

**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



I. Introduction.

The American Cable Association (“ACA”) files these Reply Comments in response to the Commission’s Further Inquiry into Two Under-Developed Issues in the Open Internet Proceeding.¹ It bears repeating that the impressive progress that ACA members have made in delivering broadband Internet services in a wide variety of lower density markets has been fostered by a regulatory environment characterized by “light touch” regulation.² To preserve their ability to continue to do so, the Commission must keep foremost in mind that the costs and burdens of regulation can hinder broadband progress, especially for smaller providers. Accordingly, it is essential that “specialized” and “managed” services be exempt from any network neutrality regulation. Imposing unnecessary regulations on an ever-growing array of Internet-based services will only constrain innovation and broadband

¹ *Further Inquiry Into Two Under-Developed Issues in the Open Internet Proceeding*, Public Notice, DA 10-1667 (rel. Sept. 1, 2010) (“Further Inquiry”).

² *In the Matter of Preserving the Open Internet; Broadband Industry Practices*, Notice of Proposed Rulemaking, Comments of the American Cable Association, GN Docket No. 09-191, WC Docket No. 07-52, at 1 (filed Jan. 14, 2010) (“Initial ACA NPRM Comments”).

investment. Broadband Internet service providers must also be permitted to use bandwidth- or consumption-based billing models as a tool to address network congestion. These billing models should be deemed reasonable network management practices for all providers regardless of network technology – not just wireless providers. ACA urges the Commission to:

- Exempt specialized and managed services from any regulation; and
- Expressly recognize that bandwidth- or consumption-based billing models are reasonable network management practices for all broadband providers, not just wireless providers.

ACA highlights the ample support for ACA's proposals in the record below.

II. Specialized and managed services must be exempt from network neutrality regulation.

The Further Inquiry noted “three general areas of concern about how to maintain the investment-promoting benefits of specialized services” while protecting the openness of the Internet.³ These concerns include: (i) bypassing open Internet protections; (ii) supplanting the open Internet; and (iii) increasing anti-competitive conduct.⁴ The Further Inquiry sought comment on each of the concerns, “six general policy approaches” intended to address those concerns, and “any other concerns or policies regarding specialized services that the Commission should consider.”⁵

In its Initial NPRM Comments – filed in response to the Notice of Proposed Rulemaking, not the Further Inquiry – ACA urged the Commission to specifically exempt specialized and managed services from network neutrality regulation.⁶ ACA noted that “[n]o

³ Further Inquiry at 2.

⁴ Further Inquiry at 2-3.

⁵ See Further Inquiry.

⁶ Initial ACA NPRM Comments at 17-18.

complaints have arisen, no public interest harm has ever been shown, and neither Congress nor the Commission has ever articulated policy principles governing these services, other than to generally encourage their development.”⁷ There was ample support in the record for ACA’s proposal, which ACA outlined in its Reply Comments in this proceeding.⁸ Based on the comments responding to the Further Inquiry, it is apparent that commenters continue to share ACA’s concern about the potential for regulation to constrain innovation in specialized and managed services and broadband investment in general.

National Cable & Telecommunications Association (“NCTA”)

At this early stage. . . . specialized services themselves are. . . speculative and inchoate, there is no basis for believing that they will ever adversely affect the vitality and openness of broadband Internet access service.⁹

Time Warner

[F]ar from showing that specialized services actually pose a threat to consumers, the record compiled to date confirms the likely benefits of such services.¹⁰

National Exchange Carrier Association, Inc. (“NECA”), National Telecommunications Cooperative Association (“NTCA”), Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”), Eastern Rural Telecom Association (“ERTA”), and Western Telecommunications Alliance (“WTA”).

[A] general and flexible definition of specialized services will ‘improve the ability and incentive. . .to invest in. . . broadband networks, to the benefit of all. . .customers.’¹¹

⁷ Comments of ACA at 18 (*citing* 47 U.S.C. § 230(b)(1) (“It is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media . . .”).

