July 18, 2007

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: Joint Filing of Technology Sector Organizations and Public Interest Organizations Concerning Open Access;
WT Docket Nos. 96-86 and 06-150; PS Docket No. 06-229.

Dear Chairman Martin:

At the April 25 Open Meeting that approved the *Further Notice*, you issued a bold challenge to your fellow Commissioners to see this auction as the "biggest opportunity" to create a "third pipe" independent broadband provider, and bring to all Americans the benefits of increased wireless and broadband competition. The undersigned welcome this opportunity, and your leadership role in making it happen. Throughout this proceeding, the undersigned have built a strong record in support of proposals that will create truly independent wireless broadband providers. More than 250,000 members of the public, as well as numerous providers of new services and innovations, have echoed your words that a "status quo outcome" will not well serve the American people, and that the auction must produce "a real third broadband competitor [a]nd . . . technology that is cost-effective to deploy not just in the big cities, but in the rural areas, as well."

Recent reports in the press, however, suggest that the *Order* on circulation will not be sufficient to create the environment that will produce a new broadband competitor. The proposal to require the winner of the 22 MHz "C" Block to abide by a version of the network attachment rules (aka "wireless *Carterfone*") is a noble beginning to improving the "status quo." Nonetheless, this condition alone will not create the possibility of a new broadband access provider emerging. Further, as the investment analyst firm Stifel Nicolaus observed in a recent note, even this condition by itself apparently contains numerous loopholes, and thus is unlikely to have a significant impact on the very problem of device competition that the condition seeks to address.

Although the signatories to this letter have submitted their own separate proposals for promoting competition and fostering the emergence of a wireless "third pipe" through the upcoming auction, we jointly file this *ex parte* letter to reiterate our long-held shared principles. In particular, we believe the Commission should allocate at least 20 MHz of spectrum in the Upper 700 MHz band on the basis of the following, pro-competitive principles, each of which constitutes an essential element of open access: (1) open devices, (2) open applications, (3) open services, and (4) open networks. Only an "open access" that incorporates ***all*** of these "four opens" can meet the challenge you set for yourself and the other Commissioners less than three months ago. We emphasize that without each of these equally important elements, the upcoming auction will fail to foster a market environment open to new investment by new entrants.

THE "FOUR OPENS" OF SUCCESSFUL OPEN ACCESS

Open Devices. The Commission should retain, and strengthen, the proposed principle that the licensees must allow any device that does not harm the network to attach to the network. As the European and Asian experiences demonstrate, consumers and the American economy as a whole would be far better off if consumers were free to buy and use devices of their choosing for wireless communications. The device lock down unfortunately is reminiscent of the old Ma Bell system, which stalled for years the introduction of the fax machine, modem and other breakthrough devices, until the FCC's seminal *Carterfone* decision. Consumers with iPhones or any device should enjoy the same basic rights they have in the wireline world, and not be locked into any particular network for years on end. In short, by providing for an open device platform, the Commission could do for the wireless and broadband markets what *Carterfone* did in the wireline context.

Based on recent press accounts, we applaud your leadership in acknowledging the importance of a "no lock" principle, which together with the other components of open access will bring new entry into the wireless market.[1] However, this principle should be spelled out clearly, as a binding requirement, and with a delineated enforcement provision. We further emphasize that device portability alone is not enough. "No lock" really means that the licensee should not be able to "lock down" the network, preventing new devices from attaching to it subject to do-no-harm rules.

