

December 7, 2010

ELECTRONIC FILING

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

Re: Notice of *Ex Parte* Meetings, GN Docket No. 09-191, WC Docket No. 07-52

Dear Ms. Dortch:

On December 6, 2010, I, Barbara van Schewick, met with Commissioner Michael J. Copps, John Giusti, Chief of Staff to Commissioner Copps, and Margaret McCarthy, Commissioner Copps' Policy Advisor, Wireline.

I also met with Edward P. Lazarus, Chief of Staff to the Chairman.

In both meetings, the discussion focused on the Chairman's recent Open Internet proposal. The discussion covered the following areas:

**Non-discrimination rule**

The current proposal bans discrimination that is "unjust" and "unreasonable." Whether these criteria are met, will be decided by the FCC in case-by-case adjudications. As explained in detail in prior filings in this proceeding,<sup>1</sup> a rule that doesn't clearly define what behavior is and is not allowed does not provide enough certainty for industry participants and puts start-ups and innovators with little or no outside funding at a disadvantage.

Instead, the FCC should adopt a rule that clearly defines which behavior is and is not acceptable. As proposed earlier in this proceeding, I suggest that a non-discrimination rule that bans application-specific discrimination (i.e. discrimination based on the specific application, the identity of the application provider or the class of application), but allows application-agnostic discrimination would be preferable.

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<sup>1</sup> See, e.g., van Schewick, Barbara. 2010a. "Network Neutrality: What A Non-Discrimination Rule Should Look Like." Paper presented at 38th Research Conference on Communication, Information and Internet Policy (TPRC 2010), <http://ssrn.com/abstract=1684677>.

Such a rule would provide certainty to market participants. It would protect the application-blindness of the network and preserve the principle of user choice, factors which have fostered application innovation in the past. It would prevent network providers from distorting competition among applications or classes of applications, while providing room for the network to evolve. In particular, it would allow certain, but not all forms of Quality of Service.

### **Access fees**

It seems that the proposed rule would not clearly ban access fees – that is, it would not prohibit a network provider from charging application or content providers who are not its Internet service customers for access to the network provider’s Internet service customers, or for prioritized or otherwise special access to these customers. (I assume that fees for interconnection among networks are not affected by the Open Internet proceeding.)

For reasons discussed in earlier testimony in this proceeding,<sup>2</sup> the rules should ban access fees. Leaving the legality of access fees to case-by-case adjudications creates uncertainty in the market. At the same time, those who will be most affected by access fees (such as innovators with little or no funding, or public interest groups) would be least able to bear the burden of defending themselves in a future adjudication.

### **Wireless**

The current proposal does not provide the same protections for wireless as for wireline networks. It only prohibits the blocking of websites and applications that compete with the provider’s voice or video telephony services. This leaves many applications without any protections. Since voice or video telephony applications are only protected if the network provider offers a competing application, a network provider can prevent competitors from establishing a first mover advantage in video telephony. Finally, banning blocking, but allowing discrimination effectively makes the rule against blocking meaningless by providing an alternative to blocking that is equally effective and less costly.

Instead, the rules should provide the same protections to wireline and wireless services. The threats for application innovation, free speech and user choice are the same in both technologies. Wireless networks have been historically controlled by network providers, so the bias towards network provider control may be even stronger in wireless networks. Thus, the rationale for protection is the same. At the same time, the technology is evolving rapidly. In the absence of strong protections, technology may evolve in a way that will make it more difficult to protect the values that network neutrality rules are designed to protect in the future. At the same time, since mobility or location-awareness are specific to mobile services, the space of potential applications is larger and even less explored than in the wireline space. Thus, the potential for application

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<sup>2</sup> van Schewick, Barbara. 2010. *Opening Statement at the Workshop on Approaches to Preserving the Open Internet*. Federal Communications Commission, [http://www.law.stanford.edu/display/images/dynamic/publications\\_pdf/schewick-statement-20100428.pdf](http://www.law.stanford.edu/display/images/dynamic/publications_pdf/schewick-statement-20100428.pdf)

innovation (and the dampening effect of a lack of protections against discriminatory behavior on investment) is particularly large.

Any technical differences – to the extent they exist – can be accounted for when applying the reasonable network management exception. For example, if specific characteristics of wireless networks made it impossible to solve certain network management problems on specific wireless networks in application-agnostic ways, the “reasonable network management exception” described below would allow network providers to use application-specific ways of solving the problem.

### **Reasonable network management exception**

As I have explained in prior testimony,<sup>3</sup> network providers often have an incentive to solve specific networking problems in application-specific ways, even if there are application-agnostic ways of solving the problem. Given the increase in bandwidth use, it is likely that instances of discriminatory network management will become more common. At the same time, the harm to users and innovators is the same, whether a network provider acts to harm a competitor or to manage its network. As a result, the need for protection is independent of the motivation of the provider. Thus, a rule that allows blocking or discrimination as long as it is done to manage the network, would not sufficiently protect innovators and users. Instead, network management should be as application-agnostic as possible (and respect the principle of user choice to the extent possible) in order to make sure that network management preserves the beneficial characteristics of the Open Internet (such as application-blindness and user choice) as much as possible.

### **Definition of Broadband Internet Access Service**

The definition of Broadband Internet Access Service in the legislative proposal initiated by Representative Henry Waxman seems to be too broad. In particular, it is unclear whether services that provide access to only parts of the Internet (for example, to the top 50 websites, effectively blocking access to the rest) would be subject to the Open Internet rule.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

/s/ Barbara van Schewick

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<sup>3</sup> van Schewick, Barbara. 2008. *Official Testimony at the Federal Communications Commission Second En Banc Hearing on Broadband Management Practices*. Federal Communications Commission, [http://www.fcc.gov/broadband\\_network\\_management/041708/vanschewick-written.pdf](http://www.fcc.gov/broadband_network_management/041708/vanschewick-written.pdf).

cc:

Commissioner Copps

John Giusti

Margaret McCarthy

Edward P. Lazarus