

VIA ECFS

August 6, 2012

Ex Parte

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

Re: In the Matter of Consumer Information and Disclosure Truth-in-Billing Format IP-Enabled Services, CG Docket No. 09-158; In the Matter of Truth-in-Billing and Billing Format, CC Docket No. 98-170; In the Matter of IP-Enabled Services, WC Docket No. 04-36

Dear Ms. Dortch:

For two years, the undersigned Internet service providers (ISPs) have been working with the Federal Communications Commission to assist its pioneering efforts to develop a broadband performance test. We submit this letter to address a series of recent submissions¹ by Google, New America Foundation (NAF), and M-Lab² that mischaracterize the Commission's program and the role that ISPs and M-Lab have played in that program.

¹ See, e.g., Letter from Thomas Gideon, New America Foundation, and Meredith Whittaker, Google, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 09-158 (filed July 30, 2012) (Gideon/Whittaker July 30 Letter); Letter from Sascha Meinrath, New America Foundation, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 09-158 (filed July 24, 2012) (Meinrath July 24 Letter); Letter from Sascha Meinrath, New America Foundation, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 09-158 (filed July 23, 2012) (Meinrath July 23 Letter); Letter from Vint Cerf, Google, et al., to Julius Genachowski, Chairman, Federal Communications Commission, CG Docket No. 09-158 (filed July 18, 2012) (Cerf Letter); Letter from Thomas Gideon, New America Foundation, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 09-158 (filed June 29, 2012) (Gideon June 29 Letter); Letter from Thomas Gideon, New America Foundation, and Meredith Whittaker, Google, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 09-158 (filed June 29, 2012) (amended by subsequent letter filed June 29, 2012 by Benjamin Lennett, New America Foundation) (Gideon/Whittaker June 29 Letter).

² M-Lab supplies a test server platform (server equipment and interconnection to those servers) to SamKnows, which is the company that is contractually responsible for running the Commission's broadband measurement program. M-Lab is an organization that was created by Google and the New America Foundation, an advocacy organization whose largest

I. The Commission Has Developed An Open and Transparent Broadband Testing Program

The Commission's effort to establish a broadband performance testing program in collaboration with participating ISPs and other interested parties is unprecedented in scope and has produced some useful results for both consumers and the research community. The recent Google/NAF/M-Lab letters criticize the Commission and its testing program, claiming that the process has not been sufficiently open and transparent³ and that ISPs are trying to make it even less open and transparent going forward.⁴ As described below, the criticism from Google, NAF and M-Lab is unjustified and their assertions are false. The Commission has run an open and transparent process from the start and there is no cause for concern that it will depart from that approach.

The Commission has always strived to maintain an open and transparent testing process, which is an approach that all of the ISPs have endorsed throughout this testing process. Pursuant to a recommendation in the National Broadband Plan, the Commission hired SamKnows to conduct a broadband performance test. SamKnows had experience with broadband testing from work it had performed in the United Kingdom and was selected in response to an RFP issued by the Commission.

The ISPs had separately begun discussing the issue of broadband performance measurement even before the Commission had hired SamKnows. These discussions included public interest groups and broadband equipment manufacturers from the outset. Following a separate recommendation in the National Broadband Plan that the Commission "encourage industry and consumer interest representatives to create" a Broadband Measurement Advisory

contributors include Google and Eric Schmidt, Google's Executive Chairman. Google and NAF hold seats on the M-Lab steering committee.

³ See, e.g., Gideon/Whittaker June 29 Letter (asserting that the Commission's decision not to use March 2012 data was not based on "open, academic analysis"); *id.* (suggesting that any use of test servers not controlled by M-Lab "would undermine the commitment to transparent, open, and credible measurement").

⁴ See, e.g., Gideon/Whittaker July 30 Letter ("In addition to the ISP representatives' clear resistance to the Commission's draft principles of open, transparent measurement, and their opposition to the formation of an IETF-style engineering and research group . . . , the ISP representatives also resisted the establishment of operational transparency."); Cerf Letter ("[W]e understand that some participants in the program have proposed significant changes that would transform an open measurement process into a closed one").

Committee,⁵ this informal collaborative has voluntarily served that role, working closely with the Commission staff and SamKnows to develop the testing regime.⁶ In this ongoing process, the group has addressed a vast number of technical, operational, regulatory, and legal issues surrounding broadband testing, the reporting of test results, and the release of test data to the public.⁷

From the start the Commission has held regular meetings that are open to all interested parties and it has filed summaries of those meetings in the public record. Given the wide range of competing interests that are participating in the process, we believe that having a neutral party prepare meeting summaries is more productive than having multiple parties submit disparate versions of events. While any party is free to separately file corrections or additional thoughts in the record, we believe it is inconsistent with the spirit of the collaborative process for one party in the meetings to file letters with the Commission purporting to represent statements made by other parties without the consent of those parties, as M-Lab and NAF lately have done.

