

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
) GN Docket No. 14-28
Protecting and Promoting the Open Internet)

**COMMENTS OF
THE UTILITIES TELECOM COUNCIL**

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SUMMARY

UTC urges the Commission to adopt rules that prohibit broadband Internet providers from blocking and discriminating against lawful traffic and sites, as proposed by the Commission. UTC also supports rules that require broadband Internet providers to provide minimum levels of service. In addition, UTC supports the comments of Southern Company Services in this proceeding, and it urges the Commission to clarify that prioritization for emergency communications may include services needed by critical infrastructure industries to promote public safety and welfare. Specifically, UTC encourages the Commission to clarify that specialized services are outside of the scope of the Commission's Open Internet rules and that broadband Internet service providers may provide priority access via specialized services and during emergencies. Finally, UTC encourages the FCC to develop rules for transparency that would require broadband Internet service providers to disclose certain information publicly upon request by the Commission. Similarly, UTC encourages the FCC to adopt rules for dispute resolution that are clear and enforceable.

These rules will help to ensure that utilities that use the public Internet for smart grid and other communications applications will have reliable communications. In turn these rules will promote public and worker safety, because the reliability of electric, gas and water services depends on the reliability of the underlying communications systems that support utilities and other critical infrastructure. As such, the public interest would be served by adopting rules against blocking and discriminating certain traffic on broadband networks. Similarly, the public interest would be served by permitting priority access on specialized access services. Moreover, the Commission has the legal authority to adopt these Open Internet rules under its Section 706 authority. For all of these reasons, the Commission should adopt its latest proposed Open Internet rules.

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The Utilities Telecom Council (“UTC”) hereby submits its reply comments in response to the Notice of Proposed Rulemaking in the above-captioned matter.¹ As discussed more fully below, UTC supports the Commission’s efforts to proactively address conduct that could harm end users’ ability to access and use the Internet. In particular, UTC urges the Commission to consider the needs of critical infrastructure industries (CII), such as electric utilities, for reliable and predictable levels of Internet service, both for routine operations and for emergency operations during or following catastrophic events. UTC supports the Commission’s proposals against blocking and unreasonable discrimination, as well as its proposals for minimum service levels. UTC also supports the comments of Southern Company Services in this proceeding, and it urges the Commission to clarify that prioritization for emergency communications may include services needed by critical infrastructure industries to promote public safety and welfare.

¹ *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, GN Docket No. 14-28, FCC 14-61 (released, May 15, 2014), (hereinafter, “*NPRM*”).

I. Introduction and Background

UTC is the international trade association for the telecom and information technology interests of electric, gas and water utilities, pipeline companies and other critical infrastructure industries (CII). The members of UTC include large investor-owned combination electric, gas and water utilities that may serve millions of customers across multi-state service territories, and UTC's members also include smaller rural electric cooperative utilities or municipal utilities that only may serve a few thousand customers in isolated communities or rural areas. UTC's members all own, manage or control extensive communications networks, which they use to maintain the safe, reliable and secure delivery of electric, gas and water services to the public at large.

In addition to their private internal networks, utilities also use commercial wireline and wireless services to support their enterprise communications and their utility infrastructure communications needs. Like the private internal networks, these commercial service offerings need to provide reliable communications for utility voice and data services. In order to ensure reliability, these systems need to be available and meet high standards for performance. Otherwise, the safety, security and reliability of the underlying electric, gas and water services that they support are degraded. In turn, this can jeopardize public safety, as well as worker safety.

As the Commission has observed, commercial wireline and wireless service providers are increasingly migrating to broadband and IP-based services, which often route traffic over the public Internet. UTC is concerned that utility communications could be impaired to the extent that utility communications rely on commercial wireline and wireless broadband services and these service are subject to blocking, discrimination and throttling of utility communications.

While UTC continues to support the ability of wireline and wireless broadband service providers to offer specialized services,² UTC supports the Commission’s proposals against blocking and unreasonable discrimination, as well as the adoption of minimum service level requirements in order to ensure the reliability and performance quality of commercial broadband services generally. Therefore, UTC is pleased to provide the following reply comments in response to the Commission’s NPRM.

