Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191
	)	
Broadband Industry Practices	)	WC Docket No. 07-52

REPLY COMMENTS OF FREE PRESS REGARDING FURTHER INQUIRY

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SUMMARY

The greatest public policy need right now is Commission action. The Commission must adopt rules to protect consumers, promote competition, and foster innovation on the open Internet, as soon as possible, with no further delays. If this proceeding has demonstrated anything conclusively, it is that further proceedings will offer little, if any, additional clarity. The Commission should move immediately to an order, one with no loopholes such as unnecessary or overbroad exemptions for mobile wireless or specialized services.

In this further inquiry, questions from the initial NPRM related to possible exemptions from open Internet rules for mobile wireless and specialized services were elaborated upon, with the purpose of eliciting specific discussion of the proper scope and constraints for any such exemptions, above and beyond that filed in previous comments. Unfortunately, many of the filings in this proceeding offer no such elaborations, only misdirection and empty rhetoric. These filers oppose any oversight in this space altogether, and consequently seek unlimited and open-ended exemptions with the intention of undermining the Commission's purpose of protecting consumers, promoting competition, and facilitating innovation on the open Internet.

The chief observation that can be drawn from this further inquiry is that the record does not support any form of an exemption for mobile wireless services. As a majority of commenters demonstrate, arguments in support of a mobile wireless exemption are unfounded, and such an exemption would prove harmful. Technical distinctions asserted by the wireless industry do not justify exemption; many of the same constraints apply to other network types, and all such constraints can be remedied through the proposed exemption for reasonable network management. Economic arguments for an exemption raise substantial concerns of rent-seeking, particularly when some filers allege the right and the desire to place a private tax on Internet developers, which would impose substantial harm on innovation and consumer choice. Finally, partial solutions that would impose a subset of open Internet protections not including nondiscrimination onto mobile wireless providers fall utterly short of providing meaningful protections, and lack any legitimate substantive support.

Initial comments in this inquiry related to specialized services primarily demonstrate a lack of clarity on what such an exemption would cover. No examples of real, existing "specialized services" are offered; instead, industry filers generally offer red herring arguments, such as assertions that IP-based MVPD services would qualify, or arguments in favor of an unrestricted right to prioritize traffic at will over Internet access services. A few discuss future services that could be offered down the road, but they offer too little information on the technical nature of such services to demonstrate why they require an exemption from nondiscrimination. Meanwhile, many commenters demonstrate that an exemption for specialized services, if not properly contained, would undermine consumer choice, competition, and innovation on the open Internet. In the absence of a more developed and honest record identifying such services and discussing ways in which they can be offered without undermining other goals in this proceeding, the Commission should not confer any such form of exemption from open Internet rules. However, based on the limited discussions in this record of what such an exemption would look like, the Commission can adopt broad rules for specialized services to limit the scope of the exemption and promote competition, transparency, and robust access to the open Internet, without imposing substantive restrictions on the legitimate offering of such services.

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Introduction

The questions raised in this proceeding are not new – they were first asked in the Commission's Notice of Proposed Rulemaking, adopted just over twelve months ago. In this further inquiry, questions from the initial NPRM related to possible exemptions from open Internet rules for mobile wireless and specialized services were repeated and elaborated upon, with the purpose of eliciting specific discussion of the proper scope and constraints for any such exemptions, above and beyond that filed in previous comments. Most of the filings in this proceeding offer no such elaborations. Opponents of Commission oversight in all its forms largely repeat talking points and resist any restrictions on mobile wireless or specialized services, seeking open ended exemptions from fundamental pro-consumer, pro-competition, pro-innovation rules. Their arguments contain no substance, only misdirection and empty rhetoric. Unfortunately, the goals of this further inquiry have been ignored and frustrated by the latest batch of industry fear, uncertainty, and doubt.

The foremost observations that can be drawn from initial comments in this inquiry are that the majority of commenters oppose any exemption for mobile wireless services, and that arguments in support of an exemption are unfounded. Wireless network technologies are advancing, increasing in capacity and becoming more like wired networks in their topology and management. Internet users are using the same devices to connect to the same Internet content and applications whether over mobile wireless or fixed connections – and mobile wireless is becoming an increasingly important service for more and more users. Technical distinctions raised by the wireless industry do not justify exemption; many of the same constraints apply to other network types, and all such constraints can be remedied through the proposed exemption for reasonable network management. Economic arguments for an exemption raise substantial

concerns of rent-seeking, particularly when some filers allege the right and the desire to place a private tax on Internet developers, which would impose substantial harm on innovation and consumer choice. Finally, partial solutions that would impose a subset of open Internet protections not including nondiscrimination onto mobile wireless providers fall utterly short of providing meaningful protections, and lack any legitimate substantive support.

Initial comments in this inquiry related to specialized services primarily demonstrate a lack of clarity on what such an exemption would cover. No examples of real, existing "specialized services" are offered; instead, industry offers red herring arguments, such as assertions that IP-based MVPD services would qualify, or arguments in favor of unrestricted rights to prioritize traffic over Internet access services. A few discuss future services that could be offered down the road, but they offer too little information on the technical nature of such services to demonstrate why they require an exemption from nondiscrimination. Meanwhile, many commenters demonstrate that an exemption for specialized services, if not properly contained, would undermine consumer choice, competition, and innovation on the open Internet. Particularly in the absence of a more developed and honest record identifying such services and discussing ways in which they can be offered without undermining other goals in this proceeding, the Commission should not confer any such form of exemption from open Internet rules. However, based on the limited discussions in this record of what such an exemption would look like, the Commission can adopt broad rules for specialized services to limit the scope of the exemption and promote competition, transparency, and robust access to the open Internet, without imposing substantive restrictions on the legitimate offering of such services.

