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January 14, 2015

## VIA ECFS

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
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:

On January 12, 2015, Michael Powell, James Assey, Rick Chessen, and Steven Morris of the National Cable & Telecommunications Association (“NCTA”), along with the undersigned and Matthew Murchison, both of Latham & Watkins LLP, met with Jonathan Sallet and Stephanie Weiner of the Office of General Counsel; Matthew DelNero, Claude Aiken, and Melissa Kirkel of the Wireline Competition Bureau; Roger Sherman and James Schlichting of the Wireless Telecommunications Bureau; and Philip Verveer, Senior Counselor to the Chairman, in connection with the above-referenced proceedings.

At the meeting, we reiterated and elaborated on several of the points addressed in the *ex parte* letter filed by NCTA on December 23, 2014,<sup>1</sup> and in other prior submissions.<sup>2</sup> In particular, we explained that the surest way to establish lasting, legally sustainable open Internet protections without harming broadband investment and innovation would be to follow the clear path laid out by the D.C. Circuit in *Verizon v. FCC* and adopt rules under Section 706 of the

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<sup>1</sup> See Letter of Matthew A. Brill, Counsel for NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (filed Dec. 23, 2014) (“NCTA Dec. 23 Letter”).

<sup>2</sup> See, e.g., Comments of the National Cable & Telecommunications Association, GN Docket Nos. 14-28, 10-127 (filed Jul. 15, 2014) (“NCTA Comments”); Reply Comments of the National Cable & Telecommunications Association, GN Docket Nos. 14-28, 10-127 (filed Sep. 15, 2014) (“NCTA Reply Comments”).

Telecommunications Act of 1996.<sup>3</sup> We stressed that pursuing the alternative path of seeking to reclassify broadband Internet access (or any component thereof) under Title II would threaten to destroy the Internet’s dynamism and reduce broadband investment and innovation and would stand a significant chance of being reversed on appeal.<sup>4</sup> We also noted that it is entirely unnecessary to take such a risky and destabilizing approach to open Internet regulation in light of the Commission’s broad and judicially confirmed authority under Section 706.<sup>5</sup>

Moreover, as discussed in greater detail below, we explained that (1) if the Commission ultimately decides to pursue a Title II-based approach, any reclassification decision should be coupled with immediate, nationwide forbearance from *all* of Title II’s obligations and restrictions; (2) the Commission should reject calls to impose regulation on the robustly competitive Internet traffic-exchange marketplace in this proceeding; and (3) the Commission should ensure that its rules are properly calibrated with the relevant policy interests in other respects (*e.g.*, in the treatment of specialized services and Wi-Fi).<sup>6</sup>

**A. The Commission Should Grant Immediate, Broad, and Nationwide Forbearance from All Obligations and Restrictions in Title II in the Event of Reclassification**

We explained, as discussed in detail in our December 23 letter, that any reclassification decision should include as an integral component a grant of forbearance to broadband Internet service providers (“ISPs”) from all of the substantive obligations and restrictions contained in Title II.<sup>7</sup> Doing so in conjunction with the adoption of open Internet rules would maintain the light-touch regime the Commission has repeatedly endorsed and would be consistent with

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<sup>3</sup> See *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), *affirming in part, vacating and remanding in part, Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 25 FCC Rcd 7905 (2010) (“2010 Open Internet Order”).

<sup>4</sup> See NCTA Dec. 23 Letter at 3-12; NCTA Comments at 16-45; NCTA Reply Comments at 3-24.

<sup>5</sup> See NCTA Dec. 23 Letter at 12; NCTA Comments at 45-47; NCTA Reply Comments at 24-30.

<sup>6</sup> We also briefly responded to questions from staff regarding NCTA’s joint submission with ACA and WISPA on January 9, 2015, which addressed the Commission’s failure to undertake an examination of the significant economic impact of its proposals on small broadband providers, as required under the Regulatory Flexibility Act. See Letter of NCTA, ACA, and WISPA to Chairman Tom Wheeler, FCC, GN Docket Nos. 14-28, 10-27 (filed Jan. 9, 2015). We explained that the Commission’s Initial Regulatory Flexibility Analysis contains no analysis whatsoever of the impact that Title II reclassification would have on small ISPs—much less any discussion of the compounded effect of imposing Title II in conjunction with the enhanced disclosure obligations and other regulatory changes under consideration by the Commission.

