

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the matter of	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191
	)	
Broadband Industry Practices	)	WC Docket No. 07-52
	)	
Further Inquiry Into Two	)	DA 10-1667
Under-Developed Issues in the	)	
Open Internet Proceeding	)	
	)	

**COMMENTS OF THE OPEN INTERNET COALITION**

The Open Internet Coalition<sup>1</sup> (“OIC”) submits the following comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) September 1, 2010 Public Notice (“PN” or “Notice”), DA 10-1667, in the above-captioned proceedings.<sup>2</sup>

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<sup>1</sup> The Open Internet Coalition represents consumers, grassroots organizations, and technology and Internet companies working in pursuit of a shared goal: keeping the Internet fast, open and accessible to all Americans. Its members include Our members include entities such as Amazon.com, American Civil Liberties Society, Computer & Communications Industry Association, Consumers Union, Data Foundry, DISH Network, Earthlink, eBay, Entertainment Consumers Association, Evite, Free Press, Google, IAC, Internet2, Media Access Project, Mozilla, Netflix, New America Foundation, PayPal, Public Knowledge, Skype, Sony Electronics, Inc., Ticketmaster, TiVo, Twitter, US PIRG, and YouTube, among others. For a full list, and for more information, see [www.openinternetcoalition.com](http://www.openinternetcoalition.com).

<sup>2</sup> *Further Inquiry Into Two Under-Developed Issues in the Open Internet Proceeding*, Public Notice, GN Docket No. 09-191, WC Docket No. 07-52, DA 10-1667 (rel. Sep. 1, 2010) (“Notice”).

## I. INTRODUCTION

Over the last year, we have witnessed a robust debate around the development of principles to protect an open Internet for the promotion of innovation, consumer choice, and economic growth. The Commission has initiated multiple dockets relating to rules to protect an open Internet with over 100,000 submissions to date. The Commission also has sponsored weeks of stakeholder discussions. On Capitol Hill, the Chairman of the U.S. House of Representatives Committee on Energy and Commerce has sponsored additional stakeholder discussions, which resulted in a draft legislative proposal. Progress has been made in these various fora, yet consumers and innovators still are left without rules to ensure an open and competitive Internet.

We believe the time is ripe now for the Commission to decisively and conclusively move forward to enact baseline protections to put this issue to rest and remove market uncertainty around investment across the Internet ecosystem. The docket proceedings and various stakeholder discussions have demonstrated that there are areas where there is consensus. There is consensus that an open and robust Internet must be protected, preserved, and incentivized to grow. There is consensus that the Internet policy statement should be codified as enforceable rules. There is consensus that a non-discrimination rule should apply to wireline broadband Internet access. There is consensus that there should be transparency regarding how broadband Internet access services are operated in order to enable consumers and application providers with the ability to know how traffic is being treated on networks. There is

consensus that Internet users should be able to avail themselves of an expedited complaint process to enforce the rules that protect an open Internet. There is consensus that if the Commission were to develop a category of prioritized, specialized services, those services must not harm an open and robust best efforts Internet. There is consensus that there should be some rules that apply to wireless broadband Internet access providers.

Of course, there still exists a gap on some key issues, most particularly the issue of the scope of rules that apply to wireless broadband Internet access service. And, there is a gap on the scope of rules that would apply to any future category of prioritized, specialized services.

These gaps where stakeholders are not able to agree represent an opportunity and responsibility for the Commission to use its expert technical and legal resources to make decisions that will bridge those gaps, based on the information presented in the various, relevant public dockets.

With regard to the two key areas of disagreement among stakeholders, the Open Internet Coalition believes that the Commission should adopt a rule that protects and preserves an open Internet on both wireline and wireless platforms. The Commission should reject any artificial distinctions between those two platforms. With respect to prioritized, specialized services, the Coalition believes that network operators have not made a compelling case for the creation of such a category of services. If the Commission were to create such a category, however, we believe that this category should be subject to a non-discrimination rule.

We urge the Commission to move to completion on the matter of the Open Internet. Further delay on bringing this matter to closure will have a deleterious impact on continued investment in both the infrastructure and content companies that make the Internet work for all Americans.

**II. THE CONTINUING LACK OF CLARITY REGARDING WHAT SUCH SERVICES ARE SUGGESTS THAT IT IS PREMATURE TO ADOPT RULES PERTAINING TO SPECIALIZED SERVICES**

The *Notice* identifies several areas of concern regarding specialized services that were made during the initial comments phase in this proceeding. These include the concern that specialized services would give broadband Internet access service providers the option of bypassing open Internet protections; the concern that such services would eventually supplant the open Internet, resulting in a more closed network environment less welcoming to innovation; and the concern network operators would have the incentive and ability to engage in anti-competitive conduct with respect to specialized services by, for example, favoring their own content, applications, and services or those in which they have a financial interest.<sup>3</sup> The *Notice* also identifies several general policy approaches to address these concerns, many of which were proposed alone or in combination by parties during the initial comments phase. OIC is heartened that the Commission recognizes the concerns posed by specialized services and has identified potential approaches to address these concerns.

