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**TESTIMONY BEFORE THE NEW YORK CITY COUNCIL
COMMITTEE ON TECHNOLOGY AND GOVERNMENT ON
RESOLUTION NO. 712-A ON NATIONAL NET NEUTRALITY RULES**

NOVEMBER 20, 2009

I. INTRODUCTION

Good morning to developers, entrepreneurs, telecoms, academics, advocacy groups and the greater technology community. Council Members Fidler, Gerson, James, Liu, Sanders, and de Blasio, thank you for recognizing the importance of this issue and for sponsoring this resolution. Council Member Brewer, Council and committee staff members Kunal Malhotra and Sam Wong, thank you for your amazing work on this committee, for your commitment and continuing to address issues of importance to the technology community like Network Neutrality.

My name is Benjamin Kallos, I am here before you today as a co-founder of the Open Government Foundation, Inc. (the "Foundation"), a New York State not-for-profit which aims to bring greater transparency, accountability and openness to government by making information available online for all to see.

We are here today in response to your committee's call for testimony on two issues. First, will the Network Neutrality principles as articulated effectively obtain the goal of maintaining a free and open Internet? Second, pending resolution number 712-A of 2007, which asks the Federal Communications Commission ("FCC") and Congress to set firm Network Neutrality regulations.

It is important to clarify the question before this body, the FCC, and indeed Congress. On October 22, 2009 the FCC released a Notice of Proposed Rule Making opening a public comment period through January 14, 2010, with a reply comment period through March 5, 2010. In this notice the FCC states its intent to preserve a "free and open Internet" through a codification of the four principles articulated in its 2005 Internet Policy Statement best summarized as "any lawful content, any lawful application, any lawful device, any provider" with the addition of two new principles of non-discrimination and transparency as well as their application to include not only wired Internet but also non-wired Internet such as mobile wireless and satellite. It is important that the City Council, Congress as well as the FCC remain true to paragraph 14 of its notice:

The rules we propose today address *users'* ability to access the Internet and are not intended to regulate the Internet itself or create a different Internet experience from the one that users have come to expect. Instead, our proposals attempt to build on existing policies (discussed below) that have contributed to the Internet's openness without imposing conditions that might diminish innovation or network investment. We seek to create a balanced framework that gives consumers and



providers of Internet access, content, services, and applications the predictability and clarity they need going forward while retaining our ability to respond flexibly to new challenges. (Emphasis Added).

Thus, this notice does not seek to change the Internet, so much as preserve it as “free and open.” This opportunity for rulemaking must not be treated by anyone as a Pandora’s Box that somehow open’s all regulation of the Internet to comment and criticism but rather our discussion must be limited to the two new principles, with first four treated as sacred.

II. LOOKING BACK ON THE INTERNET AS WE MOVE FORWARD

Whether you believe Al Gore or DARPA invented the Internet, most will agree that it is a product of the financial support of tax dollars from the United States and Internationally that has entered the public domain as “free and open” with a “freedom to innovate.” This freedom to innovate makes the Internet an incubator for an ideal free market where there is a low barrier to entry, where an entrepreneur does not need to secure permission or pay royalties to compete, and end to end connectivity where everyone has the potential to reach the same universal audience at no additional cost.

For simplification’s sake, the Internet has historically consisted of content providers and the end user, each with their own access to the Internet. Content providers are billed for access by Internet Service Providers (ISPs) based “bandwidth” or the speed of their connection as measured by the amount information they can send at once and “traffic” which is a data transfer allotment or how much information they can distribute over the Internet in a specific period of time. You may have noticed that when you are downloading multiple files at once over the Internet that they all tend to slow down. The same is true for content providers, so the more successful they are and the more traffic they have, the more bandwidth and traffic they need and purchase. As a high speed Internet user in the United States you don’t have to worry about this, as most people can pay a lump sum to their cable or phone company for “unlimited” Internet access where you can download as much as you want. The model works because content providers are willing to bear the costs to get the information onto the Internet, users have been happy to pay a singular fee for access, and both believed that information would be delivered as fast as possible between them.

Recently the Internet has begun to change, growing from mostly text based web sites with some pictures here and there to have increasing amounts of audio, video, and other bandwidth intensive real-time applications. Not only that, but with the Web 2.0 revolution, every Internet user has become a content provider. It has become common place for regular users to record and upload YouTube videos, video and audio conference over Skype, make phone calls over Vonage, and even share files from their computer like the latest Linux distribution. Cable and phone companies now face increased costs from supporting its users who demand to be provided with the additional bandwidth necessary for being a content provider without paying for



additional traffic. Cable and phone companies now also face competition from each other as well as content providers who are currently allowed to compete with them at no added cost over the very Internet connection they are providing to their user. Some cable and phone companies such as Comcast have reacted by developing and implementing technology to control the flow of Information on the Internet though traffic shaping based on information type, giving priority to certain traffic while slowing down traffic of others. This traffic shaping has largely occurred without notice to the user, without a renegotiation of contracts or rates, and without disclosing how a user's Internet experience is being affected.

