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October 17, 2014

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Ex Parte

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

RE: In the Matter of Protecting and Promoting the Open Internet, GN Docket No. 14-28

Dear Ms. Dortch:

On October 15, 2014, Michael Glover, Craig Silliman and I, from Verizon, met with Jonathan Sallet, Stephanie Weiner, Marcus Maher, and Andrew Erber from the Commission's Office of General Counsel and Matt DeNero of the Wireline Competition Bureau to address issues related to the Commission's open Internet proceeding.

First, we addressed the Commission's authority to adopt enforceable net neutrality rules under Section 706 of the 1996 Act, as confirmed earlier this year by the D.C. Circuit. In this regard, we noted that, with appropriate findings concerning harm to competition or consumers, Section 706 provides the Commission with authority to adopt a rule that would presumptively prohibit forms of "paid prioritization." Such a rule would not cross the line into impermissible common carriage provided that the Commission otherwise left providers with flexibility to enter into other forms of individualized or differentiated arrangements with edge providers that do not involve paid prioritization. We also noted that, in this proceeding, all major broadband providers and their trade associations have conceded that Section 706 as interpreted by the D.C. Circuit provides the Commission with authority to address harmful paid prioritization, thus limiting the universe of parties who could potentially challenge the Commission's authority on this point.

Next, we noted that any effort to "reclassify," in part or in whole, broadband Internet access service as a common carriage service subject to Title II would be subject to significant legal challenges. While proponents of a Title II approach blithely assume that the Commission has discretion to simply reclassify a service under Title II at will, they leave largely unaddressed the significant legal hurdles to reclassification. Indeed, courts have long recognized that the Commission lacks "unfettered discretion . . . to confer or not confer common carrier status on a given entity, depending on the regulatory goals it seeks to achieve." *NARUC v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976). Instead, the Commission must look to the nature of the service that is

actually being offered in deciding whether common carriage obligations apply because a provider “is a common carrier by virtue of its functions, rather than because it is declared to be so.” *Id.*

In the context of broadband Internet access services, reclassification under Title II would face significant legal jeopardy. As an initial matter, in light of the Commission’s previous finding that broadband services are integrated information services, any Commission decision to reclassify would be subject to heightened scrutiny and would require a “more detailed justification” under *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). After all, reclassification would “rest upon factual findings that contradict” the numerous Commission findings that “underlay [its] prior policy.” *Id.* As we previously set out in our comments, broadband services have only become more sophisticated and have integrated more information service components in the time since the Commission recognized that they were integrated information services exempted from Title II regulation. As a factual matter, therefore, the service actually being offered to consumers is all the more an integrated information service. Moreover, such a radical reversal of course would uproot the “serious reliance interests” of Internet players who have invested billions in broadband networks and developed services premised on light-touch regulation. *Id.* And the reliance interests here are particularly acute given that the avowed purpose of the Commission’s previous decisions was to induce the very investment that has since occurred.

We also noted that reinterpreting the statute to apply common carriage regulation to broadband Internet access simply because it includes a telecommunications component would have far-reaching consequences, given the wide range of Internet services – from streaming video, to VoIP services, to search engines and more – that also incorporate a telecommunications component. While we do not believe that such Internet services should be saddled with legacy regulation, the Commission long ago recognized that, if utility-style regulation applies to Internet access service under such a theory, “it would be difficult to devise a sustainable rationale under which all . . . information services did not fall into the telecommunications service category.”¹

Next, we discussed the additional legal challenges to subjecting mobile broadband to Title II. Even if the Commission could lawfully reverse course on the information service nature of broadband services – which it cannot – Section 332(c)(2) separately prohibits common carriage regulation of “private mobile services” such as mobile broadband. This is so because, under the terms of the statute, mobile broadband Internet access is not an “interconnected service” – that is, it is not interconnected with the Public Switched Network. On the contrary, by definition, mobile broadband Internet access connects to the Internet, not to the Public Switched Network. Thus, as the statute makes clear and the Commission has previously recognized – the Commission is foreclosed from applying common carriage treatment to this service.²

We also noted that the Title II “hybrid” proposals – such as those put forward by

¹ Stevens Report, 13 FCC Rcd. 11,501, ¶ 57 (1998).

² See 47 U.S.C. § 332(d); *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, ¶ 45 (2007).

Congressman Waxman, Mozilla, and Tim Wu – face these same legal infirmities and more. For example, some of these approaches would characterize the single broadband Internet access service that providers offer today into two separate services – one service for purposes of end-user subscribers and a separate service for edge providers. These arguments confuse the distinction between a single service being sold in the context of a potential two-sided market and two separate services. In a two-sided arrangement such as a sponsored data plan, for example, the service that an edge provider is offered access to is the same integrated information service offered to the end user, including the ability of the edge provider’s customer to access and interact with the edge provider’s content, the ability to back up that information and the like. The fact that the payment for that service may be split in some fashion between the edge provider and the end user does not magically convert the service into two separate offerings, one of which is pure transmission. The D.C. Circuit’s decision in *Verizon* does not suggest otherwise: even as it discussed the two-sided nature of broadband services, the court never suggested that anything but a single service was at issue.

In any event, even if the Commission concluded that broadband providers offer a distinct service to edge providers, such services still would not be “telecommunications services” subject to common carriage treatment. The premise of the debate in this regard is the interest of broadband providers to have flexibility to enter differentiated arrangements with edge providers on individualized terms. But it is fundamental that “a carrier will not be a common carrier where its practice is to make individualized decisions in particular cases whether and on what terms to serve.” *NARUC v. FCC*, 533 F. 2d 601, 608-09 (D.C. Cir. 1976). Thus, at most, any services offered to edge providers would be private carriage services similarly exempt from Title II treatment.

Next, we reiterated that while we do not believe that new rules are warranted for mobile broadband Internet access services, if the Commission does adopt rules for these services it should provide substantial flexibility to mobile broadband providers. Such flexibility should not be limited to reasonable network management – which the Commission’s rules already allow – but also to providing flexibility for commercial arrangements that take into account the highly competitive and still-rapidly-evolving nature of the wireless business. Such flexibility is particularly important so that that wireless services can continue to develop into a more full-throated competitive option to the higher speed wireline services that, in many places, may only be available from cable operators.

We also reiterated the importance of retaining the exclusions that currently apply to enterprise and specialized services. In particular, the Commission should continue to define specialized services flexibly as being any service that may share the same network as a broadband Internet access service but that is not delivered over the Internet access service. While this is still an emerging area, services such as VoIP and cable television are frequently offered today over the same networks as broadband Internet access. As technology evolves, future specialized services could include things like telehealth, connected car, Smart Grid, and a wide range of machine-to-machine services that are distinct from mass market Internet access.

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Finally, in response to questions, we addressed the “minimal level of access” to be provided by any no-blocking rule. Rather than a technical definition, we suggested that this should be viewed from the perspective of the service being purchased by the consumer. So if a consumer buys a 25 Mbps best efforts broadband Internet access service, she should be able to use that connection equally to go anywhere she wants and do what she wants online.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "William H. Johnson". The signature is written in a cursive style with a prominent initial "W".

William H. Johnson

cc: Jonathan Sallet
Stephanie Wiener
Matt DelNero
Marcus Maher
Andrew Erber