Above and beyond this immediate inquiry, the greatest public policy need is immediate Commission action. The Commission must adopt rules to protect consumers, promote

competition, and foster innovation on the open Internet, as soon as possible, with no further delays. If this proceeding has demonstrated anything, it is that further proceedings will offer little, if any, additional clarity. The Commission should move immediately to an order, one that contains no exemptions for mobile wireless services or for poorly-defined "specialized services." If the Commission wishes to confer an exemption on specialized services, however, the Commission must establish fundamental, baseline rules to limit the scope of such an exemption and to promote good behavior in the offering of such services, in order to protect the open Internet.

I. The Commission Must Adopt Technology-Neutral Open Internet Rules.

The collective filings across several comment rounds in this proceeding have clearly demonstrated that open Internet protections must be applied to mobile wireless broadband services on the same terms as fixed. The Commission must protect the ability and the right of users of mobile wireless broadband services to an open Internet access service, and the Commission must preserve the dramatic edge innovation occurring over these services. Although mobile wireless broadband currently serves as a complement to, rather than a substitute for, fixed broadband services for most users,[1] many individuals do use mobile wireless services as a primary means to connect to the Internet.[2] Next generation mobile services will offer network management and performance characteristics comparable to many fixed wireless and wireline broadband services, further reducing distinctions between the service categories. Finally, mobile wireless broadband services are valuable for unique innovation and growth,

[1] Reply Comments of Free Press, GN Docket No. 09-191, WC Docket No. 07-52 (April 26, 2010) at 45-46 (Free Press April Reply Comments).

[2] Comments of Latinos for Internet Freedom and Media Action Grassroots Network at i (Media Justice Comments).

distinct from the value of fixed broadband services, and this social and economic value would be jeopardized by failure to preserve nondiscrimination on these services.[3] Failure to apply a technologically neutral approach to all broadband services would jeopardize the present and future value of mobile wireless services in the concentrated and broken broadband market.

As in the Commission's initial round of comments, the vast majority of commenters support equal treatment for mobile wireless services.[4] Primary opposition once again comes from providers of mobile wireless services and the trade organizations they control,[5] the same parties who object to any form of regulation that could affect them, even the Commission's proposed bill shock rules.[6] Acceding to these self-interested, substantively baseless pleas would put competition and innovation on the Internet into the control of mobile service providers, who implement consumer choice through widespread exclusive agreements[7] and punitive early termination fees,[8] and who "innovate" by coming up with new ways to restrict,[9] deceive,[10] and

[3] Comments of the Mobile Internet Content Coalition at 2-3 (MICC Comments).
[4] *E.g.*, Media Justice Comments at 4-12; Comments of DISH Network at 17-24 (DISH Comments); Comments of Qwest Communications International at 12-19 (Qwest Comments); Comments of the National Cable & Telecommunications Association at 11-15 (NCTA Comments).
[5] *E.g.*, Comments of Verizon and Verizon Wireless at 11-42 (Verizon Comments); Comments of AT&T at 39-74; Comments of CTIA, *passim*; Comments of WCAI, *passim*.
[6] Edward Wyatt, "F.C.C. Wants to Stop Cellphone 'Bill Shock'," *New York Times*, Oct. 13, 2010, *available at* http://www.nytimes.com/2010/10/13/technology/13shock.html.
[7] *See* Comments of the *Ad Hoc* Public Interest Spectrum Coalition, RM-11497 (Feb. 2, 2009).
[8] *See* Comments of Consumer Federation of America et al, CG Docket No. 09-158, CC Docket No. 98-170, WC Docket No. 04-36 (Oct. 13, 2009), at 27-28.
[9] *See* Dan Meredith et al., "Mobile Devices are Increasingly Locked Down and Controlled by the Carriers," New America Foundation Open Technology Initiative (Oct. 13, 2010), *at* http://oti.newamerica.net/blogposts/2010/mobile_devices_are_increasingly_locked_down_and_controlled_by_the_carriers-38418.
[10] *See, e.g.*, Juliana Gruenwald, "Survey Shows Consumer Confusion with Cell Phone Bills," *National Journal* (May 26, 2010), *available at* http://techdailydose.nationaljournal.com/2010/05/survey-shows-consumer-confusio.php.

gouge[11] their own subscribers.

And the pleas for exemption are, indeed, baseless. They have no legitimate technical justifications – although mobile wireless networks may have spectrum constraints and dynamic congestion issues that are distinct in character and at times more severe than wired or fixed wireless networks, the Commission's proposed reasonable network management standard would fully accommodate such distinctions. Furthermore, the alleged distinctions between mobile wireless and other networks provide no rational justification to allow economic discrimination across content, applications, or services. Finally, arguments that regulation is unnecessary because of alleged competition in the wireless market fail on multiple levels, including that open Internet protections are needed even in a competitive market, and that the wireless market is not competitive today, as the Commission's recent data has demonstrated.

