

November 7, 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 November 5, 2014, Gene Kimmelman, President of Public Knowledge (PK) spoke with Jonathan Sallet, General Counsel with regard to the above captioned proceedings.

**The Commission Must Adopt Clear, Brightline Rules Banning Paid Prioritization.**

The Commission must create clear, bright line rules against blocking and discrimination by broadband Internet access service providers. The record makes it clear that paid prioritization is harmful to free expression online, innovation, and economic growth. The Order should affirm this finding and conclude that paid prioritization is unlawful.

Under Title II, the Commission has a long history of banning outright practices that are intrinsically inimical to the core purposes of the Communications Act to promote diversity of expression,<sup>1</sup> encourage competition,<sup>2</sup> and bring the benefits of our communications networks to “to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex.”<sup>3</sup> Thus, the Commission has banned any limitation on the right of customers to attach devices to the network that do not harm the network,<sup>4</sup> has prohibited any prioritization or discrimination in the provision of long distance access codes,<sup>5</sup> categorically banned all forms of call blocking,<sup>6</sup> and prohibited, in the most absolute terms possible, any right to discriminate against rural phone calls – or engage in practices that would contribute to rural call completion problems.<sup>7</sup>

---

<sup>1</sup> 47 U.S.C. §257.

<sup>2</sup> *Id.*

<sup>3</sup> 47 U.S.C. §151.

<sup>4</sup> *Use of CarterFone Device in Message Toll Service*, 13 FCC.2d 420 (1968).

<sup>5</sup> *Telecommunications Research & Action Center v. Central Corp.* 4 FCC Rcd 2157 (Com. Car. Bur. 1989).

<sup>6</sup> *Establishing Just and Reasonable Rates for Local Exchange Carriers; Call Blocking by Carriers*, 22 FCC Rcd 11629, 11631 (WCB 2007).

<sup>7</sup> *Rural Call Completion*, WC Docket No. 13-39, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 16154, 16155-56, 16169 (2013).

In none of these cases did Title II’s “reasonableness” requirement compel the Commission to make exceptions or issue anything other than clear, bright line rules. Not 80 years of tariffs permitting differentiated quality of service justifies a failure to ensure that rural phone calls are completed. Providers may not block calls as part of a dispute over payments – despite the usual commercial reasonableness of such practices. In places where the conduct frustrates the clear intent of the Communications Act, the Commission has not hesitated to impose clear, bright line rules – and it should do so here.

Today the Internet is a place where sites, services, and other edge providers compete on the quality of their offerings. Paid prioritization would shift that environment to one where competition is decided by who is willing and able to pay the most to gatekeeping broadband Internet access service providers. Paid prioritization has the potential to create fast lanes and slow lanes, low latency lanes and high latency lanes, and countless other technical rifts that shatter the democratic engine of Internet innovation. In light of this, it is appropriate for the Commission to make clear that paid prioritization is anathema to a free and open Internet.

**Because The Communications Act Permits Both Forbearance And Waiver, The Commission Must Make Clear That Any Exception To A Ban On Paid Prioritization Will Require A High Showing.**

Congress has required the Commission to consider forbearance from any statute or regulation where doing so would not lead to unjust and unreasonable rates or practices, would not otherwise harm consumers, and would serve the public interest.<sup>8</sup> Additionally, any party is free to apply for a waiver in specific circumstance on the grounds that such waiver would serve the public interest. While the Commission must not only permit such Petitions and waiver applications, but genuinely consider their merits, the Commission has broad discretion with regard to what standard it will apply.<sup>9</sup> Given the vital importance of the open Internet, any forbearance petition or waiver request must be measured against the most exacting of standards in order to avoid creating a waiver process that allows broadband Internet access service providers to circumvent the rules.

The Commission should require that any exception demonstrate by clear and convincing evidence that any paid arrangement is the only means to achieve a legitimate public interest goal, would not otherwise tilt the level playing field of the open Internet in favor of one particular form of expression, type of service, or point of view, does not have an adverse impact on

---

<sup>8</sup> 47 U.S.C. 160.

<sup>9</sup> Compare *Qwest Corp. v. FCC*, 689 F.3d 1214 (10<sup>th</sup> Cir. 2012) with *Earthlink v. FCC*, 462 F.3d 1 (2006).

competition, and is not harmful to the virtuous circle. In addition, no waiver should go into effect until an appeals process has been exhausted.

