use*, Wired, Oct. 21, 2010, at <http://www.wired.com/epicenter/2010/10/netflix-instant-accounts-for-20-percent-of-peak-u-s-bandwidth-use/>.

conferencing, and online gaming. Wireline carriers, just like wireless carriers, “need considerable discretion to manage their networks closely” in order to “support the increasingly bandwidth-hungry applications that customers value.”⁷

Moreover, growing use of smartphones and other mobile devices increasingly put strains on wireline networks. Cisco System’s (Cisco) Traffic Forecast Update for 2009-14 -- cited favorably in the *National Broadband Plan* and elsewhere⁸ -- notes that “[m]uch mobile data activity takes place within the user’s home” and thus “operators may be able to offload traffic onto a fixed network.”⁹ Cisco estimates that by 2014, wireless carriers will seek to offload nearly one fourth of the traffic from their subscribers’ smartphones to wireline networks, either through use of femtocells or dual-mode handsets that connect to Wi-Fi hotspots supported by wireline connections.¹⁰ Windstream points to additional data confirming this trend, including the finding that approximately 40 percent of all iPhone traffic is transmitted not by AT&T’s wireless network, but by Wi-Fi hotspots supported by a wireline network. Qwest agrees with Windstream that “[t]here is no network or other difference between the ‘wireless broadband Internet connectivity’ provided by AT&T over an iPhone at a Wi-Fi access point and the ‘wireline broadband Internet connectivity’ provided by [a wireline carrier] to a subscriber connecting a netbook or other device to a HomePortal wireless gateway.”¹¹ Particularly as wireline networks

⁷ Comments of AT&T Inc. at 57 (discussing purported “unique challenges” facing mobile wireless broadband providers).

⁸ See *Connecting America: The National Broadband Plan*, § 5.1 at nn. 7 and 12 (rel. Mar. 16, 2010) (the NBP).

⁹ Cisco Visual Networking Index Global Mobile Data Forecast 2009-2014 (2010), at http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-520862.html.

¹⁰ *Id.*

¹¹ Comments of Windstream at 10-11.

are asked to take on more and more traffic from wireless devices, the Commission should not subject wireline networks to regulations that it does not impose on wireless carriers.

Security concerns likewise create a need for traffic management in all broadband networks regardless of the platform. Qwest agrees with T-Mobile USA, Inc. (T-Mobile) that “[h]ackers and third parties can use devices and apps as conduits to introduce viruses or other malware, potentially causing harm not only to the networks and network operators, but also to other network users.”¹² These threats, however, are not unique to wireless networks. Like a wireless carrier, wired broadband providers require “flexibility to address network security . . . and other threats to the consumer experience.”¹³

As Qwest explained in comments concerning the role of cybersecurity in the *National Broadband Plan*, “Computer-based attacks against computer systems and networks frequently involve malicious software such as viruses, Trojans, worms and botnets; email threats that include SPAM and phishing schemes; and denial of service attacks directed at computing or network infrastructures.”¹⁴ Qwest defends its network and its subscribers against these threats by, among other methods, dropping spoofed packets, limiting the amount of email each customer can send to prevent spam, restricting Internet services to accounts from which threats originate, and authenticating and filtering Internet protocols.¹⁵ In the dynamic, ever-changing online environment, no broadband carrier should be encumbered by static regulations that are certain to be many steps behind the latest cyber threat.

¹² Comments of T-Mobile at 15.

¹³ *Id.* at 14.

¹⁴ Comments-NBP Public Notice #8 of Qwest Communications International Inc., GN Docket Nos. 09-51, 09-47, 09-137, filed Nov. 12, 2009 at 6-7.

¹⁵ *Id.* at 7.

