FOIA NO. 2011-093

BEFORE THE OFFICE OF GENERAL COUNSEL

ON APPEAL FROM THE FOIA DIVISION, FEDERAL COMMUNICATIONS COMMISSION

APPELLANT AMERICANS FOR LIMITED GOVERNMENT'S FREEDOM OF INFORMATION ACT APPEAL REGARDING DENIAL OF REQUEST FOR FEE WAIVER

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STATEMENT OF FACTS

Appellant, Americans for Limited Government, (Appellant) filed a request under the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq*. with Federal Communications Commission (FCC) on December 7, 2010. A copy of that FOIA request is attached as Appendix 1.

In its FOIA request Appellant sought production from the FCC of specifically described federal records that pertain to communications to or from any Commissioner of the FCC and group of nine identified individuals. The Appellant's request of records read:

> These records [seeking] pertain to communications to or from any Commissioner of the Federal Communications Commission (FCC) or their immediate staff and the following individuals:
>
> 1. Alan Davidson
> 2. Frannie Wellings
> 3. Harry Wingo
> 4. Jennifer Taylor
> 5. Johanna Shelton
> 6. Pablo Chavez
> 7. Richard Whitt
> 8. Seth Webb
> 9. Will DeVries
>
> Please provide copies of all records of communications and the communications themselves between any FCC Commissioner or their immediate staff and the persons named above. Please provide copies of any such records that were created on or after January 20, 2009.

In its FOIA request Appellant sought a fee waiver due because of the public benefit that disclosing these records will provide.

Joel Kaufman, Associate General Counsel and Chief for the FCC, by letter dated December 29, 2010 and received by Appellant, denied the fee waiver request on the grounds that "ALG provides no information as to the affiliations of these individuals [the nine individuals listed above], the subject matter of the communication sought, or why these communications have any particular significance that would contribute significantly to public understanding of the operations of activities of the government." A copy of that denial is attached as Appendix 2.

SUMMARY OF THE ARGUMENT

Appellant is entitled to a fee waiver because it has reasonably identified the records it is seeking, which have a direct correlation between nine identified individuals and how the FCC makes its policy. Furthermore, the records sought will significantly increase the public understanding of the operations or activities of the FCC. The Appellant does not have a commercial interest in the records, and hence, should be considered a "representative of news media" under 47 C.F.R. § 0.470(a)(2). Based on these arguments, Appellant should be granted a fee waiver.

ARGUMENT

THE FEE WAIVER PROVISIONS FOUND IN THE FOIA EXIST TO FURTHER SIGNIFICANTLY THE PUBLIC UNDERSTANDING OF THE GOVERNMENT AND ARE TO BE LIBERALLY CONSTRUED

The information sought by Appellant in its FOIA request concerns the operations or activities of the FCC and will be used to better the public's understanding of how the FCC is reaching its decisions on internet regulation and spending taxpayer money. As such the public good that will occur in disclosing the information sought in and of itself weighs strongly in favor of a fee waiver. Further, the information sought is "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). Appellant regularly publishes information on the activities, structure, and operations of the federal government. This information is distributed to a large number of diverse individuals across the entire nation. The records sought are of the type which Appellant regularly provides to the public through its publications and website, www.getliberty.org. As such granting the request to waive fees is in the public interest. Further, "Congress intended that the public interest standard be liberally construed and that fees not be used as an obstacle to disclosure of requested information." (*Emphasis added.*) *Eudey v. Central Intelligence Agency*, 478 F.Supp. 1175, 1177 (D.D.C. 1979). (*Internal citations omitted.*) The central focus of the analysis in determining whether the fee waiver is in the public interest is whether the public rather than the requestor is the primary beneficiary of the release of the information. "The statute indicates that the issue to be considered by the agency is whether furnishing the information will primarily benefit the public at large or whether any benefit will inure primarily to the specific individual requesting the documents." *Id*. In the instant case the records sought will be used to further the public's

understanding of the operations of the FCC. The records sought will be disseminated widely to parties interested in the workings of the government and as such will not inure primarily to the benefit of the requestor. Therefore the request for waiver of fees should be granted pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).

