

UTILITIES AND TELECOMMUNICATIONS ALERT

FCC'S OPEN INTERNET POLICIES COULD IMPACT SMART GRID NETWORKS

As you likely are aware, the FCC ordered controversial regulations and policies governing the practices of broadband Internet service providers that became effective within the past several months. The so-called "Open Internet Order" is the subject of current judicial appeals, and recently has also been challenged in a Petition for Reconsideration filed by Southern Company on the basis of concerns that the FCC may, in the future, seek to regulate "specialized services" used to support smart grid technologies. Although the Open Internet Order applies only to mass market retail broadband Internet access offerings, the FCC also committed to continuous monitoring of premium "specialized services"; those services generally provided to large enterprise customers on a private contract basis, using the same last-mile facilities as the mass market broadband services now regulated by the FCC. Without providing any specific detail, the Open Internet Order also suggests that the FCC may, at some later date, take affirmative steps to impose the same or similar regulations and policies on "specialized services", to the extent such offerings are found, to limit available mass market retail broadband Internet access offerings. Southern Company relies on such "specialized services" to deliver enhanced quality broadband connectivity to its smart grid network, and according to its Petition, would be adversely affected by such FCC action.

A copy of the Petition is attached for your review. Oppositions to the Petition must be filed with the FCC no later than December 16, 2011, and replies to Oppositions are due on December 27, 2011. Please let us know if your company shares the concerns raised in the Petition, would like to discuss any concerns addressed in the Petition, or would be interested in joining a coalition filing in support of the Petition before the FCC.

This Utilities and Telecommunications Alert is intended to keep readers current on matters affecting businesses and is not intended to be legal advice. If you have any questions please contact Charles Zdebski at 202.659.6605, Eric Schwalb at 202.659.6608, Brett Heather Freedson at 202.659.6669, or contact any one of our other Utilities and Telecommunications Group attorneys at Eckert Seamans.

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**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

To: The Commission

**PETITION FOR CLARIFICATION
OR RECONSIDERATION**

Southern Company Services, Inc. ("Southern"), on behalf of itself and its operating affiliates, hereby requests clarification or reconsideration, pursuant to Section 1.429 of the Commission's Rules, of one aspect of the Commission's *Report and Order* in the above-captioned rulemaking proceeding on the development of rules and policies for an Open Internet.¹

Specifically, Southern urges the Commission to clarify its policies on specialized services so that enterprise customers, such as Southern, have greater assurance that they can contract for specialized services from broadband providers without risk that the Commission will impose new terms and conditions that could fundamentally alter the nature of the specialized services.

¹ *In re Preserving the Open Internet; Broadband Industry Practices*, Report and Order in GN Docket No. 09-191 and WC Docket No. 07-52, 25 FCC Rcd 17905 (2010) (hereinafter "*Open Internet Order*"). The *Open Internet Order* was published in the Federal Register on September 23, 2011, 76 Fed.Reg. 59192.

I. Background

Southern is a wholly-owned subsidiary service company of Southern Company, a super-regional energy company in the Southeast United States. Southern Company also owns four electric utility subsidiaries – Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company – which provide retail and wholesale electric service throughout a 120,000 square mile service territory in Georgia, most of Alabama, and parts of Florida and Mississippi. Members of the Southern Company family use a variety of communications technologies to support the safe and efficient delivery of energy services to their customers. Southern has significant interest in ensuring that broadband or other communications networks used to support “Smart Grid” and other utility-related communications requirements are reliable and secure.²

II. The Commission Should Clarify Its Position on Specialized Services

In the *Notice of Proposed Rulemaking* in this proceeding, the Commission recognized that some services provided to enterprise customers or others may be provided to end users over the same facilities as broadband Internet access services, but may not themselves be an Internet access service and may instead be classified as a managed or specialized service.³ Although the *NPRM* did not define managed or specialized services, it cited to telemedicine, smart grid, and eLearning applications as examples of specialized services that may require or benefit from enhanced quality

² Southern submitted Comments on these issues on October 12, 2010, in response to the Commission’s Public Notice, DA 10-1667, released September 1, 2010.

³ *In re Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 (2009) (“*NPRM*”).

of service rather than traditional best-effort Internet delivery.⁴ The Commission invited comment in the *NPRM* on the essential distinguishing characteristics of managed or specialized services and how the Commission should define the category of managed or specialized services that would be generally exempt from the Commission’s Open Internet rules.

In the *Open Internet Order*, the Commission largely exempted specialized services from the ambit of the rules by defining “broadband Internet access service” as being limited to “mass market retail service:”

(a) Broadband Internet access service. A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.⁵

Thus, to the extent a specialized service is not mass-marketed on a retail basis the new Open Internet rules do not apply. The Commission explained that “mass market” means that the service is “marketed and sold on a standardized basis to residential customers, small businesses and other end-user customers such as schools and libraries,” and that the term “does not include enterprise service offerings, which are typically offered to larger organizations through customized or individually negotiated arrangements.”⁶ The Commission further explained these limitations as follows:

47. . . .Broadband Internet access service likely does not include services offering connectivity to one or a small number of Internet endpoints for a particular device, *e.g.*, connectivity bundled with e-readers, heart monitors, or energy consumption sensors, to the

⁴ *NPRM*, para. 150.