II. The Commission Should Allow Priority Access for Specialized Services and for Utility Communications during Emergencies.

A. Specialized Services

As noted above, UTC is on record in support of excluding specialized services from the Open Internet rules, and it continues to urge the Commission to allow wireline and wireless broadband service providers to provide utilities with specialized services for utilities that would help to ensure reliable communications, which are critical for utilities to protect the safe, secure and reliable delivery of electric, gas and water services to the public at large. In its earlier filings, UTC explained that as communications networks increasingly become IP-based there will be a need and desire to place at least some operational traffic of a more critical nature on public broadband networks.

Such applications could range from automated metering infrastructure (“AMI”) to supervisory control and data acquisition (“SCADA”) with a significantly greater number of remote devices embedded deeply within the electric system. For these extremely large and complex machine-to-machine communications supporting operation of the nation’s critical

² See Comments of UTC in GN Docket No. 09-191 (filed Dec. 27, 2011), *citing* Petition for Clarification or Reconsideration of Southern Company Services, Inc., GN Docket No. 09-191 and WC Docket No. 07-52 (filed Oct. 24, 2011) (supporting clarification that specialized access services are outside the scope of the Open Internet rules.)

infrastructure the traditional “best efforts” standard for broadband Internet access will not be acceptable. Latency must be extremely low to optimize polling performance and prevent communications “front ends” from timing out, and is critical for command and control applications such as load management, protective relaying, and SCADA. Utilities generally require latency levels of less than 100 milliseconds for command and control applications, and consider any increase in latency above 250 milliseconds to be unacceptable.

UTC respectfully requests that the Commission clarify the status of specialized services by stating that they are outside the scope of the Open Internet rules and, in any event, that such customized offerings for enterprise customers are “commercially reasonable” methods by which a broadband Internet access provider may offer its network capacity. On the one hand, the proposed definition of “broadband Internet access service” largely excludes specialized or other enterprise services because it is defined as a “mass-market retail service...that provides capability to transmit data to and receive data from all or substantially all Internet endpoints...” The Commission previously stated that this definition would not include “enterprise service offerings, which are typically offered to larger organizations through customized or individually negotiated arrangements.”³ The Commission further stated that broadband Internet access service does not include “virtual private network services, content delivery network services, multichannel video programming services, hosting or data storage services, or Internet backbone services (if those services are separate from broadband Internet access service).”⁴

In seeming contradiction to these previous statements, the Commission has tentatively concluded in its *NPRM*, that it should “continue to closely monitor the development of

³ *Open Internet Order*, para. 47.

⁴ *Id.*

specialized services to ensure that broadband providers are not using them to bypass the open Internet rules or otherwise undermine a free and open Internet.”⁵ This tentative conclusion suggests that specialized services are *within* the scope of the Open Internet rules.

While UTC understands the need to ensure that the specialized services exception is not used to circumvent its open Internet rules,⁶ UTC nonetheless continues to urge the Commission to clarify that broadband Internet providers may provide specialized services to support smart grid services by utilities and that these specialized services are outside the scope of the Open Internet rules. UTC continues to believe that leaving this issue open to question “could have a chilling effect on broadband providers’ willingness to develop specialized services, either with existing capacity or through expanded capacity” for utilities.⁷ In addition, lack of regulatory certainty in this area would also discourage utilities from using services from broadband Internet service providers for smart grid.⁸ UTC also continues to believe that the Open Internet rules were intended to apply to mass market services and accordingly, specialized services for utilities and other enterprise users should be outside the scope of the Open Internet rules.⁹ As such, the

⁵ *NPRM* at ¶160.

⁶ *Id.*

⁷ Comments of UTC in GN Docket No. 09-191 *et al.* at 4 (filed Dec. 27, 2011), *citing* Petition for Clarification or Reconsideration of Southern Company Services, Inc., GN Docket No. 09-191 and WC Docket No. 07-52 at 6 (filed Oct. 24, 2011).

