

MASSACHUSETTS
40 main st, suite 301
florence, ma 01062
tel 413.585.1533
fax 413.585.8904

WASHINGTON
501 third street nw, suite 875
washington, dc 20001
tel 202.265.1490
fax 202.265.1489



Acting Chairman Michael J. Copps
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

April 3, 2009

RE: WC Docket No. 07-52

Dear Chairman Copps,

Free Press submits this written *ex parte* filing to highlight again an issue in the Commission's open docket on broadband industry practices, WC Docket No. 07-52. For two years, we have followed your leadership in raising concerns that wireless service providers appear to be engaging in activities that go against the Commission's Internet Policy Statement by violating consumers' right to run applications, use services, or attach devices of their choice over their broadband connections.¹ Recent reports about application blocking again raise these questions. Regardless of whether any particular incident would be found in violation of the law, the lingering uncertainty surrounding consumer rights on the Internet indicates the need for the Commission to clarify its rules. To resolve any alleged ambiguity raised by parties in earlier proceedings,² the Commission should confirm that the Internet Policy Statement applies to wireless service providers that offer broadband Internet access service, as has been acknowledged in prior proceedings and statements of sitting Commissioners. Furthermore, the Commission should request more information on the extent of the wireless providers' role in and their justifications for these widely-reported behaviors.

Wireless networks demonstrate numerous anti-consumer practices that may be violations of the Commission's Internet Policy Statement. In some cases, these appear to be outright restrictions on applications, services or devices imposed by the carrier. In other cases, there appears to be a business relationship between carriers and equipment vendors designed to cripple applications or hinder consumer choice for anticompetitive purposes. Most notable among recent reports, the Skype Voice over IP (VoIP) application on the Apple iPhone can make and receive calls over a Wi-Fi connection, but cannot make or receive calls over AT&T's 3G network.³ Although this limitation is formally imposed by Apple as part of the rules for its application store, a senior official at AT&T was quoted in *USA Today* as saying, "We absolutely expect our vendors" – in this case, Apple – "not to facilitate the services of our competitors."⁴ This statement suggests that AT&T may be playing a role in restricting consumers' access to an application that competes with the carrier's own voice service. Similarly, applications to allow tethering of the Google Android phone are unavailable on Google's Android Marketplace for all T-Mobile customers.⁵ The Android user community reports that Google's distribution agreements require Google to remove applications that violate the device manufacturer or carrier's terms of service.⁶ These two cases suggest that the future of wireless innovation will be determined first and foremost not by developers of the devices, but by wireless carriers through restrictive language used to control consumers' use of applications and services on their

networks. Instances like these crop up so routinely in the wireless market that we believe they merit attention from the Commission – the consumer’s cop on the beat for protecting access rights.

Wireless terms of service make clear the wireless providers’ intent to violate the Internet Policy Statement. The terms imposed by most major wireless carriers purport to prohibit the use of, at minimum: peer-to-peer applications, either in general⁷ or when transmitting to multiple recipients;⁸ Web broadcasts;⁹ server or host applications;¹⁰ tethering;¹¹ and the use of wireless as a substitute for wired broadband.¹² AT&T states specifically that “customer initiated redirection of television or other video or audio signals via any technology from a fixed location to a mobile device” is prohibited,¹³ a rule that would seem to prohibit innovative and consumer-friendly technologies such as Sling Media’s mobile player.¹⁴ AT&T claims that its service limitations are justified because the prohibited uses “cause extreme network capacity issues and interference with the network.”¹⁵ However, explicitly permitted uses such as “downloading legally acquired songs” and the default and non-removable YouTube application on the iPhone also consume substantial amounts of bandwidth, and thus call into question any claims of network limitations. In any event, if there are legitimate issues of network management, they are covered under exemptions from the Internet Policy Statement and would also benefit from legal clarity.

