

January 10, 2011

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

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

Dear Chairman Genachowski:

MetroPCS has announced recent changes to its mobile broadband service plans that offer a glimpse of the future of the mobile Internet, one in which carriers, not users, decide what content, applications, and services are important and will be delivered. This future would present great risks to innovation, competition, and consumer choice, and create a new “digital divide” between the fixed Internet and the mobile Internet, one that would have a significant, harmful impact on millions of American Internet users and thousands of American businesses. MetroPCS’s announcement appears to vindicate the predictions of many observers, that both the substance and enforcement of the Commission’s new open Internet policies will be pushed to their limits and beyond by a recalcitrant industry. If the Commission does not respond quickly and decisively to such challenges, the result will be steady and rapid undermining of any benefits associated with the new rules, leading to damaging and destructive uncertainty and substantial harm to the innovation and competition that these rules are designed to promote. To avoid these harms, the Commission must act immediately to investigate MetroPCS’s harmful practices, and to discourage Verizon, AT&T, and other carriers from following suit.

In its new scheme, MetroPCS is advertising unlimited talk, text, “Web browsing” and YouTube at a base price of \$40 per month, with additional features like mobile instant messaging or access to audio downloads available on higher tiers for another \$10 or \$20 per month.<sup>1</sup> Notable among these “additional features” is the use of a category of Internet content, web sites, applications, and services labeled by MetroPCS as “Data Access.” Although this category is ambiguous, various news reports, documents, and statements provided by MetroPCS indicate that it includes popular Internet applications and services, including Skype and Netflix.<sup>2</sup> Users of the base MetroPCS plan apparently will not have access to such Internet content, web sites, applications, and services. Users of the intermediate plan will have their use of such services capped at 1 GB per month, even though these users can continue to use their mobile broadband plans for other content, applications and services (most notably, some forms of web browsing, along with YouTube video viewing).<sup>3</sup> By selectively blocking or capping the use of some Internet content,

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<sup>1</sup> MetroPCS, Press Release, Jan. 3, 2011, *at*

<http://www.metropcs.com/presscenter/assets/pdf/mpcs-news-20110103.pdf>.

<sup>2</sup> See Matthew Lasar, “Is MetroPCS 4G a walled garden without Skype and Netflix?”, *Ars Technica*, Jan. 5, 2011, *at* <http://arstechnica.com/tech-policy/news/2011/01/metropcs-4g-wireless-walled-garden-without-skype-and-netflix.ars>.

<sup>3</sup> Currently, MetroPCS only carries one device that can use its 4G LTE service, the Samsung Craft. As reported, this device is not a smartphone, although it includes some advanced features

web sites, applications, and services, MetroPCS appears to be in violation of the Commission's recently adopted open Internet rules. Although these rules have not yet taken effect, the Commission must not use this as an excuse to ignore or delay action on MetroPCS's harmful practices. The Commission must act immediately to provide guidance to a growing industry and to help ensure that its recently adopted rules are not being immediately violated on the first day they take effect.

The new service plans offered by MetroPCS give a preview of the future in a world without adequate protections for mobile broadband users. Blocking of lawful Internet content, services or applications would be prohibited and deemed unreasonable on a cable or DSL network. But disparities in the recently adopted open Internet rules have created great uncertainty for mobile broadband users. The Commission's December Open Internet Order clearly prohibited mobile operators from blocking web sites and certain applications. That Order also stated that the Commission did not intend to implicitly approve practices on mobile broadband services that violate its rule against unreasonable discrimination,<sup>4</sup> yet in the absence of clear rules, discriminatory practices are already beginning to emerge. Through MetroPCS's new plans, and through industry presentations by policy control and deep packet inspection companies, Internet users are beginning to learn the outcomes that will result from these disparities.

MetroPCS's plans will restrict consumer choice and innovation in a developing mobile market, all for the sake of further padding the company's bottom line. And if permitted, these practices will inspire others to follow suit. The FCC must not sit on the sidelines as carriers engage in anti-consumer and anti-competitive behavior.

**Permitting the use of some Internet applications and services while prohibiting the use of others stifles competition, consumer choice, and innovation.**

The service plans announced by MetroPCS create distinctions between different uses of the Internet that lack any engineering merit. By permitting YouTube videos and web sites to be viewed without limit, while simultaneously disallowing or restricting the use of other voice and video web sites and services, MetroPCS's actions harm competition, consumer choice, and innovation. Current third party voice and video service providers, including Skype and Netflix, face a competitive disadvantage to the voice and video services offered by MetroPCS, because would-be subscribers must pay an additional fee per month to use them.<sup>5</sup> Consumers who wish

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such as a web browser and the capacity to view YouTube videos. *See, e.g., id.* Usage limitations deriving solely from device functionality and not the behavior of a mobile broadband provider would not necessarily give cause for concern; however, MetroPCS's plans are designed not solely for the Samsung Craft but for its 4G LTE service generally, and appear destined for use for more advanced smartphones with greater functionality.