A. Commenters overwhelmingly support extending open Internet and nondiscrimination rules to mobile broadband Internet access services.

A diverse range of commenters in this round support application of open Internet rules to mobile wireless broadband services. Many public interest groups and academics who regularly participate in Commission proceedings contend that special treatment for mobile wireless is unnecessary and unwarranted. For example, the Center for Democracy and Technology expresses strong skepticism towards any arguments that discriminatory treatment is necessary for mobile wireless networks.[12] The organizations comprising Latinos for Internet Freedom and the

[11] *See, e.g.*, Ryan Singel, "Verizon Coughs Up $77 Million to Settle Mystery Data Fee Probe," *Wired Epicenter* (Oct. 28, 2010), *available at* http://www.wired.com/epicenter/2010/10/verizon-mystery-fees/ (discussing a settlement of an FCC investigation into allegations that Verizon charged hidden and inadvertent fees to its subscribers over several years).

[12] Comments of the Center for Democracy & Technology at 5-6 (CDT Comments) ("If wireless carriers do not respond to this public notice with a sound and convincing description of why

Media Action Grassroots Network assert that failing to extend nondiscrimination, transparency, and other open Internet rules to mobile wireless services would "unintentionally treat[] communities of color, people living in rural areas, and the poor as second-class digital citizens."[13] Others argue that convergence between mobile wireless and fixed networks – both from the consumer's perspective in terms of the devices and the connectivity, and in the network as a result of LTE and WiMax technologies – undercuts any arguments of fundamental distinctions between wireless and fixed Internet access services.[14] Others emphasize that differential traffic management activity taking place in wireless networks in lower layers does not justify discrimination in higher network layers such as content and applications.[15] Collectively, public interest and academic commenters provide substantial evidence that differential treatment of mobile wireless Internet access services is neither necessary nor appropriate.

Other commenters argue strongly that failing to preserve the open Internet on mobile wireless networks would be not merely inappropriate but in fact actively harmful. Innovations in wireless devices, such as the emergence and rapidly growing popularity of tablets, are greatly increasing the use and the significance of mobile wireless network connections; failing to preserve open Internet access through these services risks anticompetitive behavior and

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exactly they need free rein to play favorites, then CDT suggests the Commission should take that as strong evidence that no such reason exists…. Indeed, the repeated assertion that discriminatory treatment is somehow a necessary component of wireless network management, with no convincing technical explanation for why this would be so, simply underscores the importance of applying openness principles to wireless.").

[13] Media Justice Comments at i.

[14] Comments of Public Interest Commenters at 17-19 (PIC Comments); *see also* Comments of Scott Jordan and Gwen Shaffer at 18-19 (Jordan Comments).

[15] Jordan Comments at 19-21.

jeopardizes equal access to all content, applications, and services.[16] Such a result is detrimental not only to consumer choice but also to the producers of such content, applications, and services. The concentrated wireless marketplace poses substantial barriers to innovators, who risk having their content and applications blocked or discriminated against.[17] Mobile wireless service providers make no illusions as to their intentions, openly engaging in blocking wherever possible and insisting upon a right of absolute control over content and applications, discouraging market entry and investment by edge innovators.[18]

Broadband companies without significant mobile wireless networks raise a range of arguments against special treatment for mobile wireless as well. DISH Network raises concerns over both the growing parity between mobile wireless and fixed networks and inadequate competition in the mobile wireless market, and DISH asserts that exempting mobile wireless broadband from nondiscrimination rules would harm consumers and competition.[19] Time Warner Cable observes that the same limitations asserted by wireless carriers to justify special treatment – capacity constraints, shared usage across users and services, and variability in network performance resulting from excessive usage – characterize cable systems as well.[20] NCTA also emphasizes that the supposed distinctions of mobile wireless networks are not meaningful on legal or policy grounds.[21] Qwest refers to any such distinctions as "arbitrary and

[16] Comments of the Writers Guild of America, West at 6-7 (WGAW Comments).
[17] MICC Comments at 2-3.
[18] *Id.* at 5-7.
[19] DISH Comments at 17-20.
[20] Comments of Time Warner Cable at 33-34 (TWC Comments). As Time Warner Cable notes, "flexibility in responding to potentially harmful applications is not limited to wireless platforms, but rather is a universal issue for all broadband Internet access service providers."). *Id.* at 35.
[21] NCTA Comments at 11-15.

capricious."[22] Charter raises concerns that in the absence of open Internet rules for mobile wireless broadband, Internet video delivery being offered to consumers may be blocked or discriminated against by mobile wireless service providers, producing an outcome harmful for consumers and for competition.[23] And many commenters note that the Commission's reference to usage-based pricing creates no distinction between mobile wireless and fixed service providers, many of whom have also experimented with or are currently offering such pricing models.[24] Many service providers note that an exemption for mobile wireless providers from nondiscrimination rules would force the Commission to exclude such services from future universal service funds designated for broadband,[25] an action which would reflect clear Congressional intent (as demonstrated in the American Recovery and Reinvestment Act) that networks supported by federal funds be subject to nondiscrimination obligations.[26]

B. Arguments for special treatment for wireless are unfounded.

As many commenters noted, the technological and economic arguments raised by the mobile wireless industry seeking special treatment rather than regulatory parity are baseless. Most of the arguments raised in this round of comments are old and long ago debunked.[27] New arguments in this proceeding are little better, and easily dealt with.

