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United States Senate

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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, SW
Washington, DC 20554

Re: GN Docket No. 09-191; WC Docket No. 07-52

Dear Chairman Genachowski and Commissioners:

I am writing to comment on Chairman Genachowski's draft Order to preserve the online freedom of all Americans. I should note that I have not seen or had access to the exact language of the draft Order. Like Chairman Genachowski and President Obama, I believe that we must keep the Internet as it should be: open and free. I also share the Chairman's belief that there are real, concrete threats to that openness and freedom. However, I am very worried that the draft Order does not do enough to preserve that openness and stop those threats. As it is currently written, the draft Order may do more harm than doing nothing at all.

I understand and am encouraged that the draft Order contains strong language on transparency and that it will allow law enforcement to combat the theft of intellectual property; I have long believed that net neutrality will only succeed if it allows the enforcement of criminal and intellectual property law. Nevertheless, based on my conversations with advocates, Commission officials, and my constituents, I believe that the draft Order may fall short in several key respects.

Summary

First, I understand that the draft Order would effectively permit the blocking of lawful content, applications, and devices on mobile Internet connections—and would in fact fail to impose *any* non-discrimination protections for users of mobile Internet services. This reverses and contravenes the Commission's wise policies to protect and invest in mobile broadband service—largely enacted under Chairman Genachowski's watch. It would also dramatically impair the development of a service which most Americans rightly see as the future of the Internet, and which is disproportionately important to poor, minority communities—as well as rural Minnesotans.

Second, while the draft Order would enact stronger protections for Internet access over fixed connections, I also understand that it does not contain a clear prohibition, or even a weaker rebuttable presumption, against paid prioritization by network operators—basically the creation of an Internet "fast lane" for big companies that can afford it.

Paid prioritization is the antithesis of net neutrality. One cannot commit to the principle of a free and open Internet and simultaneously allow a company to purchase a fast lane through that Internet to beat out small businesses, start-ups and other competitors. The draft Order's feebleness on paid prioritization on fixed Internet services is troubling. Its silence on paid prioritization for mobile Internet services is baffling and legitimates rampant paid prioritization throughout mobile Internet services. This would be a sad milestone in the history of the Commission.

Third—and again, I caution that my comments are based on first- and second-hand descriptions of the draft Order—I fear that the draft Order may define "broadband Internet access service" too narrowly—allowing powerful companies to circumvent any protections this framework would establish.

I will describe each of these criticisms in detail. I respectfully ask and urge you to address them—and do believe that, if addressed, the draft Order would constitute a powerful tool to maintain and protect an open and free Internet.

Mobile Internet Services

In 2009, three members of the Commission endorsed a principle of non-discrimination—applicable to fixed and mobile Internet services *alike*—under which a broadband Internet access service provider "must treat lawful content, applications, and services in a nondiscriminatory manner." Federal Communications Commission, Preserving the Open Internet and Broadband Industry Practices, Notice of Proposed Rulemaking, 24 F.C.C.R. 13,064, 13,104 (Oct. 22, 2009) ("2009 NPRM"). The Commissioners interpreted that principle—again, for both fixed and mobile Internet services—to mean that a broadband Internet access service provider "may not charge a content, application, or service provider for enhanced or prioritized access to the subscribers" of that ISP. *Ibid* at 13,105.

I understand that the draft Order does not adopt these protections. Rather, I understand that for fixed connections, it prohibits "unreasonable and unjust" discrimination and explicitly bans the blocking of lawful websites, applications, content, and devices. I also understand that it contains no protection whatsoever against discrimination on mobile connections, merely prohibiting the blocking of lawful websites and video and voice telephony applications—and only to the extent that those applications compete with a broadband Internet access service's own applications.

This curiously narrow exception begs the questions: What if the mobile ISP has a competing video streaming, as opposed to a video telephony, application? Or a competing GPS mapping application?

Under the language of the draft Order as I understand it, it would be entirely acceptable for a mobile ISP to prioritize its own such applications and either degrade competing applications, or, quite simply, block them outright. To use a hypothetical, under this framework, Verizon could initially allow iPad owners access to a streaming Netflix video application over their 3G or LTE network—but then block that same Netflix application the very day that V CAST, Verizon's mobile video on-demand service, becomes available and offers competing content. In fact, they could have blocked the Netflix application the day they thought of offering V CAST on iPad.

