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Federal Communications Commission
Washington, D.C. 20554

Preserving the Open Internet

GN Docket 09-191

Broadband Industry Practices

WC Docket No. 07-52

REPLY COMMENTS OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
(CCIA)

ON THE FURTHER INQUIRY
INTO TWO UNDER-DEVELOPED ISSUES IN THE
OPEN INTERNET PROCEEDING

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The Computer & Communications Industry Association (“CCIA”), by and through counsel, files these Reply Comments in response to the Further Inquiry Into Two Under-Developed Issues in the Open Internet Proceeding released September 1, 2010, in this docket (“Further Inquiry”).¹ CCIA focuses on two issues for which broad agreement seems to have been reached with regard to Open Internet principles: that “specialized services” remain undefined and thus should not be addressed at this time; and that there is no technological or policy basis for exempting all wireless broadband services from the forthcoming rules.

SUMMARY

This proceeding reflects considerable agreement on two key issues in the Further Inquiry: that “specialized services” are too little understood to warrant an express exemption from the Open Internet rules; and wireless broadband is too important a platform for Internet access for the Commission to isolate it from Open Internet safeguards. As CCIA stated in its Initial Comments and is further borne out in this proceeding, no one can supply a coherent or lasting definition of “specialized services.” As such, the Commission could not know what it was exempting if it culled this purported “class” of service out from the forthcoming rules. Most commenters attempt to define “specialized services” by example, others try to define them as being something other than “traditional” broadband Internet access — that term being defined in a laughably narrow manner. And as before, those who seek the exemption want this “class” of service to be so broadly construed that it could encompass all or nearly all broadband Internet access services. Because no limiting principles or characteristics of “specialized services” can be identified, the Commission should not attempt to address them at this time. CCIA thus continues to support the “Definitional Clarity” approach in the Further Inquiry.

¹ Published at 75 Fed. Reg. 55,297-55,300 (Sept. 10, 2010).

With regard to wireless broadband services, a startling level of opposition has arisen to the concept of an exemption from the Open Internet rules. Several parties, including policy groups, satellite service providers, wireline carriers, and cable operators uniformly oppose granting this exemption. They persuasively argue that the purported network capacity constraints of wireless services have been exaggerated, and that the network facilities used by wireless carriers are largely the same as those used by wireline providers. According to Qwest, therefore, any technological differences between wireless and wireline networks are “distinctions without a difference.” In addition, a wireless exemption holds competitive consequences for the broadband market and is likely to cause consumer confusion. The record is strongly positioned against the adoption of an exemption for wireless broadband Internet access services from the forthcoming Open Internet rules. The Commission thus risks taking arbitrary and capricious action by treating retail broadband services in a disparate fashion without a sound, well-supported reason.

I. AN EXEMPTION FOR “**SPECIALIZED SERVICES**” IS IMPOSSIBLE, BECAUSE NO PARTY IS ABLE TO DEFINE THAT PURPORTED CLASS OF SERVICE

As CCIA stated in its Initial Comments on the Further Inquiry, the notion of “specialized services” is “not easily defined or contained,”² and thus to create an exemption from the forthcoming Open Internet rules³ for this purported class of service is unwise. CCIA therefore

² Comments of the Computer & Communications Industry Association (CCIA) on the Further Inquiry Into Two Under-Developed Issues in the Open Internet Proceeding at 2-3 (Oct. 12, 2010) (“CCIA Further Inquiry Comments”).

³ It bears mention that the Commission has just received additional support for applying its Title II authority as the basis for the forthcoming Open Internet rules. Allbritton Communications Company has filed Comments in this proceeding and in GN Docket No. 10-127, the “Third Way” proceeding, stating that “[a]fter careful review and consideration of Chairman Genachowski’s proposal for the ‘Third Way,’ Allbritton finds it to be a reasoned and enforceable framework that will prevent abuses on wired and mobile Internet, and is pleased to support it.” Comments of Allbritton Communications Company at 2 (Oct. 29, 2010).

advises that “the Commission take no action with respect to these yet-undefined services,”⁴ and supports the “Definitional Clarity” approach outlined in the Further Inquiry by which the Commission “could address the policy implications of such services if and when such services are further developed in the market.”⁵

It remains the case, consistent with CCIA’s observation in its Initial Comments,⁶ that no one can define “specialized services.”⁷ Some parties purport to define them by example, setting forth a list of services prefaced by “such as”⁸ or “including.”⁹ Many parties attempt to define “specialized services” in the negative: any service that is not “traditional” broadband Internet access service — a term for which they suggest the narrowest possible definition¹⁰ —

⁴ *Id.* at 4.

