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September 15, 2010

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Preserving the Open Internet*, GN Docket No. 09-191; *Framework for Broadband Internet Service*, GN Docket No. 10-127

Dear Ms. Dortch:

During the course of the net neutrality debate, certain pro-regulation advocates have argued that "[n]o Internet packets should be given priority over others" and have repeatedly urged the Commission to ban "paid prioritization," which they claim is "the antithesis of openness on the Internet."[1] More recently, however, leading proponents of net neutrality regulation – the Open Technology Initiative (OTI) at the New America Foundation and the Center for Democracy & Technology (CDT) – acknowledge that existing Internet access services that include the capability to prioritize traffic for a fee, including those currently offered by AT&T, are consistent both with the way the Internet was designed to operate as well as the approach to net neutrality "widely supported by public interest groups."[2] In their view, the dispute over prioritization of Internet traffic is far narrower than AT&T and others had assumed, and there is actually more agreement than disagreement on one of the more contentious issues in the net neutrality debate. In this respect, their letters show that the Commission's effort to promote a continued dialog in furtherance of consensus solutions, rather than the knee-jerk regulatory response suggested by some parties,[3] is the approach that will best foster an open Internet while encouraging broadband investment and job-creation.

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[1] Free Press, *Dismantling Digital Deregulation*, at 76 (May 2009), http://www.freepress.net/files/Dismantling_Digital_Deregulation.pdf; Free Press, *Paid Prioritization: The Antithesis of Openness on the Internet* (July 26, 2010), http://www.freepress.net/resource/paid-prioritization-antithesis-openness-internet. *See also* Public Knowledge, Oral Testimony of Gigi B. Sohn, FCC Workshop: Approaches to Preserving the Open Internet (Seattle WA, April 28, 2010); Letter from S. Derek Turner, Free Press, to Marlene Dortch, FCC, GN Docket No. 09-191 (July 28, 2010); Letter from S. Derek Turner, Free Press, to Marlene Dortch, FCC, GN Docket No. 09-191 (Aug. 3, 2010).

[2] Letter from Josh King, et al, Open Technology Initiative, New America Foundation, to Marlene Dortch, FCC, GN Docket Nos. 09-191, 10-127, at 4 (Sept. 1, 2010) (OTI Letter); Letter from Alissa Cooper, et al, Center for Democracy and Technology, to Marlene Dortch, FCC, GN Docket Nos. 09-191, 10-127, at 2, 3 (Sept. 8, 2010) (CDT Letter).

[3] Free Press, FCC Delays Rulemaking on Net Neutrality Again (Sept. 1, 2010) ("It is time for the FCC to stop writing notices and start making clear rules of the road."), http://www.freepress.net/press-release/2010/9/1/fcc-delays-rulemaking-net-neutrality-again.

Nonetheless, and notwithstanding their concession regarding the propriety of existing prioritization services, a significant area of disagreement remains. In particular, OTI and CDT continue to advocate for a sweeping, preemptive ban on all forms of Internet traffic prioritization that involve a "third party" content or application provider paying for the prioritization of Internet traffic over an "end user's" "last mile" Internet connection – even when the end user consents to such prioritization.[4] Their advocacy for this bright-line prohibition (and their apparent rejection of a case-by-case approach to examining new IP-based services), however, is based on mischaracterizations of a technical mechanism developed by the Internet Engineering Task Force (IETF) to enable traffic prioritization. But beyond that, the preemptive ban they seek makes no sense from a public policy perspective. To the contrary, based on nothing but speculation, the ban they seek would have the perverse effect of preventing the introduction of new, pro-consumer services that could further the Administration's and Congress's goals of using broadband to improve healthcare delivery through telemedicine; education through distance learning; the environment through telecommuting; and many other national imperatives. Thus, the ban they seek would run directly counter to "the policy of the United States to encourage the provision of new technologies and services to the public."[5]

Below, we summarize our understanding of the key areas where OTI, CDT and AT&T appear to be in agreement on prioritization of Internet traffic. We then address so-called third party "paid prioritization," where a difference of opinion still exists.

