

August 6, 2010

Marlene Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554



Re: Notice of *Ex Parte* Presentation
GN Docket No. 10-127 (Broadband Internet Service Framework)
GN Docket No. 09-191 (Preserving the Open Internet)
GN Docket No. 09-51 (National Broadband Plan)

Dear Ms. Dortch:

On Thursday, August 5, 2010, representatives of several public interest organizations met with Chairman Julius Genachowski to present their unified position on specific matters in the above-captioned dockets. Also attending the meeting were Edward P. Lazarus, the Chairman's Chief of Staff; Rick Kaplan, his Chief Counsel and Senior Legal Advisor; and Zac Katz, his Legal Advisor for Wireline Communications, International and Internet Issues.

The Public Interest Representatives in attendance were Andrew McDiarmid, Center for Democracy & Technology; Mark Cooper, Consumer Federation of America; Bob Williams, Consumers Union; Joel Kelsey and Joe Torres, Free Press; Tyrone Brown and Matt Wood, Media Access Project; Beth McConnell and Chance Williams, Media and Democracy Coalition; Sascha Meinrath and Michael Calabrese, New America Foundation's Open Technology Initiative; and Harold Feld and Sherwin Siy, Public Knowledge.

During the meeting, the Public Interest Representatives stressed the importance of clarifying by a date certain the Commission's jurisdiction over broadband connectivity services. Such clarification is a prerequisite to any action the Commission may take to implement the National Broadband Plan (the "Plan"), as well as a necessary framework for enforcing meaningful Open Internet rules that would preserve innovation, investment, free speech, and consumer choice online.

The Public Interest Representatives thereafter presented their common, baseline positions on matters of vital importance in the Open Internet proceeding. Several of these points reportedly were at issue in the recently concluded round of so-called stakeholder discussions held at the Commission with a small group of companies and associations. While the Public Interest Representatives' respective organizations strongly disagreed at times with the manner in which such discussions occurred, the Public Interest Representatives nonetheless agree on the importance of debated questions such as the application of rules to wireless networks, "managed service" exceptions, and the harms stemming from schemes for paid prioritization.

For these reasons, the Public Interest Representatives respectfully suggested during the meeting that the Commission make the following determination with respect to its authority, then adhere to the Open Internet principles described below in brief.

Classify broadband connectivity as a telecommunications service.

Supreme Court precedent strongly suggests that such a statutory determination would be well within the Commission's discretion. Technological and marketplace realities confirm that this classification decision would be eminently reasonable. Taking this path would provide the surest and swiftest jurisdictional framework for preserving the Open Internet and implementing the key facets of the National Broadband Plan, while it simultaneously would provide certainty for broadband network operators, broadband users, and Internet innovators alike.

The Public Interest Representatives expressed serious doubt about the enforceability of any compromise or consensus solution in the absence of clear Title II authority, explaining that the substance of the Commission's rules and the process used to adopt them are inextricably intertwined. Private agreements on network management, whether brokered by the Commission or not, would be meaningless without clear Commission enforcement authority. Furthermore, the Public Interest Representatives noted that even if consensus on legitimate Open Internet rules were possible, such an understanding would not resolve questions regarding the Commission's ability to implement other elements of the Plan, nor ensure the Commission's authority to protect consumers online while awaiting possible legislation.

Adopt a common regulatory framework and rules for wired and wireless services.

The exclusion of wireless networks from the Commission's broadband regulatory framework or Open Internet rules would have severe negative repercussions. Having consistent principles in place would not preclude consideration of technology in determining what network management practices may be "reasonable." Yet, the failure to adopt common principles would widen the digital divide by ensuring a different and less open experience for traditionally underserved regions and demographic groups that may more often need to access or choose to access the Internet on a mobile device.

Bifurcating the framework also could skew investment toward deregulated wireless platforms with less capacity than wired networks – further dampening innovation as well as attainment of broadband national purposes, while lessening the potential for wireless platforms to compete with wired offerings or serve remote areas pursuant to the Plan's universal broadband goals. The Public Interest Representatives noted strong support from various industry sectors for a unified framework. They also highlighted the confusion that would arise if consumers were to have disparate experiences depending solely on the connection that their mobile devices might use to reach the Internet, especially as consumers use more and more hybrid devices that may gain access over carrier-licensed spectrum one minute and over a WiFi connection the next.

Finally, the Public Interest Representatives pointed out that many international regulators have adopted unified regulatory frameworks for wireline and wireless data communications networks.

Limit “managed services” to avoid exceptions that would overwhelm the Internet.

An overbroad definition and conceptualization of the proposed “managed services” category would impact detrimentally the growth and vitality of the Internet. In fact, such overbreadth would create an exception that swallows the rule. For example, managed services might consist simply of rebranded or repackaged services and applications typically delivered today over the Open Internet. In that case, broadband connectivity providers likely would prioritize such services in terms of provisioning available bandwidth and investing in networks, decreasing or freezing in place current Open Internet capacities and capabilities.

Network operators also could attempt to create a multi-purpose “managed service” that purports in some fashion to replicate the broadband Internet experience, while not – in name, at least – replacing traditional Internet access. In reality, such a service would constitute a walled-garden in which openness, transparency, and nondiscrimination protections might not apply. Such services could be used to fashion exclusive arrangements and foster other anticompetitive network management practices. The Public Interest Representatives urged the Chairman and other Commission attendees at the meeting to ensure that managed services would not undermine the fundamental character, utility, and vitality of the Open Internet, nor diminish and degrade the level of Internet access offered to the public by broadband connectivity providers.

Recognize that paid prioritization is antithetical to openness on the Internet.

Paid prioritization on the Open Internet (and in a “managed services” context as well) must be presumed harmful and an unreasonable network management practice, whether such prioritization is paid for by a third-party or used to favor a broadband network operator’s affiliates. Such arrangements would favor certain content providers by permitting them to buy or otherwise obtain priority access at congested nodes. By definition, prioritizing some traffic in this type of data network results in degrading other traffic. Furthermore, prioritization only has value during times when such a network experiences congestion. Therefore, rules permitting such prioritization would create perverse incentives for broadband connectivity providers to delay network capacity investment in order to profit from artificial scarcity.

Rules permitting paid prioritization of the sort described here also would harm edge investment by skewing demand for online applications and services, as any applications and services offered on a non-priority basis likely would not function well enough to serve as substitutes for prioritized alternatives. Thus, such rules would depress edge company investment and jeopardize the innovation economy. The Public Interest Representatives respectfully submitted that the principle of open, nondiscriminatory transmission is essential for two-way communications networks. The Communications Act recognizes this truth, and the *de facto*

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application of this principle to the Internet allowed it to become the best communications infrastructure for twenty-first century commercial markets as well as the marketplace of ideas.

At the conclusion of this presentation, the Public Interest Representatives briefly discussed with the Chairman and his staff the potential timing and structure of various Commission actions and decisions that could be made to implement the policy goals outlined above.

We submit this letter to the Secretary's office today pursuant to Section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b). Please contact the undersigned should you have any questions regarding this submission.

Respectfully submitted,

/s/ Matthew F. Wood

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Media Access Project

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Beth McConnell
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Joel Kelsey
Joe Torres
Free Press

Harold Feld
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Public Knowledge

cc: Chairman Julius Genachowski
Edward P. Lazarus
Rick Kaplan
Zac Katz