II. NAF and M-Lab Have Misrepresented the Issues Surrounding Test Servers

The latest letter from NAF and M-Lab purports to provide a summary of the collaborative meeting that was held on July 25, 2012. Their summary misrepresents positions taken by ISPs and omits a number of critical issues discussed at the meeting. In this section we address one issue that M-Lab and NAF have fixated on – the role of ISP test servers in the testing process.

As a threshold matter, the interest of the undersigned in what entity (or entities) provides the test server platform for the Commission's efforts to measure ISP broadband performance is limited. If the Commission is going to continue to collect data and report on ISP performance, the accuracy of those reports is paramount. The undersigned have voluntarily agreed to assist the Commission in its effort and have worked through numerous issues with the Commission and

⁵ CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (rel. March 2010) at 45 (“The FCC should encourage industry and consumer interest representatives to create a Broadband Measurement Advisory Council to provide input for the measurement of broadband services”).

⁶ Given the broad range of issues to be addressed, the extensive participation of a wide variety of subject matter experts, and the open nature of the group, there is no need for a separate Technical Advisory Committee that includes only engineers, as proposed by NAF. *See* Gideon/Whittaker July 30 Letter; Meinrath July 24 Letter.

⁷ An *ex parte* letter filed by the ISPs in October 2010 gives some flavor of the issues that were addressed in advance of the initial round of testing. *See* Letter from Michael Olsen, Cablevision, et al, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 09-158 (filed Oct. 15, 2010).

SamKnows to improve the accuracy of the results. Any errors in the test server platform (as with errors in any other part of the process) should be timely addressed with a fulsome examination and explanation of root causes and alternatives to avoid recurrences.

By way of background, ISP-provided servers have always been a part of the overall testing process. At the beginning of the testing effort, at the Commission's request,⁸ the participating ISPs had provided SamKnows with roughly 100 servers to support the program.⁹ These servers, located throughout the country, are dedicated solely to this testing program, and the ISPs neither control them nor have access to the data they generate. These servers operate in parallel to servers provided by M-Lab, which are the servers that SamKnows relies on for purposes of the data used in the Commission's reporting.

The July 30 letter from NAF and M-Lab states that ISPs objected to portions of a draft presentation by Commission staff that would prohibit the use of ISP test servers even though "this exclusion did not represent a change" in operating procedure. In fact, the relevant portions of the draft presentation, which was proposed to "formalize the principles of openness and transparency that the collaborative has been operating under for two years," represent a clear departure from proposals that previously had been made by Commission staff itself. For example, at the collaborative meeting on June 6, 2012, Commission staff proposed using ISP servers in conjunction with M-Lab servers or other third-party servers as a way to avoid future data losses and delays.¹⁰ Following the June 6 meeting, SamKnows developed a test server specification that included a framework proposing to use ISP servers as the primary source of measurement results, with M-Lab servers or those of another third party as back-up or redundant

⁸ Public Notice, *Comment Sought on Residential Broadband Fixed Services Testing and Measurement Solution*, CG Docket No. 09-158, DA 10-670 (rel. Apr. 20, 2010) at 4.

⁹ See, e.g., Letter from Jeb Benedict, CenturyLink, et al, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 09-158 (filed July 6, 2010) ("SamKnows and the Commission have asked broadband providers to place dedicated servers on their networks, thus isolating the tests from factors related to the public Internet that may degrade performance").

¹⁰ Letter from Walter Johnston, Chief, Electromagnetic Compatibility Division, FCC Office of Engineering and Technology, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 09-158, et al (June 12, 2012) ("Participants queried whether provider donated test nodes could be included in the testing platform with the next data gathering. Commission staff revisited that participants were invited in February 2012 to submit proposed criteria for how provider donated test nodes could be incorporated into the recorded data sets, and that enabling providers to assume a greater diversity of roles in program is a long term goal. It was discussed that Commission Staff and SamKnows could facilitate discussion by developing a baseline for discussions to be circulated for feedback").

servers. Commission staff circulated that specification to the group to solicit feedback. The proposal did not originate with ISPs and no ISP has committed to agree to the proposal.