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<sup>3</sup> *Notice* at 2-3.

However, OIC maintains that it is difficult to comment on the issue of specialized services without further clarity on what such services are. The record on this issue, and indeed the *Notice* itself, does not provide sufficient clarity as to the definition of specialized services, what services may fall under such a category, etc. The appropriate regulatory response, of course, depends significantly on such matters – for example, the policy approach may be very different if specialized services were limited to services like telemedicine than if the services in this category competed directly with content, applications, and services offered by unaffiliated parties.

Accordingly, as OIC has argued in the past, the Commission should not address the issue of specialized or prioritized services in this proceeding.<sup>4</sup> Should the Commission nevertheless decide to address specialized services in this proceeding without a Further Notice of Proposed Rulemaking, it should clearly define such services and enact rules to ensure that such services do not adversely affect broadband Internet traffic and are available on a non-discriminatory basis.

### **III. OPEN INTERNET PRINCIPLES SHOULD APPLY TO WIRELESS BROADBAND INTERNET ACCESS SERVICES**

#### **A. Recent Developments Do Not Change the Importance of Open Internet Principles Applying on All Broadband Platforms, Including Wireless Networks**

As OIC and numerous other parties have stated in the past, open Internet principles should apply to all broadband platforms, including wireless broadband

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<sup>4</sup> Comments of the Open Internet Coalition at 92-93 (filed January 14, 2010) (“OIC Comments”); Reply Comments of the Open Internet Coalition at 27-28 (filed Apr. 26, 2010) (“OIC Reply Comments”).

networks.<sup>5</sup> Such a policy is desirable not only because it is consistent with Commission policies that establish a consistent regulatory framework across platforms<sup>6</sup> and that do not unwisely bias investment decisions in favor of a particular technology, but also

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<sup>5</sup> See, e.g., OIC Comments at 36-41; OIC Reply Comments at 16-23; Comments of Google at iii (filed Jan. 14, 2010) ("The policy framework adopted in this proceeding should be network agnostic, applying across both wireline and wireless broadband infrastructure. . . . Consumers enjoy services and applications across networks and expect seamless integration, usage and utility, regardless of whether the underlying networks are wired or wireless.") ("Google Comments"); Comments of National Cable & Telecommunications Association at 46 (filed Jan. 14, 2010) (arguing that while implementation may be different across different types of networks, "there is no basis for differentiating among specific broadband Internet access technologies - current or future - with respect to the applicability of any rules ultimately adopted.") ("NCTA Comments"); Comments of Comcast at 32 (filed Jan. 14, 2010) ("Differences between broadband technologies are not grounds for exempting any particular type of platform from the objectives of this proceeding."); Comments of Center for Democracy & Technology at 3 and 51 (filed Jan. 14, 2010) ("...the Internet openness rules should apply to all broadband Internet access service delivery platforms, including **wireless**. Wireless networks may require more aggressive traffic management... failing to address wireless would leave a gaping hole in a policy meant to promote openness or nondiscrimination on the Internet.") ("CDT Comments"); Comments of CenturyLink at 22-23 (filed Jan. 14, 2010) ("Wireline broadband service providers face the same problems as wireless providers - including the need to protect networks, manage capacity, and find incremental revenue. Wireless providers must expect to compete on the same playing field. The Commission cannot reasonably apply the proposed rules . . . more leniently based on a broadband service provider's technology."); Comments of ADTRAN at 15-16 (filed Jan. 14, 2010) ("If the Commission nevertheless decides to move forward with adopting rules, it must do so in a manner that does not favor particular technologies or rivals. . . . By way of example, if the Commission affords wireless Internet service providers with significantly greater flexibility than wireline providers to address capacity shortages by "throttling back" traffic, then wireless providers would have an artificial cost advantage because they could "manage" their way through congestion, rather than having to construct more capacity.").

<sup>6</sup> *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, WT Docket No. 07-53, FCC 07-30, at 2, ¶ 2 (rel. Mar. 23, 2007) (Classifying wireless broadband consistently with wireline broadband, and noting that such a classification "furthers [the Commission's] efforts to establish a consistent regulatory framework across broadband platforms by regulating like services in similar manner.").

because it would reflect consumer experience and expectations. Increasingly, consumers are indifferent as to the broadband technology they use to access the Internet – sometimes using a single device that accesses the Internet through both wired and wireless broadband networks, and sometimes replacing their wired connections with wireless ones.<sup>7</sup> Consumers expect the same openness policies to apply across all broadband networks, and the Commission’s policies should reflect such preferences.

