

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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

**REPLY COMMENTS OF DISH NETWORK L.L.C.**

**I. INTRODUCTION AND SUMMARY**

DISH Network L.L.C. (“DISH”) submits these Reply Comments in the above-captioned proceedings in order to 1) propose a set of definitions regarding broadband Internet access service, to which open Internet protections should apply; 2) suggest an approach to enforcing a specific nondiscrimination provision for specialized services that compete with services provided over the open Internet in the event that the Commission chooses to exempt any specialized services from the broader open Internet protections; and 3) respond to assertions by the incumbent wireless providers that threaten to reserve the wireless Internet for affiliated applications and content.<sup>1</sup>

In sum, DISH cautions the Commission against carving out a broad category of specialized services from the general open Internet safeguards. Such a carve-out could open up

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<sup>1</sup> See Two Under-Developed Issues in the Open Internet Proceeding, *Notice of Further Inquiry*, GN Docket No. 09-191 (rel. Sept. 1, 2010) (“*Further Inquiry*”); see also Preserving the Open Internet, *Notice of Proposed Rulemaking*, FCC 09-93, GN Docket No. 09-191 (rel. Oct. 22, 2009) (“*Open Internet NPRM*”). In these Reply Comments, DISH cites to comments filed in response to the *Open Internet NPRM* simply as “Comments” or “Reply Comments,” and to comments filed in response to the *Further Inquiry* as “Further Inquiry Comments.”

and pave numerous avenues for evading such safeguards through a widespread resort by broadband providers to the specialized services vehicle. If the Commission decides to make some provision for specialized services despite the risk of evasion, it should take steps to minimize such risk. To do this, the Commission should focus on two areas. First, the Commission should define broadband Internet access service broadly and specialized services narrowly. Second, even when a service qualifies for inclusion in the narrow category of specialized services, the Commission should not abdicate oversight. Instead, the Commission should prevent providers of specialized services from discriminating against “like” or competing services, create presumptions of discrimination if the difference between equivalent metrics for the specialized and competing services exceeds certain parameters (e.g., certain latency and jitter variances), and employ an additional totality of the circumstances test for determining whether there is discrimination.

As for the arguments made by the incumbent wireless providers favoring their own or affiliated applications, they appear to amount to a self-fulfilling justification for discrimination. An incumbent could always argue that it can coordinate better with its own and affiliated applications, and that this better coordination results in more efficient use of network resources. If entertained, such arguments would enshrine discrimination as the most efficient method of supplying wireless broadband services to consumers.

## II. THERE IS OVERWHELMING SUPPORT FOR A BROAD DEFINITION OF BROADBAND INTERNET ACCESS SERVICES SUBJECT TO OPEN INTERNET SAFEGUARDS

Commenters overwhelmingly support the broad application of open Internet safeguards.<sup>2</sup>

To the extent that the Commission believes that some forms of specialized services should be regulated by a different set of standards, the Commission should both limit such services and subject them to their own, tailored nondiscrimination requirement.<sup>3</sup>

In its *Further Inquiry Comments*, DISH urged the Commission to adopt a broad definition of broadband Internet access in order to ensure that broadband providers are not incentivized to invest in “specialized services” that essentially supplant open and traditional