⁸ *In the Matter of Preserving the Open Internet; Broadband Industry Practices*, Reply Comments of the American Cable Association, GN Docket No. 09-191, WC Docket No. 07-52, at 7-9 (filed Apr. 26, 2010).

⁹ *In the Matter of Preserving the Open Internet; Broadband Industry Practices*, Comments of the National Cable & Telecommunications Association, GN Docket No. 09-191, WC Docket No. 07-52, at 6 (filed Oct. 12, 2010) (“NCTA Comments”).

¹⁰ *In the Matter of Preserving the Open Internet; Broadband Industry Practices*, Comments of Time Warner, GN Docket No. 09-191, WC Docket No. 07-52, at 9 (filed Oct. 12, 2010).

As ACA noted in its Initial NPRM Comments, within its constituency, specialized and managed services encompass a growing array of networking and IP-based services distinct from broadband Internet access. This important subset of services includes Voice-over-Internet Protocol (“VoIP”) telephony service, website hosting, advertising, IPTV, and virtual private networks for businesses. Specialized and managed services provide public interest and consumer benefits, including competition in video and voice service, robust and cost-effective networking, and innovative data and communications transfer technologies for businesses, institutions, governments, and schools. Moreover, the revenue from these services supports continued innovation and investment to the benefit of consumers.

To ensure consumers continue to receive benefits from managed and specialized services, the Commission must ensure that these services remain under the exclusive control of the broadband Internet service provider, and must not be subject to burdensome regulation. No factual, legal, or policy basis exists for imposing regulation on specialized and managed services. Instead, the unhindered ability to develop and offer these dynamic services provides strong incentives for continued investment to upgrade and expand broadband Internet network facilities and access service. The Commission can best support innovation and broadband investment by exempting specialized and managed services entirely from network neutrality regulation.

In its Comments responding to the Further Inquiry, NCTA suggested that should the Commission determine that network neutrality rules are required, it avoid unnecessary and

¹¹ *In the Matter of Preserving the Open Internet; Broadband Industry Practices*, Comments of National Exchange Carrier Assoc., Inc.; National Telecommunications Cooperative Association; Organization for the Promotion and Advancement of Small Telecommunications Companies; Eastern Rural Telecom Association; and Western Telecommunications Alliance, GN Docket No. 09-191, WC Docket No. 07-52, at 5-7 (filed Oct. 12, 2010)..

counterproductive regulation of specialized services by confining application of the new rules solely to a provider's offering of "broadband Internet access service," defined as limited to "mass market residential broadband Internet access service that provides connectivity to all or substantially all published IP addresses."¹² This approach is fully consistent with ACA's recommendation that the Commission "should make clear that the limits of 'reasonable network management' apply to management of broadband Internet access service, not to traffic arising from specialized and managed services."¹³ Defining "broadband Internet access service," a service that has been in the marketplace for over a decade now, clearly and narrowly for purposes of applying the proposed network neutrality regulations, as NCTA suggests, can accomplish the goal of exempting specialized and managed services in a clear and straightforward manner without requiring the Commission to define the characteristics of a class of services that is both largely nascent and potentially limitless.¹⁴

III. The Commission must expressly recognize that bandwidth- or consumption-based billing models constitute reasonable network management practices for all providers.

The Further Inquiry states that "some mobile providers have introduced usage-based data pricing..." and asked "[t]o what extent do these business models mitigate concerns about congestion of scarce network capacity by third-party devices?"¹⁵ In response to the Further Inquiry, many commenters noted that bandwidth- or consumption-

¹² NCTA Comments at 6.

¹³ Initial ACA NPRM Comments at 13.

¹⁴ In addition, to the extent that traditional multichannel video programming distributor (MVPD) services such as cable service are provided by broadband Internet service providers over the same last mile facilities and not through the public Internet, they too must also remain outside the scope of the Commission's network neutrality rules. As NCTA notes, cable services are governed by Title VI of the Communications Act, which "precludes the application of common carrier-type regulation, such as the restrictions proposed or suggested by the Commission." NCTA Comments at 5.