If this Order is adopted as drafted, it would be the first time in the Commission's history that it effectively legitimated blatantly discriminatory conduct on the Internet—against *lawful* applications, content, and devices. In fact, the failure to impose blocking prohibitions for lawful content, devices, and most applications for mobile would even appear to retreat from the four Internet policy principles that the Commission adopted in 2005. *See generally In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14986 (Sept. 23, 2005). Ironically, this is coming at precisely the moment when the American public has widely recognized mobile Internet services as key to the future of the Internet.

But this isn't just a Commission "first." It is also a reversal of Commission policies to promote the development and deployment of mobile broadband service—precisely *because* it competes with fixed Internet services. The first recommendation of the National Broadband Plan's chapter on broadband competition and innovation policy is "to make more spectrum available for existing and new wireless broadband providers in order to foster additional wireless-wireline competition at higher speed tiers." Federal Communications Commission, Connecting America: The National Broadband Plan, 2010 WL 972375, at *31 (March 16, 2010).

This is why, in September, the Commission unlocked so-called "white space" spectrum for use—the most significant block of spectrum made available for unlicensed use in two decades. Federal Communications Commission, FCC Frees Up Vacant Airwaves for "Super Wi-Fi" Technologies, 2010 WL 3726639 (Sept. 23, 2010); *In re* Unlicensed Operation in the TV Broadcast Bands, 23 F.C.C.R. 16,807 (Nov. 14, 2008). This is also why, in October, the FCC announced that it would spend $100 to $300 million from the Universal Service Fund to create a Mobility Fund to support deployment of 3G and 4G mobile service to previously unserved areas. Federal Communications Commission, FCC Proposes Creation of Mobility Fund to Close Gap in Mobile Wireless Access, 2010 WL 4059828 (Oct. 14, 2010).

Despite these policies and investments, the draft Order would give mobile ISPs an unprecedented degree of control to decide who will win and who will lose on the Internet. This is dangerous. Choosing not to apply the same consumer protections for mobile Internet users as for fixed would send a loud signal to the market that this Commission endorses anticompetitive behavior by mobile ISPs, discouraging innovation and investment in the wireless ecosystem. The draft Order is a recipe for making mobile connections inferior and non-competitive to fixed connections.

I am most concerned about the impact that the draft Order will have on Minnesotans. Rural communities are chronically underserved by broadband providers. Nationally, rural residents have access to broadband at rates 20 percentage points lower than urban and suburban residents. *See* PEW INTERNET & AMERICAN LIFE PROJECT, HOME BROADBAND ADOPTION 2008, at 3 (2008) *available at* http://www.pewinternet.org/~/media/Files/Reports/2008/PIP_Broadband_2008.pdf.

In Minnesota, residents of rural counties have broadband adoption rates 16 points lower than residents of the Twin Cities. *See* Center for Rural Policy and Development, 2010 Minnesota Internet Survey: Looking at Growth of Broadband Access and Use for Clues to What's Next, at 5 (2010), *available at http://www.mnsu.edu/ruralmn/pages/Publications/reports/2010%20Minn%20Internet%20Study.pdf.* As of 2000, fully 1.4 million Minnesotans—or around 29% of our population—lived in rural areas as defined by the U.S. Census. *See* U.S. Census Bureau, Census 2000 Urban and Rural Classification (Apr. 30, 2002), http://www.census.gov/geo/www/ua/ua_2k.html.

As the Commission rightly notes in its Rural Broadband Strategy, because wireless infrastructure costs are often lower than comparable wireline deployments, "[w]ireless service will play a critical role in ensuring that broadband reaches rural areas"—and those unserved rural Minnesotans. *See* Federal Communications Commission, Bringing Broadband to Rural America: Report on a Rural Broadband Strategy, 2009 WL 1480862, at *41 (May 27, 2009). If this draft Order is approved, the Commission would establish few meaningful neutrality protections for the cutting-edge of wireless Internet—mobile broadband. In other words, many rural Minnesotans' best hope for broadband will come with few, if any, protections against ISP discrimination.

I am not an engineer, but I am unconvinced by arguments that neutrality obligations are not technologically feasible for mobile broadband. I say this because executives from mobile ISPs are already forecasting that 4G technology will eventually offer speeds comparable to fixed broadband connections. *See* Vlad Savov, *Verizon CEO: 4G can be a 'Substitute' for Home Internet and Cable, Will Accelerate Cord Cutting*, Engadget, Dec. 7, 2010, *available at* http://www.engadget.com/2010/12/07/verizon-ceo-4g-can-be-a-substitute-for-home-internet-and-cabl. If mobile Internet access is already becoming a substitute for fixed Internet access, why would we establish separate regulatory regimes for these two technologies?

