NEW AMERICA
FOUNDATION

February 14, 2013

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

Re: Notice of Oral *Ex Parte* Presentation
WT Docket No. 10-4 (Signal Booster Rules to Improve Wireless Coverage)
WT Docket No. 11-49 (Progeny LMS, LLC Petition for Waiver)

Dear Ms. Dortch:

On February 11, 2013, the undersigned and Harold Feld, Senior Vice President of Public Knowledge, met with Rudy Peraertz, Legal Advisor to Commissioner Mignon Clyburn, on behalf of Public Knowledge and the New America Foundation's Open Technology Institute, concerning the proceedings referenced above.

With respect to WT Docket No. 10-4 (Signal Boosters), we conveyed the view that the carrier consent and registration requirements proposed by the Wireless Bureau – and reportedly circulating in a draft order – are arbitrary and anti-consumer. We began by noting that the Commission's NPRM correctly began with a focus on *consumers* and encouraging the deployment of wireless services to rural areas – proposing a blanket authorization of boosters that were certified to protect carriers from interference. However, reportedly because of fear of a legal challenge by carriers, the Commission's draft Order has devolved into proposing a purposeless (and unenforceable) burden on consumers that is both unrelated to mitigating interference to carriers and unrelated even to the theory that a consumer's right to transmit somehow derives from the license of his or her own carrier.

Since the two industries (wireless carriers and boosters) have already agreed on a technical safe harbor that ensures that boosters certified by the Commission can prevent harmful interference, we suggested that the Commission could simply require that consent is presumed when a consumer purchases and uses a safe harbor booster certified by the Commission.

Moreover, even assuming that the consent requirement proposed by the Bureau is anything but arbitrary, the registration requirement imposed on consumers is fashioned in a manner likely to provide no benefit for avoiding interference and, in fact, to be ignored entirely by consumers.

We shared our view that at least with respect to wideband boosters (which, according to booster manufacturers, comprise 97 percent of booster sales), requiring booster users to acquire the consent of the carrier (or at least one of the carriers) they subscribe to is completely arbitrary. By definition, wideband boosters amplify the signals of all carriers equally. If the Commission prefers to abandon the licensing-by-rule authorization that it correctly proposed in the NPRM, or a similar licensing condition providing consumers with blanket authorization, and declare instead that carriers have a right under their license to grant consent even when the Commission certifies that the booster in question will not create a risk of interference, then that right must be extended to *each carrier on whose frequencies the booster is transmitting.* It is arbitrary for the Commission to delegate this authority to a single carrier when the booster is amplifying the incoming signals (as well as many outgoing transmissions from handsets) on the frequencies of multiple carriers. For example, the Commission knows that there are some competitive carriers that believe signal boosters give a further competitive advantage to the two dominant carriers, yet the Bureau is proposing, in the vast majority of cases, to give AT&T and Verizon the authority to decide if a consumer can use a booster. And although in many instances (in a home or car, for example) the transmission of a booster user's device will be amplified more often than those tied to other carriers, that is not true with respect to the boosting of received signals, which is indiscriminate.

With respect to the arbitrariness of the proposed Order, we asked Mr. Peraertz if the Order addresses which carrier would take precedence in a multi-carrier household, or which carrier should be delegated this authority in a small business (coffee shop, restaurant, gas station) which actually *intends* that consumers of *every carrier in the area* will be receiving and transmitting on the frequencies of each and every carrier? And why impose such a confusing and unnecessary burden on consumers when it is obvious to everyone – just like the illegal unlicensed wireless microphones that populated the TV band without enforcement – that consumers will by-and-large ignore this requirement?

With respect to the registration requirement, which apparently will be dispersed among the carriers and implemented at their discretion, we argued that this also is a pointless burden on consumers if there is not at least a *single neutral registry* that can be used effectively to identify malfunctioning boosters that are actually causing interference. Instead, the Bureau reportedly has left it to each individual carrier to decide if and how to establish a registration process for the individual booster users that the Commission would arbitrarily assign to them for consent. Such a fragmented registration system does not seem to advance its sole productive purpose: to permit individual carriers experiencing interference suspected to originate with a booster to easily

determine its source. And although carriers could possibly decide to share this information through a common database, it's unclear from what's known about the Order how this avoids running afoul of CPNI protections (since carriers will have much of this data only because of their relationship with booster users as subscribers).

