

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

In the Matter of)	
)	
Further Inquiry into Two Under-Developed)	GN Docket No. 09-191
Issues in the Open Internet Proceeding)	WC Docket No. 07-52

**COMMENTS
of the
NATIONAL EXCHANGE CARRIER ASSOCIATION, Inc.;
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION;
ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL
TELECOMMUNICATIONS COMPANIES;
EASTERN RURAL TELECOM ASSOCIATION; and
WESTERN TELECOMMUNICATIONS ALLIANCE**

October 12, 2010

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I. INTRODUCTION AND SUMMARY

The Commission’s Public Notice¹ requests further comment on two issues initially raised, but not thoroughly explored, in comments filed in response to the Commission’s Open Internet NPRM.² Specifically, the Commission seeks further information on: (1) the relationship between open Internet protections and services that are provided over the same last-mile facilities as broadband Internet access service (“specialized” services),³ and (2) the application of open Internet rules to mobile wireless Internet access services.⁴

¹ *Further Inquiry Into Two Under-Developed Issues in the Open Internet Proceeding*, GN Docket No. 09-191, WC Docket No. 07-52, Public Notice, DA 10-1667 (rel. Sept. 1, 2010) (*Open Internet Public Notice*).

² *Preserving the Open Internet*, GN Docket No. 09-191, *Broadband Industry Practices*, WC Docket No. 07-52, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 (2009) (*Open Internet NPRM*).

³ See, *Open Internet Public Notice* at 2-4.

⁴ See *id.* at 4-6.

In these comments, the Associations⁵ continue to urge caution in attempting to apply new rules to the provision of broadband Internet access and related services, particularly insofar as such rules may impose additional cost and reporting burdens on rural rate-of-return incumbent local exchange carriers (RLECs). Such rules also should not impose any strict non-discrimination prohibitions on rural broadband providers, but instead should at most prohibit the types of unjust or unreasonable discrimination long applicable to telecommunications services under Title II of the Act. In particular, RLECs and their Internet Service Provider (ISP) affiliates should not be prohibited from offering specialized broadband service arrangements on a voluntary basis to upstream service and content providers. Such services may benefit both upstream providers and end users, while providing RLECs with improved incentives for additional broadband network investment.

With respect to mobile broadband services, the Associations recognize that mobile technologies are subject to significant spectrum and other technical limitations that may justify exempting mobile broadband services from application of open Internet rules. The same limitations make clear that mobile services are complementary to, not substitutes for, fixed

⁵ The National Exchange Carrier Association, Inc. (NECA) is responsible for preparation of interstate access tariffs and administration of related revenue pools, collection of certain high-cost loop data, and administering the interstate Telecommunications Relay Services (TRS) fund. *See generally*, 47 C.F.R. §§ 69.600 *et seq.*; *MTS and WATS Market Structure*, CC Docket No.78-72, Phase I, Third Report and Order, 93 FCC 2d 241 (1983). The National Telecommunications Cooperative Association (NTCA) is a national trade association representing more than 580 rural rate-of-return regulated telecommunications providers. The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) is a national trade association representing approximately 470 small incumbent local exchange carriers (ILECs) serving rural areas of the United States. The Western Telecommunications Alliance (WTA) is a trade association that represents over 250 small rural telecommunications companies operating in the 24 states west of the Mississippi River. The Eastern Rural Telecom Association (ERTA) is a trade association representing approximately 68 rural telephone companies operating in states east of the Mississippi River.

broadband services and should accordingly be subject to separate USF broadband high-cost support mechanisms, as recommended by the Associations in prior comments.⁶

II. BACKGROUND

In the *Open Internet NPRM*, the Commission recognized the possibility that broadband service providers may wish to offer “managed” or “specialized” services over the facilities used to offer broadband Internet access services, and requested comment on the role such services might play in the broadband services marketplace.⁷

The Public Notice recognizes that specialized services may indeed “drive additional private investment in networks and provide consumers new and valued services.”⁸ Nevertheless, the Commission also expresses concern that by offering specialized services that mimic Internet access services, providers may be able to bypass rules intended to protect the open Internet.⁹ Providers offering specialized services might also, in the Commission’s view, “constrict or fail to continue expanding” network capacity allocated to broadband Internet access service in favor of specialized services, which in turn may perhaps cause the open Internet “to wither as a platform for competition, innovation, and free expression.”¹⁰

Finally, the Commission expresses concern broadband providers may engage in anti-competitive conduct with respect to specialized services, “particularly if they are vertically integrated providers of content, applications, or services; or if they enter into business

⁶ Joint Comments by NECA, *et al.* WC Docket No. 10-90 (July 12, 2010) at 12 (*Association Comments*).