III. PRESERVING A FREE AND OPEN INTERNET

In response to the recent implementation of traffic shaping by cable and phone companies, on October 22, 2009 the FCC released a Notice of Proposed Rule Making opening a public comment period through January 14, 2010, with a reply comment period through March 5, 2010. In this notice the FCC states its intent to preserve a "free and open Internet" through a codification of the four principles articulated in its 2005 Internet Policy Statement with the addition of two new principles of non-discrimination and transparency as well as their application to include not only wired Internet but also non-wired Internet such as mobile wireless and satellite.

As mentioned earlier the FCC has not opened the first four principles best summarized as "any lawful content, any lawful application, any lawful device, any provider" for comment. Under the new non-discrimination principle a provider of broadband Internet access "would be required to treat lawful content, application, and services in a nondiscriminatory manner." It should be noted that the FCC states in their notice that cable and phone companies who provide broadband Internet access have a conflict of interest due to online competition and that implementation of this principle is necessary to protect the interests of the end user and the public. While this principle would seek to eliminate the bulk of current traffic shaping by cable and phone companies, they are still empowered to engage in "reasonable network management," which still might involve traffic shaping. The sixth principle seeks to provide accountability for the broad "reasonable network management" powers it is providing through transparency and the requirement that providers of broadband Internet access "would be required to disclose such information concerning network management and other practices as is reasonable required for users and content, application, and service providers to enjoy the protections specified in this rule making." The transparency principle in further detail requires that the provider of broadband Internet access must "make available relevant information regarding network management practices to the consumer who purchases their service; to content, application, and service providers, who must ensure that their offering function on the Internet; and to the Commission." What is ground breaking about this principle is the opportunity to codify a concept of accountability to both the end user and the fellow community, in a broad departure from typical accountability that is only to a regulating agency.



As a non-profit dedicated to transparency, accountability and openness, we strongly support these two new principles, which together would scale back behavior that currently threaten a free and open Internet. We also believe the codification of such principles would help to begin an era of transparency, accountability and imparting the concept of responsibility of a service provider to the consumer and the larger global community.

IV. NYC FRANCHISE OF CABLE, HIGH CAPACITY AND MOBILE TELECOMMUNICATIONS

While the New York City Council should be commended for holding a public hearing to consider a non-binding resolution on Network Neutrality directing Congress to take action the City could also use its power over phone and cable franchise to accomplish similar goals to Network Neutrality and Universal Broadband.

The New York City Charter empowers the Franchise and Concession Review Committee (FCRC) to review and approve franchise agreements through public hearing, Mayoral approval, registration by the Comptroller, and governing resolutions passed regularly by the New York City Council. Current franchises include Cable (Resolution 538 approved September 27, 2006), Local High Capacity Telecommunications (Resolution 1204 approved February 27, 2008), Mobile Telecommunications (Resolution 519 approved March 23, 2005), and Public Pay Telephones (Resolution 1043 approved September 17, 2003). The powers granted under these resolutions expire five years after their approval and can be amended, although all the franchises granted in accordance with the resolutions may have terms of up to fifteen years.

The importance of the FCRC and its negotiating ability is easily demonstrated by Deputy Mayor for Economic Development Robert Lieber who on April 29, 2008, announced a franchise agreement with Verizon to allow the phone company to begin offering cable television service to provide increased competition among cable companies for the benefit of the consumer. This franchise was granted in exchange for more channels, adopting concepts introduced by Comptroller William Thompson, Jr.'s "Cable Consumers Bill of Rights" for improved customer service protections, a five percent franchise fee on cable television revenues, a \$10 million grant to NYC TV, a \$4 million grant for Technology Education and Municipal Facilities, infrastructure improvements enabling public safety grade telecommunications, and most importantly bringing fiber optics to every street in the City by 2014, with 50 percent of the City completed by the end of next year. The Council should take notice of this last franchise agreement as an example for what may be accomplished through franchise negotiation.

In addition to calling upon the Federal government the City Council should call upon the Mayor and FCRC to use their franchise negotiation powers to have phone, cable, and mobile franchises provide universal access to the Internet, including communities with relatively low adoption rates, though programs to provide free or reduced rates for



families of children attending public schools and New York City Housing Authority residents. Similarly, while the FCC considers adding two new principles and codifying them the City should investigate its powers to require franchisees to abide by these six principles to the extent they are not pre-empted, as well as calling upon the Mayor and FCRC to indicate that a failure to comply with the spirit of the FCC's four principles, which would include the two previously implied new additions, will be considered negatively on future franchise renewal.

V. RESOLUTION NUMBER 712-A ON NATIONAL NETWORK NEUTRALITY RULES

The New York City Council is empowered to speak as a body on behalf of New York City's more than 8 million residents through resolution. We recommend that this resolution be updated from this version which was originally drafted in 2007 to be more technically accurate and to provide the comments sought by the FCC in their October 22, 2009 Notice of Proposed Rulemaking.

Please consider updating the resolution to provide a stronger enactment clause that specifically supports all of the FCC's six proposed principles, supports the inclusion of regulating wireless Internet, and opposing the implementation of "managed" or "specialized" services or "toll roads" that might degrade current Internet infrastructure. Please also consider including a communications clause in the resolution's enactment directing that the City Council participate in the public comment period on behalf of all residents of New York City by submitting this resolution before the FCC, as well as transmitting copies to the City's Congressional Delegation and Senators.

Thank you again for considering Network Neutrality. We look forward to continue working with the New York City Council to make our world a little more transparent bit by bit.