The proposal for ISP servers to play a more prominent role was developed as part of an effort by SamKnows and the Commission staff to improve reliability of the testing process following a series of technical failures involving the M-Lab platform in March, April, and May 2012.¹¹ As documented by the Commission staff, the problems with the M-Lab servers in March 2012 compelled the Commission to conclude that data from that month could not be used as the basis for the report.¹² Not only did that delay the release of the second Measuring Broadband America report, it also resulted in the Commission, SamKnows, and ISPs incurring additional costs associated with a second, replacement month of data collection. Although M-Lab has stated that it is working on a report analyzing the cause of these problems, to date no information or explanation of the server failures has been provided to any of the ISPs or the public. Another failure in April rendered six days of data unusable, which compelled the Commission to exclude all data for those days from its second report.¹³ Another failure compromised data in May, although no details of that incident have been provided to ISPs.

Significantly, these issues with the M-Lab test platform were discovered not by M-Lab but by SamKnows when it compared data from M-Lab servers to data from nearby test servers that had been provided to SamKnows by ISPs. Far from compromising the openness or accuracy of the tests, the ISP test servers played a critical role in allowing SamKnows to identify M-Lab failures that were undermining the accuracy of the data for purposes of measuring or comparing ISP performance. In light of the repeated problems with the M-Lab equipment, it was entirely

¹¹ See Letter from Walter Johnston, Chief, Electromagnetic Compatibility Division, FCC Office of Engineering and Technology, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 09-158, et al (Apr. 16, 2012); Letter from Walter Johnston, Chief, Electromagnetic Compatibility Division, FCC Office of Engineering and Technology, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 09-158, et al (June 12, 2012). In addition to these three problems in 2012, it was also discovered that one of the M-Lab servers in New York had been rate limiting tests during the March 2011 testing period.

¹² Letter from Walter Johnston, Chief, Electromagnetic Compatibility Division, FCC Office of Engineering and Technology, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 09-158, et al (Apr. 16, 2012).

¹³ See Letter from Walter Johnston, Chief, Electromagnetic Compatibility Division, FCC Office of Engineering and Technology, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 09-158, et al (Apr. 30, 2012); *see also* Gideon June 29 Letter (blaming Level 3 for any problems that occurred in April 2012). The letter fails to note that Level 3 is the company chosen by M-Lab, not the ISPs, for access to the test server.

appropriate for the Commission staff and SamKnows to consider the need for ISP servers and/or servers from a third party to supplement or replace the M-Lab servers.

III. NAF and M-Lab Have Presented an Inaccurate and Incomplete Picture of the July 25 Public Meeting with the Commission Staff

In addition to containing misrepresentations, the July 30 letter from NAF and M-Lab also improperly omitted reference to a number of key topics discussed at the July 25 meeting.

First, the group discussed whether the ownership or control of a test server was relevant to the reliability of the results produced by that server. ISPs objected to portions of the draft presentation distributed by the Commission staff because they could be read to suggest that ISP ownership or control of a test server had tainted the results of prior testing and should no longer be allowed. We noted that SamKnows, not the ISPs, controls the servers and that it would be impossible for an ISP to manipulate one of these servers to artificially inflate test results. We also pointed out that Google's recent entry into the ISP marketplace and its other commercial interests potentially jeopardizes M-Lab's credibility as a neutral test platform for purposes of any program designed to test ISP performance.

Second, the group discussed the possibility of using an alternative third-party test platform in lieu of, or in addition to, the M-Lab platform. We noted that the Commission staff had proposed this following the aforementioned failures by M-Lab's platform, which meaningfully affected results and rendered data unusable for the purpose for which it was being collected. Given these concerns, ISPs were generally supportive of the idea of considering alternative sources of test servers to supplement - or even replace - the M-Lab servers.

Third, the group discussed the Code of Conduct that has governed all parties in the two year testing program. We explained that the draft outline of principles presented by the Commission staff during the meeting appeared unnecessary, because all parties had signed a detailed Code of Conduct that bound them to act with integrity. SamKnows, however, clarified that the Code of Conduct had been signed by all participating ISPs, SamKnows, and Commission staff, but not by M-Lab. Given the major role that M-Lab has played in the testing process, the revelation that it has for two years failed to commit to the same Code of Conduct as the other parties was surprising and disturbing.

Conclusion

Over the past two years, we have devoted substantial time and resources to assist the Commission in trying to develop an effective, voluntary broadband measurement program. The program has been open and transparent throughout and, to the extent the program continues, it should remain that way, with integrity by all parties.

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August 6, 2012
Page 7

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August 6, 2012

Page 8

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