

**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

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**REPLY COMMENTS OF  
THE  
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES**

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The comments of the Open Internet Coalition (“OIC”) assert that

[t]he docket proceedings and various stakeholder discussions have demonstrated that there are areas where there is consensus. There is consensus that an open and robust Internet must be protected, preserved, and incentivized to grow. There is consensus that the Internet policy statement should be codified as enforceable rules. There is consensus that a non-discrimination rule should apply to wireline broadband Internet access. There is consensus that there should be transparency regarding how broadband Internet access services are operated in order to enable consumers and application providers with the ability to know how traffic is being treated on networks. There is consensus that Internet users should be able to avail themselves of an expedited complaint process to enforce the rules that protect an open Internet. There is consensus that if the Commission were to develop a category of prioritized, specialized services, those services must not harm an open and robust best efforts Internet. There is consensus that there should be some rules that apply to wireless broadband Internet access providers.<sup>1</sup>

Would that were true. Unfortunately, there is no such consensus,<sup>2</sup> except perhaps that “an open and robust Internet must be protected, preserved, and incentivized to grow.”

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<sup>1</sup> OIC Comments at 2-3; see also Comments of the Telecommunications Industry Association (“TIA”) at 1-2.

<sup>2</sup> E.g., Comments of The United States Telecom Association (“USTelecom”) at [2]; Comments of Frontier Communications Corporation (“Frontier”) at 2; Comments of the National Cable & Telecommunications

The National Association of State Utility Consumer Advocates (“NASUCA”)<sup>3</sup> offers these reply comments on the Federal Communications Commission’s (“FCC” or “Commission”) September 1, 2010 *Public Notice* in these proceedings.<sup>4</sup> Consistent with their position in these and other proceedings, the network owners and operators continue to assert that no rules are necessary, that rules will harm consumers, and that rules will “de-incentivize” them from investing in the increasingly-important facilities over which consumers reach broadband services. As equally consistently asserted by NASUCA, the owners and operators are wrong.<sup>5</sup>

The network owners assert that rules will cause them not to invest.<sup>6</sup> Firms in virtually any industry would prefer not to be regulated,<sup>7</sup> and will likely raise the specter

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Association (“NCTA”) at 2; Comments of Qwest Communications International Inc. (“Qwest”) at 1; Comments of Windstream Communications, Inc. (“Windstream”) at 2; Comments of Time Warner Cable Inc. (“TWC”) at 1. Interestingly, AT&T Inc. (“AT&T”) asserts that “[w]hile differences of opinion may still exist, there is now more common ground among most of the various stakeholders than at any time in the long-running debate over net neutrality.” AT&T Comments at 13. AT&T’s comments do not display much of that common ground.

<sup>3</sup> NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

<sup>4</sup> *Further Inquiry into Two Under-Developed Issues in the Open Internet Proceeding*, Public Notice, DA 10-1667 (rel. September 1, 2010) (“*Public Notice*”).

<sup>5</sup> See NASUCA Initial Comments (January 14, 2010); NASUCA Reply Comments (April 26, 2010). NASUCA also commends to the Commission the well-reasoned, extensive comments of the Public Interest Commenters.

<sup>6</sup> Frontier Comments at 2; NCTA Comments at 2; Qwest Comments at 2; Comments of SureWest Communications (“SureWest”) at v; AT&T Comments at 4. AT&T’s hyperbolic ad hominem attacks on those who, it says, “cavalierly dismiss the investment-chilling effect of such profound regulatory uncertainty” as “oblivious to the real-world effects of their regulatory proposals more generally” and being made “because they have never run a capital-intensive business, they do not have to account to investors, and they fail utterly to appreciate the business impact of the regulatory overhang their proposals would introduce into the marketplace” (*id.* at 5), should not be countenanced.

