Public Knowledge

January 28, 2010

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

RE: Notice of *Ex Parte* presentation in:

GN Docket No. 09-51
GN Docket No. 09-137
GN Docket No. 09-191
WC Docket No. 07-52
CG Docket No. 09-158
CC Docket No. 98-170
WC Docket No. 04-36
WT Docket No. 09-66
GN Docket No. 09-157

Dear Ms. Dortch:

On behalf of Public Knowledge, this letter is to provide information relating to discussions between Public Knowledge (PK) and members of the Commission's staff on January 27, 2010.

Present at the meeting were: Harold Feld, Legal Director, PK; Michael Weinberg, Staff Attorney, PK; Sharon Gillett, Chief, WCB, FCC; Cathy Seidel, Deputy Chief, WCB, FCC; Nick Alexander, WCB, FCC; Randy Clarke, WCB, FCC; Carol Simpson, WCB, FCC; and Jenny Prime, WCB, FCC.

PK discussed its filing of January 26, 2010 recommending the FCC reclassify broadband as a Title II service or, at a minimum, clarify the basis of FCC Title I authority for each specific undertaking recommended in the National Broadband Plan. Uncertainty with regard to the FCC's authority impacts the following areas:

1) ***Ability to collect information for benchmarks***. While the FCC has clear and expansive authority under Title II to collect information from providers, the FCC has not identified a basis under Title I to collect any information pertaining to deployment, pricing, cost, speed, or uptake rates. Indeed, it is unclear that even the basic information collected in Form 477 under the Commission's Section 706 and BDIA responsibilities has a firm foundation in law. While the statute requires the FCC go determine "timely deployment," the extent of the authority granted the FCC to compel honest and complete responses remains unclear.

2) ***National Security/Public Safety***: What is the basis in ancillary authority for applying the NSEP TSP to broadband networks? The Commission made this determination in the *Wireline Framework Order*, but did not identify a statute to which the extension of NSEP TSP was "ancillary to."

1818 N St., NW
Suite 410
Washington, DC 20036

T 202.861.0020
F 202.861.0010
publicknowledge.org

3) ***USF Reform***: For any theory of USF reform adopted under the NBP, the Commission will need to provide a precise and tight link to a statutory duty under Title II.

4) ***Privacy*:** The Commission would appear to lack authority to apply CPNI or other privacy regulations under ancillary authority.

5) ***Transparency***. The existing truth in billing and consumer protection regulations apply to Title II and Title VI services. The Commission has yet to determine how applying such requirements to broadband could be deemed "reasonable ancillary" to the performance of its duties under Title II or Title VI.

6) ***Elimination of PSTN***: Even if the FCC were to find sufficient, specific ancillary authority for all of its NBP initiatives, and without regard to its pending determinations in the Open Internet rulemaking or the Truth-in-Billing NOI or other relevant dockets, what would happen if the FCC were to adopt AT&T's suggestion and sunset the PSTN? Unless AT&T is also suggesting that the network which replaces the PSTN would also be subject to Title II, how would any authority to take any action persist? As incumbents and the D.C. Circuit have consistently remind the Commission, authority must be ancillary ***to*** something. It cannot remain ancillary to the ghost of the PSTN.

7) ***Preemption of state action***: In the absence of clear FCC authority in any of these areas, is it wise to preempt state and local governments from creating complimentary regulatory regimes? Indeed, if the Commission lacks authority to regulate in a specific area under Title I, what is the legal basis for assuming Commission authority to preempt?

PK noted that answers could be found to these questions, but they remain unaddressed. Supporters of Title I ancillary authority for certain purposes, such as Comcast and AT&T, have simply asserted that the Commission has sufficient Title I authority to achieve its ends and therefore need not consider Title II reclassification. To date, however, Comcast and others taking this position have yet to provide a firm Title I basis for Commission authority for ***any*** specific measure, whether they support such a measure or oppose it.

PK therefore urged that the National Broadband Plan team should issue a public notice setting forth the specific areas of activity envisioned in the plan (at least in summary form) and soliciting ***specific and detailed*** explanations of the possible source of the FCC's exercise of ancillary jurisdiction for each. Mere general assertions of Commission authority should be regarded as suspect. Further, commenters should be encouraged to explain how exercise of the authority is "ancillary" to the fulfillment of a clear Title II, Title III, or Title VI obligation, and how statements of sufficient ancillary jurisdiction to warrant exercise of preemption authority are consistent with the positions taken in related proceedings that the Commission lacks sufficient authority to protect subscriber privacy, require provider transparency, or adequately protect consumers. The Commission should then evaluate whether it finds these varying justifications of its authority sufficient, whether they are outweighed by the objections of others, and whether it would facilitate the implementation of any aspect of the NBP to reclassify broadband access service, or some portion of the service (such as the transmission component) as a Title II service.

PK noted that reclassification would subject broadband to a "reasonable discrimination" standard under Section 201/202 rather than a "no discrimination, but reasonable network management" as proposed by some organizations in the pending Open Internet proceeding. In this regard, PK observed that Section 201/202 has never found it "reasonable" to permit prioritization of ***consumer initiated*** calls. That is to say, while the commission has found it reasonable for providers of tariffed services to offer volume discounts or other "reasonable discrimination" in an enterprise setting, the Commission has never allowed a business to pay for the ability to have calls initiated by consumers given priority when circuits are congested. The Commission has never permitted, and never would permit, a business to pay a provider subject to 201/202 so that "if a consumer makes a call to our phone number, drop someone else's call to ensure there is an open circuit for the call inbound to us."

In accordance with the FCC's *ex parte* rules, this document is being electronically filed in the above-referenced dockets today.

Sincerely,

_____/s/_____

Harold Feld
Legal Director
Public Knowledge

CC: Sharon Gillett
Cathy Seidel
Nick Alexander
Randy Clarke
Carol Simpson
Jenny Prime