These limitations fly in the face of the consumer rights contained in the Internet Policy Statement, and the Commission should reaffirm that the Internet Policy Statement applies to wireless networks. Text and history demonstrate that the Internet Policy Statement has always applied to all broadband technologies, including wireless networks. The text of the Internet Policy Statement is technology neutral on its face, discussing the Internet and “broadband networks,” not the wireline network or any other specific technologies.¹⁶ Wireless data services offer connections over broadband networks to the Internet, and are thus included within the plain language of the Policy Statement. The history of broadband deregulation also confirms the importance of treating all technologies alike – the Commission emphasized technological neutrality and regulatory parity in the 2002 *Cable Modem Order*,¹⁷ the 2005 *Wireline Broadband Order*,¹⁸ the 2006 *Broadband over Power Lines Order*,¹⁹ and, most recently, the 2007 *Wireless Broadband Declaratory Ruling*.²⁰ We applaud your commitment to this application of the law, which you have affirmed ever since the 2007 order, in which you stated, “[T]he right to attach network devices—as well as the three other principles of our policy statement—now applies to wireless broadband services.”²¹

The Commission’s August 2008 *Comcast Order* further confirms that wireless networks are included in the Commission’s case-by-case approach for protecting the rights enumerated in the Internet Policy Statement.²² The Commission chose to adopt a case-by-case approach in large part because case-by-case adjudication is more appropriate for “complex and variegated” networks – mentioning wireless networks specifically.²³ Similarly, the Commission stated that its order did not need to address practices of wireless networks specifically, because the case-by-case approach permitted the Commission to address wireless networks in the future.²⁴

Clarifying the text and tradition of the applicability of the Internet Policy Statement to wireless networks is particularly important now, given AT&T’s announcement of its intent to sell discounted laptops along with wireless broadband connections.²⁵ AT&T’s wireless terms of

service will apply to these computers and computer users as well. Clarity for consumer protections in this nascent market would be valuable for buyers and sellers alike.

Consistent with your long-standing view, the Commission should officially confirm that the Internet Policy Statement applies to wireless broadband service providers, and should investigate the practices of wireless carriers engaging in what may be violations of the Internet Policy Statement, including in particular the imposition of direct or indirect limits on consumers' right to run the applications and use the services of their choice.

Sincerely,



Ben Scott, Policy Director
Chris Riley, Policy Counsel
Free Press
501 Third St NW, Suite 875
Washington, DC 20001
202-265-1490

CC:

Robert McDowell
Jonathan Adelstein
Rick Chessen
Rudy Brioche
Angela Giancarlo

¹*Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings; Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CC Docket Nos. 02-33, 01-337, 98-10, 95-20, GN Docket No. 00-185, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986 (2005) (*Internet Policy Statement*).

² *Compare* Public Interest Spectrum Coalition, *Petition to Dismiss or Deny*, WT Docket No. 08-95 (filed Aug. 11, 2008), at 17-18, with Verizon Wireless, Altantis Holdings LLC, *Joint Opposition to Petitions to Deny and Comments*, WT Docket No. 08-95 (filed Aug. 19, 2008) (*Joint Opposition*), at 69-71.

³ See, e.g., Geoffrey A. Fowler and Amol Sharma, "Skype to Launch iPhone Software," *Wall Street Journal* (Mar. 30, 2009), available at <http://online.wsj.com/article/SB123836849558067525.html>.

⁴ Leslie Cauley, "Skype's iPhone limits irk some consumer advocates," *USAToday.com* (Apr. 2, 2009), available at http://www.usatoday.com/tech/news/2009-04-01-att-skype-iphone_N.htm ("Jim Cicconi, AT&T's top public policy executive, says AT&T has 'every right' not to promote the services of a wireless rival. 'We absolutely expect our vendors' — Apple, in this case — 'not to facilitate the services of our competitors,' he says.").

⁵ Karl Bode, "Google Android Not Quite So Open," *DSLReports.com* (Apr. 2, 2009), available at <http://www.dslreports.com/shownews/Google-Android-Not-Quite-So-Open-101689>.