B. Disparate Regulatory Treatment of Wireline and Wireless Networks Would Distort the Broadband Marketplace.

Subjecting wireline broadband services to more burdensome regulations than their wireless counterparts would harm competition to the detriment of consumers. As Frontier explains, “Allowing one platform to maximize its revenue potential via network management practices while saddling its competitor with regulations that prohibit it from also doing so would completely distort the competitive marketplace.”¹⁶ AT&T has previously espoused a similar view in connection with transaction-specific net neutrality obligations, arguing that “there is nothing ‘neutral’ about imposing conditions only on AT&T and not on the cable companies and other broadband providers.”¹⁷

First, it is undisputed that wireline and wireless networks compete against one another for subscribers.¹⁸ The rapid evolution of wireless technologies -- particularly the emergence of commercial LTE services -- increases competition between the two platforms. Verizon and Verizon Wireless (Verizon) notes in its comments that it will initiate commercial LTE service in up to 38 markets covering a third of the U.S. population before the end of the year, and will expand coverage to its entire, current 3G footprint by the end of 2013.¹⁹ The capabilities of LTE were made clear by Clearwire in tests held last month in Phoenix, which showed a record peak

¹⁶ Comments of Frontier Communications at 7.

¹⁷ Joint Opposition of AT&T Inc. and BellSouth Corp. to Petitions to Deny and Reply to Comments, WC Docket No. 06-74, at 82-83 (filed June 20, 2006) (footnote omitted).

¹⁸ See, e.g., FCC, Wireless Broadband Facts for Consumers and Local Governments (“There are many different types of broadband access technologies, such as cable, DSL, powerline, satellite and wireless. Each of these technologies can compete to provide similar services to consumers and businesses.”), at <http://www.fcc.gov/wbatf/wbatf-factsheet.pdf>. See also Comments of Qwest Communications International Inc., GN Docket No. 09-191, filed Jan. 14, 2010 (Qwest NPRM Comments) and its Factual Record Appendix at 10-18, 20-26; Comments of Qwest Communications International Inc., GN Docket No. 10-127, filed July 15, 2010 (Qwest Title II Comments) and its Factual Record Appendix at 10-19, 21-27.

¹⁹ Comments of Verizon at 3-4.

download speed of 90 Mbps over paired 20 MHz spectrum blocks, and a still-high download speed of 50 Mbps when using only paired 10 MHz spectrum blocks.²⁰ Put simply, it would be inappropriate for the Commission to subject wireline networks to greater regulatory burdens given the continued evolution of wireless broadband as a competitive force. Qwest therefore urges the Commission to continue its successful policy of competitive neutrality and not tilt the marketplace in favor of some providers over others through lopsided regulatory requirements.

Second, there is no market failure to address in the provision of wireline broadband services, which are subject to as much “robust innovation” as broadband services delivered wirelessly.²¹ Qwest’s own product and service developments underscore the role of wired networks in innovation. For example, in June 2010, Qwest introduced fiber-optic “Heavy Duty Internet service” at speeds that allow households to download an average 30-minute TV show in as little as 44 seconds, download an HD movie in as little as 10 minutes, and upload a 3-minute video file in less than 10 seconds.²² Qwest also is upgrading its nationwide network so that it can deliver speeds of up to 100 Gbps to customer edge sites, using service routing facilities that will reduce latency and add capacity to the core network to accommodate growth from video and other bandwidth-intensive applications.²³ Just as new regulations would “create uncertainty for the additional investment that will be needed” to bring new 4G wireless services to market,

²⁰ See, e.g., Mike Dano, *Clearwire Details Results of Initial LTE Testing*, Fierce Broadband Wireless, Oct. 20, 2010, at <http://www.fiercebroadbandwireless.com/story/clearwire-details-results-initial-lte-testing/2010-10-20>.

²¹ Comments of Verizon at 12 (describing “robust innovation” in wireless broadband).

²² “Qwest Launches Heavy Duty Internet More Than Fast – Powerful,” <http://news.qwest.com/heavyduty>.

²³ Qwest Positions its National Network for Fastest-Available Ethernet Technology <http://news.qwest.com/QwestNetworkEnhancements>.

burdensome regulations on wireline providers could stifle the types of innovations and investment that the current regulatory environment is enabling for wired networks like Qwest's.²⁴

Third, burdening a broadband service with greater regulation because of the nature of technology used to deliver Internet access would violate the Commission's longstanding policy of technological neutrality. As Windstream notes, the Commission is on record with respect to the competitive harms of treating some types of broadband services differently than others. Specifically, in the *Wireless Broadband Order*, the Commission held that "[w]ithout a consistent approach toward all Internet access providers (both within the wireless industry and across diverse technologies), and absent a showing that an application of common carrier regulation to only one type of Internet access provider will promote the public interest, the possibility of full and fair competition will be compromised."²⁵ Regulatory parity and technological neutrality have worked well to promote next-generation networks and 21st Century broadband infrastructure; the Commission should not now reverse course.

