



December 15, 2014

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BY ECFS

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

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

Dear Ms. Dortch:

The Commission could achieve all of its goals with respect to Internet openness – as well as the substantive objectives recently articulated by President Obama – by reaffirming that broadband Internet access is an integrated information service and then applying its authority under Section 706 as that provision now has been construed by the D.C. Circuit. There is no reason for the Commission to reverse course and subject any aspect of broadband Internet access service to Title II.

There is a broad policy consensus, consistent with President Obama’s statement, on the types of behaviors that the Commission might want to address in its open Internet rules, subject to the longstanding exception for reasonable network management.¹ Specifically:

- ***Paid Prioritization.*** Parties generally agree that the Commission should protect against paid prioritization – a practice by which a broadband provider in theory might charge a content provider a fee to deliver its bits faster than the bits of others over the last mile broadband Internet access service – if it harms competition or consumers;
- ***Blocking.*** Parties generally agree that broadband providers should not block lawful traffic on the basis of the traffic’s source, destination, or content.

¹ For example, in a recent letter to Representative Henry Waxman, Chairman Wheeler stated that “there are three bright lines for any open Internet rules: no blocking, no throttling, and no fast lanes.” See November 19 Tom Wheeler Letter to Rep. Henry A. Waxman, available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1204/DOC-330839A1.pdf.

- **Throttling.** Parties generally agree that broadband providers should not intentionally slow traffic on the basis of the traffic’s source, destination, or content.

Parties insisting that the Commission can only pursue these ends by treating broadband Internet access as a Title II common carriage service are simply wrong. The D.C. Circuit has already confirmed that Section 706 provides the Commission with authority to protect the open Internet by addressing practices that would harm competition or consumers and provided a roadmap for sustainable rules. Given that, Verizon and all other major broadband Internet access providers and their trade associations have conceded that the Commission has authority under Section 706, as it now has been interpreted by the D.C. Circuit, to prohibit harmful “paid prioritization” arrangements as well as other practices, such as blocking.² By doing so, Verizon and these other broadband providers have effectively waived their ability to litigate the issue of whether Section 706 provides authority for such rules. Thus, in addition to being unlawful,³ any effort by the Commission to classify broadband Internet access service in whole or in part under Title II would be unnecessary and would be regulation for regulation’s sake.

In many ways, the debate about paid prioritization is a red herring. The record shows no instances of paid prioritization arrangements to date and broadband providers have confirmed that they have no plans to adopt such a practice in the future.⁴ The record is similarly bereft of any evidence that broadband providers have blocked or degraded online traffic.

² See AT&T Reply Comments at 11 (“The Commission has ample authority under section 706 to address *all potential threats to Internet openness*, including paid prioritization.”) (emphasis added); Comcast Reply Comments at 29 (“The *Verizon* court confirmed that Section 706 provided the ‘requisite affirmative authority’ to regulate paid prioritization arrangements that pose a threat to the open Internet.”); *id.* at 5 (“[N]early all [commenters] agree that such a [no-blocking] rule could be adopted pursuant to Section 706.”); Time Warner Cable Reply Comments at 13 (“[S]ection 706 enables the Commission to prohibit anticompetitive paid-prioritization arrangements between broadband providers and edge providers.”); *id.* at 2 (“[T]he Commission has ample authority under Section 706 . . . to . . . prevent[] the blocking of access to online content and services[.]”); Verizon Reply Comments at 24 (“[T]here is widespread agreement—including among broadband providers—that Section 706 provides sufficient authority to address paid prioritization”); Cox Reply Comments at 15 (“The record . . . reinforces the NPRM’s tentative conclusion that the Commission can address any concerns regarding ‘paid prioritization’ by relying on its authority under Section 706”).

³ See Oct. 29, 2014 Verizon White Paper (“Title II Reclassification and Variations on that Theme: A Legal Analysis”).