⁷ *Open Internet NPRM* at ¶ 148.

⁸ *Open Internet Public Notice* at 2.

⁹ *Id.*

¹⁰ *Id.*

arrangements with third-party content, application, or service providers concerning specialized service offerings.” In the Commission’s view, discriminatory conduct based on these relationships could harm competition among, and private investment in, content, application, and service providers.¹¹

The Public Notice describes six potential ways to address these concerns, either singly or in combination.¹² These range from definitional approaches (i.e., defining broadband Internet access service “clearly and perhaps broadly” and applying proposed open Internet rules explicitly to such services while leaving specialized broadband services unregulated); “truth in advertising” rules (i.e., rules that would prohibit broadband providers from marketing specialized services as broadband Internet access service or as a substitute for such service, while also requiring providers to offer broadband Internet access service as a stand-alone service); imposing new disclosure requirements regarding specialized service offerings and their effects on broadband Internet access and related services; non-exclusivity rules (i.e., rules requiring that any commercial arrangements with a vertically-integrated affiliate or a third party for the offering of specialized services be offered on the same terms to other third parties); rules permitting broadband providers to offer only those specialized services that cannot be provided via broadband Internet access service; and rules that would impose minimum capacity allocation requirements for broadband Internet access service while prohibiting specialized services from inhibiting at any time the performance of broadband Internet access services, including during periods of peak usage.¹³

¹¹ *Id.* at 3.

¹² *Id.*

¹³ *Id.* at 3-4.

Separately, the Public Notice seeks to update the record with respect to application of openness principles to wireless services. The Commission asks for comment on potential new disclosure requirements for providers of wireless services and devices; whether new mobile technologies and business models might facilitate non-harmful attachment of third-party devices to mobile wireless networks; and methods to maximize consumer choice, innovation, and freedom of expression with respect to mobile applications.¹⁴

III. DISCUSSION

A. Only the Least Intrusive and Burdensome Approaches Should Be Considered in Developing Rules Governing Broadband Services.

The Associations participating in these comments continue to recommend the Commission exercise extreme caution before attempting to promulgate rules governing the provision or marketing of Internet access or specialized broadband services. It appears premature, for example, to attempt to establish clear definitional lines between “plain old” broadband Internet access services and “specialized” broadband services when the marketplace for both types of services is still evolving. No one really knows which of the various services described by participants in this proceeding will actually be brought to market, whether consumers will purchase them, or what impact (if any) they may have on other services.¹⁵ In this environment it does not appear desirable, and may not even be possible, for the Commission to draw sharp lines between one type of developing service and another.

For the same reasons it will likely be difficult for providers to make sense of new reporting rules regarding such services. Even today, the industry is hopelessly mired in disputes

¹⁴ *Id.* at 4-6.

¹⁵ *E.g.*, NTCA Comments, GN Docket No. 09-191 (Jan. 14, 2010) at 5 (*NTCA Comments*).

over differences between “telecommunications” services and “information” services, a definitional line that has been in place for more than thirty years.¹⁶ Rules requiring providers to report sales and utilization of “Internet Access” as opposed to “specialized” services are likely to be far more confusing to interpret. To the extent providers make varied and inconsistent judgments in choosing which category or categories a particular service fits, any data compiled based on such reports will be of limited use.¹⁷

