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VIA ELECTRONIC SUBMISSION

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

Re: *Protecting and Promoting the Open Internet; Framework for Broadband Internet Services; GN Docket No. 14-28; GN Docket No. 10-127*

Dear Ms. Dortch:

On October 22, 2014, Bob Quinn, Gary Phillips, Christopher Heimann, and I, all of AT&T, met with the Commission's General Counsel, Jon Sallet, and Stephanie Weiner of the Office of General Counsel. During the meeting we discussed the above-referenced proceedings and, in particular, the Commission's authority to prohibit prioritization that is harmful to consumers or to competition.

Under D.C. Circuit precedent, the FCC has ample authority under Section 706 to adopt new rules that target practices that could undermine the virtuous circle of investment and innovation that has driven broadband deployment and enabled the Internet to thrive. The Communications Act prohibits the Commission from applying common carriage regulation to information services such as broadband Internet access. But case precedent makes clear that the Commission can pursue the goals of section 706 without crossing the line into common carriage regulation. In particular, and as discussed more fully below, the Commission could prohibit, either on a case-by-case basis or categorically, the types of paid prioritization services that the Commission finds are inconsistent with an open Internet and thereby contravene the goals of section 706.

Importantly, not all types of prioritization services pose such risks. Rather, as AT&T detailed in its Reply, broadband providers have long provided services that allow business customers to prioritize certain Internet traffic. Users of AT&T's Managed Internet Service (MIS), for example, may purchase a prioritization capability that enables them to designate certain performance-sensitive traffic for special handling in the event

of network congestion.[1] These services are used by scores of small businesses, non-profits, and educational institutions without any harm to Internet openness.

Leading net neutrality advocates have acknowledged that this type of "user driven" or "customer controlled" prioritization is unobjectionable and is a capability that should be preserved in any new Internet openness rules. For example, Free Press, which has been particularly vocal in its opposition to paid prioritization, recently said in reference to user-directed prioritization: "People should be free to use their connection any way they want. That's the point of all this."[2] And Professor Barbara van Schewick has observed that, in certain circumstances, prioritized transmission of Internet traffic is fine so long as it is directed by broadband users.[3] Other leading net neutrality advocates have likewise recognized the distinction between user-directed prioritization and other forms of paid prioritization.[4]

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[1] This Class of Service (CoS) option allows a customer to assign data traffic to one of four classes of service, which determine the transmission priority of data over its network access link and across AT&T's Internet backbone. These classes are real time, high-grade data, medium-grade data, and low-grade data. Customers can choose from among 25 service profiles with predetermined bandwidth allocations for different classes of service to ensure that higher priority data flows during congested periods. If any service is not using its allocated bandwidth, other services can share it. This option is implemented through the mechanism designed by the IETF to enable prioritization of performance sensitive traffic, known as the differentiated services field or "DiffServ," which relies on class of service information inserted into packet headers to inform the network of the traffic priority assigned to specific data traffic. Customers may allocate no more than a specific percentage of their data traffic (as defined by their service profile) to each class of service. Once the percentage of a customer's traffic assigned to a particular class reaches that of its profile, the network will not recognize (and thus prioritize) any additional data traffic marked for priority in the data's packet headers.

[2] Nancy Scola, *Net Neutrality Defenders Actually Fine if Internet Users Decide What Goes Fast*, Wash. Post (July 21, 2014), http://www.washingtonpost.com/blogs/the-switch/wp/2014/07/21/net-neutrality-defenders-actually-fine-if-internet-users-decide-what-goes-fast/ (quoting Matt Wood).

[3] Hal Singer, *A Tipping Point in the Net Neutrality Debate? User-Directed Priority Could Bring Huge Benefits to Broadband Customers*, Forbes (Sept. 22, 2014), *available at* http://www.forbes.com/sites/halsinger/2014/09/22/a-tipping-point-in-the-net-neutrality-debate-user-directed-priority-could-bring-huge-benefits-to-broadband-customers/ (quoting Professor Barbara van Schewick's comments at an FCC Open Internet Roundtable — session 1, at 89:45) (last checked Sept. 26, 2014).

[4] CDT Comments, GN Docket No. 14-28, at 5-6 (July 17, 2014) ("Nor is the goal [of open Internet policy] to prevent all differential treatment of traffic or all negotiation of commercial deals between network operators and content providers. Significantly, the 2010 rules always envisioned that network operators could strike deals for the delivery of selected content or traffic via "specialized services." They also permitted end-user controlled discrimination, under which subscribers themselves designate traffic for special treatment"); TechAmerica Comments at 8 ("Some consumers . . . may want prioritized access to certain content and should be able to have it if they're willing to pay for it. If ISPs simply offer faster access to certain content, without forcing it upon their customers, those types of arrangements between ISPs and edge providers should be deemed 'commercially reasonable.'"); Ad Hoc Comments at 21-23; *see also* AT&T Comments at 27-28 (collecting prior advocacy to the same effect).