⁸ *Id.* at 3 (stating that “utilities would be discouraged from using such specialized services if there is uncertainty that they could be subject to Open Internet rules,” and that “[t]his cannot be left to chance; instead utilities need to know which specialized services would be subject to restrictions and which wouldn’t. That way, utilities may decide whether they can use specialized services for certain smart grid applications, depending on their criticality.”).

⁹ *Id.* at 4 (stating that “The Commission does not need to apply the Open Internet rules here in order to protect mass market Internet services, quite the opposite.”) See also Comments of Cox Communications in GN Docket No. 14-28 at the rules should remain limited to ensuring mass market consumers’ unfettered access to the Internet, and should not extend to... specialized services.”)

Commission should not restrict specialized services as part of the Open Internet rules, and it should instead clarify that broadband Internet services may provide priority access for utility smart grid communications.¹⁰

B. Priority Access for Utilities during and After Emergencies

Similar to its position on specialized services, UTC also supports the comments by Southern Company Services that urge the Commission to “permit prioritization of Internet access for critical infrastructure services during and following emergencies.”¹¹ UTC agrees with Southern that this would be consistent with other mechanisms that the Commission has in place to afford priority provisioning or restoration of services deemed to be in the public interest, such as the Telecommunications Service Priority (“TSP”) system, the Wireless Priority Service (“WPS”), and the Government Emergency Telecommunications Service (“GETS”).¹² Conversely, to prohibit priority access for utilities and CII during and following emergencies would “turn the public interest standard on its head by forbidding information service providers from giving preferential treatment for NSEP-type services even though more heavily regulated common carriers are permitted and indeed, encouraged or required, to offer such prioritization in

¹⁰ UTC continues to oppose any suggestions by comments on the record that the Commission should adopt a limited exception that would entail *a priori* review of specialized access services. *See* Comments of UTC in GN Docket No. 09-191 at 4 (stating that “[t]aking the prophylactic approach that Public Knowledge wants would require endless Commission review of every single specialized service by every single broadband Internet service provider before an exception could be applied. Instead, the Commission should provide blanket regulatory certainty that the Open Internet rules do not apply to specialized services for smart grid generally, rather than require *a priori* review of such specialized services.”)

¹¹ Comments of Southern Company Services, Inc. in GN Docket No. 14-28 at 3.

¹² *Id.*

the interest of the public safety and welfare.”¹³ As such, the Commission should permit prioritization of Internet access for utilities and CII during and following emergencies.

III. The Commission Should Prohibit Blocking of Lawful Content, Support Non-discriminatory Access to Lawful Sites, and Ensure Minimum Service Levels That are clear and Objective.

A. No Blocking

In the *NPRM*, the Commission has proposed to adopt a no-blocking rule based upon the 2010 Open Internet Order, but which “would allow individualized bargaining above a minimum level of access to a broadband provider’s subscribers,” consistent with the rationale suggested by the court in *Verizon v. FCC*, “but, also consistent with the court’s analysis, separately subject such practices to scrutiny under the commercially reasonable practices rule (or its equivalent).”¹⁴ UTC supports this proposal. As utilities and CII use services from broadband Internet service providers and as incumbent local exchange carriers increasingly transition from circuit-switched networks to IP-based systems, it will become increasingly important for utilities and other CII that commercial wireline and wireless service providers do not unreasonably discriminate among network traffic, subject only to reasonable network management practices. Even though the *Verizon* decision prevents the FCC from adopting common carrier regulations so long as broadband Internet access is classified as an information service, UTC agrees with the Commission in its tentative conclusion that the Commission may adopt a “commercially

¹³ *Id.* at 5, citing *In the Matter of National Security Emergency Preparedness Telecommunications Service Priority System*, Memorandum Opinion and Order, 4 FCC Rcd. 8473, 8477 (Com. Car. Bur. 1989).