Comments by mobile wireless trade association WCAI exemplify the typical scope of

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[22] Qwest Comments at 13; *see generally* Qwest Comments at 12-19.
[23] Comments of Charter Communications at 10-11 (Charter Comments).
[24] *See, e.g.*, Comments of Windstream Communications at 12 (Windstream Comments); NCTA Comments at 14.
[25] Comments of the National Exchange Carrier Association et al. at 10-11 (NECA Comments).
[26] *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(j), 123 Stat. 115, 515 (2009) (requiring all grant recipients of ARRA funds to meet nondiscrimination and interconnection obligations).
[27] *See, e.g.*, Free Press April Reply Comments at 21-33.

industry comments in this proceeding. For example, WCAI asserts that the most important consumer-facing similarity between mobile wireless and fixed Internet access services – that both services offer access to the Internet – is irrelevant in determining whether or not to adopt open Internet rules.[28] If anything, the opposite is true: The fact that both services provide access to the same Internet is the central and key reason to apply the same protections for consumers, competition, and innovation on the Internet.[29] WCAI's arguments run counter to convergence arguments as well – as technologies and performance characteristics improve, Internet users and Internet content and application innovators are increasingly adopting mobile wireless platforms, and failing to preserve the open Internet on these platforms risks creating a new digital divide.[30]

Many mobile wireless industry commenters premise their objections on the widely-discredited theory that regulations are unwarranted in the absence of demonstrated market failure. Comments in this proceeding and substantial academic studies have already demonstrated that nondiscrimination rules are warranted even in a competitive market.[31] Furthermore, the most recent report on the mobile wireless industry failed to find effective competition in the wireless industry as a whole.[32] Particularly in the face of increasing concentration and consumer harms, the Commission must not allow mobile broadband – central

[28] WCAI Comments at 2.
[29] Free Press Comments at 2.
[30] PIC Comments at 5.
[31] Comments of Free Press, GN Docket No. 09-191, WC Docket No. 07-52 (Jan. 14, 2010) at 45-53 (Free Press January Comments); BARBARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION at 255-64 (2010).
[32] Fourteenth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analsis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services,* FCC 10-87, WT Docket No. 09-66 (rel. May 20, 2010). The Commission's report analyzed the combined market for wireless voice, data, and text services; the mobile wireless broadband market is likely even more concentrated.

to this Commission's broadband goals[33] – to go the way of other poorly regulated sectors such as drilling or finance.

Raising the bar on absurd and harmful arguments, WCAI now asserts that preserving "innovation without permission" – a central goal articulated by the Commission for this proceeding – is in fact a government-mandated subsidy for application entrepreneurs.[34] This argument is ludicrous: Network operators already receive market rates (in fact, likely far more than the rates that would be charged in a competitive market) from consumers paying for Internet access service. Seeking the right to be paid twice for the same connection is tantamount to placing a private tax on innovation. Never before have network operators seriously attempted to charge all innovators additional fees for access to the network connections of the *users* of applications and content. Former AT&T CEO Ed Whitacre made similar notorious comments regarding Google, but few if any have ever directed such naked rent-seeking assertions on small businesses and entrepreneurs who cannot possibly afford to pay every broadband provider for the right to have their innovations used. Such a development would destroy the start-up economy and innovation that characterizes the Internet.[35]

C. Proposed limited rules for wireless services would be overwhelmingly ineffective.

Some commenters in this proceeding offer partial proposals for minimal regulations on mobile wireless broadband services. In particular, the proposal by ITIC would prohibit mobile broadband service providers from blocking content or those applications that compete with

[33] Free Press Comments at 16.
[34] WCAI Comments at 31-32.
[35] *See, e.g.*, Inimai M. Chettiar, J. Scott Holladay, and Jennifer Rosenberg, "The Value of Open: An Update on Net Neutrality," Institute for Policy Integrity (Sep. 2010), *available at* http://policyintegrity.org/files/publications/TheValueofOpen.pdf.

services offered by the provider or its partners (such as voice services), and would require disclosure of network management practices comparable to that provided by fixed service providers.[36] Although self-referenced as "balanced,"[37] the ITIC proposal is better characterized as "empty." This proposal does not effectively protect users of mobile wireless Internet access services, nor does it protect innovators from anti-competitive and harmful rent-seeking behavior. Instead, the proposal would create a substantially different "closed, mobile Internet" that will leave many Internet users on the wrong side of a new digital divide.[38]

As noted in numerous comments in this proceeding, technical distinctions between mobile wireless and fixed networks do not justify disparate treatment.[39] Implicit in the ITIC proposal is the unproven assertion that discrimination in network management is on balance beneficial and should be permitted, but only in mobile wireless networks. This assertion is incorrect: Allowing discriminatory routing in mobile wireless networks, as in other networks, is unnecessary and harmful. Congestion and limits on capacity arising from spectrum limitations or variable usage levels do not justify discriminatory, unreasonable network management. To the contrary, they create an environment where degradation of some signals and/or prioritization of others is particularly harmful to disfavored communications, and thus particularly harmful to the consumer choice, innovation, and competition that characterize the open Internet.[40]

Additionally, the ITIC proposal would allow discrimination and blocking motivated by economic rent-seeking incentives, which would negatively impact users and small businesses in

