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See MCI v. FCC, 515 F.2d 385 (D.C. Circ 1974).

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FCC ACTS TO PRESERVE INTERNET FREEDOM AND OPENNESS

Action Helps Ensure Robust Internet for Consumers, Innovation, Investment, Economic Prosperity

Washington, D.C. – The Federal Communications Commission today acted to preserve the Internet as an open network enabling consumer choice, freedom of expression, user control, competition and the freedom to innovate.

Chairman Genachowski voted for the Order; Commissioner Copps concurred and Commissioner Clyburn approved in part and concurred in part. Commissioners McDowell and Baker dissented.

In 2009, the FCC launched a public process to determine whether and what actions might be necessary to preserve the characteristics that have allowed the Internet to grow into an indispensable platform supporting our nation's economy and civic life, and to foster continued investment in the physical networks that enable the Internet.

This process has made clear that the Internet has thrived because of its freedom and openness -- the absence of any gatekeeper blocking lawful uses of the network or picking winners and losers online. Consumers and innovators do not have to seek permission before they use the Internet to launch new technologies, start businesses, connect with friends, or share their views.

The Internet is a level playing field. Consumers can make their own choices about what applications and services to use and are free to decide what content they want to access, create, or share with others. This openness promotes competition. It also enables a self-reinforcing cycle of investment and innovation in which new uses of the network lead to increased adoption of broadband, which drives investment and improvements in the network itself, which in turn lead to further innovative uses of the network and further investment in content, applications, services, and devices. A core goal of this Order is to foster and accelerate this cycle of investment and innovation.

The record and the economic analysis demonstrate, however, that the openness of the Internet cannot be taken for granted, and that it faces real threats. Broadband providers have taken actions that endanger the Internet's openness by blocking or degrading disfavored content and applications without disclosing their practices to consumers. Finally, broadband providers may have financial interests in services that may compete with online content and services. The record also establishes the widespread benefits of providing greater clarity in this area: clarity that the Internet's openness will continue; that there is a forum and procedure for resolving alleged open Internet violations; and clarity that broadband providers may reasonably manage their networks. In light of these considerations, the FCC has long recognized that certain basic standards for broadband provider conduct are necessary to ensure the Internet's continued openness.

The rules ensure that Internet openness will continue, providing greater certainty to consumers, innovators, investors, and broadband providers, including the flexibility providers need to effectively manage their networks. These rules were developed following a public rulemaking process that began in

fall 2009 and included input from more than 100,000 individuals and organizations and several public workshops. The rules require all broadband providers to publicly disclose network management practices, restrict broadband providers from blocking Internet content and applications, and bar fixed broadband providers from engaging in unreasonable discrimination in transmitting lawful network traffic. The rules ensure much-needed transparency and continued Internet openness, while making clear that broadband providers can effectively manage their networks and respond to market demands

The Order builds on the bipartisan Internet Policy Statement the Commission adopted in 2005. It concludes that adopting open Internet protections to ensure the continued vitality of the Internet is needed in light of instances of broadband providers interfering with the Internet's openness and natural incentives they face to exert gatekeeper control over Internet content, applications, and services.

Broadband Internet access services are clearly within the Commission's jurisdiction. Congress charged the FCC with "regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding" and therefore intended to give the FCC sufficiently broad authority to address new issues that arise with respect to "fluid and dynamic" communications technologies. Congress did not limit its instructions to the Commission to one section of the Communications Act. Rather, it expressed its instructions in multiple sections which, viewed as a whole, provide broad authority to promote competition, investment, transparency, and an open Internet through the rules adopted today.