⁴ See, e.g., Oct. 29, 2014 Randal S. Milch Letter to Senator Patrick J. Leahy at 1 (“As we have said before, and affirm again here, Verizon has no plans to engage in paid prioritization of Internet Traffic.”), available at http://publicpolicy.verizon.com/assets/images/content/Leahy_Response_Final_10-29-14.pdf; Comcast Reply Comments at 27 (“[T]he record clearly demonstrates that no ISP is engaging in paid prioritization or has any plans to do so.”); Time Warner Cable Reply Comments at 12

Nonetheless, if the Commission concludes that such practices could occur and would harm consumers or competition, D.C. Circuit precedent is clear that it has authority under Section 706 to prohibit them without resorting to 19th-century utilities regulation. In fact, the D.C. Circuit explained how the Commission could reinstate a no-blocking rule pursuant to Section 706, and the approach suggested by the court would be equally applicable in the case of a properly crafted no-throttling rule.⁵

Section 706 provides a sufficient basis for the Commission to limit or prohibit paid prioritization or other harmful practices, provided that it otherwise leaves providers with flexibility to engage in individualized or differentiated arrangements *other than* that practice. Although the court struck down parts of the previous open Internet rules as amounting to common carriage, it recognized that the Commission retained authority to regulate broadband providers' activities under Section 706 provided it does not impose common carrier requirements.⁶ In particular, the court noted that its 2012 *Cellco* decision had upheld the Commission's data roaming rules, even though they shared some characteristics with traditional common carriage. The reason the data roaming rule did not amount to common carriage was that it allowed wireless providers some meaningful flexibility to “negotiate the terms of their roaming agreements on an individualized basis” and to “tailor roaming agreements to ‘individualized circumstances.’”⁷ The court likewise noted that differentiated payment arrangements would rescue a regulatory requirement from being deemed an impermissible common carriage mandate.⁸

This precedent demonstrates that the Commission could prohibit particular practices such as paid prioritization under Section 706, so long as the rules permit individualized negotiation over differentiated commercial terms. There are many ways in which providers could structure their commercial relationships and agree on differentiated arrangements that could provide additional choices for consumers. For example, “sponsored data” arrangements could allow a content provider to pay for usage associated with its traffic, instead of the end user. Much like 1-800 numbers, such voluntary arrangements could allow additional ways for providers to differentiate themselves and attract customers. And these arrangements benefit consumers by saving them money. Indeed, a number of smaller content providers have expressed interest in precisely such types of arrangements as a way to differentiate their services and help them

(“[T]he record makes clear that no broadband provider has actually established ‘fast lanes’ and ‘slow lanes’ on its network, and no provider has expressed any interest in doing so.”).

⁵ See *Verizon v. FCC*, 740 F.3d 623, 659 (D.C. Cir. 2014).

⁶ *Id.* at 638, 643.

⁷ *Cellco Partnership v. FCC*, 700 F.3d 534, 540 (D.C. Cir. 2012) (“*Cellco*”), (quoting *Data Roaming Order*, 26 FCC Rcd at 5432 ¶ 43, 5433 ¶ 45).

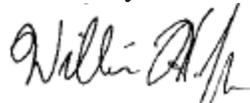
⁸ *Verizon*, 740 F.3d at 658.

grow.⁹ Allowing flexibility for these and other types of pro-consumer arrangements provides the flexibility that would ensure that the Commission does not stray into impermissible common carriage, even as it addresses practices that it concludes are harmful. What matters for purposes of escaping the “common carrier” label thus is not the *type* of differentiation at issue, but the fact that the provider is able to enter into arrangements with different entities at different rates or other commercial terms and conditions.

Parties pushing for Title II regulation are wrong when they claim that resorting to Title II would give the Commission a stronger basis to address harmful forms of paid prioritization. For starters, Title II’s core provisions bar only “unjust and unreasonable discrimination in charges, practices, [and] classifications.”¹⁰ 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. In fact, prioritization, just like other forms of service level agreements, is permitted in the case of telecommunications services subject to Title II.¹¹ And any restrictions on paid prioritization under Title II would have to overcome this long line of precedent allowing such offerings as long as they are not unreasonable. Thus, ultimately the FCC would face the very same question in analyzing a particular practice under Title II as it would under Section 706—whether or not that practice was “reasonable”—and Title II provides no additional authority to support such rules.

For these reasons, Verizon urges the Commission to retain the current “integrated information service” approach to broadband, and to pursue its policy objectives under Section 706. This approach would be lawful and would avoid the extensive legal and practical challenges posed by reclassification.

Sincerely,



William H. Johnson

⁹ See Ryan Knutson, *Will Free Data Become the Next Free Shipping* (Wall Street Journal, Oct. 24, 2014) (discussing experiments with sponsored data by startups and established edge providers), available at www.wsj.com (search for article title).

¹⁰ See 47 U.S.C. § 202(a).

¹¹ See Verizon Opening Comments at 52-53 (noting that the Commission has upheld differentiated terms and conditions such as differentiated service levels, differentiated prices, volume and term pricing, and prioritized installation and repair services).