The *Public Notice* also suggests the possible application of rules designed to insure the availability of specialized services (*i.e.*, a rule requiring that any commercial arrangements with a vertically-integrated affiliate or a third party for the offering of specialized services be offered on the same terms to other third parties).¹⁸ To the extent the Commission finds that rules restricting commercial arrangements between broadband network providers and upstream service or content providers are needed at all, the Associations continue to believe such rules should be based on the same “just and reasonable” standard found under Title II of the Act, and should apply to all providers of broadband Internet-based content, applications, and transport services.¹⁹

¹⁶ See, e.g., Letter from Richard A. Belden, Chief Operating Officer, USAC, to Julie Veach, Acting Chief, WCB, FCC, WC Docket No. 05-337 (Aug. 19, 2009); Letter from Richard A. Belden, Chief Operating Officer, USAC, to Julie Veach, Acting Chief, WCB, FCC, WC Docket Nos. 05-337, 06-122 (Aug. 21, 2009). See also, U.S. TelePacific Corp. Request for Review and Reversal of a USAC Decision, WC Docket No. 06-122 (Jan. 8, 2010); *Order*, 25 FCC Rcd 4652 (2010), *recon. pending* (partially granted request for review).

¹⁷ The Associations are particularly concerned about the impact new reporting requirements may have on smaller carriers and their affiliated ISPs, as the burdens likely to be associated with such rules will likely far outweigh whatever benefits might be gained.

¹⁸ *Open Internet Public Notice* at 4.

¹⁹ See, e.g., NECA Comments, GN Docket No. 09-191 (Jan. 14, 2010) at 5-6 (*NECA Comments*). See also, American Cable Association (ACA) Comments, GN Docket No. 09-191 (Jan. 14, 2010) at 7; USTelecom Comments, GN Docket No. 09-191 (Jan. 14, 2010) at 40; OPASTCO Comments, GN Docket No. 09-191 (Jan. 14, 2010) at 2-6 (*OPASTCO Comments*); NTCA Reply Comments, GN Docket No. 09-191 (Apr. 26, 2010) at 3 (*NTCA Reply Comments*).

As NECA explained in its initial comments, prohibitions against “discrimination” in the provision or pricing of telecommunications services have been applied to common carriers since the early years of the 20th century, and trace their origins to interstate commerce laws developed in the 19th century and beyond for application to railroads and other common carriers.²⁰ But such prohibitions apply, by their terms, only to “unjust” or “unreasonable” forms of discrimination. Imposition of new, stricter rules that would prohibit literally any form of a commercial arrangement between broadband service providers and upstream service or content providers, as proposed by some parties in this proceeding, appear premature and unwise, as such rules would “needlessly deprive market participants, including content providers, from willingly obtaining services that could improve consumers’ Internet experiences.”²¹

Similarly, OPASTCO pointed out that a general and flexible definition of specialized services will “improve the ability and incentive of [RLECs] to invest in their broadband networks, to the benefit of all of their customers.”²² OPASTCO explained in this regard that RLECs have limited customer bases for Internet access service that cannot be relied upon, by themselves, for recovering the considerable costs of deploying and operating ubiquitous high-speed broadband networks, and the problem of cost recovery will become even more challenging as local exchange service and intercarrier compensation revenues diminish over time. To the extent specialized service offerings enable RLECs to earn additional revenues, they will have

²⁰ *NECA Comments* at 5.

²¹ *Id.* at 7, quoting Letter from James W. Cicconi, AT&T, to Chairman Genachowski, FCC, GN Docket No. 09-191 (Dec. 15, 2009) at 2. AT&T expands on these points in a follow-up letter submitted to the Commission on January 12, 2010. Letter from Robert W. Quinn, Jr., AT&T, to Marlene H. Dortch, FCC, GN Docket No. 09-191 (Jan. 12, 2010). Among other benefits, management systems and techniques such as local caching, IP multicast, content delivery networks, etc. enable various time-sensitive services such as “over the top” video, which in turn make the Internet more attractive to different types of users.