¹⁴ *NPRM* at ¶95, citing *Verizon*, 740 F.3d 623, 658 (D.C. Cir. 2014).

reasonable” standard as it did in the context of data roaming and that was cited with approval by the court in the *Verizon* decision.¹⁵

Other comments on the record agree with the Commission’s tentative conclusion. As Cogent Communications explained in its comments, “[i]n an environment in which certain edge providers may choose to enter into one-on-one arrangements for a dedicated connection to a network, it is therefore imperative that others have the ability to decline that choice and still be able to reach—and, crucially, be reached by—all ISP customers.”¹⁶ Likewise utilities and CII must be able to maintain communications and be able to reach their crews and devices that they use to maintain and restore electric, gas and water services. For example, there are numerous applications and databases that utility field personnel use in the performance of their duties. In an emergency scenario, utility employees may need to remotely access corporate facilities and/or vendor-hosted applications through the Internet. It is therefore critical that utilities have assurance that their employees won’t be blocked during emergencies and can depend on a minimum level of access from fixed broadband Internet service providers.

As other comments recognize, the Commission’s tentative conclusion also appropriately balances the need to protect against blocking, but at the same time allow individualized negotiated terms, consistent with the *Verizon* court’s admonition against the application of common carrier regulations to “information services.” As Comcast observes, “the court indicated that the 2010 no-blocking rule would have been valid if it were understood to simply establish a minimum level of service on a broadband provider’s network, while leaving room for providers to ‘negotiate separate agreements with . . . individual edge provider[s]’ regarding a

¹⁵ *Verizon*, 740 F.3d at 655 (quoting *Cellco P’ship v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012)).

¹⁶ Comments of Cogent Communications in GN Docket No. 14-28 at 21-22 (filed July 15, 2014).

greater level of service and to charge similarly situated edge providers ‘different prices for the same service.’”¹⁷ Therefore, the Commission should utilize the court’s reasoning and reinstate a no-blocking rule that guarantees that end users can access the entire Internet.¹⁸

B. Minimum Level of Service

Coupled with a no-blocking requirement, the Commission should also establish a minimum level of access service.¹⁹ UTC agrees with the Commission that this would not run afoul of the court’s admonition in *Verizon* against common carrier regulation of broadband Internet services. “Broadband providers [would] have no obligation to actually provide an edge provider with the minimum service necessary to satisfy the rules,” because they could instead “deliver all edge providers’ traffic” in a manner that exceeds that minimum, and they would then be free to “negotiate separate agreements with each individual edge provider” and also to “charge similarly-situated edge providers completely different prices for the same service.”²⁰

However, UTC is concerned that utility traffic on the public internet is at risk of obtaining inferior levels service or perhaps no service at all. Critical infrastructure industries, such as electric utilities, will be unable to rely on the public Internet for any applications or services that are vital to the safe and efficient provision of other public services. Therefore, it is

¹⁷ Comments of Comcast Corporation in GN Docket No. 14-28 at 19 (filed Jul. 15, 2014), *citing Verizon*, 740 F.3d at 658. *See also Cellco P’ship v. FCC*, 700 F.3d 534, 547 (D.C. Cir. 2012)(stating that “the Commission has significant latitude to determine the bounds of common carriage.”).

¹⁸ *Id.*

¹⁹ *NPRM* at ¶97 (tentatively concluding that “the revived no-blocking rule should be interpreted as requiring broadband providers to furnish edge providers with a minimum level of access to their end-user subscribers.”)

²⁰ *Verizon*, 740 F.3d at 658.

important for the Commission to define the minimum access levels using objective technical standards that are clear and enforceable, as more fully described below.

The Commission suggested three ways that the Commission could define the minimum access levels: 1) best efforts, 2) minimum quantitative performance, and 3) an objective, evolving “reasonable person” standard.²¹ While some comments have suggested the use of “best efforts” as the standard,²² UTC is concerned that a “best efforts” standard would require constant benchmarking of a provider’s level of service against all other similarly situated providers to assess whether it is providing a “typical” level of service using “traditional” Internet architecture. Enforcement of a best efforts standard would be difficult to impossible, due to the vagueness of the standard as many comments on the record have noted. Similarly, an evolving “reasonable person” standard would be too subjective to be readily enforceable.²³

UTC therefore recommends the use of objective performance criteria, such as latency, packet loss, throughput and/or minimum speed. Comments on the record support the use of quantitative standards of performance to define the minimum level of access, as well.²⁴ While UTC defers from recommending specific parameters,²⁵ the benchmarks could be updated

²¹ *NPRM* at ¶¶102-104.

