



November 29, 2010

**Ex Parte**

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

**Re: Preserving the Open Internet GN Docket No. 09-191, Broadband Industry Practices, WC Docket No. 07-52, GN Docket No. 10-127 - Framework for Broadband Internet Service**

Dear Ms. Dortch:

Vonage Holdings Corp. (“Vonage”) files this letter to supplement its comments in the above-referenced docket as well as to respond to certain aspects of the Comments filed by AT&T Corp. (“AT&T”) and Verizon and Verizon Wireless (“Verizon”) on November 4, 2010 and October 12, 2010 respectively.

Recent press reports suggest that the Commission is considering “Net Neutrality” rules based upon Representative Waxman’s proposed legislation. While Vonage supports such a Title I based approach, it has certain concerns with the draft legislation. Specifically, the proposed legislation prohibits wireline providers from blocking lawful content, applications, or services or prohibiting the use of non-harmful devices subject to reasonable network management. In addition, the legislation prohibits wireless providers from “blocking lawful applications that compete with the provider’s voice or video communications services in which the provider has an attributable interest, subject to reasonable network management.” Neither of these prohibitions are sufficiently broad enough to protect the public interest. To the extent the Commission models its rules on the draft legislation, it should modify the text to prohibit unreasonable and unfair conduct comprehensively.

In the case of wireline providers, these companies should not just be prohibited from *blocking* lawful content, applications, or services - they should also be prohibited from *degrading access* (subject to reasonable network management practices). Furthermore, in the

Brendan Kasper, Senior Regulatory Counsel  
23 Main Street • Holmdel, New Jersey 07733  
Tel: 732-444-2216 • 848-219-9567  
Fax: 732-202-5221  
brendan.kasper@vonage.com

case of wireless providers, these companies should not just be prohibited from blocking lawful applications that compete with the provider's *voice or video* communications in which the provider has an attributable interest - they should be prohibited from blocking or degrading *any lawful application* - including messaging applications (subject to reasonable network management practices). By adopting broader prohibitions, the Commission will ensure that its rules preserve the public interest and the freedom of choice that has enabled the Internet to blossom.

Both AT&T and Verizon argue that Section 332(c)(2) of the Act denies the Commission authority to impose "Net Neutrality" obligations on the provision of wireless broadband Internet access services. In their zeal to prevent the imposition of fair rules guaranteeing consumers enforceable net neutrality rules, AT&T and Verizon have overstated the impact of Section 332 on the Commission's ability to subject wireless broadband internet access to network neutrality rules.

AT&T argues that "section 332(c)(2) of the Communications Act bars the Commission from imposing 'neutrality.'"<sup>1</sup> There is simply no such text in Section 332(c)(2). Section 332(c)(2) makes no reference to "neutrality." Instead, Section 332(c)(2) provides only that "a person engaged in the provision of a private mobile service shall not...be treated as a common carrier for any purpose under the Act." Verizon, on the other hand, argues more subtly, suggesting that because "many of the proposed 'policy approaches'... would amount to common carrier regulation,"<sup>2</sup> the Commission lacks the authority to impose such requirements on wireless broadband.

Both AT&T and Verizon are incorrect. If the Commission imposes its net neutrality rules using ancillary authority it would neither impose a duty of common carriage, nor a duty that would amount to common carriage, on wireless broadband internet services.

The Commission has established a clear definition of common carriage and the proposed prohibitions on blocking or degrading access do not somehow turn the broadband provider into an entity that meets that definition. To determine whether a service is a common carrier service, the Commission applies a two-part test based on judicial precedent.<sup>3</sup> This test considers whether the service is held "out to serve indifferently all potential users"; and whether the service allows "customers to transmit intelligence of their own design and choosing."<sup>4</sup> The test for common

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<sup>1</sup> Reply Comments of AT&T Inc., GN Docket No. 09-191, WC Docket No. 07-52, p. 31 (filed Nov. 4, 2010).

<sup>2</sup> Comments of Verizon and Verizon Wireless on Under-Developed Issues in the Open Internet Proceeding, GN Docket No. 09-191, WC Docket No. 07-52, p. 67 (filed Oct. 12, 2010).

<sup>3</sup> See *Cable & Wireless Application for a License to Land and Operate in the United States a Private Submarine Fiber Optic Cable Extending Between the United States and the United Kingdom*, 12 FCC Rcd 8516, 8522, ¶ 14 (1997).

<sup>4</sup> *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1480 (D.C. Cir. 1994), citing *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 640-41 (D.C. Cir.), cert.

carriage is reflected in the Act's definitions of telecommunications service added in the 1996 amendments.<sup>5</sup> The Commission has found that telecommunications services, which are common carrier services,<sup>6</sup> and information services are "mutually exclusive"<sup>7</sup> and thus "separate, non-overlapping categories" of service.<sup>8</sup>

The Commission has previously recognized that wireless broadband Internet services do not allow "customers to transmit intelligence of their own design and choosing,"<sup>9</sup> but rather "inextricably combine[] the transmission of data with computer processing, information provision, and computer interactivity, for the purpose of enabling end users to run a variety of applications."<sup>10</sup> Nothing in the Commission's net neutrality principles that it attempted to enforce against Comcast, for example, will turn wireless Internet access into common carriage.<sup>11</sup> At their core, the Commission's neutrality obligations would prevent blocking or degradation of Internet content, applications, and services, subject to reasonable network management principles.<sup>12</sup> Preventing such blocking or degradation of customer use of Internet access services neither can reasonably be characterized as "common carriage" nor tantamount to the common carriage principle of serving all customers indifferently. To the contrary, the neutrality principles make clear that the broadband provider may not use the "computer processing" features of its information service to thwart the end user's ability to "run a variety of applications."

The Commission's neutrality rules should apply to both wireline and wireless broadband Internet access services. Without such "a consistent approach toward all Internet access providers (both within the wireless industry and across diverse technologies)... the possibility of

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*denied*, 425 U.S. 992 (1976) ("NARUC I"), and *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) ("NARUC II").

<sup>5</sup> See 47 U.S.C. § 153(46).

<sup>6</sup> *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905, 22032-33 ¶ 263, 22033-34, ¶ 265 (1996).

<sup>7</sup> *Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd at 11501, 11520, ¶ 39 (1998).

<sup>8</sup> *Telecommunications Carrier's Use of Customer Proprietary Network Information and other Customer Information*, 13 FCC Rcd 8061, ¶ 46. (1998).

<sup>9</sup> See n. 4, *supra*.

<sup>10</sup> *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, Declaratory Ruling*, 22 FCC Rcd 5901, 5911 ¶ 26 (2007) ("Wireless Broadband Order").

<sup>11</sup> *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd 13028, 13034 ¶ 13 (2008).

<sup>12</sup> *Id.*

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full and fair competition will be compromised.”<sup>13</sup> The Commission should maintain its consistent approach by applying its net neutrality rules, preferably through the use of its ancillary authority, to both wireline and wireless broadband services.

Respectfully submitted,

/s/ Brendan Kasper  
Brendan Kasper  
Senior Regulatory Counsel  
*Vonage Holdings Corp.*

cc: Edward Lazarus  
Zac Katz  
Margaret McCarthy  
Christine Kurth  
Angela Kronenberg  
Brad Gillen

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<sup>13</sup> *Wireless Broadband Order*, 22 FCC Rcd at 5921 ¶ 55.