C. The Commission Cannot Lawfully Impose Uniquely Burdensome Regulations on Wireline Broadband Networks.

There remains no rational basis for regulating a broadband service more harshly based upon the fact that it makes broadband access available by wire instead of over the radio spectrum. The Commission therefore cannot lawfully maintain the light touch regulatory regime solely for wireless broadband services.

²⁴ Comments of the CDMA Development Group at 8.

²⁵ Comments of Windstream at 17 n. 40, quoting *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5921 ¶ 55 (2007) (*Wireless Broadband Order*).

The Commission already has found wireline and wireless broadband services to be fundamentally alike.²⁶ Thus, as Qwest explained in its initial comments to the *Further Inquiry*, divergent regulatory classifications for wireline and wireless broadband services would not withstand judicial scrutiny under the APA. *Anderson v. U.S. Sec'y of Agriculture*, 462 F.Supp.2d 1333, 1339 (2006) (“Agencies have a responsibility to administer their statutorily accorded powers fairly and rationally, which includes not ‘treat[ing] similar situations in dissimilar ways’ (internal quotation omitted)).

To Qwest’s knowledge, no party to date has attempted to defend the disproportionate regulation of wireline and wireless broadband services on legal grounds. AT&T, however, contends that there is an independent legal basis preventing regulation of wireless *but not* wireline services. This is incorrect. The provision cited by AT&T -- Section 332 of the Communications Act -- merely prohibits imposition of common carrier regulations on services that are not “commercial mobile services.” Moreover, the Act grants the Commission substantial leeway in defining the scope of the term “commercial mobile services” and does not prevent the Commission from re-visiting the question of whether wireless broadband service is a “commercial mobile service.”²⁷

²⁶ See *Wireless Broadband Order*, 22 FCC Rcd at 5911 ¶ 26 (finding that wireless broadband access services are “identical to those provided by cable modem service, wireline broadband Internet access, or BPL-enabled Internet access”).

²⁷ The Act defines a “commercial mobile service” broadly as “any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public.” 47 U.S.C. § 332(d)(1). Notably, Section 332 does not mandate any particular definition for an “interconnected service.” Although the Commission adopted implementing regulations defining an “interconnected service” to mean solely those mobile services that interconnect with the PSTN, nothing in Section 332 prohibits the Commission from re-visiting that definition to encompass services that interconnect with broadband networks. See *In the Matter of Implementation of Sections 3(N) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1435-36 ¶ 57 (1994).

To be clear, Qwest would not support re-classification of wireless broadband as a commercial mobile service subject to common carrier regulation -- as noted, Qwest urges that no broadband service be subject to new, burdensome regulation. Thus, Qwest does not dispute the contention of commenters such as CTIA, who states “the Commission would best serve the public interest by continuing to apply a light regulatory touch to wireless broadband services.”²⁸ Yet the Commission would be mistaken if it were to look to Section 332 as justifying lopsided regulatory treatment favoring wireless broadband services in the competitive marketplace.²⁹ It is thus good law and good policy for the Commission to maintain the existing light touch framework in place for all broadband providers.

III. THERE IS NO FACTUAL OR LEGAL BASIS FOR THE *FURTHER INQUIRY*'S PROPOSALS REGARDING SPECIALIZED SERVICES.

Numerous parties' initial comments join Qwest in observing the speculative nature of the concerns described in the *Further Inquiry* regarding specialized services – (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 engage in anti-

²⁸ Comments of CTIA at Summary, page 3.