Although these groups concede that user-directed prioritization service is not necessarily of concern, they staunchly oppose allowing ISPs to sell non-user directed prioritization services to edge providers – services by which an edge provider could pay to have its own traffic prioritized over an end user's last mile connection. Indeed, net neutrality advocates have characterized this type of paid prioritization service as the principal threat to Internet openness.

To AT&T's knowledge, no ISP currently offers (or has plans to offer) any form of paid prioritization service for mass-market broadband Internet access services, user-directed or otherwise. Indeed, AT&T does not even have the capability to offer such a service at this time. However, if a user-directed service were developed and implemented, it is easy to see how it could offer significant consumer benefits, just as the "class of service" option offers benefits to business customers. For example, a consumer-based class of service option could enable consumers to choose to prioritize their over-the-top health monitoring or home alarm monitoring devices and services, and/or telemedicine, distance learning services, or workplace communications that enable telecommuting, as well as any number of other services that have yet to be even developed that a consumer might want to prioritize. To preemptively and categorically block consumers from making these types of choices over their own Internet access connection before anyone even knows what the services might look like would needlessly stifle innovation and deny consumers the ability to tailor their own Internet service to their own needs.

In recognition of the difference between user-directed prioritization and non-user directed prioritization, AT&T has suggested that any categorical ban on paid prioritization apply only to non-user-directed prioritization arrangements. As noted, it is this form of paid prioritization that has galvanized the net neutrality community, and that same community recognizes that user-directed prioritization may not only be unobjectionable but beneficial. To be clear, however, AT&T has not proposed a "safe harbor" for any and all user-directed prioritization arrangements. Although we believe that, if such services are developed, they are likely to be beneficial to consumers and pose no threat to Internet openness, we recognize that these services do not yet exist. Thus, no one knows for sure what they would look like, how they would work, who would buy them, and what impact, if any, they might have on the larger Internet ecosystem. But innovation is not advanced by preemptively foreclosing a category of services that have not even been developed because of the possibility that might somehow cause some unspecified harm. That would certainly be an odd way for the Commission to fulfill its mandate under section 706. And so for that reason, AT&T is proposing only that the Commission not rule out user-directed prioritization arrangements at this time, while preserving its right to prohibit any such arrangement that might be offered down the road if such arrangement is inimical to an open Internet or harms competition. Moreover, to provide more certainty in the marketplace or address concerns it might already have, the Commission could provide guidance about how it might view certain types of arrangements. For example, it might prohibit or establish a presumption against exclusive arrangements with edge providers that would skew competition and restrict consumer choice. Or the Commission might clarify the level of consumer control needed – for

example by specifying that the consumer must directly request (and/or pay for) any prioritization over her broadband Internet access service. There might be other clarifications as well that the Commission might deem appropriate. But what the Commission should not do is preemptively ban all consumer-controlled prioritization arrangements and thus foreclose the sort of experimentation, innovation and investment by ISPs (among others) that the Open Internet principles and net neutrality rules were intended to promote.

The Commission has ample authority to take these sensible steps pursuant to section 706. And it could do so without reclassifying broadband Internet access as an information service. In fact, insofar as paid prioritization services have long been commonplace under Title II (and section 201(b) expressly contemplates different charges for different classes of communications), section 706 provides a far *better* and more legally sound path forward than reclassification – wholly apart from the legal risks of reclassification itself, which are considerable.

As an initial matter, *Verizon* agreed with the FCC that Congress, in directing the Commission to undertake certain acts to promote broadband deployment, "'necessarily invested the Commission with the statutory authority to carry out those acts.'"[5] Further, the court held, "[t]he Commission could reasonably have thought that its authority to promulgate regulations that promote broadband deployment encompasses the power to regulate broadband providers' economic relationships with edge providers if, in fact, the nature of those relationships influences the rate and extent to which broadband providers develop and expand their services for end users."[6]

Although *Verizon* nonetheless struck down parts of the previous open Internet rules because they amounted to per se common carriage, the court recognized that the Commission retained authority to regulate broadband providers' activities without falling afoul of the ban against common carrier treatment. In particular, the court highlighted the FCC's data roaming rules as examples of rules that bore some of the hallmarks of common carriage regulation but imposed no *per se* common carriage requirements because they permitted host providers to "'negotiate the terms of their roaming agreements on an individualized basis'" and to "tailor roaming agreements to 'individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms.'"[7]

As the May 2014 NPRM recognizes, the court's discussion leaves the FCC with discretion likewise to apply a "commercial reasonableness" requirement (or a rule of reason) to prevent harmful practices in the context of broadband Internet access services without effectuating unlawful common carrier mandates. So long as the rule adopted

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[5] *Verizon v. FCC*, 740 F.3d 623, 661 (D.C. Cir. 2014) (*Verizon*).

[6] *Id.* at 643.

