

**Before the
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554**

In the Matter of)	
)	
Preserving the Open Internet)	GN Docket No. 09-191
)	
Broadband Industry Practices)	WC Docket 07-52
)	
Petition for Reconsideration of)	Report No. 2936
Action in Rulemaking Proceeding)	

**OPPOSITION OF PUBLIC KNOWLEDGE AND FUTURE OF MUSIC
COALITION TO PETITION FOR CLARIFICATION OR
RECONSIDERATION**

The Commission should deny Southern Company Services' request that the Commission clarify or reconsider its policies on specialized services. The Commission has adopted a cautious policy regarding these developing services and will monitor them on a case-by-case basis to protect consumers against anti-competitive effects.¹ Southern has not presented any new facts or arguments that the Commission has not already considered.² It desires what amounts to a declaratory judgment that its proposed specialized service is not anti-competitive

¹ See Preserving an Open Internet, Report & Order, 25 FCC Rcd. 17905, §§ 112-114 (2010).

² For similar concerns to Southern's, which the Commission has already considered before releasing its Order, *see, e.g.*, Comments of MetroPCS Communications, GN Docket 09-191, Oct. 12, 2010, at 35-37.

and not subject to Commission oversight. The Commission is not in a position to provide this.

The Commission's Open Internet Order generally adopts rules that prevent a broadband Internet access service provider from giving preferential treatment to one Internet service over another over a last-mile connection. At the same time, it adopts a cautious policy regarding a potential loophole that could allow a broadband provider to simply define a particular service as not part of the "Internet" in order to provide it preferential service regardless. These non-Internet services that broadband providers offer over the same last-mile connections as broadband access service (and which necessarily share bandwidth with broadband service) are known as "specialized services."

The Commission's policy regarding specialized services recognizes that some such services are not traditionally considered to be violations of Open Internet principles even though they share bandwidth with broadband Internet service. For example, a cable TV service, by its very architecture, receives preferential treatment over competing online video services in the form of dedicated bandwidth on the last-mile connection to a customer's home, which implies a certain quality-of-service guarantee. Voice services offered by broadband Internet providers similarly receive preferential treatment. But, because these kinds of services predate broadband Internet access, and because they are

separately regulated by the Commission (multichannel video services are regulated under Title VI, and voice services under Title II) and subject to various competitive and consumer-protection requirements, the fact that they receive preferential treatment and dedicated bandwidth not available to competing services has been accepted. In the case of voice and video services particularly, their unique historical status and regulatory treatment means that they are, in effect, grandfathered in.³

The Commission has found that there may be good reason for broadband providers, in the future, to offer new kinds of non-broadband services over their last-mile connections to consumers. For example, future broadband providers may wish to offer specialized services relating to medicine or the energy grid. At the same time, these newer services are not regulated as traditional communications services the way managed voice and video services are, and it is possible that a broadband provider could offer these new managed services in an anti-competitive way—for instance, by devoting an ever-increasing amount of bandwidth to them in a way that makes broadband Internet service (and the Internet services accessed through it) unsuited to certain high-bandwidth applications. Recognizing this potentially anti-competitive threat, while at the

³ Were “cable” or “voice” services to begin expanding beyond their traditional contours, Commenters would expect the Commission to monitor such expansions with the same critical eye with which it will monitor other kinds of new specialized services.

same time allowing that some flexibility is needed to allow broadband providers to respond to future needs, the Commission has decided to tackle specialized services issues on a case-by-case basis by monitoring new developments as they occur.

Southern wishes to contract with broadband providers to offer energy-related specialized services, and wants assurance that its offering will not be considered to be a violation of Open Internet principles. As an initial matter, Public Knowledge has not seen any facts that suggest it would be. In PK's view, a utility-related specialized service that was only offered to customers who requested it, that had a *de minimis* effect on the bandwidth available to broadband Internet access, and that did not compete with third-party, over-the-top Internet services, does not present a *prima facie* cause for concern. However, the Commission is not in a position to offer even this level of assurance to Southern. Its decision to address anti-competitive issues that may arise in a specialized service context as they arise is the right one considering that these services are not yet mature and the factual predicate for the Commission to make an informed policy choice is not yet present. If Southern deploys a specialized service, the Commission should monitor it for potential anti-competitive effects and be open to adjudicating complaints about it—it should not pre-judge the

issue based on descriptions of a future product.⁴ While it is understandable that Southern would desire a greater level of “certainty” as to the outcome of Commission actions that have not yet and might never occur, the present Commission is in no position to provide it. The level of uncertainty that Southern faces in this respect is no different in degree or kind than that uncertainty which attends any new investment. Any new endeavor carries business, legal, and technical risk. Southern has not shown how its proposed services are any different, nor has it provided a compelling argument that the Commission should rethink its approach regarding specialized services.

For these reasons, Southern Company Services’ petition should be denied.

Respectfully Submitted,

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⁴ If Southern is able to come forward with more facts about its service, the proper vehicle for it to attempt to make its case is via a Petition for Declaratory Judgment. Even then, however, it would have to square its position with the Commission’s stated desire to monitor the specialized services market as it develops rather than preemptively issuing rulings that could have unanticipated consequences.

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December 16, 2011