<sup>7</sup> See NCTA Dec. 23 Letter at 12-22.

repeated assertions that the *sole* rationale for invoking Title II is to eliminate the perceived obstacles created by the *Verizon* decision to reinstating strong open Internet rules. The *Verizon* court held that Section 706, on its own, authorizes the sorts of prohibitions on blocking, unreasonable discrimination, and paid prioritization adopted in the *2010 Open Internet Order*, and invalidated those rules only because they appeared to subject information service providers to impermissible common carriage mandates.<sup>8</sup> In the wake of the President’s call for reclassification, Chairman Wheeler made clear that “the goal [is] simple: to reach the outcomes sought by the 2010 rules” by removing this so-called common-carrier prohibition.<sup>9</sup> Most other supporters of reclassification, including prominent members of Congress, likewise have argued that Title II is needed *only* to support strong open Internet rules—not to subject broadband providers to common carrier regulation more broadly.<sup>10</sup> While we strongly disagree that there is any need to reclassify broadband Internet access under Title II in order to adopt appropriate open Internet protections, there is plainly no policy basis for applying Title II to increase regulatory burdens on broadband providers in areas *unrelated* to net neutrality.

We reiterated that such forbearance would be justified as a legal matter under Section 10 of the Communications Act of 1934, as amended (the “Act”). Section 10 requires forbearance from provisions of Title II when (1) such regulation is not “necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with” broadband Internet access services “are just and reasonable and are not unjustly or unreasonably discriminatory,” (2) such regulation is not “necessary for the protection of consumers,” and (3) “forbearance from applying [any] such provision or regulation is consistent with the public interest.”<sup>11</sup> Each of these requirements is met in this context.

In particular, and as noted in prior submissions, the fact that the broadband industry has consistently delivered robust and constantly increasing speeds at declining per-megabit prices and other benefits to consumers *in the absence of Title II regulation* powerfully demonstrates that such regulation is unnecessary.<sup>12</sup> Moreover, the regulatory backstop afforded by the new open Internet rules, together with the Commission’s continuing authority under Section 706 to take targeted action to remove any remaining obstacles to broadband deployment, further

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<sup>8</sup> See *Verizon*, 740 F.3d at 635, 657.

<sup>9</sup> Press Release, *FCC Chairman Tom Wheeler’s Statement on President Barack Obama’s Statement Regarding Net Neutrality* (rel. Nov. 10, 2014); see also White House, *Statement by the President on Net Neutrality*, Nov. 10, 2014, available at <http://www.whitehouse.gov/the-press-office/2014/11/10/statement-president-net-neutrality> (proposing forbearance “from the Title II regulations that are not needed to implement” open Internet regulations).

<sup>10</sup> See NCTA Dec. 23 Letter at 17-18 (collecting statements from Title II proponents).

<sup>11</sup> 47 U.S.C. § 160(a)(1)-(3).

<sup>12</sup> See NCTA Dec. 23 Letter at 19-20 (summarizing evidence of consumer benefits delivered by broadband providers).

undermines any argument for imposing Title II regulation.<sup>13</sup> Notably, the Commission’s analysis of forbearance when first considering the congressionally mandated extension of Title II to Commercial Mobile Radio Services (“CMRS”) confirms that the imposition of traditional telecommunications service regulations on an emerging, growing marketplace would threaten to impede the development of competition and continued investment, and thus that forbearance affirmatively advances those vital public interest objectives and the associated consumers benefits.<sup>14</sup> While Congress had not authorized the Commission to forbear from Sections 201 and 202 when the Commission conducted that analysis for CMRS providers under Section 332, it subsequently *did* authorize forbearance from Sections 201 and 202 pursuant to Section 10, thereby justifying broader forbearance in the broadband context.<sup>15</sup>

In response to questions from staff, we explained that if the Commission chooses not to forbear from Sections 201 and 202 entirely, it should *at most* rely on these provisions as sources of substantive legal authority for its open Internet rules. In other words, Sections 201 and 202 would be invoked for broadband Internet access services *only* to provide additional authority to promulgate the transparency, no-blocking, and antidiscrimination rules, and the Commission would expressly forbear from all *other* substantive obligations and restrictions of these provisions (along with the rest of Title II’s obligations and restrictions) for the broadband services covered by the new open Internet rules. Given the consensus between the President and Chairman Wheeler (among many others) that the sole purpose of invoking Title II is to support the adoption of strong open Internet rules,<sup>16</sup> there is no justification for expanding the applicability Sections 201 and 202 beyond that limited application.