I respectfully request that you consider implementing strong neutrality obligations on mobile ISPs that are the same as those applied to fixed ISPs—with the understanding that reasonable network management may well mean different things for different technologies.

Paid Prioritization

But the problems of the draft Order are not limited to issues in the mobile space. The proposed Order also walks back on critical protections on paid prioritization for fixed Internet services. I understand that instead of adhering to a clean prohibition on paid prioritization, as set out in the Commission's 2009 Notice of Proposed Rulemaking, the Commission merely states that paid prioritization for fixed Internet services raises cause for concern.

This is a change in course, to say the least. It also goes beyond what industry has agreed to in separate settings, both government-mandated and private in nature. In 2006, for example, AT&T, Inc. and BellSouth Corporation assented to a Commission condition to their merger that required the companies "not to provide or to sell to Internet content, application, or service providers, including those affiliated with AT&T/BellSouth, *any service that privileges, degrades or prioritizes* any packet transmitted over AT&T/BellSouth's fixed broadband Internet access service based on its source, ownership or destination." *In re* AT&T & Bellsouth Corp., 22 F.C.C.R. 5662, 5814 (2007) (emphasis added). This August, Google and Verizon developed a separate framework that would create a rebuttable presumption against paid prioritization. *See* Verizon-Google Legislative Framework Proposal 1 (Aug. 9, 2010), http://www.google.com/ googleblogs/pdfs/verizon_google_legislative_framework_proposal_081010.pdf.

The very core of net neutrality is the principle that the Internet, by its structure, will not determine who wins or loses—that it will remain a fair, open, and free marketplace of ideas, not to mention products and services. It is this structure that allowed a startup named YouTube to beat Google Video. It is also this structure that allows blogs and other user-initiated content to rival—and at times beat—the services offered by major media conglomerates. Paid prioritization would end that.

I urge the Commission to, at a bare minimum, create a rebuttable presumption that paid prioritization is prohibited—regardless of how Americans choose to access the Internet. Given the strong statements and actions of the Commission in the past on this issue, it is my hope that this is one aspect of the Commission's draft Order that has been lost in translation—and can be brought back in line with the Commission's past work on this subject.

Definition of Broadband Internet Access Service

Finally, I am concerned that the draft Order purportedly includes an excessively narrow definition of broadband Internet access service that mirrors a recent proposal by Congressman Henry Waxman (D.-Cal.). I understand that the draft Order defines a broadband Internet access service as a "*consumer retail service*, by wire or radio, that provides high-speed capability to transmit data to and receive data from *all or substantially all* Internet endpoints."

This definition is flawed. The "consumer retail service" language could be interpreted to cover solely the residential use of the Internet, excluding Internet services for businesses or larger institutional clients. The "all or substantially all" language would, perversely, allow broadband Internet access service providers who block websites to remove themselves from coverage under the rule. For example, a fixed Internet access provider could offer a "Top 200 websites" service to consumers and exclude themselves from any neutrality obligations on the grounds that they do not reach "all or substantially all" Internet endpoints. Put simply: you could get out of your obligations not to block websites by blocking websites.

I understand that this definition includes a savings clause or a provision that would attempt to address this kind of evasion, but am unaware of the details of this provision and how it would apply to a service that falls outside of the clear language of the definition.

Regardless, I believe that the definition should be as broad as possible, in line with past Commission precedents, and should avoid overly broad carve-outs for specialized or managed services. I urge the Commission to delete the words "consumer retail" and the words "all or substantially all" from the draft Order's definition of a broadband Internet access service. Conversely, I urge the Commission to return to existing definitions, such as those proposed in the Commission's 2009 Notice of Proposed Rulemaking. 2009 NPRM at 13,128 (Appendix A). This definition would eliminate loopholes and prevent bad actors from using them to skirt the rules.

I commend you for seeking to put in place net neutrality rules despite fervent, but parochial, opposition from powerful interests. I fear, however, that, absent significant changes to the draft Order as it has been described to me, adopting these rules as they are may actually send signals to industry endorsing any closing off of the Internet that is not specifically prohibited.

Thank you for your time and prompt consideration of this matter.

Sincerely,

Al Franken
United States Senator