⁵ CCIA Further Inquiry Comments at 4 (quoting Further Inquiry at 3).

⁶ *Id.* at 2-3.

⁷ Comments of AT&T at 4 (noting the “unbounded diversity” of “specialized services”); Comments of CTIA – The Wireless Association (Summary) (““Specialized services’ represent any number of business practices ...”) (Oct. 12, 2010); Comments of DISH Network LLC at 6 (Oct. 12, 2010) (broadband Internet access “can masquerade as a specialized service with just a little window dressing”); *see also* Further Comments of PAETEC Holding Corp. at 3 (Oct. 12, 2010) (seeking “definitional clarity”); Comments of The National Cable & Telecommunications Association at 6 (Oct. 12, 2010) (“specialized services themselves are still largely speculative and inchoate”) (NCTA Comments); Comments of Qwest Communications International Inc. at 6-7 (seeking “definitional clarity”) (Oct. 12, 2010).

⁸ Public Notice Submission of the Internet Innovation Alliance at 1, 2 (Oct. 12, 2010); Comments of tw telecom at 2 (Oct. 12, 2010); Comments of Verizon and Wireless on Under-Developed Issues in the Open Internet Proceeding at 46 (Oct. 12, 2010) (Verizon Companies Comments).

⁹ AT&T Comments at 5-6; Comments of MetroPCS Communications, Inc. at 4 (Oct. 12, 2010).

¹⁰ The Information Technology Industry Council, for example, defines broadband Internet access as “high-speed connections to customers that enable customers to transmit data to and receive data from any point on the public Internet” but excludes from that definition “services that utilize prioritization” and “services that use Internet Protocol”. Comments of the Information Technology Industry Council at 3 (Oct. 12, 2010) (ITIC Comments). That definition of broadband Internet access is akin to defining a car as something that is mobile but does not require any type of fuel or steering device.

should be deemed exempt from Open Internet principles.¹¹ Others simply advocate a “specialized services” exemption without providing any definition or any examples of such services at all.¹²

The irony in this proceeding is that, because “specialized services” remain undefined, parties of diametrically opposite positions with respect to the Open Internet guidelines nonetheless all agree that the Commission should not address “specialized services” at this time. Many, like CCIA, oppose a “specialized services” exemption on the ground that it will be vastly overbroad due to the lack of any meaningful limiting principles for this term.¹³ Those who oppose Open Internet safeguards seek to exploit the amorphous nature of “specialized services” and request that the Commission simply omit them from its consideration of the forthcoming rules.¹⁴ Though the two approaches are near-antitheses of each other, they demonstrate the fundamental problem that so-called “specialized services” create: nobody knows what they are. As such, it is impossible that the Commission could know how to address them.

Thus, in keeping with the “Definitional Clarity” approach in the Further Inquiry, the Commission should not draft an exclusion for “specialized services” from the Open Internet rules unless and until they can be identified and are demonstrably unable to harm the ability of

¹¹ AT&T Comments at 4; ITIC Comments at 3; NCTA Comments at 2; Qwest Comments at 7-8.

¹² Comments of the Information Technology and Innovation Foundation at 9-10 (Oct. 12, 2010) (discussing “Internet bypass” and “communications-oriented applications”); *see generally* Comments of The United States Telecom Association On the Further Inquiry Into Two Under-Developed Issues In the Open Internet Proceeding (Oct. 12, 2010) (USTA Comments).

¹³ Comments of the Open Internet Coalition at 5 (Oct. 12, 2010); DISH Network Comments at 5-6; *see also* Further Comments of Vonage Holdings Corp. at 5-7 (Oct. 12, 2010) (“specialized services” exemption could become “means to evade” Open Internet rules “[w]ithout clear limitations”); Comments of Free Press Regarding Further Inquiry at 6-7 (Oct. 12 2010) (opposing notion of “prioritization” of traffic).