<sup>7</sup> Just as they would prefer their competitors to be regulated

of “non-investment” as an argument against regulation.<sup>8</sup> But the Commission should not mistake its mission of protecting the public interest as one that requires that network owners be free of regulation, even if uncontrolled network owners might make incrementally more investment in networks that they control absolutely.<sup>9</sup>

The network owners continue to assert that there have been no demonstrated harms that would show the need for rules.<sup>10</sup> Two points in response: First, until *Comcast*, the industry had to assume that the Internet Principles could be enforced, and would be on what might pass as their best behavior; now that prospect is gone, given the D.C. Circuit’s decision.<sup>11</sup> And second, as consistently argued by NASUCA, the notion that consumers must be harmed **before** rules are adopted,<sup>12</sup> rather than rules being adopted to prevent such harms, overstates the capability of private enterprise to consistently act in the public interest.<sup>13</sup>

One of the myths in this arena is that both wireless broadband and specialized services are “nascent” and thus should not be regulated.<sup>14</sup> Yet the industry comments are

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<sup>8</sup> Frontier says that it opposes regulation, but touts the fact that it has formally committed to widespread broadband deployment. Frontier Comments at 3. Those commitments did not contain any “regulatory out.”

<sup>9</sup> USTelecom’s hyperbole that “the damage that could result from [the Commission] being wrong – such as diminished broadband deployment and job loss – would likely be irreparable....” (USTelecom Comments at [3]) ignores the damage to the overall public interest of monopoly (or duopoly) control.

<sup>10</sup> USTelecom Comments at [3]; Comments of Verizon and Verizon Wireless (“Verizon”) at 1.

<sup>11</sup> *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (“*Comcast*”). See Qwest Comments at 2, 3 (“virtually all major broadband providers have supported the FCC Internet Policy Principles and voluntarily abide by those principles as good policy”); see also Windstream Comments at 1-3; TIA Comments at 2; CenturyLink Comments at 1-2.

<sup>12</sup> See USTelecom Comments at [4].

<sup>13</sup> See Comments of Vonage Holding Corp. (“Vonage”) at i.

<sup>14</sup> Comments of Sprint Nextel Corporation (“Sprint”) at ii;

replete with assertions of how widespread these services are.<sup>15</sup> Perhaps the implication is that there need be no regulation until the industry is in decline.... and then the decline will be claimed as a reason not to regulate.

Another of the myths that continues to be perpetrated is that it would take Congressional action for the Commission to either reclassify broadband as a Title II service,<sup>16</sup> or to “decide[e] in the first instance whether, and if so how, to modify today’s light-touch regulatory model.”<sup>17</sup> **Congress** did not adopt that model; it was adopted by the Commission, and upheld by the courts not as an inevitable product of Congressional intent but as one reasonable choice of a regulatory agency.<sup>18</sup> Thus it should not take Congressional action to modify the model to be consistent with current reality.

As an indicator of the self-interest that pervades the industry commenters’ remarks, the wireline network owners assert that wireless networks must be subject to any rules that are adopted,<sup>19</sup> while wireless network owners assert that they must be free of any regulation, especially that adopted for wireline.<sup>20</sup> From the customers’ perspective, the platform – wireline or wireless -- should not matter; the customer’s right

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<sup>15</sup> E.g., AT&T Comments at 2-12; T-Mobile Comments at 2.

<sup>16</sup> See Verizon Comments at 2; Qwest Comments at 2.

<sup>17</sup> USTelecom Comments at [2]; see also Comments of the Free State Foundation at 1.

<sup>18</sup> *NCTA v Brand X*, 545 US 967 (2005).

<sup>19</sup> NCTA Comments at 2-3; Frontier Comments at 7; Qwest Comments at 4; Windstream Comments at 2; TWC Comments at 7-8; SureWest Comments at vi; CenturyLink Comments at 3.