The provisions of the Communications the FCC relies on in enacting the open Internet rules include:

- Section 706 of the Telecommunications Act of 1996: This provision directs the FCC to "encourage the deployment on a reasonable and timely basis" of "advanced telecommunications capability" to all Americans. It directs the Commission to undertake annual inquiries concerning the availability of advanced telecommunications capability to all Americans and requires that, if the Commission finds that such capability is not being deployed in a reasonable and timely fashion, it "*shall take immediate action* to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market," under Section 706(b). In July 2010, the Commission concluded that broadband deployment to *all* Americans is not reasonable and timely and noted that as a consequence of that conclusion, Section 706(b) was triggered. Section 706(b) therefore provides express authority for the pro-investment, pro-competition rules adopted today.
- Title II of the Communications Act protects competition and consumers of telecommunications services. Over-the-top Internet voice services -- VoIP -- can develop as a competitor to traditional phone services. The FCC likewise safeguards interconnection between telephone customers and VoIP users.
- Title III of the Act gives the Commission authority to license spectrum used to provide fixed and mobile wireless services. Licenses must be subject to terms that serve the public interest. The Commission previously has required certain wireless licensees to comply with open Internet principles, as appropriate in the particular situation before it. The open Internet conditions adopted today likewise are necessary to advance the public interest in innovation and investment.
- Title VI of the Communications Act protects competition in video services. Internet video distribution is increasingly important to video competition. A cable or telephone company's interference with the online transmission of programming by Direct Broadcast Satellite operators or stand-alone online video programming aggregators that may function as competitive alternatives to traditional Multichannel Video Programming Distributors would frustrate Congress's stated goals in enacting Section 628 of the Act, which include promoting "competition and diversity in the multichannel video programming market."

Following are key excerpts from the Report and Order adopted by the Commission to preserve the open Internet:

Rule 1: Transparency

A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.

Rule 2: No Blocking

A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.

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

Rule 3: No Unreasonable Discrimination

A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not unreasonably discriminate in transmitting lawful network traffic over a consumer's broadband Internet access service. Reasonable network management shall not constitute unreasonable discrimination.

Select Definitions

Broadband Internet access service: *A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.*

Reasonable network management. *A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service. Legitimate network management purposes include: ensuring network security and integrity, including by addressing traffic that is harmful to the network; addressing traffic that is unwanted by users (including by premise operators), such as by providing services or capabilities consistent with a user's choices regarding parental controls or security capabilities; and by reducing or mitigating the effects of congestion on the network.*

Pay for Priority Unlikely to Satisfy "No Unreasonable Discrimination" Rule

A commercial arrangement between a broadband provider and a third party to directly or indirectly favor some traffic over other traffic in the connection to a subscriber of the broadband provider (i.e., "pay for priority") would raise significant cause for concern. First, pay for priority would represent a significant departure from historical and current practice. Since the beginning of the Internet, Internet access providers have typically not charged particular content or application providers fees to reach the providers' consumer retail service subscribers or struck pay-for-priority deals, and the record does not contain evidence that U.S. broadband providers currently engage in such arrangements. Second this departure from longstanding norms could cause great harm to innovation and investment in and on the Internet. As discussed above, pay-for-priority arrangements could raise barriers to entry on the Internet by requiring fees from edge providers, as well as transaction costs arising from the need to reach agreements with one or more broadband providers to access a critical mass of potential users. Fees imposed on edge providers may be excessive because few edge providers have the ability to bargain for lesser fees, and because no broadband provider internalizes the full costs of reduced innovation and the exit of edge providers from the market. Third, pay-for-priority arrangements may particularly harm non-

commercial end users, including individual bloggers, libraries, schools, advocacy organizations, and other speakers, especially those who communicate through video or other content sensitive to network congestion. Even open Internet skeptics acknowledge that pay for priority may disadvantage non-commercial uses of the network, which are typically less able to pay for priority, and for which the Internet is a uniquely important platform. Fourth, broadband providers that sought to offer pay-for-priority services would have an incentive to limit the quality of service provided to non-prioritized traffic. In light of each of these concerns, as a general matter, it is unlikely that pay for priority would satisfy the “no unreasonable discrimination” standard. The practice of a broadband Internet access service provider prioritizing its own content, applications, or services, or those of its affiliates, would raise the same significant concerns and would be subject to the same standards and considerations in evaluating reasonableness as third-party pay-for-priority arrangements.