A. Areas of Apparent Agreement on Prioritization of Internet Access Traffic

1. *Existing Prioritization Services Are Permissible*. As AT&T has previously explained, we and other providers are currently offering -- and a wide range of business customers are currently using -- services that prioritize Internet traffic. In particular, AT&T offers an enterprise-grade Internet access service, known as Managed Internet Service (MIS), which provides business customers with the ability to access the Internet and, if the customer chooses, the capability (for an additional fee) to designate certain performance-sensitive traffic for special handling in the event of network congestion.[6] AT&T sells this service to hundreds of customers who voluntarily subscribe to the prioritization option, the substantial majority of whom are small and medium-sized businesses.[7] In their letters, OTI and CDT agree with AT&T that this MIS

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[4] *See infra* Section B.

[5] 47 U.S.C. § 157.

[6] *See* Letter from Robert W. Quinn, Jr., AT&T, to Marlene Dortch, FCC, GN Docket Nos. 09-191, 10-127 (Aug. 30, 2010) (AT&T Letter); AT&T Reply Comments, GN Docket No. 09-191, at 8-9 (April 26, 2010). In addition to the enterprise-grade services available in the U.S., AT&T understands that residential Internet access services with prioritization capabilities are available in other countries. *See, e.g.*, Demon Broadband, Gamer Broadband Service (U.K. ISP offering Internet access with "traffic prioritisation" for an enhanced online gaming experience), *available at* http://www.demon.net/gamer-broadband/game-pro/.

[7] AT&T Letter at 4. MIS customers may choose to use this prioritization capability to, among other things, ensure that in the event of congestion, latency- or jitter-sensitive voice or video traffic receives the network performance it needs to function properly or to ensure that traffic from online commercial transactions (e.g., credit card purchases) are processed optimally.

service, and similar services currently offered by other providers, are consistent with the mechanism that the IETF designed to enable prioritization of real-time and other performance sensitive Internet traffic, known as the differentiated services field or "DiffServ."[8] CDT also concedes that these services are "unobjectionabl[e]"[9] and, importantly, OTI agrees that the services are consistent with the DiffServ mechanism and "do not violate proposals for network neutrality."[10]

2. *Payment for Traffic Prioritization Is Permissible.* AT&T previously demonstrated that MIS, which gives customers the option to prioritize performance-sensitive Internet access traffic for an additional fee, is consistent with the IETF's statement in RFC 2475 that "[s]ervice differentiation is desired to accommodate heterogeneous application requirements and user expectations, and *to permit differentiated pricing of Internet service*."[11] Similarly, the Information Technology & Innovation Foundation has explained to the Commission that "the creation of the DiffServ architecture was explicitly driven, in part, by the desire to enable operators to create new billable services."[12] OTI acknowledges that AT&T receives "payment" for MIS, which as discussed above, includes the additional fee for use of traffic prioritization capabilities.[13] CDT likewise recognizes that AT&T and other providers "charge business customers for the ability to prioritize" certain Internet traffic.[14] Notwithstanding any objection it may have to some other form of third party "paid prioritization," however, CDT states that "differential pricing may certainly be used in conjunction with DiffServ" and it agrees that AT&T's offering of a service that includes payment for Internet access traffic prioritization in this context is "unobjectionabl[e]."[15] OTI likewise asserts that AT&T's offering "would not be impacted by the network neutrality framework widely supported by public interest groups."[16]

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[8] DiffServ is one of many different mechanisms designed to enable the differential treatment of traffic. As the Information Technology & Innovation Foundation has explained, "Networks employ several means for identifying the desired class of service for particular packets above and below the level of the DiffServ option in the Internet Protocol; Quality of Service designators are found in IEEE 802.1d (VLAN,) 802.3 (Ethernet,) and 802.11e (Wi-Fi.) They are also found in DOCSIS, DSL, in BGP Community Attributes and in MPLS. The oft-repeated claim that all packets are equal on the Internet, or if they aren't, their inequality is strictly under user control, is false as a matter of architecture and of empirical fact, but no amount of evidence seems capable of putting the fiction to bed." ITIF Reply Comments, GN Docket No. 10-127, at 7 (Aug. 9, 2010).

[9] CDT Letter at 3.

[10] OTI Letter at 4.

[11] AT&T Letter at 3 (quoting RFC 2475 at 3 (emphasis added)).

[12] ITIF Reply Comments, GN Docket No. 10-127, at 5.