<sup>4</sup> *In the Matter of Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, FCC 10-201 (rel. Dec. 23, 2010) (*December Open Internet Order*), at para. 104.

<sup>5</sup> Subscribers to the base MetroPCS plan have no "Data Access" usage rights; VoIP and other services, if supported by the devices in use, are neither web browsing nor YouTube, and therefore are not permissible under this plan. *See* Ryan Kim, "MetroPCS LTE Plans to Charge More for VoIP & Streaming," *GigaOm*, Jan. 4, 2011, at

to use alternatives to the services offered by MetroPCS will find that they must pay more for the privilege - a clear restriction on consumer choice.

Innovation is similarly harmed by permitting some applications while restricting others. The December Open Internet Order noted the risk to innovation that arises if broadband providers are permitted to favor their own affiliates or incumbents.<sup>6</sup> If MetroPCS had developed these plans before the emergence of YouTube, a different video provider – such as RealVideo or Google Video – might have been designated as the “free” service. If adopted by other, larger wireless carriers, such a practice could have had the exact effect feared by the Commission: The newer, smaller, but better video service offering of YouTube might not have survived and grown. Today, competitors to YouTube – Vimeo,<sup>7</sup> or greater numbers of web sites hosting content themselves to capture ad revenue without middlemen – will reach fewer users as a result of MetroPCS’s practices, and find themselves at a competitive disadvantage.

The value of the Internet is rooted in its openness, in its creation of a market where new entrants can emerge and innovate without permission or artificial fees, and where consumers can choose the Internet content, applications, and services that best serve their needs, without having those choices made by a network gatekeeper. Being forced to pay an additional monthly fee for access to new or competing services creates barriers to consumer choice and experimentation, and jeopardizes the social and economic benefits associated with the Internet.

**MetroPCS’s service plans would appear to violate even the limited rules recently adopted for mobile broadband services.**

Although the Commission adopted disparate rules for mobile broadband service providers, even these limited obligations directly prohibit MetroPCS’s offerings. The rules state:

*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>

Offering a service plan that does not permit the use of Skype, Google Voice, or other VoIP applications constitutes a violation of this rule. MetroPCS offers its LTE data service in conjunction with voice service; consequently, VoIP offerings are in direct competition with the voice telephony service also offered by MetroPCS.

MetroPCS may contend that its refusal to permit VoIP services for its lowest service plan is

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<http://gigaom.com/2011/01/04/metropcs-lte-plans-charge-more-for-skype-and-streaming/> (“[T]o get broad unlimited Internet access for things like VoIP, streaming video and audio services, data uploads and gaming services, users will have to move up to the \$50 or \$60 tier, MetroPCS’s [spokesperson Drew] Crowell said.”).

<sup>6</sup> December Open Internet Order, *supra* note 4, at para. 23.

<sup>7</sup> Vimeo, at <http://www.vimeo.com>.

<sup>8</sup> December Open Internet Order, *supra* note 4, at para. 99.

permissible as a form of reasonable network management. Such an objection should be dismissed. VoIP services require little bandwidth to operate, and contribute little congestion to broadband networks. Furthermore, the MetroPCS plans permit unlimited YouTube viewing, which (even if compressed) likely requires more bandwidth and creates more congestion than many VoIP communications.

MetroPCS may also argue that its service is not an Internet access service at all, but instead is a “specialized service.” Although this category remains undefined, the Commission has defined broadband Internet access service for purposes of its rules to include all services that provide “a functional equivalent” to broadband Internet access service.<sup>9</sup> By offering “Web access,” the data service plans offered by MetroPCS must be interpreted to be, at minimum, the “functional equivalent” of a broadband Internet access service, and therefore subject to the Commission’s rules.

Additionally, the category of “Data Access” as defined by MetroPCS is undefined, and could be interpreted to include some lawful web sites. MetroPCS documents state:

*We shall determine in our sole discretion what data usage constitutes Data Access and reserve the right to alter, make additions to or deletions to what type of data usage, or protocols, constitute Data Access without notification to you. Data Access may include, for example, multimedia streaming and video on demand services, as well as certain multimedia uploads, downloads and gaming services and applications.*<sup>10</sup>

Lawful web sites that include multimedia upload or download capabilities may be interpreted by MetroPCS to fall within this definition, and could therefore be blocked for Internet users with service plans that do not include Data Access capabilities (or for users whose plans include a limited amount of data access, after an initial cap has been exceeded). Indeed, the terms of use for customers without “Data Access” state “You acknowledge and agree and authorize MetroPCS to alter for you, as your agent, such Data Content and to restrict or deny access to certain sites or Internet addresses for any reason.”<sup>11</sup>