[36] Comments of the Information Technology Industry Council at 6-7 (ITIC Comments).
[37] ITIC Comments at 2.
[38] Media Justice Comments at 7.
[39] TWC Comments at 33-34.
[40] *See* M. Chris Riley and Robb Topolski, "The Hidden Harms of Application Bias," Free Press (Nov. 2009) (*Application Bias Policy Brief*), *available at* http://www.freepress.net/files/The_Hidden_Harms_of_Application_Bias.pdf.

the Internet economy.[41] Rent-seeking has no legitimate justifications through engineering or other distinguishing features of mobile wireless broadband services. The repercussions of permitting such behavior would be an environment where mobile wireless service providers can and will place a tax on innovation by charging fees to Internet companies even to *allow* popular Internet applications such as Twitter, Facebook, or Pandora to be used over their networks. Previously, such a concern appeared hypothetical; now, filers in this very proceeding have asserted the right and the desire to levy such fees.[42] The Commission has enough exclusionary behavior by gatekeepers on its hands in navigating debates over retransmission consent, among other open and active proceedings;[43] a world in which "carriage" on mobile wireless networks for popular Internet applications results in endless disputes and disruptions over fees, all in the name of unnecessary and inefficient rent-seeking in an increasingly concentrated and broken wireless industry, stands to be a thousand times worse.

II. Specialized Services

Tremendous conceptual confusion persists in this proceeding over the idea of "specialized services." Some commenters confuse them with managed services implementing quality of service pursuant to service level agreements;[44] some companies persistently reference their MVPD services (regulated by Title VI) as examples;[45] other filers seem to think the concept

[41] Free Press Comments at 5-6, 21-22.
[42] WCAI Comments at 31-32.
[43] *See, e.g.*, Brian Stelter and Bill Carter, "Cablevision Subscribers Facing Loss of Fox Shows," *New York Times* (Oct. 13, 2010), *available at* http://www.nytimes.com/2010/10/14/business/media/14fox.html.
[44] *See, e.g.*, Comments of TW Telecom at 3-5.
[45] *See, e.g.*, AT&T Comments, *passim*.

can include any form of prioritization over the open Internet.[46] All of these references are invalid. The Commission raised broad and open-minded questions in discussing specialized services; however, the result is that this proceeding has become overwhelmed by red herrings and attempts to engineer glaring loopholes in the proposed open Internet rules.

To clear up the confusion and make this process more productive, the Commission's most immediate obligation is to clearly articulate the boundaries between categories of services. The Commission must more clearly define and separate telecommunications services, Internet access services, MVPD services, and information services, and must clarify that the objective is to create a cognizable category of "specialized services" distinct and apart from telecommunications services, Internet access services, MVPD services, and information services offered over Internet access services. Under a proper definition and classification, it will immediately become clear that few, if any, "specialized services" are currently being offered. Coupled with the great amount of concern demonstrated in this record over the potential for "specialized services" to cause harm, the Commission should hesitate before granting exemptions from fundamental nondiscrimination obligations for such services.

Contrary to the worst of the red herring arguments, being cautious with specialized services does not in any way represent a limit on services that can be offered or the ability of consumers to choose among a broad and diverse range of service offerings.[47] The question of "specialized services" isn't about limits at all, and it certainly is not about limiting anything resembling protected speech activity.[48] Rather, it is a question of how broad an exemption from a fundamental public policy principle needs to be to permit future hypothetical services that may

[46] *See, e.g.*, Verizon Comments at 44-46.
[47] *See* Verizon Comments at 62.
[48] *See* Verizon Comments at 68-76.

require such an exemption. It is a question of categorization: which services should be considered information services offered over Internet access service for which the underlying transport is subject to nondiscrimination obligations, and which services should be considered "specialized services" being offered over distinct (perhaps integrated) transport capacity which holds an exemption from nondiscrimination. Many, including numerous government officials in this Commission and in Congress, have identified nondiscrimination to be a fundamental public policy principle for broadband Internet access services; therefore, the Commission should consider narrowly what services should be placed in which category, and what other safeguards should be put in place to make sure the goal of preserving an open Internet is not undermined by the creation of a new category of exempted services.

As identified by numerous comments in this proceeding, exempting a category of services from nondiscrimination poses serious and substantial risk to the open Internet.[49] Allowing "specialized services" to receive an exemption from nondiscrimination may drive substantial investment and innovation away from the open Internet, and it may drive the future growth and allocation of broadband capacity towards specialized services and away from open Internet access services, even as the United States falls further behind other countries in offering high capacity Internet access connections. The outcome of such a development would be exactly what this proceeding is designed to prevent – it would mean the loss of the innovation and growth that characterize the open Internet, and the loss of the economic and social benefits that have been generated, all in the name of short-term rent-seeking behavior by a few already profitable gatekeepers operating in an increasingly concentrated and broken market.

To handle a limited and still speculative category of "specialized services," the FCC

[49] *E.g.* Comments of Vonage Holdings Corp. at 5-7 (Vonage Comments); PIC Comments at 7-9.

should, ideally, defer on action entirely – both on permitting any such services to receive exemptions from nondiscrimination/RNM obligations, and on specifying other rules for their management – until actual examples of services unable to function without an exemption from nondiscrimination can be demonstrated.[50] Alternatively, the Commission can establish general baseline rules (to be elaborated on over time) that would allow such services to be receive an exemption while establishing safeguards to protect the open Internet.[51] Legitimate business practices, now and in the future, would not be restricted by suitable and suitably flexible rules. The Commission's choice, therefore, is to engage in limited and appropriate oversight, or to take at its word a concentrated industry with a history of abuse. The former would result in sound and sensible public policy; the latter, years of harm to consumers, competition, and innovation in broadband networks.