Measured Steps for Mobile Broadband

Mobile broadband presents special considerations that suggest differences in how and when open Internet protections should apply. Mobile broadband is an earlier-stage platform than fixed broadband, and it is rapidly evolving. For most of the history of the Internet, access has been predominantly through fixed platforms -- first dial-up, then cable modem and DSL services. As of a few years ago, most consumers used their mobile phones primarily to make phone calls and send text messages, and most mobile providers offered Internet access only via “walled gardens” or stripped down websites. Today, however, mobile broadband is an important Internet access platform that is helping drive broadband adoption, and data usage is growing rapidly. The mobile ecosystem is experiencing very rapid innovation and change, including an expanding array of smartphones, aircard modems, and other devices that allow mobile broadband providers to enable Internet access; the emergence and rapid growth of dedicated-purpose mobile devices like e-readers; the development of mobile application (“app”) stores and hundreds of thousands of mobile apps; and the evolution of new business models for mobile broadband providers, including usage-based pricing.

Moreover, most consumers have more choices for mobile broadband than for fixed broadband. Mobile broadband speeds, capacity, and penetration are typically much lower than for fixed broadband, though some providers have begun offering 4G service that will enable offerings with higher speeds and capacity and lower latency than previous generations of mobile service. In addition, existing mobile networks present operational constraints that fixed broadband networks do not typically encounter. This puts greater pressure on the concept of “reasonable network management” for mobile providers, and creates additional challenges in applying a broader set of rules to mobile at this time. Further, we recognize that there have been meaningful recent moves toward openness, including the introduction of open operating systems like Android. In addition, we anticipate soon seeing the effects on the market of the openness conditions we imposed on mobile providers that operate on upper 700 MHz C-Block spectrum, which includes Verizon Wireless, one of the largest mobile wireless carriers in the U.S.

In light of these considerations, we conclude it is appropriate to take measured steps at this time to protect the openness of the Internet when accessed through mobile broadband

Specialized Services

In the Open Internet NPRM, the Commission recognized that broadband providers offer services that share capacity with broadband Internet access service over providers’ last-mile facilities, and may develop and offer other such services in the future. These “specialized services,” such as some broadband providers’ existing facilities-based VoIP and Internet Protocol-video offerings, differ from broadband Internet access service and may drive additional private investment in broadband networks and provide consumers valued services, supplementing the benefits of the open Internet. At the same time, specialized services may raise concerns regarding bypassing open Internet protections, supplanting the open Internet, and enabling anticompetitive conduct. We note also that our rules define broadband Internet access service to encompass “any service that the Commission finds to be providing a functional equivalent of [broadband Internet access service], or that is used to evade the protections set forth in these rules.”

We will closely monitor the robustness and affordability of broadband Internet access services, with a particular focus on any signs that specialized services are in any way retarding the growth of or constricting capacity available for broadband Internet access service. We fully expect that broadband providers will increase capacity offered for broadband Internet access service if they expand network capacity to accommodate specialized services. We would be concerned if capacity for broadband Internet access service did not keep pace. We also expect broadband providers to disclose information about specialized services' impact, if any, on last-mile capacity available for, and the performance of, broadband Internet access service. We may consider additional disclosure requirements in this area in our related proceeding regarding consumer transparency and disclosure. We would also be concerned by any marketing, advertising, or other messaging by broadband providers suggesting that one or more specialized services, taken alone or together, and not provided in accordance with our open Internet rules, is "Internet" service or a substitute for broadband Internet access service. Finally, we will monitor the potential for anticompetitive or otherwise harmful effects from specialized services, including from any arrangements a broadband provider may seek to enter into with third parties to offer such services. The Open Internet Advisory Committee will aid us in monitoring these issues.

Action by the Commission December 21, 2010, by Report and Order (FCC 10-201). Chairman Genachowski approving, Commissioner Clyburn approving in part and concurring in part; Commissioner Copps concurring, Commissioners' McDowell and Baker dissenting. Separate statements issued by Chairman Genachowski, Commissioners' Copps, McDowell, Clyburn, and Baker.

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