### **The Wireless Internet Must Also Be An Open Internet.**

The Commission also must take this opportunity to eliminate the distinction between wireline and wireless networks. There is one Internet. While that Internet can be reached by a variety of technologies—cable, DSL, fiber, satellite, mobile, fixed wireless—strong open Internet rules should not apply to some connection technologies and not others. This is not to say that strong open Internet rules should be blind to the distinctions between access technologies. PK has long recognized that many factors – ranging from atmospheric condition to interference from other sources, to difference in the propagation and penetration characteristics of frequencies – can impact the ability of network operators to deliver consistent and reliable service.<sup>10</sup>

Open Internet rules recognize this through the reasonable network management provision. Reasonable network management gives broadband Internet access service providers the ability to deal with technical constraints within their networks, but not an excuse for non-technical distinctions. For example, whatever technical constraints may impact performance on AT&T’s mobile network, AT&T should not resolve those differences by allowing content providers to buy better access through such non-technical management means as “sponsored data” plans.

### **If the Commission Classifies Broadband As A Title II Service, It Should Find That Mobile Broadband Is A “Functional Equivalent” To CMRS Service.**

Wireless providers have repeatedly argued that even if broadband is a Title II service, the Commission may not regulate it as a common carrier because it does not meet the definition of “commercial mobile radio service” (CMRS),<sup>11</sup> and therefore must be classified as a “private mobile radio service” (PMRS). As PMRS, mobile broadband would be insulated from common carrier regulation (even if it is otherwise a Title II service) by the “common carrier prohibition.”<sup>12</sup>

Congress, however, did not trap the Commission in such an absurd result. Congress recognized that, as technology evolved, services that did not initially appear to be CMRS might eventually reach a point where they were essentially the same service, but one that denied consumers the

---

<sup>10</sup> This is why Public Knowledge has so often urged the Commission to make more low-band spectrum available to competitors through spectrum caps, better roaming rules, and greater access to shared low-band spectrum such as the TV white spaces. It is also why wireless broadband is a compliment, rather than a substitute, for wireline.

<sup>11</sup> See *Appropriate Regulatory Treatment for Broadband Access To The Internet Over Wireless Networks*, 22 FCC Rcd 5201, 5915 (2007) (“*Wireless Framework Order*”).

<sup>12</sup> *Cellco Partnership v. FCC*, 700 F.3d 534 (D.C. Cir. 2013).

benefits of Title II regulation. As a consequence, Congress inserted into the final version of the law an exception to the PMRS rule for services that are the “functional equivalent” of PMRS. As the legislative history demonstrates, Congress intended this safety valve to prevent a hard and fast division between CMRS and PMRS services from excluding services from regulation when the public interest – and common sense – required.

Section 332(d)(3) defines PMRS as “any mobile service (as defined in Section 153 of this title) that is not a commercial mobile radio service or *the functional equivalent of a commercial mobile service*, as specified by regulation by the Commission.” (emphasis added). This language did not arise by chance. As the legislative history makes plain, Congress drafted the amendments to Section 332 in response to the Commission’s increasingly inconsistent regulatory treatment of emerging mobile services under the traditional *NARUC* test.<sup>13</sup> As the House Report explained:

Under current law, private carriers are permitted to offer what are essentially common carrier services, interconnected with the public switched telephone network, while retaining private carrier status. Functionally, these “private” carriers have become indistinguishable from common carriers but private land mobile carriers and common carriers are subject to inconsistent regulatory schemes. The rates charged by common carrier licensees are subject to the requirements of title II of the Communications Act, which requires inter alia, that rates must be just and reasonable and not unreasonable discriminatory. Common carriers are also subject to state regulation of rates and services. Private carriers, by contrast, are statutorily exempt from title II of the Communications Act and from rate and entry regulation by the States.<sup>14</sup>

The House Report further explained that it intended the amendments to Section 332 to resolve the inconsistent treatment while still retaining the traditional distinction between common carriers and exempt private carriers.<sup>15</sup> The initial House version therefore gave the Commission considerable flexibility to define what constituted CMRS service, but maintained a strict division between common carrier and private carrier services by defining PMRS as any mobile service not CMRS.

In conference, however, the Committees rejected this purely binary choice between common carriage and private carriage.<sup>16</sup> The Senate amended the House bill to alter the definition in several ways. Of relevance here, the Senate added the phrase “or the functional equivalent of a

---

<sup>13</sup> H.R. Rep. 103-111, 1993 U.S.C.C.A.N. 378 (“House Report”).