A. Initial comments reveal broad concern over potential anticompetitive and anti-consumer harm resulting from exemptions for specialized services.

Many filers in this proceeding express concerns over broad exemptions from open Internet rules for specialized services. A number of the concerns relate to poor definition of the scope of specialized services, raising the possibility of an overly broad exemption that undermines the proposed rules. For example, CCIA notes that the entire concept remains ill-defined, creating substantial risk that any exemption would be overbroad.[52] Public interest commenters echo this sentiment.[53] Vonage echoes the Commission's observations that exemptions for specialized services may allow providers to offer services that have substantial

[50] *See, e.g.*, Media Justice Comments at 12.
[51] Free Press proposed such rules in its opening comments. Free Press Comments at 6-19.
[52] Comments of the Computer & Communications Industry Association at 2-4 (CCIA Comments).

overlap with Internet access services yet are exempt from nondiscrimination obligations, and that such a development would weaken open Internet protections.[54] By and large, these filers request that the Commission refrain from granting any exemptions from nondiscrimination and other open Internet protections for services that remain ill-defined and largely speculative.

Commenters also worry directly about the impact that specialized services, if left unchecked, will have on innovation and competition in the open Interent. Public interest commenters raise concerns that providers will build a second, prioritized "pay for play" platform that evades and eclipses open Internet access services and undermines the benefits that this proceeding is intended to achieve.[55] Vonage notes that innovators on the open Internet would be discouraged by an open-ended specialized services category, as broadband providers would be able to replicate any functionality they create on specialized services with an inherent and potentially unmatchable competitive advantage.[56] Competition would similarly be thwarted, as an incumbent with deep pockets can pay for special treatment over a "specialized service" and thereby buy an advantage over a smaller competitor[57] – exactly the scenario open Internet rules are intended to prevent. Similarly, the Writers Guild notes the many benefits that have accrued to content creators and consumers as a result of the "vibrant and competitive online content distribution market" on the open Internet, and that these benefits are in jeopardy if gatekeepers are permitted to build priority lanes on the Internet and thereby thwart meaningful competition.[58]

Generally, commenters raising concerns over specialized services either ask the Commission not to create any such exemptions, or echo the Commission's proposed safeguards

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[53] PIC Comments at 7-8.
[54] Vonage Comments at 5.
[55] PIC Comments at 8-9.
[56] Vonage Comments at 7.
[57] *Id.* at 7-8.

in part or in full; however, no consensus has emerged as to the right set of safeguards that would be sufficient to eliminate all of the potential risk to competition and innovation. Furthermore, consensus on policy for specialized services is highly unlikely when the entire concept and scope of specialized services remains unresolved. The Commission should thus recognize that the market has not yet demonstrated the need for any exemptions from nondiscrimination and other open Internet obligations, and should limit itself to providing greater clarity for the potential scope of future exemptions. Deferring on a broad exemption would not prevent the Commission from conducting regulatory forbearance from open Internet obligations under Section 10.[59]

B. Initial comments identify no real, existing services that fall or need to be placed outside existing service categories.

In attempts to portray a broad range of specialized services so as to defeat what is painted as new regulations, industry commenters engage in three separate misdirections, conflating "specialized services" with MVPD or telecom services, with managed services maintaining quality of service pursuant to a service level agreement (SLA), and with general information services offered as information services over Internet access services today that may or may not in the future be offered as distinct services. The Commission must set aside these references, as none are cognizable as distinct "specialized services," nor do any require exemption from existing regulatory frameworks or the proposed nondiscrimination obligations.

First and most prevalent are those commenters conflating specialized services with services regulated under other statutory frameworks. AT&T's comments are rife with this fallacy.[60] Over and over and over again, AT&T references its U-Verse IPTV service as an

[58] WGAW Comments at 3-4.
[59] CCIA Comments at 4-5.
[60] *See* AT&T Comments at 17-19, 28, 32-33, 36-37.

example of a "specialized service," and frames its criticism of any potential rules in terms of how U-Verse would be impacted. Such comments are irrelevant to this debate, as U-Verse is a MVPD service subject to Title VI of the Communications Act.[61] Verizon makes the same mistake with its FiOS TV service.[62] Verizon and other carriers also confuse "specialized services" with business transport services regulated under Title II as telecommunications services,[63] and with Voice over Internet Protocol services,[64] which are routinely regulated under various provisions of Title II through ancillary jurisdiction. Contrary to other industry arguments, VoIP and MVPD services are not merely being "grandfathered" into service without nondiscrimination obligations;[65] they are distinct services that are not properly characterized as "specialized services" as that term is intended. Distinctions for VoIP and MVPD services are not arbitrary, and they do not extend to other services not subject to provisions of Title II or Title VI.