[13] OTI Letter at 4.

[14] CDT Letter at 3.

[15] CDT Letter at 3. Contrary to CDT's suggestion, AT&T did not claim that the IETF was "involve[d] in matters of payment." CDT Letter at 3. Rather, based on RFC 2475's statement that DiffServ is desired "to permit differentiated pricing of Internet service," AT&T stated that the IETF "expressly contemplated" paid prioritization. AT&T Letter at 1. Indeed, as CDT itself acknowledges, RFC 2474 states that "much of the details of service construction are covered by legal agreements *between different business entities*." CDT Letter at 3 (quoting RFC 2474 at 4) (emphasis added). *See also* RFC 2475 at 7

3. *Intra-Network and End-to-End Prioritization Is Permissible*. OTI and CDT also agree with AT&T that, consistent with IETF specifications, prioritization of Internet traffic may be offered on an "intra-network basis."[17] In other words, Internet traffic may be prioritized from the customer's premise to the point where the traffic leaves the provider's network on its way to another network. OTI and CDT further agree with AT&T that prioritization of Internet traffic on an "end-to-end" basis "across multiple networks" is consistent with IETF specifications,[18] even if it is not occurring in any significant way in today's marketplace.

4. *End Users Are Permitted to Mark Packets for Prioritization and Network Operators Are Responsible for Managing Prioritization Designations*. OTI asserts that DiffServ was designed to enable customers of a DiffServ-enabled service to mark packets for priority handling.[19] Contrary to OTI's apparent understanding of our position on this point, AT&T does not disagree. In our recent letter addressing this issue, we were responding to Free Press's suggestion that, once a packet is marked by a customer for priority handling, an ISP using DiffServ had no choice under the DiffServ mechanism but to honor the packet as so marked. We pointed out that, contrary to Free Press's inaccurate claims, the IETF source document on this topic (RFC 2474) states that "it is the responsibility of [the] network to control the access to, and

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(defining Service Level Agreement). Thus, while the RFCs obviously did not specify the terms of those agreements (and AT&T did not suggest otherwise), they clearly show that the IETF expected that interested parties would enter into commercial arrangements to enable "differentiated pricing of Internet service."

[16] OTI Letter at 4. OTI and CDT assert that "paid prioritization" is actually a term of art that is narrower than AT&T and others may have understood it to be. They claim that many services involving payment for prioritization of Internet traffic do not, in fact, constitute "paid prioritization" as they understand that term. OTI Letter at 3-4; CDT Letter at 1-2. As CDT explains, "paid prioritization" involves content or application providers – which CDT and OTI refer to as a "third party" – paying a fee for an ISP to deliver traffic in a prioritized manner over the "last-mile facilities" of the ISP's subscribers. This type of prioritization, according to CDT, is different from so-called "user-driven prioritization," which also involves payment for prioritization of traffic over the ISP's last-mile facilities, but which is "unobjectionabl[e]" because it is performed at the direction of the ISP's subscriber. CDT Letter at 2. Regardless of the idiosyncratic definitions that OTI and CDT assign to the practice they describe as third party "paid prioritization," however, AT&T disagrees that such a practice is improper. *See infra* Section B.

[17] OTI Letter at 4 (describing a hypothetical business customer's decision to prioritize certain traffic flows on its ISP's network, and noting that such prioritization ends when the traffic leaves the ISP's network); CDT Letter at 3 note 8 (discussing RFC 2474 definition of the term "service" as describing the treatment of a subset of a customer's traffic "across a particular domain, across a set of interconnected DS domains, or end-to-end.").

[18] OTI Letter at 2 (discussing the "end-to-end traffic prioritization technologies of DiffServ"); CDT Letter at 3 note 8; AT&T Letter at 4, note 17.