We noted that the same factors that justify complete forbearance from Title II provide equal if not greater support for forbearance from Title II’s obligations and restrictions except for limited reliance on Sections 201 and 202 for the sole purpose of supporting the adoption of the open Internet rules. Given that (a) consumers have enjoyed constant increases in speeds and decreases in per-megabit prices absent *any* Title II regulation, including the requirements of Sections 201 and 202, and (b) the Commission in all events will retain authority under Section 706 to take appropriate measures in the broadband arena, the limited use of Sections 201 and 202 as support for new open Internet rules would make it even more clear that there is no need to retain that statutory authority *for any other purposes*.

We further explained that, to the contrary, applying Sections 201 and 202 beyond the discrete adoption of open Internet rules would expose broadband providers to the investment-

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<sup>13</sup> *Id.* at 21 (explaining that “even if the Commission were to conclude that additional broadband regulation is warranted to protect consumers and competition (beyond the open Internet rules the Commission plans to adopt in this proceeding), it would likely be able to rely on Section 706 to adopt such rules—thus rendering the affirmative obligations contained in Title II entirely unnecessary”).

<sup>14</sup> *Id.* at 15-16 (discussing CMRS precedent).

<sup>15</sup> Compare 47 U.S.C. § 332(c)(1) with *id.* § 160.

<sup>16</sup> See *supra* at 3.

reducing and innovation-chilling risks that have sparked vehement opposition to reclassification among broadband providers, equipment manufacturers, content delivery networks, investors, and other key participants in today's vibrant broadband marketplace. As parties have explained, Sections 201 and 202 have given rise to many of the most sweeping and invasive regulations ever imposed by the Commission, including detailed pricing mandates, forced unbundling and structural separation, and collocation requirements.<sup>17</sup> Subjecting broadband providers to the risk of such a regulatory overhang would constitute a grave threat to their ability and incentive to make the enormous investments necessary to achieve the Commission's broadband performance and adoption objectives. The immediate, investment-chilling implications of this outcome would be fundamentally incompatible with the pro-investment, pro-innovation broadband policy goals the Commission has consistently championed on a bipartisan basis.

We stressed that, in all events, it is particularly important to forbear from enforcing Section 201(b) (whether fully or at least for any uses other than adopting the specific open Internet rules). The directive to ensure that all "charges" and "practices" are "just and reasonable" would subject every aspect of a broadband provider's business to regulatory second-guessing and micromanagement if left in place.<sup>18</sup> Indeed, the President's call for forbearing from "rate regulation" cannot be accomplished without forbearing from Section 201(b)—as that provision *is* the primary source of statutory authority for the FCC to engage in rate regulation.<sup>19</sup> Supervising a carrier's charges in response to complaints, rather than through an *ex ante* rate prescription or tariff regime, does not make such activity something other than rate regulation. To the contrary, every aspect of a broadband provider's pricing practices could be subject to challenge under Section 201(b) (through Section 208 complaints)—including challenges to the "reasonableness" of standard rate levels, promotional discounts, and so forth. Authorizing such regulatory micromanagement of broadband business practices would be a far cry indeed from the narrow rationale asserted in support of reclassification.

We explained that the Commission has the ability under Section 10 to preserve its authority under Sections 201 and 202 to support the adoption of open Internet rules while otherwise forbearing from those statutory provisions. Specifically, the Commission's power to forbear fully from *all* Title II provisions and rules that impose (or could be used to impose) obligations and restrictions on broadband Internet access services and those who provide them

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<sup>17</sup> See Letter of Kathryn A. Zachem, Comcast Corp., GN Docket Nos. 14-28, 10-127, at 19 (filed Dec. 24, 2014).

<sup>18</sup> 47 U.S.C. § 201(b); *see also, e.g.*, Reply Comments of Free Press, GN Docket Nos. 10-127, 14-28, at 2 (Sept. 15, 2014) (suggesting that the Commission could rely on Title II to regulate "all manner" of "practices" in which ISPs engage).