Open Applications. Not only should consumers have the power to move devices from one network to another, but the applications installed on those devices must continue to function properly. Consumers moving a 700 MHz iPhone from AT&T to Verizon Wireless, for example, must still be able to use iTunes without also needing to subscribe to V-Cast. Consumers are eager to download and enjoy on their mobile devices the diverse content, services and applications that they have today in the home. Despite this demand and the willingness of entrepreneurs in Silicon Valley and elsewhere to fill it, mobile users generally are blocked from using all but the few "options" offered by the big wireless incumbents. Thus, even if consumers are free to use the device of their own choosing with a given network, that device will be of little value if the network owner can dictate what services a consumer can access. A Verizon Wireless subscriber will still be allowed only to use Verizon's voice telephony service, Verizon's text messaging service, Verizon's music service, Verizon's video service, and any other new services that emerge over time. Indeed, the innovation lessons of the Internet are apt here: one can never know what novel consumer applications are missing, simply because the major carriers failed to create them. If there is to be a next generation of wireless networks, there must also be clearly enunciated and enforceable prohibitions against the blocking of content, applications, and services.

[1] One drawback, however, is that with a build-out requirement limited to 75% of the population, one-fourth of Americans will not be able to benefit from this principle. We support instead options like a 99% build-out because we do not believe that one-fourth of Americans should be left behind.

Open Services. Competition must not end at the edge of the wireless network. One key difference between a mobile network device and a traditional hand held lies in the ability to have "always on" wireless mobile services. If a consumer can take a device from one network to another, but each time faces a new "gatekeeper" limiting access to the broader network, the advantage of the open device and open applications rules are lost. The Commission should therefore require that the licensee allow third party service providers to offer resold services without interference.

The pace of wireless innovation has been much slower here than in Europe and Asia because the best ideas too often are not allowed to cross over to the wireless world. The record in this proceeding is replete with examples of entrepreneurs who have been unable to obtain reasonable network access from the large retail incumbents.[2] To accomplish this, the licensees must make available all important network interfaces to wholesale customers and third-party application providers. By "important" network interfaces, we mean any network interface that enables meaningful differentiation of service to end users. Examples include geo-location information (e.g, via A-GPS) and quality of service (QoS) tiers. To the extent that such interfaces somehow are "costly" from a bandwidth perspective (as with quality of service), they must be available to all on reasonable and non-discriminatory terms.

Open Networks. Finally, it is also integral to open access to ensure that the licensee provide wholesale network capacity to service providers on a non-discriminatory basis. Only this last condition can provide iron-clad assurance that one or more independent broadband providers will emerge from the auction, either directly as a licensee or indirectly through leasing wholesale access after the auction. Well-established financial firms such as Citibank have informed the Commission that they are prepared to finance new entrants to bid on licenses with such wholesale requirements; this should relieve any concerns generated by the incumbents that no one will bid on licenses with wholesale access conditions. By contrast, venture capitalists and experienced entrepreneurs have repeatedly warned that without a wholesale access requirement ***no new entrant will find financing to compete against the largest incumbents***. And if only the incumbents show up to the auction, they will secure licenses at prices far below what could be possible in a more competitive bidding environment.

* * *

In conclusion, only if the Commission includes all four open principles as delineated, enforceable conditions to a real "open access" license block will potential new entrants be brought into the auction. Such an outcome will pave the way for robust competition in applications and content that will flow from an independent, nationwide, and open broadband platform. In contrast, potential new entrants can be expected not to participate meaningfully in the auction if it is structured to advantage the large incumbents, whose legacy business model favors closed networks.

The incumbents repeatedly have sought to protect the "status quo result" by accusing those that support competition of "rigging the auction" and "regulating business models." But numerous independent studies – as well as the record compiled in this proceeding

[2] *See, e.g.*, Letter from The Wireless Founders Coalition for Innovation, June 7, 2007.

– show quite the reverse. Without the license conditions proposed here, the advantages enjoyed by incumbents in spectrum auctions allow them to freeze out new entrants, eliminate rival business models, and deprive the American people of the total value of one of our most rare and precious public resources. The conditions will stimulate bidder participation and competition in the auction, thereby increasing auction revenue, especially as compared with the pro-incumbency plans advocated by Verizon. We continue to support the pro-competitive vision you announced on April 25, and urge you to finish the job of bringing a "real third pipe" to all Americans.

Respectfully submitted,

/s/

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Members of the Wireless Founders Coalition for Innovation

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