



400 N. CAPITOL STREET, NW, SUITE 585
WASHINGTON, DC 20001
OPENINTERNETCOALITION.COM

December 6, 2010

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

**Re: Notice of Oral *Ex Parte* Communication
Preserving the Open Internet, GN Docket No. 09-191
Broadband Industry Practices, WC Docket No. 07-52**

Dear Ms. Dortch:

We submit this notice in compliance with Section 1.1206(b) of the Commission's rules.

On December 3, 2010, the following individuals and I met with Commissioner Mignon Clyburn: Jeffrey Blum of Dish Network, Staci Pies of Skype, Emmett O'Keefe of Amazon.com, Aparna Sridhar and Joel Kelsey of Free Press, Andy Schwartzman of Media Access Project, Sascha Meinrath of the Open Technology Initiative at the New America Foundation, and Gigi Sohn of Public Knowledge. David Grimaldi, Angela Kronenberg, Louis Peraertz, and Alexander Reynolds of Commissioner Clyburn's staff also attended the meeting.

We discussed the Commission's ongoing efforts to establish open Internet rules. Consistent with our respective organizations' prior filings, we emphasized the following points:

(1) We emphasized that if press reports are accurate, the Commission's most recent proposal does not adequately protect users who access the Internet via wireless networks. In particular, we argued that broadband users reach one Internet, regardless which technology they use to access that Internet. We also noted that the failure to impose a no-

blocking rule and nondiscrimination protections to the wireless space has the potential to cause grave harm to innovators and entrepreneurs — they cannot be assured that they may bring new content, applications, and services to the market without the permission of network operators. We emphasized that selectively prohibiting blocking of only competing voice and video telephony applications would open the door to a myriad of practices that would curtail consumer choice, raise prices and limit innovation. As written, the rule has the potential to permanently stunt the natural growth of wireless broadband offerings, ensuring they will never be a true competitor to wireline services. Further, we argued that the Commission should be especially careful to protect wireless broadband access because such access is more likely to be used in the future by communities that are currently unserved or underserved. We also observed that any differences between wireline and wireless technology do not counsel in favor of two sets of rules — rather, a context-specific definition of reasonable network management will allow wireless network operators adequate flexibility to manage their networks. To the extent that there should be a divergence in how wireline and wireless networks are treated, we suggested the Commissioner consider applying the wireline nondiscrimination rules to wireless networks that are fourth generation or higher.

(2) We emphasized that paid-prioritization agreements between content providers and broadband access providers fundamentally harm innovation and competition in the market for Internet content, applications, and services. In particular, we observed that paid-prioritization arrangements represent the one business practice that open Internet rules should be most clearly designed to guard against. We expressed concern that the Commission's proposal fails to either ban such agreements or state that such agreements are presumptively unreasonable. A rule falls short in this regard fails to accord adequate protection to Internet users, innovators, and investors.

(3) We expressed concern that the definition of broadband Internet access set forth in the legislative proposal initiated by Representative Henry Waxman this summer creates significant loopholes that may allow Internet service providers to evade the rule's broader protections. We recommended that the Commission retain the definition of broadband Internet access proposed in its October 2009 Notice of Proposed Rulemaking in this docket.

(4) We expressed concern that the Commission intends to pursue its *Open Internet* rulemaking based on its authority under Title I of the Communications Act. We argued that there is very strong evidence in the record supporting reclassification of broadband internet services under Title II. By contrast, adopting open internet rules under Title I authority would create endless litigation and, consequently, uncertainty which would adversely affect markets and innovation.

December 6, 2010

Page 3

Very truly yours,

_____/s/_____

Markham C. Erickson
Partner, Holch & Erickson LLP and
Executive Director
Open Internet Coalition

cc: Commissioner Mignon Clyburn
David Grimaldi
Angela Kronenberg
Louis Peraertz
Alexander Reynolds