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<sup>2</sup> See, e.g., *Free Press Further Inquiry Comments* at 4 (“As Free Press has previously argued, exempting broadband capacity allocated to specialized services from open Internet rules could create significant loopholes that jeopardize open Internet protections.”); *Writers Guild of America, East, AFL-CIO Further Inquiry Comments* at 1 (referring to specialized services as “nothing more than sleight of hand – avoiding open internet principles by declaring a major portion of the internet to be “not the internet”); *ACLU Further Inquiry Comments* at 20 (“If carriers can charge people a premium to evade network congestion using special high-speed data pipes, their interest in continuing to stave off network congestion through technological upgrades will inevitably wane.”); *Netflix, Inc. Further Inquiry Comments* at 2 (“[T]he risks posed by specialized services being provided over the same physical network as the public Internet heightens the need for oversight of such services.”); *Computer & Comms. Indus. Assoc. Further Inquiry Comments* at 1 (“The Commission should adopt neither the proposed exemption for so-called ‘specialized services,’ which are impossible to define currently in a meaningful way, nor the proposed industry-wide wireless exemption.”); *Assoc. of Research Libraries, and Am. Library Assoc., and EDUCAUSE Further Inquiry Comments* at 4 (“Network operators should not be allowed to sell to application and content providers prioritized service that delivers their content to end users more quickly than other application and content providers. To put it more simply, end-users, not the network operators, should have control over how their Internet traffic is treated.”); *Indep’t Film & Television Alliance Further Inquiry Comments* at 2-3 (“Open Internet principles applied to broadband Internet access must also be applied to specialized services and wireless platforms through policy principles that are tailored to the specific, rapidly changing technology limits.”); see also *Vonage Holdings Corp. Further Inquiry Comments* at 3; *Ctr. for Democracy & Tech. Further Inquiry Comments* at 2; *Info. Tech. Indus. Council Further Inquiry Comments* at 4-5.

<sup>3</sup> See *DISH Further Inquiry Comments* at 12-16 (urging the Commission to require “like-for-like” treatment for competitive substitutes for specialized services).

broadband Internet access.<sup>4</sup> Based on its review of the record, DISH now offers definitions of broadband Internet access service, broadband Internet access, and specialized service that reflect this commitment to an open Internet but still accommodate any services that truly cannot ride on the open Internet.

**“Broadband Internet Access Service.”** Any communication service by wire or radio that provides broadband Internet access directly to the public, or to such classes of users as to be effectively available directly to the public.<sup>5</sup>

**“Broadband Internet Access.”** Any Internet Protocol data transmission between an end user and the Internet. For purposes of this definition, the following shall not be considered broadband Internet access:

- (a) specialized services;
- (b) dial-up access requiring an end user to initiate a call across the public switched telephone network to establish a connection; and
- (c) the provision of a multi-channel package of one-way, linear video channels to the regular subscribers for such a package.

**“Specialized Service.”**

(a) A communication service by wire or radio (i) the purpose for which is such that it cannot be provided over the public Internet, (ii) for which there is no comparable or competitive service provided over the public Internet, and (iii) that has been certified as a specialized service by the Commission based on a showing under items (i) and (ii) of this subsection.

(b) There shall be a rebuttable presumption that services serving a health or safety function meet factors (i) and (ii) in subsection (a). Providers of all other services claiming categorization as a specialized service shall bear the burden of proof in establishing the factors set forth in subsection (a).

Other commenters have proposed definitions of broadband Internet access and specialized services that attempt to address the risk of too large an exception for specialized services.<sup>6</sup> While well intentioned, these alternative definitions run the risk of “specialized services” being a much larger category of excepted services than originally intended.

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<sup>4</sup> See *id.* at 5-10.

<sup>5</sup> This definition is identical to the definition proposed by the Commission in the *Open Internet NPRM* (Appendix A). DISH includes it here to present in one place the three definitions that work together to define the scope of open Internet protections.

<sup>6</sup> See *Vonage Further Inquiry Comments* at 6-7; *Ctr. for Democracy & Tech. Comments* at 49.

Specifically, allowing services to qualify as excepted specialized services simply because they are offered over a dedicated portion of the pipe and for a specific purpose opens the floodgates to the very type of piecemeal supplantation of broadband Internet access that the definition is intended to avert. The above definitions, on the other hand, help avoid this pitfall by restricting specialized services to health and safety and similar services that cannot exist on the open Internet.

### **III. ANY SPECIALIZED SERVICES EXCUSED FROM GENERAL OPEN INTERNET PROTECTIONS SHOULD BE SUBJECT TO A “LIKE-FOR-LIKE” NONDISCRIMINATION RULE**

To the extent that the Commission believes that the very limited class of specialized services that DISH proposes, above, is too narrow for its purposes, DISH reiterates that any such services should be subject to a “like-for-like” nondiscrimination rule. This rule would prevent broadband providers from using the specialized services label to discriminate against competitive offerings. Under the “like-for-like” nondiscrimination rule, broadband providers must offer subscribers the same access to competitive and comparable offerings from third parties as it does to the specialized service itself. This means that once a service is classified as a “specialized service” by the broadband provider, the service may enjoy certain flexibility compared to the treatment of general Internet traffic, but any similar offering by any third party must be afforded that same degree of flexibility.