[7] *Cellco*, 700 F.3d at 540.

permits individualized negotiation and the provision of services on differentiated commercial terms, the Commission could prohibit particular practices, such as non-user-directed paid prioritization arrangements, if the record demonstrates that those practices would result in harm to consumers or the open Internet. And, as Chairman Wheeler put it, "[s]omething that harms consumers is not commercially reasonable." Likewise, "[s]omething that harms competition is not commercially reasonable."

While *Verizon* requires that rules leave providers with some flexibility with regard to the nature and terms of arrangements they may reach with edge providers interested in differentiated commercial arrangements, a case-by-case review of user-directed prioritization arrangements would do just that. Not only would it allow edge providers to obtain prioritization over their own Internet access services (as they may do today when they purchased MIS), but it would also allow edge providers to negotiate arrangements for the provision of user-directed prioritization, subject to the requirement that any such arrangements be commercially reasonable. Moreover, as *Verizon* recognized, arrangements for the prioritization of traffic are not the *only* type of individualized arrangements that would provide the type of flexibility necessary to avoid common carrier regulation.[8] What matters for purposes of escaping the "common carrier" label is not the *type* of differentiation at issue, but the fact that the provider is free to enter arrangements with different entities on different rates or other commercial terms and conditions. Thus there are many ways that the Commission could stay clear of the "common carrier" category even while restricting non-user-directed prioritization if it determines such practices to be harmful.

One example of an area in which individualized negotiations, not involving prioritization of packets, would be permitted would be the negotiation of "sponsored data" arrangements that allow edge providers to pay for some or all of their customers' usage so as to avoid overage charges from the ISP. Much like 1-800 numbers, such a voluntary arrangement could allow additional ways for edge providers to differentiate themselves and attract customers, while consumers would benefit by saving money. These and other permissible arrangements, particularly when coupled with the flexibility to negotiate user-directed prioritization arrangements, would create more than enough flexibility to avoid common carrier status, even as it gives the Commission ample authority to address practices that it concludes are harmful.

In its reply comments, Free Press contends that a flat ban on non-user-directed prioritization would constitute *per se* common carriage even if it allowed user-directed prioritization, and thus could not be adopted pursuant to section 706.[9] In particular, it claims that the D.C. Circuit already has concluded that permitting user-driven prioritization would not remove the common carrier obligation imposed on ISPs by a ban

[8] *Verizon*, 740 F.3d at 658.

[9] Free Press Reply Comments, GN Docket No. 14-28 at 41 (filed Sept. 15, 2014).

against non-user prioritization, which is forbidden under section 706.[10] Free Press's argument falls apart however upon closer examination. In the passage Free Press cites, the court considered whether an exception that allowed ISPs to block content at the direction of *end users* allowed sufficient flexibility for individualized negotiations between the ISP and edge providers to remove the obligations imposed on ISPs vis-à-vis edge providers from common carrier regulation. Not surprisingly, the court found that blocking traffic at a users' request (which the ISP could effectuate without the knowledge, consent or agreement of the edge provider) allowed no flexibility in the relationship between ISPs and edge providers. That finding says nothing about how the court would evaluate a rule permitting user-driven prioritization, which would require agreement between an ISP and edge providers to effectuate.[11] Insofar as such an agreement would be subject to only one constraint — the *end user's prerogative to* decide whether or not a particular type of traffic should be prioritized — a rule allowing commercially reasonable user-directed prioritization plainly *would* allow for the requisite flexibility in the relationship between ISPs and edge providers to remove it from common carriage.

While some claim that a Title II approach to broadband regulation would afford the Commission a stronger basis to address harmful forms of prioritization, this claim is incorrect. For starters, Title II's core provisions bar only "unjust and unreasonable" practices and "unreasonable" distinctions. For more than a century, courts and agencies have interpreted such language (as used in the Communications Act, the Interstate Commerce Act, and elsewhere) to permit – or even to *require* – differentiated service offerings as long as they were available to all similarly-situated parties. In fact, prioritization, just like other forms of service level agreements, is permitted in the case of telecommunications services subject to Title II. And any restrictions on paid prioritization under Title II would have to overcome this long line of precedent in the common carriage context allowing such offerings as long as they are made available to similarly situated customers.

Thus, for the reasons discussed above, the Commission has ample authority under Section 706 to address paid prioritization, and has multiple options for addressing the concerns it raises. Those who claim that the Commission may only guard against consumer-harming prioritization under a Title II approach to broadband regulation are mistaken.

Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with your office for inclusion in the public record of the above referenced

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[10] Free Press Reply Comments at 41, quoting *Verizon v. FCC*, 740 F.3d at 656-57 ("[A] limited exception permitting *end users* to direct broadband providers to block certain traffic by no means detracts from the common carrier nature of the obligations imposed on broadband providers.").

[11] In order to prioritize certain content at a user's request, the ISP would have to reach an agreement with the edge provider of that content (and its ISP if the edge provider obtains Internet connectivity from another ISP) to appropriately mark such content for prioritized transmission.

proceeding. If you have any questions or need additional information, please do not hesitate to contact me.

Sincerely,

Henry G. Hultquist

cc: Jon Sallet
Stephanie Weiner