This is not to say that there are no differences between wireless and wireline broadband networks. OIC acknowledges that wireless networks face particular network management challenges vis-à-vis wireline networks, particularly with respect to the unpredictability of congestion caused by mobility. However, the “reasonable network management” provision is broad enough to account for such differences – the definition of what is “reasonable” network management for wireless broadband networks will account for the technical differences of such networks and may differ from what is reasonable for wired networks.<sup>8</sup> However, while such distinctions may

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<sup>7</sup> See Google Comments at iii (“Consumers enjoy services and applications across networks and expect seamless integration, usage and utility, regardless of whether the underlying networks are wired or wireless.”).

<sup>8</sup> See *id.* at iii (“The policy framework adopted in this proceeding should be network agnostic, applying across both wireline and wireless broadband infrastructure. . . . That said, there is little doubt that the wireless sector has its own unique characteristics, and its own unique technical challenges and constraints in dealing with Internet traffic flows. The Commission’s framework certainly can and should account for these factors in evaluating ‘reasonable network management.’”); NCTA Comments at 46 (“It may be the case that broadband Internet access service providers face different operational issues in attempting to manage their networks depending on any unique aspects of their particular networks regardless of the technology employed. But, beyond that, there is no basis for differentiating among specific broadband Internet access technologies – current or future – with respect to the applicability of any rules

result in slightly different application of open Internet principles to various types of broadband networks, there is simply no need to exclude wireless networks from the proposed rules altogether.

The *Notice* asks whether the introduction of data usage-based pricing plans by certain wireless carriers affects the need for open Internet rules for wireless broadband platforms.<sup>9</sup> While OIC believes that such variable pricing schemes, if fairly structured and adequately disclosed to consumers, are a more efficient means of managing traffic congestion on wireless networks, they do not remove the need for open Internet principles. Usage-based pricing schemes will not eliminate the carriers' incentives to engage in restrictive network management practices, particularly because such pricing schemes do not address the carriers' incentives to discriminate against content, applications, and services that may compete with services offered by the carriers themselves.

**B. Wireless Broadband Providers Should Not Be Permitted to Restrict Applications Without Respect to the Bandwidth Being Consumed**

The *Notice* asks “[t]o what extent should mobile wireless providers be permitted to prevent or restrict the distribution or use of types of applications that may intensively use network capacity ....”<sup>10</sup> OIC believes that any network management practice or blocking or restricting of particular applications without reference to the actual

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ultimately adopted.”); CDT Comments at 3 (“Reasonable traffic management in the wireless context should still focus on the amount of bandwidth being used, rather than singling out specific content, applications, services for special treatment.”).

<sup>9</sup> *Notice* at 4.

<sup>10</sup> *Notice* at 5.



bandwidth being consumed on the network is presumptively unreasonable and should be categorically prohibited.<sup>11</sup> Not all video or peer-to-peer or other applications consume the same amount of bandwidth or place the same demands on network capacity. Simply blocking all applications of a particular type in response to network congestion is an over inclusive practice and should be viewed as unreasonable. Furthermore, any network management practice that blocks or throttles only third-party applications and not those affiliated with the network operator should be deemed unreasonable as they strike at the core of the concern behind the proposed nondiscrimination rule.

**C. The Open Internet Principles and the Commission’s Oversight Should Focus on Wireless Network Operators and Not on Operators of App Stores**

The *Notice* asks to what extent “certain application distribution models — such as a mobile broadband Internet access provider acting as both a network operator and an app store provider/curator — may affect consumer choice.”<sup>12</sup> With respect to wireless applications, the Commission’s focus should remain on the conduct of wireless network operators and not on operators of app stores.

The need for Open Internet rules arises because of network operators’ control over bottleneck facilities — last-mile broadband Internet access networks. Accordingly, the focus of the Commission’s policies should be on wireless network operators and not

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<sup>11</sup> OIC Reply Comments at 37-38 n. 54; CDT Comments at 3 (“Reasonable traffic management in the wireless context should still focus on the amount of bandwidth being used, rather than singling out specific content, applications, services for special treatment.”).

<sup>12</sup> *Notice* at 5.

on app stores or edge-based applications or other entities that do not operate networks. However, a wireless network operator may not simply “contract” around its obligation to operate their networks in accordance with open Internet principles. For example, an operator that enters into an exclusive deal with an app store operator and/or device manufacturer must ensure that such app store operator or device manufacturer operates consistently with the carrier’s obligations under the open Internet principles. However, as long as a wireless network operator’s subscriber has a meaningful choice with respect to applications and the ability to download and use applications on a carrier’s network, app stores themselves are similar to other edge providers and should not be subject to nondiscrimination or other open Internet principles.

Case-by-case enforcement of open Internet principles by the Commission is best-suited to differentiate between cases in which it is the conduct of wireless network operators that violates the open Internet principles, and other cases in which app store operators act in an anti-competitive fashion (subject to oversight by the FTC).

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Respectfully Submitted,

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