



Public Knowledge

November 5, 2014

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

Re: Open Internet Remand, GN Docket No. 14-28

Dear Ms. Dortch:

On November 3, 2014, Harold Feld, Senior Vice President, Public Knowledge, and Michael Weinberg, Vice President, Public Knowledge (PK), spoke with Stephanie Weiner, OGC, with regard to the above captioned proceeding.

With regard to the nature of the Commission's authority, Public Knowledge continue to believe that the Common Carrier prohibition would prohibit a ban on paid prioritization if limited exclusively to "user directed." The *Verizon* court appeared to address this directly when it rejected the argument that since "reasonable network management" would permit user directed prioritization or blocking.¹ Further, as the D.C. Circuit emphasized in both *Cellco* and *Verizon*, rules would be subject to an "as applied" challenge if they were applied so consistently as to essentially constitute common carriage.

Put another way, rules based purely on Section 706 would face the overhang that the more meritorious challenges parties bring, the more likely the D.C. Circuit is to overturn the rules because the FCC has granted "too many" meritorious challenges. This is, obviously, untenable as a basis for protecting the Open Internet.

With regard to grant of the Mozilla Petition or other forms of "sender side" Title II, as Public Knowledge stated in its initial comments, grant of the Mozilla Petition is not an "alternative" to reversing the *Cable Modem Order* and its progeny. Rather, it is the Commission's refusal to reverse the *Cable Modem Order* that triggers an obligation to grant the Mozilla Petition.²

Regardless of which Title II theory the Commission employs, PK urges that the Commission adopt a ban on paid prioritization rather than a presumption. The Commission has,

¹ *Verizon v. FCC*, 740 F.3d 623, 656 (D.C. Cir. 2014) ("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")(emphasis in original).

² *Comments of Public Knowledge, Benton Foundation, and Access Sonoma Broadband* at 104-112.

in the past, banned numerous practices involving blocking or prioritization.³ On the other hand, PK recognizes that even if the Commission imposes a full ban, the Commission cannot prohibit companies from applying for waivers or filing forbearance petitions. The Commission should therefore make clear that because prioritization and discrimination are intrinsically harmful, a Forbearance Petition cannot meet the public interest standard⁴ without meeting the most exacting standard of evidence that the forbearance or waiver is utterly necessary and will do no harm to the open Internet.

With regard to wireless services. Public Knowledge reiterated its arguments that the Commission should establish parity between the services.

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: Stephanie Weiner

³ See, e.g., [*Rural Call Completion*](#), WC Docket No. 13-39, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 16154, 16155-56, 16169, Paras. 3, 29 (2013) (blocking or discriminating against rural calls unlawful); *Establishing Just and Reasonable Rates for Local Exchange Carriers*; *Call Blocking by Carriers*, 22 FCC Rcd 11629, 11631 paras. 1, 6 (WCB 2007) (banning call blocking); *Telecommunications Research & Action Center v. Central Corp.* 4 FCC Rcd 2157 (Com. Car. Bur. 1989) (banning discrimination against long distance access codes as unjust and unreasonable).

⁴ See 47 U.S.C. 160(a)(3) (grant of the petition must be “consistent with the public interest”).