

February 19, 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 a member of the Commission's staff on February 18, 2010.

Present at the meeting were: Harold Feld, Legal Director, PK; Michael Weinberg, Staff Attorney, PK; and Christine Kurth, Policy Director and Wireline Counsel, Commissioner McDowell, 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) ***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."
- 2) ***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.
- 3) ***Privacy***: The Commission would appear to lack authority to apply CPNI or other privacy regulations under ancillary authority.
- 4) ***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 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/
Michael Weinberg
Staff Attorney
Public Knowledge

CC: Christine Kurth