

October 24, 2014

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

Re: Notice of Ex Parte Communications, GN Docket Nos. 10-127, 14-28

Dear Ms. Dortch:

On October 22, 2014, Harold Feld, Michael Weinberg and Kate Forscey of Public Knowledge (PK) met with Jonathan Sallet, General Counsel, and Stephanie Weiner, OGC, with regard to the above captioned proceedings.

Public Knowledge (PK) reiterated its support for reversing the *Cable Modem Declaratory Ruling* and subsequent Commission Orders classifying residential broadband as an information service. PK also noted that reliance on provisions of Title II, rather than on Section 706, would provide a more reliable and consumer-oriented framework for exercise of Commission authority. By contrast, the limits of Section 706 authority are uncertain. There is only a single case addressing the extent of this authority. It is clear that reclassification and rulemaking under Section 706 could ban paid prioritization (since the court would have upheld the 2010 rule, which it characterized as effective a categorical ban on all forms of prioritization, but for the common carrier prohibition). But nothing else with regard to Section 706 is clear.

PK also stated that the *Mozilla Petition* and other forms of “sender side” Title II classification, dependent on the D.C. Circuit’s determination that broadband consists of two, severable services (a “subscriber side” and a “sender side”) could work to ban prioritization, again following the logic that the D.C. Circuit would have affirmed the rule *but for* the common carrier prohibition and its determination that the ban on prioritization constituted a “common carrier” rule. It is hard to say that such a service and such a rule are not a common carrier when the D.C. Circuit has declared that such a service, subject to such a rule *is* a common carrier as a matter of law.

Further, Verizon, at least, should be estopped from arguing otherwise, as this was their precise argument in *Verizon v. FCC*. Having won their case as a matter of law, they (and others who object to *Mozilla Petition* or other forms of sender-side classification) have no one to blame but themselves if they dislike the consequences. Verizon’s October 17 *ex parte*, in which they state that Section 706 could ban prioritization, is not only foreclosed as a matter of estoppel but foreclosed as a matter of law.

Nevertheless, while such an approach might be sustainable as a matter of law, it does not constitute the best policy. As Public Knowledge has argued since January 2010, the Commission

must stop trying to find political solutions to the problem of network neutrality and should instead establish the appropriate legal framework for the transition of our communications networks to an all IP platform. Residential broadband, as the essential service of the 21st Century, should not be subject to a patchwork of regulatory authority, but should rely upon a unitary framework grounded in the well understood and well-established framework of Title II.

PK remains certain that a decision to reverse the *Cable Modem Order* and its progeny would survive judicial scrutiny. However, to the extent the Commission wishes to insulate itself from any litigation risk, the Commission could find that (a) it grants the *Mozilla Petition*, but (b) because it reverses the *Cable Modem Order* (or decides that circumstances have changed sufficiently that the logic of the *Cable Modem Order* is no longer applicable), the separate services identified by the D.C. Circuit are restored to their unified whole. In the unlikely event that the classification of residential broadband was reversed, the grant of the *Mozilla Petition* would remain.

With regard to the supposed “double prohibition” of Section 332(c) on wireless services, PK stated the following. First, “Sender-side” broadband would not constitute either CMRS or PMRS, since it is not mobile or necessarily wireless. It is (according to the D.C. Circuit) a service that the network offers to a remote host, such as a Google server, which sits at a fixed location. Accordingly, there is no “M” for mobile to raise the CMRS v. PMRS question.

With regard to reversal of the 2007 *Wireless Declaratory Ruling*, the Commission resolved that wireless broadband would be a CMRS service, *but for* its classification of broadband as an information service in the *Cable Modem Order*. Accordingly, if the *Cable Modem Order* is reversed, Title II is not “doubly prohibited,” but “doubly compelled.”

In accordance with Section 1.1206(b) of the Commission’s rules, this letter is being filed with your office. If you have any further questions, please contact me at (202) 861-0020.

Respectfully submitted,

/s/ Harold Feld
Senior Vice President
PUBLIC KNOWLEDGE

cc: Jonathan Sallet
Stephanie Weiner