<sup>14</sup> *Id.* at 586-87 (footnotes omitted).

<sup>15</sup> *Id.* at 587.

<sup>16</sup> H.R. Conf. Rep. 103-213, 1993 U.S.C.C.A.N. 1088 (“Conference Report”).

commercial mobile radio service” to the definition of PMRS.<sup>17</sup> Although the conference did not accept all the Senate amendments to the definition section, the Conference deliberately elected to retain the “functional equivalent” language. The Conference Report explained this decision in quite explicit language.

The definition of “private mobile service” is amended to make clear that the term include neither a commercial mobile service *nor the function equivalent of a commercial mobile service*, as specified by regulation by the Commission.<sup>18</sup>

In other words, Congress was well aware that history was quite capable of repeating itself. That PMRS wireless services -- originally easily distinguishable from CMRS -- would become eventually indistinguishable from Title II wireline services. And so it has. In 2007, when the Commission made its initial determination, there was no cause to consider whether wireless broadband service was “functionally equivalent” to CMRS. Today, “smart” handsets increasingly replace the flip phones that were common in 2007, and the distinction made by the Commission between calls made with native dialing capacity and calls made via VOIP applications has increasingly faded. There is no doubt that phones using mobile broadband are capable of replicating the functions of CMRS phones yet evading necessary regulation as common carriers in precisely the way Congress found abhorrent in 1993.

Nor does a declaration that mobile broadband is the “functional equivalent” of CMRS (*i.e.*, that it can provide interconnected service) require further notice. As noted above, the Commission would not be revisiting a previous decision, but confronting a fresh definitional question. To clarify the application of a statutory term is the essence of an “interpretive” rather than a “legislative” rule, requiring no notice and comment. In this context, it is worth noting that the original Commission designation of mobile broadband as not a CMRS service was without notice, in a declaratory ruling on the Commission’s own motion, to resolve questions that had emerged in different proceedings.<sup>19</sup>

### **The Commission Should Clarify The Open Internet Would Reach Interconnection-Related Efforts To Discriminate.**

As recent events have demonstrated, carriers are capable of using interconnection disputes as a means to accomplish blocking and degradation of service. Regardless of what the Commission ultimately determines should be its policy on IP interconnection, the Commission must a minimum clarify that interconnection disputes that have the effect of blocking or

---

<sup>17</sup> *Id.* at 1185.

<sup>18</sup> *Id.*

<sup>19</sup> *Wireless Framework Order* at ¶¶2 n.3, 8-10.

consistently degrading applications sensitive to congestion are reachable under the rules the Commission will adopt.

The Internet’s end-to-end open architecture is dependent upon the seamless exchange of traffic between interconnecting networks. The interconnection point serves as the gateway to the broadband Internet access service provider’s end users. Consistent with the Commission’s conclusion that gatekeeper access fees imposed by broadband Internet access service providers directly on edge providers for access or prioritization would threaten the open Internet, the Commission should also find that gatekeeper access fees demanded at the interconnection point before landing on the last mile network would achieve the same effect. While nothing should prevent broadband access providers from recouping legitimate costs, providers should not be able to charge unwarranted access fees under the guise of recovering costs.

The Commission should provide a complaint process under Section 208 where the broadband Internet access service provider will be required to justify that any proposed fee that deviates from its general peering policy or industry norm is just and reasonable – especially when the interconnection dispute impacts a service that competes with the access provider’s own service. Such a complaint process should be streamlined to ensure that the virtuous circle is not put in jeopardy.

### **A “Hybrid” Approach That Leaves The Last Mile Title I Would Fail To Address Important Consumer Protections For Which There Is Immediate Need.**

As Public Knowledge has previously stated, a combination of tools involving Title II and Section 706, including possible “hybrid” services in which the Commission would reclassify only the “Sender Side” service identified by the D.C. Circuit in the *Verizon* case, might support rules of the kind described above.<sup>20</sup> But the fact that such an approach could support rules protecting the open Internet does not mean that it is the best approach, or even necessarily as good an approach, as reclassifying the entire service as Title II. As an initial matter, a division of authority on what is for all practical purposes a unitary service offering (despite the legal classification as two separate services) creates opportunities for game playing and arbitrage by carriers seeking to exploit their gatekeeper position. While such problems can be managed, it does not appear that doing so confers any advantage which would justify this added layer of complexity.