This “like-for-like” services nondiscrimination rule differs from the more robust nondiscrimination rule proposed by the Commission in its *NPRM*.<sup>7</sup> That more robust rule, applicable to broadband Internet access services generally, would prevent discrimination between different types of services with similar performance requirements whether or not they

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<sup>7</sup> See *Open Internet NPRM* Appendix A.

compete with one another. The more narrow, “like-for-like” nondiscrimination rule applicable to specialized services would prevent discrimination only between the specialized service and services that are in competition with, or stand as substitutes for, the specialized service.

As DISH indicated in its *Further Inquiry Comments*,<sup>8</sup> enforcement of “like-for-like” treatment will require robust disclosure rules, specific presumptions, and a fall-back test. Disclosure rules should be targeted at objective metrics, such as latency and jitter, that convey the broadband providers’ treatment of competitive or comparable offerings. Other numerical benchmarks may also be appropriate. The Commission should establish specific presumptions for the allowable variances for such metrics between the specialized service and its competitors; measures that exceed the variance would result in a rebuttable presumption of discrimination. Of course, it is difficult to predict today the approaches broadband providers may take in the future to favor their branded or affiliated services. The Commission should therefore also employ a totality of the circumstances test under which a third-party service provider may present evidence of discrimination.

#### **IV. THE INCUMBENT WIRELESS PROVIDERS SHOULD NOT BE ALLOWED TO RESERVE THE WIRELESS INTERNET FOR THEIR AFFILIATED APPLICATIONS AND CONTENT**

The large, incumbent wireless providers urge the Commission to exempt the wireless Internet from open Internet safeguards.<sup>9</sup> It is clear that such an approach would result in large swaths of the public being able to access only the applications and content approved by the companies controlling the airwaves.<sup>10</sup> This is particularly true with services or applications that

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<sup>8</sup> *DISH Further Inquiry Comments* at 15-16.

<sup>9</sup> See *AT&T Further Inquiry Comments* at 39-70; *Verizon Further Inquiry Comments* at 43-65.

<sup>10</sup> See, e.g., *DISH Further Inquiry Comments* at 17-20; see also *Mobile Internet Content Coalition Further Inquiry Comments* at 3 (noting that their members “face barriers to success

compete with a service offered by the mobile broadband providers. Both AT&T and Verizon tout their “third party” application development programs, but what their extensive comments in this proceeding fail to confront is the fact that each retains approval (and therefore veto) rights over applications their users may access from their mobile devices with their wireless Internet connections.<sup>11</sup> And each has used such rights to prevent their subscribers from accessing competitive applications provided by third parties.

AT&T praises its own work with third-party application providers, and asserts that it has “worked with . . . Slingbox so that their video applications could be used over AT&T’s network.”<sup>12</sup> What AT&T does not say is that the Slingbox iPhone application was always optimized for AT&T’s 3G network. AT&T purported to object to the amount of bandwidth that the Slingbox application used in order to stream video content, but AT&T was simultaneously allowing an affiliated content provider to stream video over its network.<sup>13</sup> In reality, it took nine months of regulatory scrutiny and pressure from the public and DISH for AT&T to “work with” DISH so that AT&T subscribers could access their Slingbox offerings over the wireless network.

Other third-party application providers have experienced similar restrictions. VoIP operators such as Skype have faced significant difficulty in gaining access across wireless Internet connections.<sup>14</sup> Rebtel, another VoIP provider, has seen its customers’ SMS messages

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that are not based on technological or engineering hurdles, but instead reflect a marketplace dominated by a few wireless carriers who seek to limit consumer use of their mobile devices”).

<sup>11</sup> See *AT&T Further Inquiry Comments* at 53-56; *Verizon Further Inquiry Comments* at 11-16.

<sup>12</sup> *AT&T Further Inquiry Comments* at 56 n.114.