⁶ Chris Davies, “Android tethering apps pulled from Market,” *Android Community* (Mar. 31, 2009), available at <http://androidcommunity.com/android-tethering-apps-pulled-from-market-20090331/>.

⁷ “Plan Terms,” AT&T, at <http://www.wireless.att.com/cell-phone-service/legal/plan-terms.jsp> (AT&T TOS).

⁸ “Terms & Conditions,” Verizon Wireless, at http://support.vzw.com/terms/products/broadbandaccess_nationalaccess.html (Verizon TOS); “T-Mobile Terms and Conditions,” T-Mobile, at http://www.t-mobile.com/Templates/Popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions&print=true (T-Mobile TOS).

⁹ AT&T TOS, *supra* note 4; Verizon TOS, *supra* note 5.

¹⁰ “PCS Terms & Conditions,” Sprint, at <http://www.sprintpcs.com/common/popups/popLegalTermsPrivacy.html> (Sprint TOS); AT&T TOS, *supra* note 4; Verizon TOS, *supra* note 5; T-Mobile TOS, *supra* note 5.

¹¹ AT&T TOS, *supra* note 4; T-Mobile, *supra* note 5.

¹² AT&T TOS, *supra* note 4; Verizon TOS, *supra* note 5; T-Mobile, *supra* note 5.

¹³ AT&T TOS, *supra* note 4.

¹⁴ “SlingPlayer Mobile Overview,” Sling Media, at <http://www.slingmedia.com/go/spm>.

¹⁵ AT&T TOS, *supra* note 4.

¹⁶ *Internet Policy Statement*, 20 FCC Rcd at 14986-88, paras. 1, 4.

¹⁷ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd 4798, 4840, para. 73 (2002) (citing sections 706 and 230 of the Communications Act to support the importance of promoting competition across multiple platforms).

¹⁸ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. §160(c) with regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era*, WC Docket No. 04-242, 05-271, CC Docket Nos. 95-20, 98-10, 01-337, 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14878, at para. 49 (2005) (*Wireline Broadband Order*), *petitions for review denied, Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007) (“[W]e believe that we should regulate like services in a similar manner so that all potential investors in broadband network platforms, and not just a particular group of investors, are able to make market-based, rather than regulatory-driven, investment and deployment decisions.”).

¹⁹ *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281, 13293 (2006) (statement of Kevin Martin, Chairman) (“I believe that it is the Commission’s responsibility to help ensure technological and competitive neutrality in communications markets.”).

²⁰ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5925, paras. 55,70 (2007) (*Wireless Broadband Declaratory Ruling*).

²¹ *Id.* at p. 27 (Concurring Statement of Commissioner Michael J. Copps) (“Now that IP-based wireless services are classified as Title I information services, the inescapable logical implication of our 2005 decision is that the right to attach network devices—as well as the three other principles of our policy statement—now applies to wireless broadband services.”).

²² *In re Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling That Degrading an Internet Application Violates the FCC’s Internet Policy Statement & Does Not Meet an Exception for “Reasonable Network Management,”* WC Docket No. 07-52, Memorandum Opinion and Order, FCC 08-183 (Aug. 20, 2008) (*Comcast Order*).

²³ *Id.* at para. 31.

²⁴ *Id.* at para. 50, n.234 (citing Robert M. Quinn, Senior Vice President-Federal Regulatory, AT&T, concerning technological characteristics of mobile wireless networks, and then stating “Given the case-by-case approach we set forth in this item, we do not (and need not) opine here on other policies and practices.”).

²⁵ Peter Svensson, “AT&T to try selling wireless broadband laptops,” *Associated Press* (Apr. 1, 2009), available at http://www.google.com/hostednews/ap/article/ALeqM5gw7NFO7S4FQOu3g8oVi_BJ38slpwD979T1C00. It is unclear how these discounts relate to AT&T’s ostensible prohibition on the use of wireless service as a substitute for wired broadband connections.