The second category of conceptual confusion surrounds services that include capacity for quality of service and end-user directed prioritization, such as via DiffServ. Many business services today are offered by service providers to subscribers pursuant to a service-level agreement, or SLAs. These SLAs can include within them provisions requesting prioritized treatment for some traffic within the connection.[66] Respecting end-user priority requests in such a fashion does not and need not convert a broadband connection into a "specialized service,"

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[61] *See, e.g.*, Comments of Free Press, MB Docket No. 09-13 (Mar. 9, 2009), at 5-10; Free Press January Comments at 110 n.218. AT&T occasionally denies this classification, for example when attempting to avoid legal obligations related to carriage of public, educational, and government channels; however, the classification is correct.

[62] Verizon Comments at 48.

[63] *Id.*

[64] AT&T Comments at 2-3.

[65] *See id.* at 33-34.

[66] *See* TW Telecom Comments, *passim*.

contrary to the arguments of many industry filers.[67] Despite misleading assertions to the contrary, DiffServ and similar network functionalities, when implemented in traditional fashion, do not represent "paid prioritization" as that term is used and presumptively prohibited by proposed rules in this proceeding, nor do they therefore require any form of separate exemption from nondiscrimination such as that contemplated for specialized services.[68] When end users request priority treatment through technologies such as DiffServ, and where the scope of network management used by a service provider is limited to the implementation of end user requests, the public policy goals of this proceeding are generally not undermined; therefore, such practices can continue without requiring additional exemptions.

The third category includes activity that cannot or need not be distinguished from information services offered over an Internet access service subject to nondiscrimination obligations. For example, Verizon suggests many services already discussed in previous rounds of this proceeding: security/parental control services, video gaming services, video teleconferencing, health monitoring services, and "widgets."[69] These services are or could be offered today, over the open Internet, on a nondiscriminatory basis; therefore, Verizon is misleading in attempting to conceptualize them as "specialized services" rather than ordinary information services. Other versions of these services *could* be offered in the future that incorporate and use higher priority delivery, but such offerings are currently speculative. Furthermore, Verizon offers no argument that such hypothetical future services could not be offered on a basis consistent with the proposed open Internet rules, in particular by allowing

[67] *See* AT&T Comments at 20; Verizon Comments at 48.

[68] *See Ex Parte* Letter of Open Technology Initiative, New America Foundation, GN Docket No. 09-191, GN Docket No. 10-127 (Sep. 1, 2010) (discussing recent AT&T claims that "paid prioritization" is equivalent to widespread practices based on service level agreements).

[69] Verizon Comments at 45-46.

users to identify any and all specific traffic that receives priority through DiffServ or similar technology. Instead, Verizon merely asserts that the possible future existence of services that could incorporate priority justifies a broad exemption from nondiscrimination obligations.

At heart, many arguments for specialized services are thinly veiled arguments for exemptions of nondiscrimination obligations for information services offered over an Internet access service.[70] No real "specialized services" are articulated; rather, industry is latching onto the concept as a vehicle to push for a glaring loophole from open Internet rules, the general right to offer prioritization for information services over an Internet access service. But, conceptually, merely implementing prioritization for information services being offered over an Internet access service cannot convert a service into a "specialized service";[71] such behavior must be treated as an Internet access service and must be subject to nondiscrimination rules, with a rule against prioritization but an exemption permitting reasonable network management.

As no real specialized services have yet been articulated, no exemptions from nondiscrimination obligations need yet be given, and the Commission is best served by waiting until a more comprehensive record can be provided before granting any.

C. Proposed, hypothetical models for distinguishable specialized services are not inconsistent with rules that ensure a robust open Internet and promote competition.

In this proceeding, the Commission faces a choice – whether to trust the industry to behave (despite a mediocre record), or to put in rules of the road to keep them at their word, rules that would not place any significant limitations on their behavior. Establishing rules to protect the open Internet from abuses in offering such services carries no substantial downside, as proper rules do not impose significant limitations on broadband service providers. On the other hand,

[70] *See, e.g.*, Verizon Comments at 46-48.

failing to pass rules and merely trusting to the good behavior of industry brings substantial risk to the open Internet and the social and economic value this proceeding seeks to preserve and protect. If history (both in and beyond the field of telecommunications) has taught the public anything, it's that only a fool would trust in the promises of a concentrated and poorly competitive industry to behave in the absence of regulatory oversight.

The industry has yet to assert any convincing need for an exemption for specialized services; yet even in their own characterizations of what services they would wish to offer under such an exemption and on what terms, the rule framework proposed in our initial comments would not overly constrain their professed actions. For example, Bright House articulates the need for specialized services by discussing limitations of current Internet access services, making clear that their objective is to offer services that cannot be offered over Internet access services.[72] Presumably, therefore, a non-duplication/non-replication rule would not represent a significant constraint. Bright House asserts that specialized services can and would be offered without engaging in anti-competitive behavior, and without compromising the offering of a robust open Internet access service.[73] Rules requiring transparency, promoting competition in the offering of such services, and ensuring the continued offering of a robust open Internet access service are

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[71] Free Press January Comments at 108-09.

[72] Comments of Bright House Networks at 11-15 (Bright House Comments).