²² *OPASTCO Comments* at 13.

additional resources to help recover middle mile costs, as well as incentives to invest in broadband facilities, including those necessary to reach high-cost consumers. OPASTCO also explained that enabling rural broadband providers to earn revenues from specialized services “improves their ability to keep rates for broadband Internet access affordable which, in turn, helps to drive adoption.”²³ Overall, rules permitting RLECs to earn revenues from specialized services “will improve, not harm, the quality and value of the broadband Internet access service that their customers receive over shared networks used for managed or specialized services.”²⁴

The Commission should reject out-of-hand any proposals that would limit in advance the types of specialized services broadband providers might offer, based on whether the services provide “functionality that cannot be provided via broadband Internet access service.”²⁵ Such “centralized command” approaches to regulating the telecommunications marketplace should not be employed at this time. It would also be unwise, to say the least, for the Commission to attempt to develop and administer rules requiring broadband providers to allocate specific levels of network capacity to broadband Internet access service as opposed to specialized services. Earlier comments in this proceeding made abundantly clear the need for network providers to manage service delivery over their networks.²⁶ Indeed, the record compiled in response to the Commission’s Open Internet NPRM thoroughly demonstrates the need for broadband providers

²³ *Id.*

²⁴ *Id.* Economic studies of such “two-sided pricing” arrangements demonstrate they provide mutual benefits to all users of service platforms. *See, e.g.,* Victor Glass, *United States Broadband Goals: Managing “Spillover Effects” To Increase Availability, Adoption, and Investment*, Princeton Edge Laboratory, Princeton University (June 2010) at 28; Marius Swartz, *Introduction to a Special Issue on Network Neutrality*, Review of Network Economics, The Berkeley Electronic Press (Mar. 2009) Vol. 8, Issue 1, <http://www.bepress.com/cgi/viewcontent.cgi?article=1166&context=rne>

²⁵ *Open Internet Public Notice* at 4.

²⁶ *E.g., NTCA Comments* at 3; *OPASTCO Comments* at 8; *JSI Comments* at 5, GN Docket No. 09-191 (Jan. 14, 2010); *ITTA Comments* at 2, GN Docket No. 09-191 (Jan. 14, 2010).

to engage in reasonable network management practices, including dynamic capacity allocations.²⁷ Rules specifying capacity allocations, regardless of peak usage, would completely undermine the ability of network providers to continue meeting customer expectations for broadband Internet access services, as well as specialized services and should not be adopted.

However, the Associations support the adoption of rules designed to insure the availability of specialized services for small providers²⁸ (*i.e.*, a non-exclusivity rule requiring that any commercial arrangements with a vertically-integrated affiliate or third-party for the offering of specialized services be offered on the same terms to other third parties).²⁹ Since small and rural companies serve consumers in sparsely populated geographic areas, they have no leverage in the negotiation process and are not afforded the content “volume discounts” that large cable companies enjoy. Thus, RLECs typically find it difficult to negotiate agreements with large national content providers, and the record is replete with accounts of small and rural providers being forced into discriminatory, onerous contracts, unfairly making it more expensive for their consumers – especially in the video arena.³⁰ Absent protections in the legal framework,

²⁷ *Id.*; Verizon and Verizon Wireless Comments, GN Docket No. 09-191 (Jan. 14, 2010), Attachment B, Declaration of Michael L. Katz at 29.

²⁸ *E.g.*, Comments in Opposition of the FACT Coalition, MB Docket No. 10-56 (June 21, 2010) at 25 (*FACT Coalition Comments*). *See*, Letter from Mark C. Ellison, Counsel for FACT Coalition, to Marlene H. Dortch, FCC, MD Docket No. 10-56 (Sept. 14, 2010). The members of the FACT Coalition are National Rural Telecommunications Cooperative (NRTC), the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), and the Rural Independent Competitive Alliance (RICA).

²⁹ *Open Internet Public Notice* at 4.