¹⁴ AT&T Comments at 15 (acknowledging that exempting “specialized services” would entail litigation “service by service”); CTIA Comments at 17-18; NCTA Comments at 6; USTA Comments at 5-6; Verizon Companies Comments at 52-55.

consumers to obtain and enjoy unfettered retail broadband Internet access service. As CCIA explained in its Initial Comments, the forbearance process lends itself very well to the requisite analysis that the Commission must undertake, on a service-specific basis, to determine whether a particular service is indeed “specialized” such that no regulatory oversight is needed.¹⁵

Moreover, it is important to remember that the Commission did not itself take up the specialized services issue. Rather, in the *Open Internet NPRM*, the Commission acknowledged the comments of Verizon and TIA who discussed “differentiated service offerings” and “managing traffic” as being means for resolving Internet latency and “jitter” issues.¹⁶ The Commission sought comment on what “managed or specialized services” are or will be offered, and how those services may impact network capacity and investment.¹⁷ From that innocuous discussion sprang the notion that “specialized services” should be exempted from the forthcoming Open Internet rules entirely. But the Commission should not feel constrained to solve this question immediately or finally. It should not begin this process by focusing on purported exceptions to the rule prior to creating a rule in the first instance. The Commission should instead move forward on adopting its proposed Open Internet rules as a general matter, and address the “speculative and inchoate” concept of “specialized services”¹⁸ later when it is better understood through additional record evidence.

¹⁵ CCIA Further Inquiry Comments at 4-5.

¹⁶ *Preserving the Open Internet*, GN Docket No. 09-191, Notice of Proposed Rulemaking, 24 FCC Rcd. 13064, 13117 ¶ 150 & n.268 (2009) (“*Open Internet NPRM*”).

¹⁷ *Id.*, 24 FCC Rcd. at 13117 ¶¶ 150, 153.

¹⁸ NCTA Comments at 6.

II. THE RECORD OVERWHELMINGLY OPPOSES A BLANKET EXEMPTION FOR WIRELESS BROADBAND SERVICES FROM THE OPEN INTERNET RULES

CCIA consistently has opposed a blanket Open Internet exemption for wireless broadband services.¹⁹ To the extent that large wireless carriers face, with regard to those facilities which truly are “wireless,” network constraints that warrant less stringent application of Open Internet rules, such issues can be addressed via the “reasonable network management” caveat that prefaces all six of the proposed rules.²⁰ As CCIA has stated, though the Open Internet principles should be applied with “regulatory parity,”²¹ parity does not require that those rules “apply to wireless carriers *in all the same ways* that they apply to wireline providers.”²² Other parties have suggested the same approach.²³ It is crucial, however, that, in employing the “reasonable network management standards” device as regards wireless broadband, the “standards” are based solely in matters of operations and engineering necessity and not to further particular business models or service plans.

CCIA has also suggested that rather than focus on challenges in the wireless industry from technological perspective, the Commission should “employ a market-based, rather than technology-based, analysis for determining whether the wireless exemption should be

¹⁹ CCIA Further Inquiry Comments at 9-12; GN Docket No. 09-191, Reply Comments of the Computer & Communications Industry Association at 17-18 (Apr. 26, 2010) (“CCIA 09-191 Reply Comments”).

²⁰ *Open Internet NPRM*, 24 FCC Rcd. at 13101 ¶ 92, at 13104 ¶ 104, at 13108 ¶ 119.

²¹ CCIA Further Inquiry Comments at 10.

²² CCIA 09-191 Reply Comments at 17 (emphasis in original).