[73] *See id.* at 21-22 ("[The Internet ecosystem] creates a situation in which the ability of any member of the ecosystem to deliver value to end users requires ongoing coordination and cooperation.... In such an environment, there is no reason to believe that significant abuses of one member of the commons by others – the essence of the "bypass the open Internet" and "anticompetitive conduct" concerns stated in the Supplemental Notice – will occur or persist."). Bright House's point is that the proposed rules are unnecessary; however, their support for this point also indicates that appropriate rules to prohibit such behavior would not impose substantive limitations on their behavior.

therefore not substantially inconsistent with Bright House's framework.[74] If Bright House and other broadband service providers plan to continue to be aggressive in offering robust open Internet access service, then a rule requiring the offering of a robust open Internet access service would impose no substantive limitation. Similarly, if broadband providers plan to offer new specialized services on a transparent and competitive basis, then rules ensuring competition and disclosure will create no burdens. On the other hand, if the industry intends to be nontransparent or anti-competitive in offering such services, or if the industry intends to compromise the offering of a robust Internet access service, then the need for rules is clear and certain. Any industry arguments about diminished incentives to invest or restrictions on new business models that would follow from all such rules should be set aside.

Other arguments raised by industry are red herrings, based on misinterpretations of the Commission's proposed oversight rules. For example, AT&T alleges that the Commission has proposed to limit the businesses and services that can be offered.[75] But no one – not the Commission, nor advocates of greater Commission oversight – is calling for restrictions on what services can be offered. AT&T is free to offer any information services over an open and nondiscriminatory Internet access service; AT&T is also free to offer MVPD service and Title II telecommunications services.[76] Contrary to AT&T's confusion or deliberate misconception, the

[74] One source of possible significant inconsistency is Bright House's implication that service providers have an inherent right to offer higher-quality versions of Internet-based services. *See id.* at 21. Free Press agrees with Bright House's prior assertion that VoIP and MVPD services are unique because they are subject to distinct regulatory regimes, *see id.* at 20, but this uniqueness cannot logically be extended to any sort of general right to offer higher-quality versions of Internet-based services if such services are not subject to non-Internet regulatory regimes, if such is Bright House's agenda.

[75] AT&T Comments at 31.

[76] *See* AT&T Comments at 32-33 (asserting that the Commission's "specialized services" categorization and affiliated limitations would implicate its current U-Verse video services).

proposal being discussed in this proceeding is a limitation on what information services should be classified as "specialized services", and thus entitled to an exemption from the proposed nondiscrimination obligations for the transport capacity underlying them, even though nondiscrimination is otherwise considered fundamental public policy. Services not qualifying for the exemption can still be offered, but AT&T must not be permitted to engage in network management behavior related to such services that violates the nondiscrimination framework.

Arguments related to any idea of mandated capacity for Internet access service similarly miss the mark.[77] Although some parties have suggested such a standard in the past, it is by no means the only (or necessarily the best) approach to ensuring continued robust Internet access service. Assigning a single fixed capacity number to all technologies, although appealing to ensure that consumers have a baseline on which they can rely, would likely be unattainable for many (in particular, mobile wireless services) and would be trivial and insufficiently aggressive for others (notably fiber and DOCSIS 3.0 cable). As Free Press proposed in the initial round of comments, the Commission is better served by adopting a general robustness standard geared not towards any fixed numeric target, but rather towards preventing active cannibalization of the capacity of the broadband pipe by other services.[78] None of the arguments raised by industry have any relevance to a general robustness standard, and such a standard would not mandate inefficient behavior but instead would serve to discourage bad behavior.

Given the absence of legitimate substantive reasons not to establish safeguards, the primary disagreement between proponents and opponents of exemptions for specialized services relates to a predictive judgment: Will service providers restrict open Internet access services or behave in a deceptive and/or anticompetitive manner in offering specialized services? Or, will

[77] *See* AT&T Comments at 34-35; Verizon Comments at 63-65.

the allegedly competitive market for broadband services provide complete discipline sufficient to eliminate any benefits of regulation? AT&T, Verizon, and others would have the Commission believe the latter. For example, Verizon asserts that it would lose customers if an insufficiently robust Internet access service were provided.[79] AT&T points to U-Verse as a precedent for its continued expansion of broadband Internet access service,[80] even as AT&T continues to choose not to build out fiber to the home. Meanwhile, the state of broadband competition in the United States is dismal, and service providers have engaged in a steady stream of harmful and abusive activity over years. Free Press encourages the Commission not to close its eyes to this present and past, and not to be deceived by empty promises of good behavior. The Commission must not permit an exemption from nondiscrimination for specialized services without enacting careful safeguards to preserve the open Internet and promote competition.

Conclusion

The Commission must adopt rules to protect consumers, promote competition, and foster innovation on the open Internet, as soon as possible, with no further delays. The Commission must set aside misleading arguments raised in this proceeding by obstructionists who seek to expand any potential exemptions for mobile wireless and specialized services into open-ended loopholes around the proposed rules.

The record demonstrates no substantive technical or economic support for any form of exemption for mobile wireless services. Additionally, in the absence of a more developed record demonstrating why specialized services require an exemption, and discussing ways in which such an exemption can be structured without undermining other goals in this proceeding, the

[78] Free Press Comments at 12-16.
[79] Verizon Comments at 53-54.

Commission should not confer a "specialized services" exemption from open Internet rules. However, should the Commission decide to move forward despite the sparse record, the Commission can adopt broad rules for specialized services to limit the scope of the exemption and promote competition, transparency, and robust access to the open Internet, without imposing substantive restrictions on the legitimate offering of such services.

Respectfully Submitted,

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[80] AT&T Comments at 16, 18.