December 10, 2010

Chairman Julius Genachowski
Commissioner Michael J. Copps
Commissioner Robert M. McDowell
Commissioner Mignon Clyburn
Commissioner Meredith Attwell Baker

Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: ***Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry Practices*, WC Docket No. 07-52; *Framework for Broadband Internet Service*, GN Docket No. 10-127**

Dear Chairman Genachowski and Commissioners:

As grassroots organizations, consumer groups, civil rights organizations, innovative businesses, technology experts and public interest advocates, we have a strong interest in the Federal Communications Commission's ongoing efforts to preserve the open Internet, promote universal broadband access, and protect consumers in a concentrated marketplace. While each of us comes to these issues from a different perspective, we are united in our belief that preserving the Internet as a free and open platform is essential for democratic participation, commerce and innovation.

As the Commission itself noted in its Notice of Proposed Rulemaking in the open Internet docket, "The Internet's openness, and the transparency of its protocols, have been critical to its success."[1] We agree strongly with this sentiment, which is why we are writing to urge you to adopt enforceable rules that represent *real* Network Neutrality.

We applaud the Commission's willingness to codify the 2005 *Internet Policy Statement.*[2] The statement's four principles were conceived by FCC Chairman Michael Powell, adopted as guidelines by FCC Chairman Kevin Martin, and served as the basis for the 2006 COPE Act, sponsored by former House Energy and Commerce Committee Chairman Joe Barton, which would have codified the four principles into law.

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[1] *Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry Practices*, GN Docket 07-52, Notice of Proposed Rulemaking, 24 FCC Rcd. 13604, ¶ 3 (2009).

[2] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33; *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337; *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*, CC Docket Nos. 95-20, 98-10; *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185; *Internet Over Cable Declaratory Ruling*, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd. 14986 (2005) (*Internet Policy Statement*).

However, adopting limited protections while giving tacit approval to other harmful practices will not adequately preserve the open Internet. If the current draft Order is adopted without substantial changes, Internet Service Providers will be free to engage in a number of practices that harm consumers, stifle innovation and threaten to carve up the Internet in irreversible ways. Further, the Order rests on shaky legal ground, which undermines not only open Internet policy, but also the Commission's entire broadband agenda.

We believe that the Order falls short in five specific areas. Unless the FCC adequately addresses each of them, the rules adopted will not represent real Net Neutrality and will face unnecessary legal challenges.

1. **Paid Prioritization:** Paid prioritization is the antithesis of openness. Any framework that does not *prohibit* such economic discrimination arrangements is not real Net Neutrality. Without a clear ban on such practices, ISPs will move forward with their oft-stated plans to exploit their dominant position and favor their own content and services and those of a few select paying partners through faster delivery, relegating everyone else to the proverbial dirt road.

   The draft Order reportedly prohibits ISPs from engaging in "unjust and unreasonable" discrimination. But it does not explicitly single out paid prioritization as an example of unjust or unreasonable discrimination. This unacceptable loophole threatens to swallow the entire rule. The Commission's codification of the principle of nondiscrimination must clearly and unambiguously prohibit the harmful practice of paid prioritization.

   In announcing the circulation of his draft Order, Chairman Genachowski rightly noted that protecting the free market online means that users, not broadband service providers, must choose what content and applications succeed. In order to actually embody this belief, the final Net Neutrality rule must make it clear that paid prioritization will not be tolerated.

2. **Adequate Protections for Wireless:** Last fall, Chairman Genachowski stated: "It is essential that the Internet itself remain open, however users reach it." Unfortunately, the draft Order apparently leaves wireless users vulnerable to application blocking and discrimination. The draft order reportedly would only prohibit outright blocking of websites and competing voice and video telephony applications, but would not restrict other blocking, degrading or prioritization. This incomplete protection would destroy innovation in the mobile apps and content space, permanently enshrining Verizon and AT&T as the gatekeepers for all new uses of the wireless Web.

   The sole reason reportedly cited for not applying full Net Neutrality to wireless networks is engineering limitations. But to the extent that a particular network has legitimate technical differences, these can be addressed through properly defined reasonable network management practices.

   At the very least, the FCC must ensure its policy is consistent with the underlying rationale for disparate treatment. For example, if bandwidth constraints are the supposed justification for disparate treatment, 4G wireless networks should receive greater Net Neutrality protections, as they should be far less capacity-constrained than some existing DSL

networks. To the extent that a particular 3G wireless network is shown to require special treatment, it still should be subjected to a strict no blocking rule.

Furthermore, the FCC must prohibit all forms of economic-motivated discrimination on wireless networks. There is simply no reason for AT&T to allow its own remote DVR application to run freely on its wireless network, but to degrade all other streaming applications.

3. **Loophole-Free Definitions:** The draft Order's definition of Broadband Internet Access Service could easily be exploited by ISPs seeking to evade or exempt themselves from the rules. The Commission should not adopt unnecessarily broad definitions that will erode the protections the rule seeks to provide. The FCC should adopt the definition of Broadband Internet Access Service suggested in the October 2009 NPRM. The Commission should also adopt a definition of reasonable network management that ensures that traffic management is only used in a manner that is valid in proportion, means, geography and time. Reasonable network management cannot be a loophole used by network operators to evade the rules.

4. **Specialized Services Cannot Undermine the Open Internet:** The Verizon-Google pact announced last summer was met with a fierce public backlash in part because the deal would have allowed ISPs to split the public, open Internet into two "pipes." It created a carve-out from Net Neutrality rules for so-called "managed" or "specialized" services. The open Internet gives every startup the chance to turn a good idea into the next Google or Facebook. These specialized services would create a pay-for-play platform that would destroy today's level playing field.

   While some highly sensitive and truly specialized services might not be best provided over the open Internet, there is no reason for the FCC to create a specialized services loophole that would undermine Net Neutrality. Unfortunately, the draft Order apparently opens the door to specialized services without any safeguards. To ensure that specialized services don't undermine the open Internet, the FCC should study this matter further.

   At a minimum, if such services are permitted, they should be offered separately from Internet services; they should not replicate the functionality of services already available on the open Internet; they should not interfere with the bandwidth allocated for Internet access or degrade other applications or services; and they should not retard the growth of broadband Internet access service capacity.

5. **FCC Broadband Policy Must Be Based on Sound Legal Footing:** Despite the U.S. Court of Appeals for the D.C. Circuit's rejection of the FCC's use of Title I ancillary authority in *Comcast v. FCC*, the chairman's draft reportedly attempts to find a new basis of authority using this strategy. This is an unnecessary risk, not only to the Net Neutrality rule, but to the FCC's entire broadband agenda. The FCC must restore its unquestionable authority to protect consumers, promote adoption and deployment, and serve the public interest in the broadband market.

Each of the above items highlights problems in the Order that must be fixed. Failure to address all of these shortcomings will jeopardize the Internet's historic openness and undermine President Obama's promise to deliver meaningful, *real* Network Neutrality protections.

Respectfully,

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