²³ DISH Network Comments at 17 (“differences can be addressed through flexibility in allowable ‘reasonable network management’ practices”); Free Press Comments at 24 (“What constitutes a reasonable network management practice may vary based on the particular network at issue.”); Open Internet Coalition Comments at 7 (“the ‘reasonable network management’ provision is broad enough to account for such differences” between networks).

adopted.”²⁴ With Verizon Wireless and AT&T presently controlling 61% of the retail wireless market,²⁵ “[s]maller carriers are already hamstrung by their dependence on the largest carriers for transmission and backhaul, and do not have spectrum or networks as robust as these vertically integrated carriers.”²⁶ Thus, while the full complement of the forthcoming Open Internet rules should apply, subject to “reasonable network management practices,” to the largest wireless carriers, smaller carriers should be subject only to the obligation to fully disclose, in transparent fashion, their terms of service. In any event, no blanket Open Internet exemption should be granted to the wireless industry.

Several parties agree,²⁷ particularly the wireline and cable providers.²⁸ The record opposes an industry-wide wireless exemption for three core reasons: (1) the Commission’s commitment to technological neutrality; (2) the market-skewing effects of dissimilar regulation; and (3) preserving consumer welfare.

With regard to technological neutrality, several parties explain at length why wireless services do not face network management challenges that are meaningfully different from those faced by wireline and cable services. They note that the purported differences in network

²⁴ CCIA Further Inquiry Comments at 12.

²⁵ *Id.* at 10 (citing Economics and Technology, Inc., *Views and News* at 1 (July 2010)); *see also* Vonage Comments at 12 (“the wireless market has been subject to striking consolidation, and is largely shared among a small handful of operators”), at 13 (“concentration in the wireless market continues to increase, up 6.5% between 2007 and 2008 using the Herfindahl-Hirschman (HHI) Index”).

²⁶ CCIA Further Inquiry Comments at 12.

²⁷ DISH Network Comments at 17-24; Free Press Comments at 19-24; Open Internet Coalition Comments at 5-8.

²⁸ Comments of Bright House Networks, LLC in Response to Supplemental Notice at 32-35 (Oct. 12, 2010); NCTA Comments at 11-15; PAETEC Comments at 9-12; Qwest Comments at 12-19; USTA Comments at 6; Vonage Comments at 10-16; *see also* Allbritton Comments at 2 (*supra* n.3).

capacity as between wireline and wireless networks are a fiction, or are grossly overstated;²⁹ Qwest calls them “distinctions without a difference.”³⁰ As Bright House aptly states, “there are few if any networks that are purely ‘wireline’ or ‘wireless,’” and as such “there is no meaningful distinction between the challenges faced by a prototypical ‘wired’ network and a prototypical ‘wireless’ CMRS network.”³¹ According to Free Press, “[t]here is nothing talismanic about delivering Internet access by radio that ought to exempt” wireless broadband services from the rules.³² For these reasons, the Commission is urged to maintain technological neutrality in adopting the Open Internet rules.³³

Indeed, it cannot be suggested that wireless carriers are incapable of surreptitiously manipulating end users’ Internet traffic. Any carrier that has integrated a telecommunications product — retail broadband Internet access — with an information service — entertainment, data, and applications — has an incentive to use its telecommunications facilities to disadvantage other providers of information service.³⁴ Indeed, PAETEC asserts that “most of the violations of the Commission’s 2005 Open Internet principles that have become public occurred in the wireless space, not on wireline platforms.”³⁵ In addition, Free Press recounts how AT&T’s wireless entity

²⁹ Bright House Comments at 35; Free Press Comments at 22 (“Those technological differences ... should not be a get out of jail free card ...”); NCTA Comments at 11-12 (“the purportedly unique characteristics of ... wireless technology advanced as a basis for a blanket wireless exemption are not meaningful legal or policy distinctions”); Qwest Comments at 12-18; Vonage Comments at 16-18.

³⁰ Qwest Comments at 13, 18.

³¹ Bright House Comments at 35.

³² Free Press Comments at 27.

³³ CCIA Further Inquiry Comments at 10; Free Press Comments at 21; Open Internet Coalition Comments at 6; Vonage Comments at 10, 14.

³⁴ Vonage Comments at 13.

³⁵ PAETEC Comments at 11.

“blocked its users from installing and using Sling Player, a mobile video application, for almost a year before relenting to its distribution and use.”³⁶ The same anticompetitive, market-leveraging conduct that is possible in the wireline industry is equally possible in wireless services.