<sup>13</sup> See Eliot Van Buskirk, “TV ‘Anywhere’: AT&T Relents on iPhone 3G Slingbox,” [www.wired.com](http://www.wired.com) (Feb. 4, 2010), [www.wired.com/epicenter/2010/02/att-will-allow-optimized-sling-app-for-iphone/](http://www.wired.com/epicenter/2010/02/att-will-allow-optimized-sling-app-for-iphone/).

<sup>14</sup> See Kevin J. O’Brien, *Skype in a Struggle to Be Heard on Mobile Phones*, *NY Times*, Feb. 17, 2010, <http://www.nytimes.com/2010/02/18/technology/18voip.html>; Scott Jones, *Why Net Neutrality Needs to Be Extended to Mobile Platforms*, *TechCrunch*, <http://techcrunch.com/2010/>

altered or blocked by AT&T.<sup>15</sup> As telecom and pay-TV providers become vertically integrated, this foreclosure risk can spread into areas where wireless broadband providers do not traditionally have an interest.<sup>16</sup>

Verizon appears to believe that its advantage in designing for the Verizon Wireless network means that it should be able to forevermore prefer its own, “branded” applications over those proffered by third parties.<sup>17</sup> Verizon reasons that its “branded” applications have less of an impact on network congestion because they have been “optimized” for Verizon’s network. Ergo, Verizon should be able to discriminate against third-party applications that may not have been “optimized” for Verizon’s network. Verizon apparently believes that reasonable network management practices justifiably include *discrimination against any third-party application* merely because of its third-party origins.<sup>18</sup>

At a minimum, Verizon’s position reflects a bad case of the “not-invented-here” syndrome that can plague even the best of companies. When the company controls a key access highway for other service and content providers, however, such a mind-set affects the health of the Internet ecosystem as a whole. Verizon’s approach creates a self-fulfilling prophesy. On the premise of “branded apps are better,” Verizon favors those applications on its network. The resulting vexing experiences of consumers with third-party applications teach them (erroneously)

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09/19/why-net-neutrality-needs-to-be-extended-to-mobile-platforms/ (noting that “Skype . . . and Google Voice . . . have been blocked by certain carriers”); *see also* Skype, *Petition to Confirm a Consumer’s Right to Use Internet Communications Software and Attach Devices to Wireless Networks* (filed Feb. 20, 2007).

<sup>15</sup> *Mobile Internet Content Coalition Further Inquiry Comments* at 5 n.4.

<sup>16</sup> *See, e.g., Netflix, Inc. Further Inquiry Comments* at 1-2 (expressing concern that “specialized services” will be used to discriminate against unaffiliated content).

<sup>17</sup> *See Verizon Further Inquiry Comments* at 35.

<sup>18</sup> *See id.* (arguing against heightened scrutiny of network management practices that discriminate against applications that compete with the network operators’ branded applications).

that “branded apps really are better,” and market share for such applications diminishes commensurately. Soon, third-party providers see the writing on the wall and stop investing resources in the development of independent applications.

As other commenters have observed, there is nothing inherent in wireless networks that makes nondiscriminatory network management practices impossible or even impractical.<sup>19</sup> Over-the-air access technologies, for example, already limit an individual user’s ability to consume a disproportionate share of mobile network resources without discriminating against the source of the content.<sup>20</sup> The Commission should not credit the incumbent wireless providers’ assertions that they cannot adequately manage their networks without resorting to discriminatory conduct.

## V. CONCLUSION

For the foregoing reasons, DISH urges the Commission to adopt a broad definition of broadband Internet access and to reject the wireless network providers’ attempt to reserve the wireless Internet for the content and applications of their preference.

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<sup>19</sup> See Media Access Project et al., *Ex Parte*, Andrew Afflerbach and Matthew DeHaven, *Any Device and Any Application on Wireless Networks: A Technical Strategy for Evolution* at 33-45, Docket No. 09-191 (filed Jan. 29, 2010).

<sup>20</sup> See, e.g., *Free Press Further Inquiry Comments* at 26.

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Respectfully submitted,

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