²² Comments of AT&T Services, Inc. in GN Docket No. 14-28 (filed Jul. 15, 2014)(To the extent that the Commission deems it necessary to clarify the no-blocking rule by establishing a “minimum level of access,” the Commission should use the benchmark of a provider’s “best efforts” Internet access service—subject to reasonable network management—and it should reject calls to define a “minimum level of access” using a “quantitative” or “reasonable person” standard.”)

²³ *NPRM* at ¶104 (proposing an “Objective, Evolving ‘Reasonable Person’ Standard”)

²⁴ Comments of Cogent Communications at 16-17 (stating that “a standard that is tethered to an objective or quantitative measurement avoids (or at least minimizes) the potential for disputes.”)

²⁵ *NPRM* at ¶103 (inviting comment on what the parameters should be for the minimum quantitative performance standards.)

periodically (*e.g.*, every two years), whether through a streamlined rulemaking or other informal process.²⁶ It should be acknowledged that the benchmarks do not have to represent “state-of-the-art” at any given point in time, but should represent the level of service that the vast majority of fixed broadband Internet access providers can, or do, provide in the absence of any special prioritization schemes. For these reasons, the Commission should define the minimum level of access according to objective performance criteria.

C. No Unreasonable Discrimination

Separate and apart from the no-blocking rule, the Commission has tentatively concluded that it should also adopt a rule requiring broadband providers to use “commercially reasonable” practices in the provision of broadband Internet access service.²⁷ The Commission claims that this “commercially reasonable” standard is both more focused and more flexible than the vacated 2010 non-discrimination rule.²⁸ The Commission explained that this approach would prohibit as commercially unreasonable those broadband providers’ practices that, “based on the totality of the circumstances, threaten to harm Internet openness and all that it protects.”²⁹ At the same time, it could permit broadband providers to serve customers and carry traffic on an individually

²⁶ *NPRM* at ¶103 (asking, “[h]ow frequently would we need to revisit a specific technical definition of minimum access to ensure that it keeps up with advances in broadband service.”) These benchmarks could be updated regularly to keep pace with technological change and consumer expectations. UTC suggests that the standards be updated using the existing standards that the Commission develops regarding the definition of “broadband” for use in its Section 706 Notice of Inquiry and its Connect America Fund benchmarks.

²⁷ *NPRM* at ¶116-117 (stating “we tentatively conclude that [the commercially reasonable standard] should operate separately from the no-blocking rule that we also propose to adopt. “)

²⁸ *Id.*

²⁹ *Id.*

negotiated basis, “without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms,” so long as such conduct is commercially reasonable.³⁰

UTC supports the Commission’s tentative conclusion to adopt a rule against commercially unreasonable practices and recommends that the Commission further clarify this rule. UTC believes that the Commission’s 2010 non-discrimination rule would have provided a better bright line standard that would have been more administratively efficient and enforceable, but given that the court has vacated that rule, UTC suggests that the Commission define commercially reasonable practices as clearly as possible under Section 706 without imposing common carrier regulation on broadband services. Clear standards for commercially reasonable practices are necessary to ensure reasonable and predictable access for all Internet users, not just those edge providers willing and able to pay a premium.

The Commission proposes certain factors – including objective technical standards -- that would guide the application of the general legal standard for commercially reasonable practices.³¹ As explained above objective technical standards provide bright line rules that can be clearly enforced and followed, and hence UTC supports the use of objective technical standards (in addition to the other standards that the FCC proposes) to determine commercially reasonable practices.³² While UTC shares the Commission’s view that there are certain practices such as unreasonable restraint of trade which would be *per se* unreasonable, UTC believes that the Commission will be required to evaluate most practices based on the totality of the

³⁰ *Id.*

³¹ *NPRM* at ¶¶122-135.

³² *Id.* at ¶¶124-135. The other factors proposed by the Commission include, the “impact on present and future competition”; “impact on consumers”; “impact on speech and civic engagement”; “technical characteristics”; “good faith negotiation”; “industry practices” and “other factors.”

circumstances.³³ Hence, it is critically important that the Commission rely on objective technical standards when determining if practices are commercially reasonable.