With regard to the market effects of the wireless exemption, USTA and NCTA view the issue as one of competitive position.³⁷ USTA fears that a wireless exemption would grant “[c]ompetitive [a]dvantage” to “some participants in the Internet ecosystem.”³⁸ The market-skewing effects of including one segment of the broadband industry within the Open Internet rules but not another must be considered.

Finally, the record demonstrates that a blanket wireless exemption would cause considerable confusion and would severely disadvantage consumers who subscribe to wireless broadband service. As DISH Network explains, both wireline and wireless networks “are viewed simply as gateways to the same Internet.”³⁹ Vonage notes that “consumers expect to be able to view and use the applications or content of their choice” regardless of the type of device or platform,⁴⁰ to exclude wireless broadband from the Open Internet protections thus “would frustrate consumer expectations.”⁴¹ Bright House likewise notes that failing to assert Open Internet authority over the wireless industry would “leave substantial public benefits on the table”⁴² For

³⁶ Free Press Comments at 23.

³⁷ NCTA Comments at 12-13; USTA Comments at 6.

³⁸ USTA Comments at 6.

³⁹ DISH Network Comments at 19.

⁴⁰ Vonage Comments at 10.

⁴¹ *Id.* at 11.

⁴² Bright House Comments at 34.

these reasons, DISH Network concludes that “the Commission would fail entirely in its efforts to protect consumers if it exempted wireless broadband networks from open Internet safeguards.”⁴³

Applying the forthcoming Open Internet rules to wireless broadband is necessary not only for American consumers but also for Internet freedom globally. Mobile wireless devices are the primary means of Internet access for the populations of developing countries. As Secretary of State Hillary Rodham Clinton remarked in her speech to the Internet Freedom conference in January of this year,

In many cases, the internet, mobile phones, and other connection technologies can do for economic growth what the Green Revolution did for agriculture. You can now generate significant yields from very modest inputs. And one World Bank study found that in a typical developing country, a 10 percent increase in the penetration rate for mobile phones led to an almost 1 percent increase in per capita GDP. To just put this into context, for India, that would translate into almost \$10 billion a year.⁴⁴

The United States should lead by example in preserving citizens’ “freedom to connect” to the open Internet, regardless of the technology employed. Any Commission action that withholds protections for wireless Internet access could begin to relegate users of mobile devices to second-class status with less robust access to the Internet.

Thus, the record demonstrates that, the factors of network capacity and anticompetitive motivation being largely equal across platforms, the Commission has no basis to adopt an Open Internet exemption for wireless broadband services. Qwest goes so far as to argue that the adoption of a wireless exemption “would be arbitrary and capricious.”⁴⁵ For, in fact, the

⁴³ DISH Network Comments at 19.

⁴⁴ Remarks on Internet Freedom, Hillary Rodham Clinton, Secretary of State (Jan. 21, 2010), *available at* <http://www.state.gov/secretary/rm/2010/01/135519.htm> (emphasis added).

⁴⁵ Qwest Comments at 13.

Commission must not regulate carriers dissimilarly without a valid reason that is supported by record evidence.⁴⁶

The broad level of agreement among policy advocates and service providers alike on this issue is extremely persuasive: the proposed exemption for wireless broadband services should be rejected. What the Commission is adopting are basic “rules of the road”, and they should apply to retail broadband Internet access as a general matter; the degree to which they apply to wireless broadband is a question that the Commission may answer in its discretion based on legitimate, demonstrable technological need. But that question must not subsume the entire Open Internet regime in the first instance.

CONCLUSION

For all the reasons CCIA has provided in this proceeding, the Commission should not exempt “specialized services” or all wireless services from the forthcoming Open Internet rules entirely. At a minimum, the safeguards discussed in the Further Inquiry should be applied to a narrow, clearly identified set of “specialized services”, and the demonstrably dominant wireless providers should be subject to the full complement of Open Internet protections.

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⁴⁶ *E.g., Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 970 (D.C. Cir. 1999) (“The Commission did not think seriously about the question whether wide-area incumbent SMR licensees are in fact sufficiently different from EA, cellular, and PCS licensees that disparate regulatory treatment is warranted under § 6002(d)(3)(B).”) (remanding order imposing greater coverage obligations on Specialized Mobile Radio licensee than other types of licensees).

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