**Aggressive implementation of the Commission’s transparency requirement, including a demand of immediate additional disclosure by MetroPCS, is essential.**

The full details of the offerings of MetroPCS are unclear. Terms such as “web access” and “data access” are loosely defined, and the mechanism by which a subscriber is prohibited from “data access” is unclear. Sufficient evidence may already be available through MetroPCS web site resources and other sources to demonstrate that restrictions on Internet use are taking place in potential violation of the Commission’s adopted rules. However, clearer identification of the network management practices used by MetroPCS would greatly facilitate subscriber

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<sup>9</sup> *Id.* at paras. 44, 112.

<sup>10</sup> MetroPCS, “MetroWeb Terms of Use,” Sept. 20, 2010, at [http://www.metropcs.com/products/metroweb/terms\\_of\\_use.aspx](http://www.metropcs.com/products/metroweb/terms_of_use.aspx).

<sup>11</sup> MetroPCS, “Terms and Conditions,” Jan. 3, 2010, at <http://www.metropcs.com/privacy/terms.aspx>.

understanding of the limitations, and also facilitate fair Commission applications of its rules.

The Commission recognized the value of transparency in its recent order, adopting a rule requiring the disclosure of information concerning network management practices “sufficient for consumers to make informed choices.”<sup>12</sup> Although no standard form of disclosure was required in the Commission’s recent order, the extremely limited disclosure by MetroPCS fails to articulate the scope of “data access,” which is central to consumer choice among even MetroPCS’s service offerings (as well as choosing between MetroPCS service and other service providers). Refusal to define or limit the scope of content, applications, and services contained within the “data access” category, unavailable to subscribers to the base MetroPCS plan, would violate the Commission’s transparency requirements once these requirements take effect. Furthermore, failing to disclose the mechanism by which data access is blocked for subscribers to the base MetroPCS plan similarly falls short of providing sufficient information to content, application, service, and device providers, as required by the rules.

The Commission should immediately request that MetroPCS, along with other mobile and fixed broadband providers, provide greater details regarding network management practices.

**The Commission should investigate MetroPCS’s behavior, and act to remedy its disparate treatment of mobile broadband services.**

MetroPCS must not be allowed to continue to offer service plans that block Internet content, web sites, applications, and services. The Commission must act immediately to investigate MetroPCS’s practices. Standing silent in the face of ongoing violations once the rules take effect could signal effective endorsement of bad practices. If MetroPCS’s violations are left unchecked, Verizon, AT&T, and other carriers may well follow suit.<sup>13</sup> And, these discriminatory practices will be surpassed by far worse: Providers of policy control and deep packet inspection equipment are currently marketing technology to mobile broadband providers that would enable highly application-specific blocking and pricing behavior.<sup>14</sup> Such a future would pose substantial risk to innovation, competition, and consumer choice.

Furthermore, the Commission should move to rectify its arbitrary and capricious loopholes for mobile broadband services, and extend to them the same nondiscrimination rules applied to fixed services. Such action would signal clearly to industry that discrimination and blocking of

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<sup>12</sup> *December Open Internet Order*, *supra* note 4, at paras. 53-61.

<sup>13</sup> Prior to its LTE service announcement, Verizon dropped numerous hints that it may engage in creative new pricing models. *E.g.* Karl Bode, “Despite Hype, Verizon’s LTE Pricing Rather Stale,” *DSL Reports*, Dec. 2, 2010, at <http://www.dslreports.com/shownews/Despite-Hype-Verizons-LTE-Pricing-Rather-Stale-111633>. Future “creative” pricing would be far more likely if Verizon believes such changes could be made without risk of FCC action. Meanwhile, AT&T has announced that it will deploy its LTE network in mid-2011, but has not announced a price structure, leaving open the possibility that the company could mirror MetroPCS from the outset.

<sup>14</sup> *See, e.g.*, Craig Aaron, “A Scary Picture for the Future of the Wireless Web,” *Huffington Post*, Dec. 15, 2010, at [http://www.huffingtonpost.com/craig-aaron/a-scary-picture-for-the-f\\_b\\_796990.html](http://www.huffingtonpost.com/craig-aaron/a-scary-picture-for-the-f_b_796990.html) (referencing and using imagery from recent presentations targeted to mobile operators and depicting application- and service-specific pricing models).

Internet content, web sites, applications, and services will not be permitted; failure to act in the face of mobile broadband provider discrimination would signal defeat, and acceptance by the Commission of discriminatory behavior, and would risk the permanent creation of “two Internets,” fixed and mobile, with concomitant harm to American citizens and businesses.

Respectfully submitted,

/s/

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