

January 21, 2011

Chairman Julius Genachowski  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

Re: Notice of Written *Ex Parte* Presentation  
GN Docket No. 09-191 (Preserving the Open Internet)  
WC Docket No. 07-52 (Broadband Industry Practices)

Dear Chairman Genachowski,

We write to you to share our concerns with some recent practices being adopted by broadband providers that appear to be contrary to preserving an open Internet.

On December 21, 2010, the Commission adopted rules of the road that would help to preserve the free and open Internet. One of the rules adopted would bar fixed broadband providers from “impairing or degrading...non-harmful devices so as to render them effectively unusable (subject to reasonable network management).”<sup>1</sup> Additionally, the Commission adopted “a no blocking rule that guarantees end users’ access to the web and protects against mobile broadband providers’ blocking applications that compete with their other primary service offering – voice and video telephony” - subject to reasonable network management.<sup>2</sup> The Commission also required *all* broadband providers to effectively disclose the commercial terms and performance characteristics of its service.<sup>3</sup> The Commission noted that “[p]rompt and effective enforcement of the rules adopted...is crucial to preserving an open Internet and providing clear guidance to stakeholders.”<sup>4</sup>

Recent announcements and events involving Comcast Corporation and MetroPCS Communications have raised questions as to whether they have adopted practices that would be in violation of the recently adopted open Internet rules. While the rules have not yet taken effect, it is imperative that the Commission quickly examine these practices to determine if they violate the spirit and letter of the rules. Doing so would not only provide “clear guidance to stakeholders,” but could also deter other anti-consumer practices.

***Comcast certification of Zoom Telephonics’ cable modem***

The Commission’s recently adopted rule states that a

*person engaged in the provision of fixed broadband Internet access service,  
insofar as such person is so engaged, shall not block lawful content, applications,*

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<sup>1</sup> Report and Order, *In the Matter of Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, ¶66 (rel. Dec. 23, 2010) (“*Open Internet Order*”).

<sup>2</sup> *Id.* at ¶99.

<sup>3</sup> *See id.* at ¶56.

<sup>4</sup> *Id.* at ¶151.

*services, or non-harmful devices, subject to reasonable network management.*<sup>5</sup>

Recent reports and complaints suggest that Comcast has imposed additional, unnecessary obstacles to determine whether Zoom's cable modem would be harmful to Comcast's network.<sup>6</sup> If true, the Commission could determine that Comcast's actions would violate the recently adopted rule prohibiting providers from blocking non-harmful devices.

Although Zoom undergoes a number of tests before it can offer its cable modem in retail stores, Comcast requires an additional, lengthy testing process. Moreover, it appears the standards and extent of Comcast's additional testing is not readily or easily available to device manufacturers.<sup>7</sup> It seems Comcast's additional testing process is being used to deter the ability of Zoom to offer its modem device to consumers. If Zoom's allegation is correct, Comcast would be blocking the ability of consumers to attach "non-harmful devices" to their broadband service. The Commission must resolve immediately this matter to ensure that consumers have the ability to purchase the cable modem of their choice.

### ***MetroPCS' new terms of service***

The Commission's recently adopted rule states that a

*person engaged in the provision of mobile broadband Internet access service, insofar as such person is so engaged, shall not block consumers from accessing lawful websites, subject to reasonable network management; nor shall such person block applications that compete with the provider's voice or video telephony services, subject to reasonable network management.*<sup>8</sup>

A recent announcement by MetroPCS regarding its new terms of service may violate the recently adopted open Internet rules. MetroPCS has announced a basic plan which includes unlimited talk, text, and "4G Web browsing with unlimited YouTube access" for \$40 per month.<sup>9</sup> For an additional \$10 or \$20 per month, consumers would be able to access additional features like mobile instant messaging, premium text messaging, "data access," access to audio downloads, or access to certain video-on-demand channels.<sup>10</sup> Neither the press release nor the lengthy Terms and Conditions of service clarify in any meaningful way what website consumers would be able to access as part of the plans.

In particular, it is unclear what is meant by "web browsing" or "data access" and whether these terms would allow for mobile users to access any lawful website of their choice or whether consumers could access applications like Skype, that compete with MetroPCS' voice service – as expected by the recently adopted rules. It is also unclear whether consumers would be able to access the websites of their choice in an "agnostic" manner; that is the new terms of service suggest that certain, "affiliated" services may not count against a bit cap, but similar independent services would count, and therefore would be subject to an additional cost.

Moreover, it is unclear whether the terms of service would limit the ability of consumers to access any

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<sup>5</sup> *Id.* at Appendix A.

<sup>6</sup> See John Eggerton, Broadcasting and Cable, *Zoom Complaint Targets Comcast Modem Cert Process*, November 29, 2010; *In the Matter of Zoom Telephonics, Inc. v. Comcast Cable Communications, LLC* (Nov. 29, 2010) ("Zoom Complaint").

<sup>7</sup> See Zoom Complaint at 5 (seeking Comcast to publish its standards for testing cable modems).

<sup>8</sup> *Open Internet Order* at Appendix A.

<sup>9</sup> MetroPCS' New 4G LTE Plans Offer Unprecedented Value and Choice with Prices Starting at Just \$40, Jan. 3, 2011, at <http://www.metropcs.com/presscenter/assets/pdf/mpcs-news-20110103.pdf>.

<sup>10</sup> See *id.*

application of their choice. While there currently is no outright ban against mobile broadband providers from blocking lawful applications, the Commission has “emphasiz[ed]” that its “decision to proceed incrementally with respect to mobile broadband at this time should not suggest that we implicitly approve of any provider behaviors that runs counter to general open Internet principles.”<sup>11</sup> The Commission further emphasized that “[b]eyond those practices expressly prohibited by our rules, other conduct by mobile broadband providers, *particularly conduct that would violate our rules for fixed broadband*, may not necessarily be consistent with Internet openness and the public interest.”<sup>12</sup>

MetroPCS has stated it will respond to recent concerns over and potential violations of the recently adopted open Internet rules.<sup>13</sup> The Commission should carefully scrutinize MetroPCS’ response and make further inquiries to determine whether MetroPCS’ terms and conditions of service violate the spirit and letter of the open Internet rules.

### ***Transparency of Comcast’s and MetroPCS’ practices***

The Commission recently adopted a transparency rule that states:

*A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.*<sup>14</sup>

The Commission should examine the disclosures of both Comcast and MetroPCS to determine whether they conform to the Commission’s rule on transparency.

With respect to Comcast, the Commission should look into whether Zoom (and other device makers) has the relevant information to know exactly what is required to certify cable modem devices. With respect to MetroPCS, the Commission should look into whether the terms and conditions of service provide accurate information for consumers to determine what, if any, are the limitations of the service.

Respectfully Submitted,

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Consumer Federation of America

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<sup>11</sup> *Open Internet Order* at ¶104.

<sup>12</sup> *Id.* (emphasis added).

<sup>13</sup> See Letter from Carl W. Northrop to Chairman Julius Genachowski, GN Docket No. 09-191, WC Docket No. 07-52 (Jan. 11, 2011).

<sup>14</sup> *Open Internet Order* at Appendix A.