[19] OTI Letter at 2. Although CDT does not directly address the issue of marking packets, it appears to agree with AT&T and OTI that end users may mark packets under the DiffServ mechanism. *See* CDT Letter at 2 (discussing "user-driven prioritization").

use of, [the] precedence designations" for DiffServ.[20] Indeed, RFC 2474 further states that "[a] packet initially marked for the Default behavior may be re-marked with another codepoint as it passes a boundary into a DS [Differentiated Service] domain so that it will be forwarded using a different PHB [Per Hop Behavior] within that domain, possibly subject to some negotiated agreement between the peering domains."[21] In fact, RFC 2474 specifically warns that the failure of a network operator to monitor and, where appropriate, re-mark traffic entering its network could result in "theft-of-service" (e.g., by enabling a customer to mark a greater percentage of packets for prioritization than the customer's service agreement permits) or, worse still, a "denial-of-service attack" that "would disrupt operation" of the network.[22] In all events, we did not suggest that customers of an ISP's network had no role in marking packets for prioritization; indeed, AT&T's MIS customers may perform that packet marking function today.

5. *AT&T's MIS Service Is Consistent with AT&T's Merger Commitments*. OTI implies that the Commission may want to investigate whether AT&T's MIS service violates its net neutrality commitments from the AT&T/BellSouth merger.[23] This suggestion appears to have been designed merely for rhetorical effect, as OTI later concedes that "we do not believe" that AT&T engaged in conduct that "would have violated the AT&T/BellSouth merger conditions at the time they were applicable."[24] For the avoidance of any doubt, however, AT&T wishes to emphasize that it has complied fully with its net neutrality merger commitments and any suggestion to the contrary is unfounded and incorrect.

As the preceding discussion makes clear, there is a broad consensus that, in a variety of circumstances, prioritizing Internet traffic for a fee is both consistent with the IETF's RFCs and also beneficial to the entities using those prioritization capabilities. Thus, assuming *arguendo* that the Commission had authority to restrict or prohibit the prioritization of Internet traffic for a

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[20] AT&T Letter at 2 (quoting RFC 2474 at 8). Rather than responding substantively to AT&T's letter pointing out the numerous inaccuracies in Free Press's filings, Free Press has chosen to issue a press release claiming that AT&T should "retract" its Letter because it contains "disinformation." Free Press Release, Public Inertest Groups Call on AT&T to Retract Letter and Stop Disinformation Campaign (Sept. 8, 2010). AT&T stands by its original letter, which, unlike Free Press's filings, quotes directly from the relevant IETF technical documents. Indeed, if anything should be "retracted" here, it is Free Press's grossly inaccurate filings. *See* ITIF Reply Comments at 4-8 (discussing errors in Free Press's filings). *See also Housely: IETF Has Taken No Position on AT&T Prioritization Assertions*, Multichannel News (Sept. 10, 2010), http://www.multichannel.com/article/456908-Housely_IETF_Has_Taken_No_Position_On_AT_T_Prioritization_Asssertions.php.

[21] RFC 2474 at 10.

[22] RFC 2474 at 15-16. Although OTI (at 3) asserts that network operators should not be permitted to "override the priorities set by end users," we would encourage OTI to revisit that position in light of the plain language of RFC 2474.

[23] OTI Letter at 1. OTI also alleges that AT&T's offering of fee-based prioritization capabilities to businesses that are minority-operated or serve minority communities "raises deep concerns" that the Commission may wish to investigate. OTI Letter at 1. OTI does not elaborate, however, on what possible concern may arise from a provider giving minority-oriented businesses the option to voluntarily purchase services that can improve the quality of their performance sensitive applications and content.

[24] OTI Letter at 1. CDT does not raise any issues related to AT&T's merger commitments.

fee,[25] there appears to be unanimous agreement that the Commission should not preemptively ban all forms of such prioritization.

B. Areas Where Agreement on Prioritization of Internet Access Traffic Has Not Yet Been Reached

OTI and CDT assert that "paid prioritization" of Internet access traffic over "residential last mile networks" at the direction of a "third-party" content or application provider that is not the ISP's Internet access customer is contrary to the IETF's RFCs, is inconsistent with public policy, and should be banned by the Commission.[26] AT&T strongly disagrees for the following reasons.

First, the IETF's RFCs do not limit the prioritization of Internet access traffic (paid or otherwise) to a specific portion of a provider's network or otherwise exclude "residential last mile connections" from the DiffServ mechanism. To the contrary, as AT&T previously pointed out, DiffServ-based prioritization "may be either *end-to-end* or intra-domain."[27] Indeed, RFC 2475 explains that DiffServ was designed to "accommodate a wide variety of services and provisioning policies, extending end-to-end or within a particular (set of) network(s)."[28] In fact, OTI and CDT agree that the IETF's RFCs on DiffServ describe "end-to-end" traffic prioritization technologies.[29] Any such end-to-end traffic prioritization must necessarily include last mile connections to end users, otherwise it would not be "end-to-end." OTI and CDT do not and cannot cite anything in the RFCs to the contrary.