<sup>20</sup> Sprint Comments at ii; Comments of T-Mobile USA, Inc. (“T-Mobile”) at 1; Comments of Cricket Communications, Inc. at 2-3; Comments of CTIA – The Wireless Association® (“CTIA”), Summary at [3]. AT&T and Verizon, of course, as owners of both kinds of networks, are steadfastly against all such regulation. AT&T Comments at 9; Verizon Comments at 1. Notably, although AT&T touts its willingness to allow consumers to use their wireless device of choice (*id.* at 10), it adamantly opposes being **required** to do so. *Id.* at 11-12; see also Sprint Comments at ii; T-Mobile Comments at 2-3; CTIA Comments, Summary at [1].

to an “open and robust Internet” should be the same. This argues, from a public policy standpoint, for rules that apply to all networks.<sup>21</sup>

One of the few things that NASUCA will agree with the industry on is that there is substantial vagueness surrounding the concept of specialized services. As AT&T states, “Although the *Notice* seeks comments on how ‘specialized services’ should be regulated, the Commission has never defined that term, nor even described the salient attributes of such services.”<sup>22</sup> NASUCA would disagree with AT&T on the scope of such services,<sup>23</sup> however, but more fundamentally disagrees that the openness of this question should preclude needed regulation where there is more certainty.<sup>24</sup>

Verizon states that the Commission

should promote informed consumer choice by encouraging all providers throughout the Internet ecosystem to disclose the key terms and characteristics of their services so that consumers themselves, rather than government fiat, can determine what services they want to receive and drive the continuing development of the Internet. That approach will best enhance consumer welfare.<sup>25</sup>

NASUCA agrees that all providers should “disclose the key terms and characteristics of their services so that consumers themselves, rather than government fiat, can determine

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<sup>21</sup> See Free Press Comments at 2; Mozilla Comments; Vonage Comments at i-ii; Comments of the Mobile Internet Content Coalition at 1. Hughes Network Systems, LLC (“Hughes”) seeks to ensure that any rules that apply to wireless do not apply to satellite service (Hughes Comments at 3, but does not explain why it should be exempt from such consumer protections.

<sup>22</sup> AT&T Comments at 2.

<sup>23</sup> Especially that they include all IPTV and VoIP services (id.) and everything from “mobile telehealth services to IPTV services to wireless dog-tracking collars” (id., n.5), “eReaders, 3G-connected GPS navigation devices, broadband-enabled picture frames, and countless other consumer-focused products” (id. at 3), and “[s]mart-grid control modules and utility meters ... [w]ireless heart monitors ... freight tracking and vehicle telemetry monitoring...” Id. (It does appear that AT&T has, deliberately or not, conflated specialized and wireless broadband services.)

<sup>24</sup> Consistent with tw telecom inc.’s (“TWTC”) assertions (TWTC Comments at 1-2), for all customers (whether mass market or enterprise) the crucial factor is that the **customer** chooses the level and type of service. See also Hughes Comments at 2.

<sup>25</sup> Verizon Comments at 2.

what services they want to receive and drive the continuing development of the Internet.” But it is hardly enough for the Commission to “encourage” this<sup>26</sup>; the Commission must require such disclosure, just as the Commission should require broadband service providers to meet all of the Internet principles (including the two new principles proposed in 2009).<sup>27</sup> **That** approach will best enhance (and protect) consumer welfare.

Respectfully submitted,

/s/ David C. Bergmann

David C. Bergmann  
Assistant Consumers’ Counsel  
Chair, NASUCA Telecommunications  
Committee

Office of the Ohio Consumers’ Counsel  
10 West Broad Street, Suite 1800  
Columbus, OH 43215-3485  
Phone (614) 466-8574  
Fax (614) 466-9475  
[bergmann@occ.state.oh.us](mailto:bergmann@occ.state.oh.us)

**NASUCA**  
8380 Colesville Road, Suite 101  
Silver Spring, MD 20910  
Phone (301) 589-6313  
Fax (301) 589-6380

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<sup>26</sup> It is not clear how such “encouragement” could be accomplished.

<sup>27</sup> See NASUCA comments cited in footnote 5, supra.