³⁰ *See*, FACT Coalition Comments at 6-7 (detailing how it took NRTC over two years to negotiate and conclude agreements for programming rights, and how the telco video operator are required to deliver and pay a fee for every broadband home the operator serves, not just video customers.) *E.g.*, *OPASTCO Comments* at 4. OPASTCO reported that ESPN has attempted to impose mandatory per-subscriber fees on rural broadband Internet access providers as a requirement to gain access to the ESPN360.com website and cites this as an example of an improper practice adopted by some web content owners. OPASTCO suggests such fees should be banned.

it is likely that the same video content providers who now or in the future will also offer on-line content will discriminate against the small providers in the provisioning of specialized services. Large competitors should not be permitted to enter into deals with content providers that permit them to offer their subscribers certain content or discounted rates not available to rural customers served by small providers. By implementing a rule that affords third parties the same commercial arrangements for specialized services that are offered to a vertically-integrated affiliate or third party, the Commission would protect consumers of small broadband Internet access providers and also preserve competitive offerings. Non-discrimination rules should apply not only to broadband Internet access service providers, but to all providers of Internet-based content, applications, and services, as well as providers of access to the Internet backbone and transport services.

B. Technical Limitations That Supposedly Justify Exempting Mobile Services from Open Internet Rules Also Require Such Services be Treated as “Complementary” for Purposes of Broadband Universal Service Funding.

In response to proposals for the application of open Internet rules to mobile services, wireless providers have made clear their networks are fundamentally different from wireline networks and subject to significant technical limitations including shared facilities (e.g., cell sites) and significant limitations on spectrum. These limitations, as well as issues surrounding handset design and other matters, are said to justify different regulatory treatment of wireless services including exemption from proposed open Internet rules.³¹

The Associations agree that wireless networks face significant technical limitations with respect to the delivery of broadband services, particularly in rural areas. In comments filed

³¹ See, e.g., Letter from Christopher Guttman-McCabe, CTIA, to Marlene H. Dortch, FCC, GN Docket No. 09-191 (Sept. 21, 2010). See also, CTIA Comments at 39; Verizon and Verizon Wireless Comments at 5; T-Mobile Comments at 15-16, GN Docket No. 09-191 (Jan. 14, 2010).

earlier this year on proposals in the National Broadband Plan for reforming the High Cost universal service program, the Associations and numerous other commenting parties raised significant concerns as to the Plan's "over-optimistic reliance" on wireless technology to meet rural service goals.

Appended to the Associations' joint comments, for example, was a report issued by the Association of Communications Engineers (ACE Report) which documented many significant constraints affecting wireless broadband systems in rural areas, including signal strength limitations, terrain problems, interference issues, lack of "real world" testing, and lack of available spectrum.³² The ACE Report described, for example, how increasing levels of data traffic are already causing wireless networks in urban areas to slow to a crawl, in part as a result of the same technical limitations cited by wireless providers in this proceeding.

Mobile services have unquestionably revolutionized the ways in which Americans communicate with one another and will play a critical role in providing certain broadband services to the public. Exempting such services from open Internet rules on the basis of network limitations would, however, essentially confirm that such services should be treated as complementary to, and not replacements for, wireline broadband services.³³ This in turn strongly supports proposals made by the Associations and others for the Commission to establish separate universal service funding mechanisms for fixed and mobile services, rather than the "technology agnostic" approach described in the National Broadband Plan for the Connect America Fund.

³² See, *Association Comments*, Appendix B, *Good Engineering Practices Relative to Broadband Deployment in Rural Areas*, The Association of Communications Engineers (ACE) (*ACE Report*).

³³ See also, OPASTCO Comments at 8-9, GN Docket No. 10-159 (Oct. 5, 2010).

IV. CONCLUSION

The Commission should be cautious in considering whether to promulgate rules governing the provision of broadband Internet access or related specialized services, particularly insofar as such rules may impose unnecessary costs on RLEC consumers. To the extent rules are needed at all, only the least intrusive and burdensome should be applied. In particular, the Commission should refrain from applying strict prohibitions against discrimination in the provision of broadband network services, and make clear that RLECs and their ISP affiliates are not prohibited from offering mutually-beneficial specialized broadband service arrangements on a voluntary basis to upstream service and content providers, as revenues from such services will help to spur additional broadband investment. Finally, the Associations recognize that mobile technologies are subject to significant spectrum and other technical limitations that may justify exempting mobile broadband services from application of open Internet rules. But the same limitations also justify treating mobile services as a complement to fixed broadband services rather than as a substitute for purposes of broadband universal service support mechanisms.

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