Second, RFCs 2474 and 2475 do not restrict the use of DiffServ to "user-driven prioritization" (as opposed to content/application provider-driven prioritization), as CDT incorrectly suggests.[30] Nor does RFC 2475, as OTI wrongly alleges, "very clearly state that control over prioritization should be determined by the customer in the last mile network" and not by any other party, such as a content or application provider.[31] Rather, in the specific passage cited by OTI, RFC 2475 discusses various architectures for implementing DiffServ and describes the concept of a "source domain," which it broadly defines as a domain that "contains the node(s) originating the traffic receiving a particular service."[32] Just like other Internet users,

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[25] *Preserving the Open Internet*, GN Docket No. 09-191, Notice of Proposed Rulemaking, FCC 09-93, ¶¶104, 106 (released Oct. 22, 2009).

[26] OTI Letter at 2, 3, 4. *See also* CDT Letter at 2, 4-5.

[27] RFC 2474 at 1 (emphasis added). *See also id*. at 3, 6.

[28] RFC 2475 at 8. *See also id.* at 22 (explaining that the differentiated packet-forwarding enabled by DiffServ "can be designed with the intent of providing host-to-host, WAN edge-to-WAN edge, and/or domain edge-to-domain edge services.").

[29] OTI Letter at 2; CDT Letter at 3 note 8.

[30] CDT Letter at 2.

[31] OTI Letter at 2.

[32] OTI letter at 2 note 1; RFC 2475 at 7. CDT does not cite any RFCs for its claims about "user-driven prioritization." CDT Letter at 2.

content and application providers "originate" traffic that is destined for other parties on the Internet (e.g., sending the contents of a webpage, music file or video to another Internet user) and thus they clearly fit within the definition of "source domain."[33] And in all events, there is nothing in the RFC to suggest, as OTI incorrectly asserts, that content and application providers are in any way excluded from the definition of "source domain."

Moreover, RFC 2475 envisions that traffic prioritization arrangements would be implemented through service level agreements (SLAs) both between network operators and their users *and* between a network operator and other network operators.[34] Thus, to the extent a content or application provider is considered a network operator's end user (e.g., it purchases Internet access service from the network operator) or the content or application provider operates its own network (in the parlance of RFC 2475, it is an "upstream domain"), the plain language of RFC 2475 contemplates that the content or application provider may enter into an SLA with a network operator for traffic prioritization.[35] OTI and CDT do not, and cannot, cite anything in the RFCs to suggest that such SLAs are restricted solely to arrangements between an ISP and its "end user."

Third, aside from OTI's unfounded speculation about what might occur at some future point in time, it offers no evidence that "paid prioritization" of Internet access traffic over residential last mile networks at the behest of third-party content or application providers is being, or will be, used for nefarious purposes. To the contrary, such services could, in the future, be used to significantly benefit consumers and businesses. Indeed, such services could be used to facilitate the cost-effective delivery of a wide variety of performance-sensitive content and applications that would further the Administration's and Congress's ambitious goal of using broadband to improve healthcare through telemedicine; education through distance learning; the environment through telecommuting, and many other national imperatives.

For example, to improve patient welfare and reduce unnecessary in-hospital expenses, a hospital may, in concept, wish to provide a medical application (e.g., wireless heart monitoring) delivered to patients in their homes over their Internet access connections. Such a monitoring application may have stringent end-to-end network performance requirements that necessitate traffic prioritization, including in the "last mile" connection to the end user. The hospital may wish to purchase such traffic prioritization capabilities from a patient's ISP and transparently include them in the monitoring application, rather than requiring the patient with the heart condition to take responsibility for the technically sophisticated process of acquiring and configuring the requisite prioritization capabilities. Despite the obvious benefits of such an application for patients and hospitals (and insurance carriers), it would presumably be banned under OTI's and CDT's approach because it involves a third party application provider (the

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[33] *See, e.g.*, *Preserving the Open Internet*, GN Docket No. 09-191, Notice of Proposed Rulemaking, FCC 09-93, at 95 (released Oct. 22, 2009) (pointing out that anyone who uploads content to the Internet is a content sender).