---

<sup>20</sup> By contrast, a pure Section 706 approach could not support even the more limited ban on all but “user directed” prioritization proposed by AT&T and others. *See Verizon*, 740 F.3d at 656-57. (“Because the relevant service broadband providers furnish to edge providers is the ability to access end users if those end users so desire, 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”). Even the proposed “basic level of service” would need to permit sufficient carrier override of user choices “so as not to run afoul of the statutory prohibitions on common carrier treatment.” At 658.

More critically, however, Title II comes with a full array of necessary consumer protections. To replicate these needed protections using the Commission’s Section 706 authority would be a laborious process, employing an untested legal standard focused not on whether the rules provide adequate protection to consumers but whether it provides sufficient protection to stimulate demand for broadband.

### **The Verizon “Perma-Cookie” Illustrates the Harm To Consumers of Relying On Section 706 Rather Than Title II in the Last Mile.**

Verizon Wireless installing a “perma-cookie” (or “super-cookie”) tracker on subscriber web browser software,<sup>21</sup> without disclosing this to the user and without allowing the user to opt out of the tracking application, demonstrate the need for full Title II rather than a pure Section 706 or “hybrid” approach. As explained in more detail below, Verizon’s tracking subscribers by injecting unique identifiers in the packet header clearly violates existing customer proprietary network information (CPNI) regulations adopted pursuant to Section 222,<sup>22</sup> and would constitute an unreasonable practice under Section 201(b).<sup>23</sup>

By contrast, it is unclear what action the Commission could take in the short term under its Section 706 authority. Even in the long term, it is uncertain to what extent the Commission can replicate the existing CPNI protections – regarded by many as the “gold standard” for consumer privacy. To satisfy the “virtuous cycle” rationale, the Commission would need to show that permitting carriers to secretly track users would so discourage users from using broadband that it would reduce demand, thus reducing investment. It is a form of “trickle down” consumer protection that does what is good for subscribers only to the extent it is also good for the carriers.

More importantly, this example demonstrates the problem with a “hybrid” approach that classifies the “sender side” service as Title II while leaving consumer side residential service under Title I. Under a hybrid approach, the CPNI in question would belong to any edge provider sending information to the subscriber, rather than belonging to the subscriber. The “unity of interest” that would support open Internet rules through application of combined Title II and Section 706 would not work in the specific case of consumer privacy or other forms of consumer protection. Only where CPNI levels of privacy protection could be justified under the “virtuous cycle” could the Commission adopt rules affording the subscriber a suitable level of protection.

---

<sup>21</sup> See, Jason Hoffman-Andrews, “Verizon Injecting Perma-Cookies to Track Mobile Customers, Bypassing Privacy Controls,” EFF Blog, November 3, 2014 (available at: <https://www.eff.org/deeplinks/2014/11/verizon-x-uidh>) (last visited November 7, 2014).

<sup>22</sup> 47 U.S.C. §222 (“EFF Perma-Cookies Post”).

<sup>23</sup> See, *Implementation of the Telecommunications Act of 1996, Telecommunications’ Carrier Use of Customer Proprietary Network Information and Other Customer Information, Declaratory Ruling*, CC Docket No. 96-115, 28 FCC Rcd 9609 (2013) (“Carrier IQ Order”).

## **Verizon’s Conduct Would Clearly Violate Existing Consumer Protections Under Title II.**

Were broadband a Title II service, Verizon’s conduct would clearly violate Section 222 in light of the Commission’s declaratory ruling on CPNI and applications such as Carrier IQ. As the Commission explained, “When providers of mobile telecommunications service leverage their control of their customers’ mobile devices to collect information that relates to the quantity, technical configuration, type, destination, location, and amount of use of the telecommunications service, that information is “made available to the carrier by the customer solely by virtue of the carrier-customer relationship” and therefore is CPNI.”<sup>24</sup>

Like Carrier IQ, Verizon’s “perma-cookie” is a software application installed at the direction of the carrier. Further, as the Commission noted, it is irrelevant whether the information collected by the application is actually delivered to Verizon or stored remotely on the customer’s device. As long as the application is installed and/or configured by the carrier the information is “obtained by the carrier” for purposes of the CPNI rule.<sup>25</sup>

Accordingly, to collect the information and to make it available to third parties, Verizon would have needed to obtain affirmative opt-in consent in a plain and clear manner consistent with the Commission’s rules.<sup>26</sup> Verizon would also have had an obligation to take reasonable precautions to ensure that the information was not disclosed to third parties.<sup>27</sup> Verizon not only failed to obtain opt in consent before making the information available to its advertising partners, it failed to even inform customers of the information collection and disclosure.

