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August 9, 2011

Chairman Julius Genachowski  
Federal Communications Commission  
445 12th Street S.W.  
Washington, DC 20554

Re: WC Docket No. 07-38 (Broadband Subscribership Data)

Dear Chairman Genachowski:

Collection of accurate, comprehensive data is central to the Commission's ability and ongoing responsibility to monitor competition and growth in the broadband and telecommunications industries. The Commission uses Form 477 submissions of service providers to track broadband subscriptions. To ensure the complete accuracy of data collected by the Commission in its next reporting cycle on September 1 of this year, Free Press requests that the Commission direct MetroPCS not to include in its forthcoming Form 477 submission any of its subscribers whose Internet access is effectively restricted by the carrier to certain websites or content.

As the Commission is already aware, at the beginning of 2011 MetroPCS changed its LTE service offerings to a tiered-pricing model, under which the basic service offerings limit access to certain applications and services that may be unlocked only by paying additional fees.<sup>1</sup> MetroPCS offers three mobile broadband plans, each with its own monthly data limit.<sup>2</sup> Earlier this year, MetroPCS offered an LTE service for \$40 which did not permit the customer to use any Internet websites, applications, or services that the carrier segregated into an ill-defined category it referred to as "Data Access."<sup>3</sup> More recently, MetroPCS has relabeled this category as "Included Multimedia Streaming Access," and has expanded that \$40 service offering to allow access to a tiny amount of such content each month;<sup>4</sup> however, the term "Data Access" confusingly lives on in other portions of MetroPCS's public information.<sup>5</sup> Although MetroPCS purports to offer

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<sup>1</sup> See *Letter of Center for Media Justice, Free Press, Media Access Project, New America Foundation Open Technology Initiative, and Presente.org to Chairman Genachowski*, GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 10, 2011) (*Letter of Free Press et al.*).

<sup>2</sup> MetroPCS Wireless Plans, <http://www.metropcs.com/plans/default.aspx> (last visited Aug. 3, 2011).

<sup>3</sup> *Letter of Free Press et al.* at 1.

<sup>4</sup> See MetroPCS Wireless Plans, *supra* note 2 (showing that "Included Multimedia Streaming Access" is available only with LTE service offerings, and that the three LTE service tiers all permit a varying monthly usage amount for such content).

<sup>5</sup> See MetroPCS Terms & Conditions of Service, <http://www.metropcs.com/privacy/terms.aspx> (last visited July 26, 2011) ("Depending on

unlimited mobile Internet access on all its plans, its terms of service expressly prohibit “off portal” multimedia streaming using third-party websites, presumably those such as Netflix or Hulu.<sup>6</sup> The terms of service also provide that MetroPCS may, at its sole discretion and as the subscriber’s agent, restrict, modify, or block any Internet content of its choosing.<sup>7</sup>

In a 2008 *Report and Order and Further Notice of Proposed Rulemaking*, the Commission amended Form 477, the form used by telecommunications and broadband service providers to report a variety of information on their services. Most notably for present purposes, providers use the form to report the number of subscribers to their service in each census tract in which they offer service. Among other changes, this 2008 *Order* added a requirement that mobile broadband service providers report “the number of subscribers whose device and subscription permit them to access the lawful Internet content of their choice.”<sup>8</sup> This language excludes subscribers to services that only permit access to a “walled garden” of content from each carrier’s count of mobile broadband Internet access service subscribers. The history of “walled garden” mobile services began

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your Rate Plan, your usage of Data Access may be metered by Us. Your Rate Plan may include a Data Access usage limit, such as 1 GB per billing cycle. We shall determine in our sole discretion what data usage constitutes Data Access and reserve the right to alter, make additions to or deletions to what type of data usage, or protocols, constitute Data Access without notification to you.”). Additionally, attempts to glean further information on terms such as “4G Web” or “Multimedia Streaming Access,” listed as features on the MetroPCS Wireless Plans page (*supra* note 2), lead the user not to additional information on those terms, but to the MetroSTUDIO proprietary media-on-demand service page and the Samsung Craft handset product page, respectively.

<sup>6</sup> See MetroWEB Terms of Use,

[http://www.metropcs.com/products/metroweb/terms\\_of\\_use.aspx](http://www.metropcs.com/products/metroweb/terms_of_use.aspx) (last visited July 26, 2011) (“[T]he web and data Rate Plans provided by MetroPCS are designed to be, and shall only be used, predominately for . . . multimedia streaming services provided by MetroPCS, its affiliates, authorized suppliers and licensors, *and not for off portal multimedia streaming services.*”) (emphasis added). This off portal content may in fact be permissible, but counted toward the subscriber’s usage threshold for “multimedia streaming” according to which plan tier she purchased; yet it is unclear exactly how the data cap for each tier is calculated, particularly given that the plan is described as “unlimited.”

<sup>7</sup> See *id.* (“In connection with the provision of the MetroWEB Service, you authorize MetroPCS to alter for you such Data Content and to *restrict or deny access to certain sites or Internet addresses for any reason. You acknowledge and agree and authorize MetroPCS to alter for you, as your agent, such Data Content and to restrict or deny access to certain sites or Internet addresses for any reason.*”) (emphasis added).

<sup>8</sup> *Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 07-38, FCC 08-89, ¶ 23 (rel. Jun. 12, 2008) (emphasis added).

with primitive data transfer services that allowed access to a small selection of content often hosted by the mobile provider itself.<sup>9</sup>

MetroPCS's mobile broadband services are today's equivalent of the "walled garden." For many of its services, including two of its LTE services, MetroPCS effectively provides access only to a limited subset of websites, because it restricts access to other Internet content, applications, and services.<sup>10</sup> Although the exact network management practices used by MetroPCS and the precise scope of the restrictions remain undisclosed, MetroPCS certainly must be operating technology that can categorize some Internet content, applications, or services on the Internet as "Data Access" or "Multimedia Streaming Access," and can measure when a user has exceeded the thresholds for such content on the lower service tiers. Once the usage threshold has been reached, presumably MetroPCS responds by automatically upgrading the user to a higher tier, or by blocking such uses for the remainder of the service period. Effectively, the service thus provides access only to a limited set of Internet sites and content after a low usage threshold is reached. These restricted services therefore do not allow users to access a substantial range of lawful Internet content, applications, and services of their choice, either at any time or after a nearly trivial usage threshold is reached.

The Commission should therefore instruct MetroPCS not to include in its Form 477 submission any subscribers to services that offer access only to a modern-day walled garden—providing only severely limited access to Internet content, applications, and services of such subscribers' choice.

Respectfully submitted,

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<sup>9</sup> See, e.g., *id.* ¶ 23 n.85 ("In particular, a device which can access only a limited set of websites optimized for wireless device usage, such as a device which can only download ringtones and games or send messages, does not permit access to the full Internet.").

<sup>10</sup> See *Letter of Free Press et al.* at 1 ("MetroPCS is advertising unlimited talk, text, 'Web browsing' and YouTube at a base price of \$40 per month, with additional features like mobile instant messaging or access to audio downloads available on higher tiers for another \$10 or \$20 per month."); see also MetroWEB Product Description, <http://www.metropcs.com/products/metroweb/> (last visited July 26, 2011) (describing MetroWEB as a portal service that provides access to "Google" and the vague "most popular sites"). All of MetroPCS's services also permit unlimited access to YouTube content, but not to other multimedia streaming services.