We noted that the Commission's draft order is an invitation to anti-competitive behavior. There appears to be nothing to stop a carrier from entering into an exclusive or royalty-based arrangement with a booster maker, which could advertise that it is the *only* booster approved by one or more of the national carriers. Because of limited shelf space at retailers and consumer fears of buying boosters that won't be approved by their carriers, any such arrangement by one of the national carriers is likely to drive independent booster makers out of business, increasing the cost of boosters and denying consumers the choice and burden-free use of a beneficial technology that was the promise of the Commission's original, abandoned NPRM.

We recommended that the Commission amend the draft Order to require a single, neutral joint industry registration process that actually serves its stated purpose. In addition, and more critically, the Commission should derive consent from the agency's own certification of booster's that meet the safe harbor technical requirements, agreed to mutually by the two industries, as minimizing the risk of harmful interference to carriers. This would effectively exclude "bad" boosters from the market, while preserving competition, innovation and consumer choice in the adjacent market for signal boosters. Based on the record, the Commission can find that with respect to the voice element, and pursuant to its authority under Section 201 and 202, it is unreasonable to deny a subscriber access to its network with respect to a booster properly certified as falling within the Commission's safe harbor concerning interference. And under its Title III authority, the Commission can impose a service and equipment requirement barring the denial of network access to any signal booster certified as meeting the Commission's safe harbor concerning interference.

We further recommended that if the Commission maintains an arbitrary single-carrier consent requirement, as proposed, that it should at least add language making it clear that consent cannot be reasonably denied for a reason unrelated to avoiding interference. It should not be reasonable to deny a consumer consent to operate a booster for business reasons other than avoiding interference. Moreover, as one official of the Wireless Bureau mentioned as an alternative, we believe that consistent with the one-year reporting and review requirement in the current draft, this language should state that a carrier denying consent to a particular booster meeting the Commission's safe harbor certification standards must be able to cite evidence of a reasonable belief that in the real world that particular booster is causing interference. This aligns well with the one-year reporting and review requirement. We also recommended that booster makers should be given longer than six months to implement the Order's requirements due to the relatively long shelf life of boosters in the retail supply chain.

Finally, we recommended that boosters already sold and in use should be grandfathered and not required to obtain the consent of any carrier. Although between 1 and 2 million signal boosters are in use today, they seem to be creating little if any interference, and so imposing a retroactive burden on consumers who purchased them in good faith is inappropriate. Consumers and the booster industry clearly had a good faith belief that the devices were legally sold and used without carrier consent, inasmuch as the matter remains unresolved and licensing-by-rule remains the unanimous view of the Commissioners as expressed in the NPRM.

With respect to WT Docket No. 11-49 and the waiver requested by Progeny LMS to use the 900 MHz unlicensed band in a manner that may violate its license condition not to cause "unacceptable" levels of interference to existing unlicensed service, we repeated the position of public interest groups that a decision cannot properly be made without additional data and without defining what level of interference is "unacceptable" under the circumstances. Since the Commission has not defined what is an "unacceptable" level of interference in the context of the 900 MHz band, we recommended that a Public Notice requesting comment on this definition is a necessary prerequisite to any decision on the waiver. It continues to be our understanding from the record that the testing completed to date, while not comprehensive, indicates that Progeny's system, due to its proposed power levels and duty cycle, will cause harmful interference to well-established consumer uses of 900 MHz unlicensed devices and effectively remove 4 MHz (of 26 MHz) of spectrum from unlicensed use in the 902-928 MHz band. If true, this would set the precedent for other M-LMS licensees to seek similar waivers, further damaging the proven benefits of this band for consumers and the economy. Progeny and other potential commercial users of the 902-928 MHz band have been on notice since the *M-LMS Recon Order* "that LMS systems are not operated in such a manner as to degrade, obstruct or interrupt Part 15 devices to such an extent that Part 15 operations will be negatively affected."[1]

In accordance with the FCC's *ex parte* rules, this document is being electronically filed in the above-referenced dockets.

Respectfully submitted,

/s/

Michael Calabrese
Director, Wireless Future Project
Open Technology Institute
New America Foundation
1899 L Street, NW 4th Floor
Washington, DC 20036

[1] *First M-LMS R&O*, 10 FCC Rcd at 4737; *see also, In the Matter of Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, Order on Reconsideration, 11 FCC Rcd 16907, 16911-12 (1996) ("*M-LMS Recon Order*").