[34] RFC 2475 at 7 (defining an SLA as "a service contract between a customer and a service provider that specifies the forwarding service a customer should receive. A customer may be a user organization (source domain) or another DS domain (upstream domain)."). *Id.* at 14 (discussing SLAs).

[35] RFC 2475 at 7.

hospital) paying an ISP to prioritize traffic over the last mile connection to the end user (the patient).

Similarly, to broaden educational opportunities for rural and/or low income students, a university may want to offer scholarships for distance learning programs that enable the students to participate in online classroom applications with real-time video, voice and data over their Internet access services. Or, to reduce greenhouse gasses associated with commuting while simultaneously reducing the overhead costs of employing workers in a traditional office building, a business may want to provide telecommuting applications to its employees over their Internet access services. Like the medical monitoring applications discussed above, some of these educational and telecommuting applications may have stringent end-to-end network performance requirements that necessitate traffic prioritization, including in the "last mile" connection to the end user, which the university or employer may wish to purchase from the student's or employee's ISP and transparently include in the respective applications. But, as in the previous example, these arrangements presumably would be prohibited under OTI's and CDT's approach because they involve a third party application provider (the university or employer) paying an ISP to prioritize traffic over the last mile Internet access connection to the end user (the student or employee).[36] And this prohibition would apparently apply to all of these arrangements – even when the end user (e.g., the patient, student or employee) consents to the third party paying for prioritization in the "last mile."[37]

The preceding examples merely hint at the wealth of pro-consumer applications and services that could be made available in the future. Indeed, countless other applications and services may benefit from various forms of third party "paid prioritization" arrangements, from online gaming to smart grid control systems to high-definition video conferencing to new, innovative applications and services that have yet to be conceived. Consistent with the Commission's well-established and highly successful "light touch" approach to Internet-based services and Congress's policy "to encourage the provision of new technologies and services to the public," these types of applications and services -- and the third party "paid prioritization" capabilities that could make them possible -- would, under normal circumstances, have the opportunity to succeed (or fail) on their own merits based on the value they provide to their users. And, consistent with its past practices, the Commission would continue to closely monitor the development of the market for such services to ensure that it develops in a pro-consumer fashion. By contrast, preemptively and blindly prohibiting arrangements for conceptual, or even yet to be conceived, third party "paid prioritization" services before they have even been introduced, as OTI and CDT advocate, would amount to a prior restraint on innovation and

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[36] To be sure, OTI and CDT may claim that they did not intend for such services to be prohibited, but that would just underscore the fundamental problem with their approach to net neutrality regulation – preemptive bans on the introduction of new services and capabilities will undoubtedly have unintended consequences that harm consumers.

[37] CDT Letter at 2 (prioritization is permissible on "last mile facilities" only when it is "*directed <u>and</u> paid for by end users*) (italics in original, underline added). *See also* OTI Letter at 4 (describing permissible prioritization as involving "decisions made entirely be end users for their own connections" and not involving "third parties.").

investment that would needlessly undermine broadband deployment, job-creation and consumer welfare without any record evidence to support such a prohibition.[38]

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As noted above, AT&T believes that there is growing consensus on the pro-consumer benefits of Internet traffic prioritization and much more agreement than disagreement when it comes to the merits of such prioritization. To the extent OTI and CDT (or other parties) are interested in continuing this dialog, we would encourage them to contact us directly so that we can mutually explore constructive solutions regarding these important issues.

Sincerely,

Robert W. Quinn, Jr.

cc: Chairman Julius Genachowski
Commissioner Michael J. Copps
Commissioner Robert M. McDowell
Commissioner Meredith Attwell Baker
Commissioner Mignon Clyburn

[38] AT&T has raised these concerns in greater detail in numerous filings with the Commission and we intend to address them again in response to the Commission's request for additional comment in its Open Internet proceeding. *See, e.g.*, AT&T Comments, GN Docket No. 09-51, at 103-115 (June 8, 2009); AT&T Comments GN Docket No. 09-191, at 65-69, 103-183 (Jan. 14, 2010).