July 20, 2008

Chairman Kevin R. Martin
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell
Federal Communications Commission
445 12th St SW
Washington, DC 20554

Mr. Chairman and Members of the Commission:

On Thursday, 10 July 2008, the Associated Press announced that Chairman Martin had proposed, and all of you were discussing, possible action on the petitions filed by Vuze and Free Press in November of 2007.

We are glad that the FCC is proposing to bring this matter to a close, because the uncertainty created by its pendency has limited the ability of our small, rural wireless Internet service provider to attract new investment and hence to roll out broadband to areas which have no service or no competition. Potential and even current investors have been concerned that the Commission might issue a ruling which restricted our company's ability to manage its networks, or preventing us from being innovative in its terms and service offerings. We expect no new funding until we can assure potential investors that the Commission's action would not compromise our competitiveness and/or prevent us entirely from continuing in business, they are declining to fund us further.

As you deliberate as to precisely what action you will take at your August 1st meeting, I would like to relate an anecdote regarding my recent visit to the FCC in Washington.

In March of this year, I traveled to DC to visit the Commission and spoke with several of your aides. I arrived early, and while I was waiting in the 8th floor lobby I opened my laptop. I immediately noted that the Commission offered Wi-Fi to members of the public who visited its offices.

Connecting to the network, I further discovered that I could browse the Internet and connect to both insecure (http://) and secure (https://) Web sites. However, when I attempted to retrieve my e-mail, I discovered that the virtual private networking protocol I was attempting to use to secure the transaction – the SSH or "secure shell" protocol – had been blocked. The FCC's network adminstrators – following best industry practices – had decided to open only certain specific TCP ports to users of the service which they provided to the public within the building.

Since any protocol that was not specifically allowed was blocked (also a best practice), and the administrators had not specifically enabled SSH, I could not use it to access my e-mail. P2P protocols such as BitTorrent were also blocked.

Recognizing the FCC's right to protect its network and to offer only the services of its choice to the public, I checked my mail via an alternative, secure Web-based interface.

While it is true that visitors to the FCC's offices might in some cases be inconvenienced by such restrictions, they are important and absolutely necessary. They protect your agency's network from potential abuse – not only by people within the building but by someone outside the building using a perfectly legal, FCC certified radio with a high gain antenna.

To prohibit such sensible restrictions on the use of a network is to invite abuse. Likewise, a ruling which prohibited ISPs from setting Terms of Service that prohibit some activities, or from placing reasonable restrictions upon use of their networks, would compromise legitimate users' access and quality of service. And as I mentioned in my testimony to the Commission at Stanford (I was not able to read all of it at the hearing, so please see http://www.brettglass.com/FCC/remarks.html for the full text), such a ruling would also allow third parties to commandeer resources on ISPs' networks and prevent ISPs such as my own from offering high quality residential and rural service at reasonable prices.

The FCC now has before it two petitions. One is for rulemaking. Another asks it to enforce a policy statement – issued by former FCC Chairman Michael Powell without public review or a formal rulemaking process – as if it were a binding set of rules, even though it was explicitly described as nonbinding when it was presented to the public several years ago.

To punish any entity, whatever its sins, on the basis of what was explicitly stated to be a "nonbinding" policy statement would be, in effect, to retroactively declare this years-old list of unpolished, unvetted, extremely broad and vague ideas to be rules, even though they had not been offered up for public comment as part of a Notice of Proposed Rulemaking. In short, it would constitute an "end run" by the Commission around its own rulemaking procedure. Because it would bypass vital due process protections, such action might well be viewed by the courts, by the public, and by Congress as arbitrary and capricious. It would also chill investors' enthusiasm for investing in broadband deployment, because it would send a signal that, at any time, any broadband provider might be subject to sanctions without prior notice that it had broken a rule, or even been notified of exactly what the "rules" were. And finally, it would violate 47 USC § 230(b), which states that it is the policy of the United States to "promote the development of the Internet and other interactive computer services and other interactive media" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."

As America falls behind the rest of the world in broadband speed, cost, and deployment, the worst thing we could do to our citizens is hobble the small, innovative companies which are trying to turn this situation around. For this reason, I and my company respectfully request that the FCC dismiss both petitions or commence a formal rulemaking procedure in which the public, experts in the field, and Internet service providers may comment upon the proposed language of new rules.

Note that because the latter alternative would still engender some doubts among our investors, we would much prefer the former. However, should the Commission choose to embark upon a formal rulemaking process, it should very carefully consider whether all of the elements of Chairman Powell's raw and untested policy ideas should indeed be turned into rules. Of particular concern is the clause which states that users must be allowed to run the "applications of their choice" on the Internet, regardless of what those applications do.

It's important to step back and think about the implications of this clause – the one which Comcast has been accused in the current proceeding of having "violated."

An application (a technical term for any computer program which is not an operating system) encodes and

embodies behavior — any behavior at all that the author wants. And anyone can write one. So, insisting that an ISP allow a user to run any application means that anyone can program his or her computer to behave any way at all — no matter how destructively — on the Internet, and the ISP is not allowed to intervene. In short, such a requirement means that no network provider can have an enforceable Acceptable Use Policy or Terms of Service.

This is a recipe for disaster. Anyone who engages in destructive behavior, hogs bandwidth, or even takes down the network could and say, "I was just running an application… and I have the right to run any application I want, so you can't stop me."

Now, imagine yourself as the administrator of a school network, a public hotspot, an ISP, or any other network which provides service to the public. Someone is doing something disruptive. Your users are complaining; quality of service has deteriorated. But if you act, and especially if you focus on the destructive behavior by detecting the rogue application and attempting to block it and not others, you would be subject to FCC fines and penalties.

The above conundrum is but one example of why any proposed rules or regulations pertaining to the Internet should be presented to the public for comment as part of a formal rulemaking process.

For this reason, if the FCC does not dismiss both petitions, it should at most chide Comcast for failing to full disclose the details of its acceptable use policy and terms of service and initiate a formal rulemaking proceeding.

Remember: while a ruling adverse to Comcast might sting this large corporation a bit, it could well be the death knell for smaller companies – including the rural wireless ISP which I and my wife have been operating for more than 16 years. We therefore urge you to consider your actions, and their possible effects, very carefully before acting, and to be cautious before taking an action that might harm the Commission's own stated goals for broadband investment and deployment.

Sincerely,

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