²⁹ AT&T also argues that the Commission is especially limited in regulating wireless broadband services because new regulations would amount to an unconstitutional takings of licenses won at auction. As AT&T should be aware, Congress and the Commission have made clear that a wireless license does not grant the license holder any property rights in spectrum, regardless of the method by which the license was assigned. *See* 47 U.S.C. § 301 (“It is the purpose of this chapter . . . to maintain control of the United States over all the channels of radio transmission; and to provide for use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license”).

competitive conduct with respect to specialized services.³⁰ Given this and the risk of unintended consequences acknowledged in the *Further Inquiry*, any potential concerns that open Internet protections could be weakened by specialized services can be easily addressed by clearly defining the terms “public broadband Internet access services” and “specialized services” - as Qwest and numerous other parties advocate.³¹ No party demonstrates any credible concerns regarding specialized services that are not addressed by definitional clarity. For these reasons alone, the Commission should reject the other potential policy tools described in the *Further Notice* - e.g., Truth in Advertising or disclosure obligations, 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. Qwest also echoes the comments of other parties questioning the Commission’s legal authority to adopt any of the other policy tools proposed in the *Further Inquiry*. As noted, *Comcast v. FCC* calls into question the Commission’s authority to adopt the regulatory framework proposed in the *NPRM*, including those proposals discussed in the *Further Inquiry*. And, as Qwest, AT&T, Verizon, and others demonstrate, the Commission has not identified any legal authority that might allow it to impose any of the proposed substantive rules.³² The policy tools described in the *Further Notice* potentially entail application to competitive Title I services of a non-discrimination obligation, line-of-business restrictions or other obligations that are either Title II common carrier-type

³⁰ See, e.g., Comments of Verizon at 52-55; Comments of USTelecom at third and fourth pages; Comments of CenturyLink at 5-8; Comments of AT&T at 16-27; Comments of Time Warner Cable at 8-12 (Time Warner).

³¹ See, e.g., Comments of Verizon at 56; Comments of AT&T at 13-16; Comments of Time Warner at 16-18.

³² See, e.g., Comments of Qwest at 2-3 (including notes 7 and 8), 5, 10-12; Comments of AT&T at 27; Comments of Verizon at 65-66, 67-79 (discussing legal authority relating to specialized services proposals); Comments of CenturyLink at 7-8; Comments of Time Warner at 14-15.

obligations or obligations that exceed even Title II-type obligations and, as such, are obviously problematic from a legal standpoint.³³ Moreover, as AT&T amply demonstrates, the Commission's *Computer Inquiry* rules do not provide a legal basis for any of the proposals and could not lawfully be imposed on the services at issue.³⁴ Free Press' arguments on this point thus hold no water. Finally, as numerous parties observe, the proposed rules raise serious constitutional concerns under both the First and Fifth Amendments.³⁵ Requiring non-exclusivity in specialized services or imposing a guaranteed capacity requirement or the like would raise substantial constitutional questions because either option would compel access providers to dedicate their privately-owned networks for the use of third-party content providers and deny access providers the right to choose how to transmit the traffic on their networks. In addition, restricting the kinds of specialized services that access providers are entitled to offer would directly silence protected expression and violate protected property rights. And as noted in Qwest's initial comments here, and as detailed further in Qwest's initial comments in response to the *NPRM*, the Commission must pay close attention to constitutional and other legal limitations on its ability to impose disclosure obligations on Title I services.³⁶

³³ See, e.g., Comments of Time Warner Cable at 14-15; Comments of Verizon at 1, 65-67; Comments of CenturyLink at 7-8; Comments of AT&T at 27-37. See also Qwest *NPRM* Comments at 51-73, Reply Comments of Qwest Communications International Inc., GN Docket No. 09-191, filed Apr. 26, 2010 at 7-10, 22-27, 37-48 (Qwest *NPRM* Reply); Qwest Title II Comments, *generally*; and Reply Comments of Qwest Communications International Inc., GN Docket No. 10-127, filed Aug. 12, 2010, *generally* (Qwest Title II Reply).

³⁴ Comments of AT&T at 28, n. 44. See also Reply Comments of AT&T, GN Docket No. 09-191 and WC Docket No. 07-52, filed Apr. 26, 2010 at 158-62.

³⁵ See, e.g., Comments of Verizon at 68-78; Comments of AT&T at 27-37. See also numerous comments and reply comment in response to *NPRM* in this proceeding, including Qwest *NPRM* Comments at 51-72; Qwest *NPRM* Reply at 37-48; Qwest Title II Comments at 3-4, 28-37; and Qwest Title II Reply at 30-32.

³⁶ Qwest *NPRM* Comments at 51-54.

IV. CONCLUSION

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

Respectfully submitted,

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November 4, 2010

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY**
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@bepiweb.com.

/s/Richard Grozier

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