⁵ To be codified at 47 C.F.R. §8.11(a).

⁶ *Open Internet Order*, para. 47.

extent the service relates to the functionality of the device. Nor does broadband Internet access service include virtual private network services, content delivery network services, multichannel video programming services, hosting or data storage services, or Internet backbone services (if those services are separate from broadband Internet access service). These services typically are not mass market services and/or do not provide the capability to transmit data to and receive data from all or substantially all Internet endpoints.⁷

The Commission further explained that “[t]o the extent these services are provided by broadband providers over last-mile capacity shared with broadband Internet access services they would be specialized services.”⁸

Although the Commission raised questions during the rulemaking about whether the rules should address the provision of specialized services, the Commission declined to take action with respect to specialized services in the *Open Internet Order*. Instead, the Commission stated that it will “exercise its authority to closely monitor and proceed incrementally with respect to specialized services, rather than adopting policies specific to such services at this time.”⁹

Southern is gratified that the Commission left open the potential for broadband service providers to develop specialized services that could meet utilities’ need for specialized broadband services with greater reliability and lower latency than mass market Internet access services. However, Southern is concerned that some of the statements made in the *Open Internet Order* could have a chilling effect on the market for specialized services.

The *Open Internet Order* strongly suggests that a broadband provider may not offer specialized services if it would have any impact on capacity for broadband Internet access services. The Commission expresses concern that “the Internet may wither as an open platform for

⁷ *Open Internet Order*, para. 47 (footnotes omitted).

⁸ *Id.*, fn.149.

⁹ *Id.*, para. 113.

competition” if broadband providers “constrict or fail to continue expanding network capacity allocated to broadband Internet access service to provide more capacity for specialized services.”¹⁰ Almost by definition the provisioning of capacity for specialized services will have an impact on capacity for broadband Internet access services. The Commission states that it will monitor the “robustness and affordability” of broadband Internet access services and focus on signs that specialized services are “in any way retarding the growth of or constricting capacity available for broadband Internet access service.” The Commission will “fully expect that broadband providers will increase capacity for broadband Internet access service if they expand network capacity to accommodate specialized services.”¹¹

In a potential Catch-22 for providers and users of specialized services, the Commission has cautioned that it retains the right to classify a specialized service as a regulated broadband Internet access service if it is “used to evade the protections set forth in these rules.”¹² The primary reason a customer would enter into a specialized service arrangement is to obtain a level of service reliability or quality that cannot be obtained through broadband Internet access service. Under the Open Internet rules, the service provider may not “unreasonably discriminate” in transmitting traffic over a consumer’s broadband Internet access service. Thus, unless further clarified by the Commission, a specialized service arrangement runs the risk of being reclassified as broadband Internet access service simply because it was designed to provide the subscriber with greater reliability and higher quality than could be obtained under the provider’s general (and

¹⁰ *Id.*, para. 112.

¹¹ *Id.*, para. 114.

¹² *Id.*, para. 113.

nondiscriminatory) provision of broadband Internet access service pursuant to the Open Internet rules.

Southern is concerned that these pronouncements could have a chilling effect on broadband providers' willingness to develop specialized services, either with existing capacity or through expanded capacity. For utilities such as Southern that are implementing smart grid functionalities, ranging from automated metering infrastructure to supervisory control and data acquisition systems with a significantly greater number of remote devices embedded deeply within the electric system, the best-efforts standard for broadband Internet access will not be acceptable for many of these applications. If public broadband networks are going to be of any value to these applications, Southern must have assurance that a broadband service provider can maintain the necessary quality of service throughout its network and over a period of time sufficient to justify the utility's investment in system design and engineering services, end-user devices, and other equipment that the utility must provide to support the service.

Even if broadband providers were willing to offer specialized services meeting Southern's requirements, the Commission's statements in the *Open Internet Order* create great uncertainty as to whether Southern could have confidence that the service for which it contracts can be maintained by the service provider without change in terms or conditions. Under the ambiguous guidelines outlined in the *Open Internet Order*, Southern, or any other customer of a specialized service, would have great difficulty predicting whether the Commission might later conclude that the specialized service is inhibiting the provider's ability to offer broadband Internet access service. The decision of whether to contract for a specialized service should be premised on market-based factors, but the Commission's ambiguous pronouncements in the *Open Internet*

Order will discourage providers and prospective users, whether intentionally or unintentionally, from entering into such agreements.

III. Conclusion

For a utility to rely on commercial broadband networks, the parties must have assurance that they can contract for quality and reliability of service that exceeds the best-efforts standard for broadband Internet access service. Southern therefore urges the Commission to clarify, or if necessary reconsider, its policies and pronouncements in the *Open Internet Order* with respect to specialized services so that utilities and other enterprise customers will be able to develop contractual relationships with confidence that specialized services will not be made subject to the Open Internet rules for broadband Internet access services.

Respectfully submitted,

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