Furthermore, in light of the Commission’s recent enforcement action against Terracom, Inc. and YourTel America, Inc.,<sup>28</sup> Verizon’s conduct would likely also violate Section 201(b).<sup>29</sup> In the *TerraComm Order*, the Commission found that failure to conform to reasonable expectations with regard to collection and storage of information relating to the provision of telecommunications service, particularly where such practices also created an increased risk of

---

<sup>24</sup> *Id.* at ¶7, 9611.

<sup>25</sup> *Id.* at ¶27, 9618.

<sup>26</sup> See *NCTA v. FCC*, 555 F.3d 996 (D.C. Cir 2009) (affirming opt in requirement to share CPNI with third parties); *In re Verizon Compliance With Commission Rules and Regulations Governing Customer Proprietary Network Information, Order Adopting Consent Decree*, (rel. September 4, 2014) (available at: [https://apps.fcc.gov/edocs\\_public/attachmatch/DA-14-1251A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DA-14-1251A1.pdf)) (failure to generate and provide proper notice to new customers).

<sup>27</sup>

<sup>28</sup> *In re TerraComm, Inc. and YourTel America, Inc., Notice of Apparent Liability for Forfeiture* (released October 24, 2014), (available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db1027/FCC-14-173A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1027/FCC-14-173A1.pdf)) (“*TerraComm Order*”).

<sup>29</sup> 47 U.S.C. §201(b).

identity theft or cybersecurity breaches, were an “unreasonable practice” under Section 201(b).<sup>30</sup> In conjunction with assurances to customers that they would protect any information collected, this failure also constituted a deceptive practice in violation of Section 201(b).<sup>31</sup>

### **Little, If Any, Protection Exists At The Moment Under Section 706.**

By contrast, no such regime exists for broadband providers under Section 706. Arguably, Verizon may have broken Rule 8.3 by failing to adequately disclose a network practice.<sup>32</sup> But even if true, nothing in the existing rule prohibits any specific network practice, especially after the *Verizon* decision.<sup>33</sup> Under the existing rule, and in marked contrast to telecommunications services subject to Title II, a broadband provider need obtain opt in permission – or even permit users to opt out. Nor is the broadband provider held to any particular standard with regard to any information it may obtain.

Verizon’s egregious conduct demonstrates the difficulty with this approach. As explained by EFF, the particular method Verizon uses to track its subscribers allows third parties to obtain the information in a straightforward manner even without Verizon’s further cooperation.<sup>34</sup> Nor can the unique identifier used for tracking be turned off by the subscriber, or purged from the subscriber’s browser in the manner of usual tracking software (aka “cookies”).<sup>35</sup>

Put another way, Verizon placed the equivalent of a big flashing neon sign pointing to every subscriber that says “follow me and learn everything I do online!” Even after they discover the sign, subscribers can neither remove it nor turn it off. While such behavior would be intolerable under Title II, it appears, at least at first glance, permissible under Section 706.

Even if one assumed the Commission could ultimately adopt some rules under its Section 706 authority, these would not address the immediate harm when action is urgently needed. AT&T has disclosed that it is looking at adopting a similar system.<sup>36</sup> The longer this practice goes

---

<sup>30</sup> *Terracomm Order* at ¶¶31-35.

<sup>31</sup> *Id.* at 36-38.

<sup>32</sup> 47 C.F.R. §8.3 Before reaching even this conclusion, however, it would be necessary to determine whether the use of tracking software constituted a “network practice” subject to the disclosure requirement, and whether any notice Verizon gave with regard to the possibility that it might share subscriber information with third parties was adequate under the rule.

<sup>33</sup> *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (leaving network disclosure rule intact, but striking non-discrimination and no blocking rule).

<sup>34</sup> EFF Perma-Cookies Post, note 1 *supra*.

