

May 26, 2010

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> St. SW  
Washington, DC 20554

RE: Notice of *Ex Parte* presentation in:      GN Docket No. 09-191  
   WC Docket No. 07-52  
   GN Docket No. 09-51  
   GN Docket No. 09-137  
   CG Docket No. 09-158  
   CC Docket No. 98-170

Dear Ms. Dortch:

On behalf of Public Knowledge, this letter is to provide information relating to discussions between Public Knowledge (PK) and members of the Commission's staff on May 25, 2010.

Present at the meeting were: Harold Feld, Legal Director, PK; John Bergmayer, Staff Attorney, PK; Jodie Graham, Legal Intern, PK; Mart Kuhn, Legal Intern, PK; Ruth Milkman, Paul Murray, David Hu, John Leibovitz, and Jane Jackson of the Wireless Telecommunications Bureau; Sharon Gillett, Don Stockdale, William Kehoe, Jenny Prime, Rebekah Goodheart, Carol Matthey, and Bill Dever of the Wireline Competition Bureau; and David Tannenbaum of the Office of General Counsel.

Regarding wireless transmission, PK argued that the Commission should classify wireless and wireline broadband the same way, as Title II telecommunications services. As the Commission itself noted in its Open Internet NPRM, the technological differences between various types of broadband access yield different conclusions for what constitutes 'reasonable network management' in different contexts.<sup>1</sup> The Commission has recognized both wireless and wireline as 'broadband access services': although they are not perfect substitutes for one another, both share the essential characteristic of transferring information from one place to another at a user's direction. Continuing to group them together would maintain a consistent basis for the Commission to apply its legal authority, and Sections 201 and 202 of the Communications Act provide the needed flexibility to accommodate the services' differences.

Moreover, the Commission will face serious difficulties if it leaves wireless broadband under Title I but reclassifies wireline in Title II. For example, if the Commission takes the position that wireless and wireline are sufficiently different from one another to justify separate classification, it will have a harder time defining them as part of the same market, such as in merger analysis, and it may not be able to require Form 477 reports from wireless operators. And leaving wireless

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<sup>1</sup> *In the Matter of Preserving the Open Internet*, Notice of Proposed Rulemaking, GN Docket No. 09-191, 24 F.C.C.R. 13064, 13117-24 (Oct. 22, 2009).

broadband out of Title II could jeopardize the use of the Universal Service Fund to promote wireless service.

Regarding forbearance, PK suggested the Commission carefully consider whether forbearance is truly necessary for each statutory provision in question, or whether an alternate approach could yield the desired regulatory ‘light touch’. For example, instead of forbearing from a particular provision, the Commission might adopt a less stringent interpretation of the statutory language or ‘streamline’ the compliance process to reduce the burden. At the very least, the Commission should separately inquire about the feasibility of adopting such alternate approaches for each statutory provision where forbearance is contemplated.

At the same time, the Commission should bear in mind the difference between duties imposed on carriers, duties imposed on the Commission, and discretionary powers granted to the Commission. The Commission *cannot* forbear from its congressionally-imposed duties, such as the preparation of reports on market entry barriers required by Section 257 of the Communications Act. And the Commission *need not* forbear from its discretionary powers, such as Section 209’s power to order monetary damages when appropriate. Where the Commission has the discretion to act, it may simply choose not to act rather than explicitly forbearing.

Accordingly, forbearance should only be considered for statutory duties imposed on carriers. However, as the Commission recognizes, even among carrier duties there are some that are so important that forbearance would be inappropriate. Austin Schlick’s recent discussion of the ‘third way’ framework lists Sections 201, 202, 208, 222, 254, and 255 as the most important provisions in the Communications Act.<sup>2</sup> PK argued that, at a minimum, the interconnection requirement of Section 251(a) and the standards provisions of Section 256 should be added to this list.

PK identified three different legal mechanisms for forbearance (Section 10, on the Commission’s own initiative; Section 10, at the request of a carrier; and Section 332(a)) and asked for clarification as to the legal and practical differences between each mechanism. PK suggested that any *Notice of Inquiry* ask respondents to discuss which forbearance mechanism (or mechanisms) should be used, and to address the feasibility of ‘undoing’ forbearance under each approach.

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

Sincerely,

\_\_\_\_\_/s/  
Mart Kuhn  
Legal Intern  
Public Knowledge

<sup>2</sup> Austin Schlick, *A Third-Way Legal Framework for Addressing the Comcast Dilemma* 4–5 (May 6, 2010), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-297945A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf)

CC: Ruth Milkman  
Paul Murray  
David Hu  
John Leibovitz  
Jane Jackson  
Sharon Gillett  
Don Stockdale  
William Kehoe  
Jenny Prime  
Rebekah Goodheart  
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