IV. The Commission Should Adopt Enhanced Transparency Rules

UTC supports the Commission's proposals for enhanced transparency of the network practices of broadband Internet service providers. In the *NPRM*, the Commission has proposed a number of ways that end users, edge providers, and the Commission can have greater access to information that could help to improve competition and innovation in broadband deployment. UTC agrees that the unstructured and open nature of the Internet provides tremendous opportunities for innovation and growth, yet it also prevents end users from fully understanding the current or potential limitations of any particular service offering. UTC therefore strongly supports adoption of rules that will allow end users to evaluate access offerings, using information disclosed to the Commission only upon request and not as part of an ongoing reporting requirement. In particular, UTC supports the following proposals, :

- Upon request, require disclosures to be tailored to different target audiences; *i.e.*, end users, edge providers, the broader Internet community, and the Commission. Each audience has distinct information needs and differing assumed levels of technical knowledge.
- Upon request, require disclosure of specific broadband provider network practices, key performance characteristics (including effective download and upload speeds, latency and packet loss), and the terms and conditions of service to end users (including pricing information and any data caps or limits on "excessive use.")
- Upon request, require timely disclosure of changes to network practices, as well as any instances of blocking, throttling, pay-for-priority arrangements, and the parameters of "best efforts" service in comparison to pay for priority service (if such prioritization is permitted).
- Upon request, require disclosure of information about the source, location, timing, speed, packet loss, and duration of network congestion.

³³ *NPRM* at ¶137 (discussing potential conduct that would be *per se* commercially unreasonable.)

V. Dispute Resolution

The Commission stated in the *NPRM* that it has a responsibility “to provide certainty, guidance, and predictability to the marketplace” as it protects and promotes the open Internet.³⁴ UTC agrees that even though the Internet is an evolving platform that draws its strength from its inherent flexibility, the rules for assessing and redressing harmful conduct should be clear and, to the extent possible, based on objective criteria. Moreover, because the range of possible disputes could vary as widely as the types of services and technologies deployed, UTC anticipates that most issues will be resolved on a case-by-case basis. It will therefore be important for the Commission to adopt a range of methods for addressing disputes, from informal guidance to parties in discrete matters to the initiation of formal complaint proceedings for disputes that could have more significant economic or operational impact.

In addition to the Commission’s traditional enforcement mechanisms (*e.g.*, monetary forfeitures and cease-and-desist orders), UTC urges the Commission to consider requesting Congress to provide additional authority for the awarding of damages and attorney’s fees in connection with violations of the open Internet rules, similar to current statutory authority for the awarding of damages against common carriers.³⁵ With the rapid evolution of services, facilities, and transactions associated with the Internet, a party alleging a violation of the open Internet rules might be unable to recover its lost opportunity even if the Commission were to later decide that the broadband provider had acted unlawfully.

VI. Conclusion

³⁴ *NPRM*, para. 170.

³⁵ 47 U.S.C. §§206 - 208.

Section 1 of the Communications Act directs the Commission to regulate interstate and foreign commerce in communication so as to make available, without discrimination, a rapid and efficient communication service “with adequate facilities at reasonable charges, for the purpose of the national defense,” and “for the purpose of promoting safety of life and property through the use of wire and radio communication.” With the nation’s public communications networks rapidly evolving to IP-based standards, which the Commission has defined as “information services” not subject to traditional common carrier regulation, UTC supports the Commission’s efforts to use its existing statutory authority to ensure, to the extent possible, that these new communications services are adequate, are provided at reasonable charges, and without discrimination. However, UTC also recommends that the Commission take care to ensure that the public Internet is also readily accessible for communications necessary to promote “safety of life and property.” Moreover, the Open Internet rules should allow, and encourage, prioritization of communications needed to promote safety of life and property and the maintenance of the nation’s critical infrastructure.

WHEREFORE, THE PREMISES CONSIDERED, UTC respectfully requests that the Commission adopt final rules in this docket consistent with the views expressed herein.

Respectfully submitted,

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