I. APPELLANT'S REQUEST FOR COMMUNICATIONS BETWEEN THE NINE IDENTIFIED INDIVIDUALS AND COMMISSIONERS OF THE FCC IS REASONABLY DESCRIBED, AND THEREFORE APPELLANT SHOULD BE GRANTED A FEE WAIVER

The Freedom of Information Act requires federal agencies make records available upon a request which "reasonably describes" the records sought. 5 U.S.C. § 552(a)(3)(A)(i). "The purpose of the identifiability requirement is to generate a reasonable description enabling the Government employee to locate the requested records." *Sears v. Gottschalk,* 502 F.2d 122, 125 (1974), citing *Bristol-Myers Co. v. F.T.C.,* 424 F.2d 935, 938 (1970). (*Internal citations omitted*.) In that case, plaintiff had asked for all abandoned patent applications, and although the court found the plaintiff's request to be "far reaching", it determined that it still had reasonably identified the records. *Id.* In this case, Appellant identified nine individuals and requested all records of their communications between themselves and any FCC commissioner and their staff. Appellant further limited their request to those communications created on or after January 20, 2009. A cursory search of the individuals named will reveal that they all have a connection to the internet giant, Google Inc., as either employees or lobbyist. Appellant believes their communications will focus on the discussion of FCC internet

policy, such as the recent "net neutrality" rules passed by the FCC. Appellant believes that the requested records would significantly contribute to public understanding of the operations of activities of the FCC as explained below. Such is the affiliation to the FCC that Appellant was trying to make by its "reasonable description" of the records sought.

II. APPELLANT'S REQUEST IS IN THE PUBLIC INTEREST BECAUSE IT IS LIKELY TO CONTRIBUTE SIGNIFICANTLY TO PUBLIC UNDERSTANDING OF THE OPERATIONS OR ACTIVITIES OF THE FCC, AND HENCE APPELLANT'S REQUEST FOR A FEE WAIVER SHOULD BE GRANTED

In further support of its argument Appellant submits the following further analysis of the factors found in the FCC's FOIA regulation related to fee waivers found at 47 C.F.R. § 0.441 *et seq*.

The FCC's FOIA regulation at 47 C.F.R. § 0.470(e)(2) lists three factors that are to used in determining whether disclosure is in the public's interest and likely to contribute significantly to public understanding of the operations or activities of the government. As discussed below, Appellant believes it has met these factors, and therefore qualifies for a waiver of fees.

A. 47 C.F.R. § 0.470(e)(2)(i) EXPLANATION OF HOW THE APPELLANT'S REQUEST CONCERNS THE OPERATIONS OR ACTIVITIES OF THE FEDERAL GOVERNMENT.

The FCC's regulation at 47 C.F.R. § 0.470(2)(2)(i) contains the first factor to be used in determining whether a fee waiver should be granted. That factor is, "Whether

the subject of the requested records concerns the operations or activities of the government." The information Appellant requested specifically identifies communication between nine individuals who have an affiliation to internet giant, Google Inc., and FCC Commissioners and their staff. FCC has written and is in the process of writing policy that will affect the future of internet use, something that Google Inc. is heavily invested in. The records sought by Appellant relate to how FCC is influenced in the writing of these rules. For instance, FCC recently released their "net neutrality" rules that curiously exempt Google.[1] The records sought by Appellant relate solely to how the government, *i.e.*, FCC is (1) operating on the issue of writing these regulations, and (2) what activities, meetings, etc. have occurred in furtherance of the government's operations on this issue.

B. 47 C.F.R. § 0.470(e)(2)(ii) Explanation of How Disclosure Is Likely To Contribute To the Public's Understanding of Government Operations and Activities.