¹⁵ Further Inquiry at 5.

based billing models mitigate congestion and should qualify as reasonable network management practices.

NCTA

Whether or not usage-based pricing mitigates network congestion concerns, there is no basis for asking the question solely with respect to wireless networks. There would be no rational basis for relieving wireless broadband providers who employ usage-based pricing from the full burdens of regulation while . . . imposing those burdens on wireline providers that utilize such a pricing model.¹⁶

DISH Network, LLC

Consumption-based wireless broadband service plans, provided they are fully disclosed and explained, could promote consumer choice and efficiency by adjusting monthly service fees for high-bandwidth and low-bandwidth users.¹⁷

AT&T

[C]ontrary to the suggestion of some commenters, usage-based pricing – which AT&T and others have begun implementing for their wireless data plans – cannot replace the need for active network management.¹⁸

Open Internet Coalition

[V]ariable pricing schemes, if fairly structured and adequately disclosed to consumers, are a more efficient means of managing traffic congestion on wireless networks....¹⁹

These comments are fully consistent with ACA's Initial NPRM Comments, which urged the Commission to expressly recognize bandwidth- or consumption-based billing models as a reasonable network management practices.²⁰ Moreover, all providers must be able to utilize this network management practice – not just wireless providers. Network

¹⁶ NCTA Comments at 14.

¹⁷ *In the Matter of Preserving the Open Internet; Broadband Industry Practices*, Comments of DISH Network, LLC, GN Docket No. 09-191, WC Docket No. 07-52, at 22 (filed Oct. 12, 2010).

¹⁸ *In the Matter of Preserving the Open Internet; Broadband Industry Practices*, Comments of AT&T Inc., GN Docket No. 09-191, WC Docket No. 07-52, at 60 (filed Oct. 12, 2010).

¹⁹ *In the Matter of Preserving the Open Internet; Broadband Industry Practices*, Comments of the Open Internet Coalition, GN Docket No. 09-191, WC Docket No. 07-52, at 8 (filed Oct. 12, 2010).

²⁰ Initial ACA NPRM Comments at 11.

congestion issues are faced by all broadband Internet service providers, not only those providing services over wireless last-mile facilities. In order to avoid competitive distortions in the marketplace, it is essential, as NCTA proposes, that any network neutrality rules “be applied in a competitively neutral manner to all broadband platforms, wireline and wireless.”²¹

While the Commission has stated that “a broadband Internet service provider *might* seek to manage congestion by limiting usage or charging subscribers based on their usage rather than a flat monthly fee,”²² ACA again urges the Commission to expressly recognize that such billing models *are a reasonable network management tool* that *all providers* can employ to address network congestion. This action would provide the regulatory certainty all broadband Internet service providers require in order to attract capital, invest in their networks, and roll-out new services to consumers.

IV. Conclusion.

To encourage continued innovation and broadband Internet network investment, the Commission must specifically exempt specialized and managed services from network neutrality regulation by confining the application of any such rules to mass market residential broadband Internet access services that provide connectivity to all or substantially all published IP addresses. The Commission must also expressly recognize bandwidth- and consumption-based billing models as a reasonable network management tool that can be utilized by all providers to address network congestion. Finally, wireless providers must not be excluded from any rules that may be imposed on providers of broadband Internet access

²¹ NCTA Comments at 11.

²² *In the Matter of Preserving the Open Internet; Broadband Industry Practices*, Notice of Proposed Rulemaking, 24 FCC Rcd. 13064, 13113 at ¶137 (2009) (emphasis added).

service. If such rules constraining the actions of broadband Internet access service providers are justified by market conditions, they must be applied in a competitively neutral manner.

Respectfully submitted,

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November 4, 2010