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December 7, 2017

Filed in ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***Restoring Internet Freedom, WC Docket No. 17-108***

Dear Ms. Dortch:

The Coalition for Internet Openness (“Coalition”)¹ respectfully submits this letter to express its support for strong rules to protect net neutrality based on statutory authority upheld by the *Verizon* and *USTA* decisions.² Members of the online industry have a variety of views about the best jurisdictional source for strong rules. But most are unified in the belief that strong rules, including the bright line protections, the general conduct standard, and oversight over interconnection practices, are necessary. The *Draft Order* errs by failing to adopt such protections, by dismissing all possible jurisdictional sources for them, by using the wrong standard to conclude that broadband Internet access service is an information service, by finding Section 706 of the Telecommunications Act of 1996 to be hortatory despite its dictate to the Commission to remove barriers to infrastructure investment, and by showing a willingness to tolerate the gatekeeping power of broadband Internet access providers despite the lack of adequate choice of provider facing most consumers in the country.³ The Coalition therefore

¹ The Coalition is a non-profit organization whose mission is to advocate for a legal environment that preserves and extends the openness of the Internet—keeping it fast, open, and accessible to all Americans.

² *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (“*USTA*”); *Verizon Comm. Inc. v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (“*Verizon*”).

³ *Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order*, WC Docket No. 17-108, FCC-CIRC1712-04 (draft rel. Nov. 22, 2017) (“*Draft Order*”).

registers its concern and requests that the Commission withdraw the *Draft Order* from circulation and substantially revisit it.

Strong, enforceable net neutrality protections. The Coalition urges the Commission to maintain its strong, enforceable net neutrality protections. This includes maintaining each of the Commission’s three bright-line conduct rules: no blocking, no throttling, and no paid prioritization. Broadband providers should not be allowed to block or slow down consumers’ access to certain websites and services while favoring others, including favoring the broadband providers’ own content and services. This behavior harms consumers. Nor should broadband providers be allowed to create “fast lanes” for content providers willing to pay broadband providers to prioritize their traffic, which would disadvantage content providers that are not able or willing to pay, and would unfairly push consumers toward content and services in the paid fast lanes. The ban on paid prioritization protects Internet users from the frustrating revolving “buffer” circle on their screens when they try to access the content of their choice, just because that content provider has not paid, or cannot pay, to have its traffic prioritized through the broadband provider’s pipes. No Internet user wants to find it difficult or impossible to create her own content because the content she creates would be relegated to the slow lane in the broadband provider’s system.

Maintaining strong net neutrality protections also includes maintaining the Commission’s general conduct standard, which enables the Commission to examine and, if necessary, prohibit on a case-by-case basis practices that harm consumers or content providers. The general conduct rule covers future practices that may not be contemplated by the existing bright-line rules, but which are detrimental to consumers, and prevents circumvention of the bright-line rules. It additionally should encompass protections against harmful interconnection practices by broadband Internet access service providers, who can use such practices to limit effective consumer access to services and applications of their choosing. At the same time, it should be flexible enough to accommodate innovative, consumer-friendly broadband provider practices. Without these net neutrality protections, broadband providers would be permitted to use their control over the “last mile” broadband access infrastructure to create artificial barriers or bottlenecks between consumers and the online content and services they wish to access, to the detriment of consumers, competition, and innovation.

Jurisdictional sources for strong, enforceable net neutrality protections. Members of the online industry have a variety of views about the most suitable source for these protections. But the Coalition is concerned that the *Draft Order* is wrong across the waterfront of all possible jurisdictional sources, including Title II and section 706. The D.C. Circuit has upheld both sources of statutory authority. Among other things, in holding that broadband Internet access service is an information service, the *Draft Order* applies the wrong standard: it erroneously

takes into account third party information services for which broadband access is a conduit, and ignores the purely incidental character of Domain Name System (“DNS”) and caching.⁴

The *Draft Order* also gives short shrift to the D.C. Circuit’s decision in *Verizon*. The *Verizon* court did more than what the *Draft Order* suggests. The court did not simply hold that Section 706 could reasonably be viewed *both* as an independent source of authority *and* as a mere exhortation.⁵ Rather, based on a number of grounds, the court recognized that “section 706 grants the Commission authority to promote broadband deployment by regulating how broadband providers treat edge providers.”⁶

Crucially, the *Draft Order* also shows a willingness of the expert communications agency to tolerate anticompetitive conduct by broadband providers in connection with the transmission of content. Broadband providers own and control the underlying “last mile” broadband access infrastructure market, and most consumers lack an adequate choice of provider. As the *Draft Order* recognizes, about 40% of households have only one wireline provider of broadband access at downlink speeds of 25 Mbps or more, and another 9% have no such provider at all.⁷ Even where there is a choice, it is typically between only two wireline providers (about 45% of households have a choice of only two providers, while only 6% have a choice of three or more providers), and it is moreover difficult for consumers to switch between broadband providers.⁸ The decision to abolish substantive net neutrality protections erroneously fails to take this competitive landscape into account.

The Coalition pleads that the Commission pull the *Draft Order* from its December open meeting agenda, and reconsider Title II and section 706 as jurisdictional authorities for maintaining the strong net neutrality protections that exist today.

⁴ *Id.* ¶¶ 25-44.

⁵ *See id.* ¶ 277 (quoting out of context the court’s statement that Section 706 certainly could be read as hortatory).

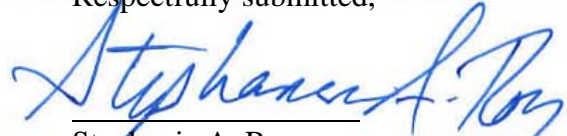
⁶ *Verizon*, 740 F.3d at 649.

⁷ *Draft Order* ¶ 125.

⁸ *Id.*

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Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Stephanie A. Roy". The signature is fluid and cursive, with a large loop at the end.

Stephanie A. Roy

Counsel for Coalition for Internet Openness