As stated above, the records sought are communications between nine identified individuals and the Commissioners and their staff. These communications have not previously been reported on in the public domain. As such the public has little or no current understanding of these communications. Therefore any disclosure of these records will increase the public's understanding of Google's influence on the FCC

[1] *See*, Mike Martin, *FCC's Net Neutrality: Have It Google-Verizon's Way*, E-Commerce Times, December 22, 2010, available online at http://www.ecommercetimes.com/rsstory/71519.html?wlc=1295474504 (accessed on January 20, 2011).

regulations. Upon receipt of the requested records Appellant will perform extensive analysis of these communications (records). Appellant has an experienced research and legal staff who will carefully scrutinize any responsive records provided. We will compare how statements made in these communications line up with official policy positions of the FCC. We will perform analysis of the timing of communications found in these records to better understand how these communications, if any, impacted the FCC's decision making and implementation processes during the time period specified in the FOIA request. After completing that analysis Appellant will publish its findings using the media described below. The records sought will significantly improve the understanding of the public as to the operation and activities of the FCC.

C. 47 C.F.R. § 0.470(e)(2)(iii) Explanation of How Disclosure of the Requested Information Will Contribute to Public Understanding as Opposed to the Individual Understanding of the Requester or a Narrow Segment of Interested Persons

Appellant speaks to a nationwide audience. Appellant maintains a daily news service that is read by tens of thousands of individuals. By way of example, on a typical day our materials are read by over 70,000 individuals. Included in that number are 9,000 editors and publishers, 8,000 bloggers, 4,000 T.V. staff, 5,000 radio talk show personnel, 3,000 political journalists, and 3,000 key individuals in positions within Washington, DC. Many of these 70,000 individuals and their respective entities republish our materials which we provide free of charge and without copyright

restriction, allowing for wide dispersal of these materials. For example, within two days one of Appellant's news story items was recently re-published by over 4,500 individual news sources. As such, the discloser of the requested information will contribute to the general public understanding as opposed to an individual understanding of the Appellant or narrow segment of interested persons.

III. 47 C.F.R. § 0.470(e)(3) THE APPELLANT DOES NOT HAVE A COMMERCIAL INTEREST IN THE DISCLOSURE OF THE REQUESTED DOCUMENTS AND SHOULD THEREFORE BE GRANTED A FEE WAIVER

The FCC's FOIA regulation at 42 C.F.R. § 0.470(e)(3) lists two factors that are used in determining whether disclosure is primarily in the commercial interest of the requester. As discussed below, Appellant believes it has met these factors, and is therefore qualified for a waiver of fees.

A. 47 C.F.R. § 0.470(e)(3)(i) DISCUSSION WHETHER THE REQUESTER HAS A COMMERCIAL INTEREST THAT WOULD BE FURTHERED BY THE REQUESTED DISCLOSURE

As noted earlier, the central focus of the analysis in determining whether the fee waiver is in the public interest is whether the public rather than the requestor is the primary beneficiary of the release of the information. "The statute indicates that the issue to be considered by the agency is whether furnishing the information will primarily benefit the public at large or whether any benefit will inure primarily to the specific individual requesting the documents." *Eudey*, 478 F.Supp. 1175, 1177 (D.D.C.

1979). In the instant case the records sought will be used to further the public's understanding of the operations of the FCC. The records sought will be disseminated widely to parties interested in the workings of the government and as such will not inure primarily to the benefit of the requestor. Appellant operates as a nonprofit, offering free expert analysis on a variety of political issues, and welcomes republication of its materials in order to get the information to as wide an audience as possible. [Anything we can site here?] Therefore the Appellant has no commercial interest and in the disclosure of the records, and it's request for waiver of fees should be granted pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).

B. 47 C.F.R. § 0.470(e)(3)(ii) Explanation of How the Magnitude of the Identified Commercial Interest of the Requester is Sufficiently Small, In Comparison with the Public Interest in Disclosure

If it were determined that Appellant had a commercial interested in the disclosure of the records, due to the fact that the Appellant distributes to a large nationwide audience on a daily basis, its commercial interest would be minimal in comparison to the magnitude of the public's interested in the disclosure of the request. Therefore, the Appellant is entitled to a waiver of fees.

IV. Appellant Should Be Considered Representative of the News Media Under 47 C.F.R. § 0.470(a)(2), and as such, Appellant's Request for a Fee Waiver Should be Granted

Based on the nature of Appellant's work, and the previous arguments, Appellant should be considered as a representative of news media. As such, the Appellant's request for a fee waiver should be granted.

CONCLUSION

Based on the foregoing Appellant respectfully urges the FCC's Office of General Counsel to reverse its decision and grant Appellant a waiver of fees for its FOIA request.