<sup>35</sup> *Id.* See also Robert Lemos, “Verizon Wireless Injects Identifiers That Link Its Users to Web Requests,” *Ars Technica* (October 24, 2014). Available at: <http://arstechnica.com/security/2014/10/verizon-wireless-injects-identifiers-link-its-users-to-web-requests/> (last visited November 7, 2014).

<sup>36</sup> Kashmir Hill, “AT&T Says It’s ‘Testing’ Unique Tracker On Customer’s Phone,” *Forbes*, October 28, 2014. Available at: <http://www.forbes.com/sites/kashmirhill/2014/10/28/att-says-its-testing-unkillable-tracker-on->

unchallenged, the more widespread it will become and the harder it will become for the FCC to act under its Section 706 authority. Indeed, given that AT&T already offers subscriber discounts on some services for permission to track its subscribers' Internet habits,<sup>37</sup> it seems extremely likely that – unless stopped – the practice of planting Perma-Cookies on broadband subscribers will soon spread to the wireline world as well.

### **Because Section 222 and 201 Recognize the Unique Nature of the Relationship Between the Carrier and the Subscriber, Rules Under Section 706 Could Not Provide The Same Level of Protection.**

As the Commission has explained, Congress passed Section 222 to address the unique relationship between the carrier and the subscriber. “The relationship between a telecommunications carrier and its customer is one of particular sensitivity, given the special position that a carrier occupies as its customers' gatekeeper to the network, and Congress recognized that special position in enacting Section 222.”<sup>38</sup> As a consequence, the Commission has found, and courts have affirmed, that strong rules are necessary to effectuate this vital government purpose.<sup>39</sup>

But Section 706 does not direct itself to consumers and protecting consumers. Rather, Section 706 requires the Commission to take those steps necessary to ensure timely deployment of broadband to all Americans by removing barriers to investment.<sup>40</sup> To construct rules, the Commission must find that doing so will stimulate use of broadband, a process that will require an extensive record demonstrating it is reasonable to conclude that the tracking practices would significantly discourage either broadband use or the development of new services to a point where it undermined adoption, discouraged investment, or otherwise disrupted the “virtuous cycle” identified by the *Verizon* Court.<sup>41</sup>

---

[customers-smartphones/](#) (last visited November 7, 2014). As the article notes, although AT&T states it will allow customers to opt out of receiving targeted ads, it has not indicated whether or not customers would stop tagging them with unique identifiers that permit AT&T or third parties to track them.

<sup>37</sup> See Stacey Higginbotham, “AT&T Gigapower Plans Turn Privacy Into a Luxury That Few Would Chose,” GigaOm (May 13, 2014) Available at: <https://gigaom.com/2014/05/13/atts-gigapower-plans-turn-privacy-into-a-luxury-that-few-would-choose/> (last viewed November 7, 2014).

<sup>38</sup> *Carrier IQ Order* at ¶17. See also *TerraCom Order*, Separate Statement of Chairman Wheeler, (“Consumers entrust their most personal, confidential, and sensitive information to our communications networks and service providers every day. The Commission has a responsibility under the Communications Act to ensure that those service providers and network operators take reasonable steps to honor that public trust, and to protect consumers from harm caused by violations of the Communications Act.

<sup>39</sup> See *NCTA*, 555 F.3d at 1001.

<sup>40</sup> 47 U.S.C. §1302. See also *Verizon*, 740 F.3d at 639-640 (noting key limitation on Commission authority and emphasizing that this limitation “is far from ‘meaningless.’”)

<sup>41</sup> *Verizon*, 740 F.3d at 643-46.

Most critically, Section 222 places the consumer interest at the center of the analysis. By contrast, Section 706 places the *commercial interest* at the center of the analysis. Protection of consumer privacy is only permissible to the extent it stimulates more use and thus more revenue for commercial providers, and thus more investment and deployment. Under Section 222, privacy is a duty owed by carriers to their subscribers, a vital part of the Network Compact. Under Section 706, privacy can only be justified to the extent it benefits the carrier's bottom line.

As the D.C. Circuit has explained in the context of Section 222, "There is a good deal more to privacy than [potential embarrassment]. It is widely accepted that privacy deals with determining for oneself when, how and to whom personal information will be disclosed to others."<sup>42</sup> Such a vital right should not be made dependent on, and subservient to, the commercial interests carriers.

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/ Gene Kimmelman  
President  
PUBLIC KNOWLEDGE

cc: Jonathan Sallet

---

<sup>42</sup> *NCTA*, 555 F.3d at 1001.