Dated this 20th day of January, 2011.

Respectfully Submitted,

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APPENDIX 1

FOR IMMEDIATE RELEASE:
December 21, 2010

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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.

--FCC--

APPENDIX 2

Verizon-Google Legislative Framework Proposal

Google and Verizon have been working together to find ways to preserve the open Internet and the vibrant and innovative markets it supports, to protect consumers, and to promote continued investment in broadband access. With these goals in mind, together we offer a proposed open Internet framework for the consideration of policymakers and the public.

We believe such a framework should include the following key elements:

Consumer Protections: A broadband Internet access service provider would be prohibited from preventing users of its broadband Internet access service from--

(1) sending and receiving lawful content of their choice;

(2) running lawful applications and using lawful services of their choice; and

(3) connecting their choice of legal devices that do not harm the network or service, facilitate theft of service, or harm other users of the service.

Non-Discrimination Requirement: In providing broadband Internet access service, a provider would be prohibited from engaging in undue discrimination against any lawful Internet content, application, or service in a manner that causes meaningful harm to competition or to users. Prioritization of Internet traffic would be presumed inconsistent with the non-discrimination standard, but the presumption could be rebutted.

Transparency: Providers of broadband Internet access service would be required to disclose accurate and relevant information in plain language about the characteristics and capabilities of their offerings, their broadband network management, and other practices necessary for consumers and other users to make informed choices.

Network Management: Broadband Internet access service providers are permitted to engage in reasonable network management. Reasonable network management includes any technically sound practice: to reduce or mitigate the effects of congestion on its network; to ensure network security or integrity; to address traffic that is unwanted by or harmful to users, the provider's network, or the Internet; to ensure service quality to a subscriber; to provide services or capabilities consistent with a consumer's choices; that is consistent with the technical requirements, standards, or best practices adopted by an independent, widely-recognized Internet community governance initiative or standard-setting organization; to prioritize general classes or types of Internet traffic, based on latency; or otherwise to manage the daily operation of its network.

Additional Online Services: A provider that offers a broadband Internet access service complying with the above principles could offer any other additional or differentiated services. Such other services would have to be distinguishable in scope and purpose from broadband Internet access service, but could make use of or access Internet content, applications or services and could include traffic prioritization. The FCC would publish an annual report on the effect of

these additional services, and immediately report if it finds at any time that these services threaten the meaningful availability of broadband Internet access services or have been devised or promoted in a manner designed to evade these consumer protections.

Wireless Broadband: Because of the unique technical and operational characteristics of wireless networks, and the competitive and still-developing nature of wireless broadband services, only the transparency principle would apply to wireless broadband at this time. The U.S. Government Accountability Office would report to Congress annually on the continued development and robustness of wireless broadband Internet access services.

Case-By-Case Enforcement: The FCC would enforce the consumer protection and nondiscrimination requirements through case-by-case adjudication, but would have no rulemaking authority with respect to those provisions. Parties would be encouraged to use non-governmental dispute resolution processes established by independent, widely-recognized Internet community governance initiatives, and the FCC would be directed to give appropriate deference to decisions or advisory opinions of such groups. The FCC could grant injunctive relief for violations of the consumer protection and non-discrimination provisions. The FCC could impose a forfeiture of up to $2,000,000 for knowing violations of the consumer-protection or non-discrimination provisions. The proposed framework would not affect rights or obligations under existing Federal or State laws that generally apply to businesses, and would not create any new private right of action.

Regulatory Authority: The FCC would have exclusive authority to oversee broadband Internet access service, but would not have any authority over Internet software applications, content or services. Regulatory authorities would not be permitted to regulate broadband Internet access service.

Broadband Access for Americans: Broadband Internet access would be eligible for Federal universal service fund support to spur deployment in unserved areas and to support programs to encourage broadband adoption by low-income populations. In addition, the FCC would be required to complete intercarrier compensation reform within 12 months. Broadband Internet access service and traffic or services using Internet protocol would be considered exclusively interstate in nature. In general, broadband Internet access service providers would ensure that the service is accessible to and usable by individuals with disabilities.