<sup>19</sup> See 47 U.S.C. § 201(b) (requiring that carrier "charges, practices, classifications and regulations" be just and reasonable); *see also* White House, *Statement by the President on Net Neutrality*, Nov. 10, 2014 (calling for forbearance from "rate regulation and other provisions less relevant to broadband services"), *available at* <http://www.whitehouse.gov/the-press-office/2014/11/10/statement-president-net-neutrality>.

necessarily encompasses the authority to forbear from all such provisions other than the transparency, no-blocking, and antidiscrimination rules that it adopts under Sections 201 and 202. The Commission on many occasions has granted partial—or less than total—forbearance. Several decisions under Section 10 have granted forbearance in part from various statutory provisions.<sup>20</sup> And even before Section 10 was enacted, the Commission used its authority under Section 332 to grant CMRS providers relief from certain Title II provisions but not others.<sup>21</sup>

We further argued that the Commission should grant forbearance from Title II obligations and restrictions at the same time that it adopts any reclassification decision. Reclassification without immediate forbearance would thwart the core policy objectives animating the Commission’s open Internet initiatives. In particular, the Commission has emphasized that the proposed open Internet rules are designed not only to protect consumers but to promote continued broadband deployment,<sup>22</sup> and subjecting broadband providers to burdensome Title II regulation that is widely recognized as ill-fitting and unnecessary would create powerful disincentives to making the substantial investments necessary to fulfill those goals. Relatedly, a failure to grant forbearance concurrently with reclassification would result in tremendous uncertainty as to which of Title II’s many restrictions and obligations ultimately would apply to broadband providers—thus exacerbating the significant threats to investment and innovation posed by reclassification. Nor should the Commission seek to take the half-measure of temporarily “suspending” certain provisions of Title II in lieu of granting forbearance pursuant to Section 10 of the Act. The Commission lacks authority to grant such “suspensions” outside the Section 10 forbearance framework, and, in any event, doing so would deprive industry participants of much-needed regulatory certainty.

## **B. The Commission Should Refrain From Regulating Internet Traffic-Exchange Arrangements**

We also reiterated NCTA’s longstanding opposition to shoehorning Internet traffic-exchange issues into the open Internet proceeding. The *2010 Open Internet Order* appropriately recognized that Internet traffic-exchange arrangements do not present the concerns addressed by

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<sup>20</sup> See, e.g., *Commission Grants in Part and Denies in Part PCIA’s Petition for Forbearance; Solicits Comment on Further Forbearance*, FCC News, WT Docket No. 98-100, Report No. WT 98-18 (rel. Jun. 23, 1998) (partial forbearance from tariffing requirements and partial forbearance from Section 226); *Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions Between Competitive Local Exchange Carriers and Cable Operators*, 27 FCC Rcd 11532 (2012) (forbearing from applying section 652(b) to cable operators’ acquisitions of competitive LECs, but not of incumbent LECs); *Verizon v. FCC*, 770 F.3d 961, 965 (D.C. Cir. 2014) (affirming FCC order granting “partial, conditional, or complete forbearance from 126 of 141 challenged rules”).

<sup>21</sup> See *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411 (1994).

<sup>22</sup> See, e.g., NPRM ¶¶ 28-30, 34.

the no-blocking and anti-discrimination rules adopted therein, and the Commission thus held that those rules were not intended “to affect existing arrangements for network interconnection, including existing paid peering arrangements.”<sup>23</sup> Consistent with that analysis, the NPRM proposed to exclude Internet traffic-exchange arrangements from the scope of the new open Internet rules.<sup>24</sup> Chairman Wheeler further observed that “peering is not a net neutrality issue” and confirmed that Internet traffic-exchange arrangements should be addressed, if at all, in a separate proceeding.<sup>25</sup> NCTA has strongly supported those common-sense conclusions, explaining that debates about an asserted need to regulate Internet traffic-exchange arrangements focus on the economics of transporting Internet traffic across Internet backbones to broadband providers’ networks and exchange of that traffic with those networks, but such arrangements have nothing to do with how that traffic is delivered to the end-user over last-mile broadband networks.<sup>26</sup> Even Netflix, perhaps the most outspoken proponent of regulating Internet traffic-exchange in this proceeding, has consistently characterized its own interconnection practices as beyond the scope of the Commission’s open Internet initiatives.<sup>27</sup>

We further stated that, on the merits, the Internet traffic-exchange marketplace does not require regulatory intervention because the remarkably competitive transit marketplace has disciplined prices not only for transit services but for paid peering, given that third-party transit services invariably provide an alternative means of connectivity for a content delivery network (“CDN”) (including a CDN operated by edge provider) that is considering purchasing a direct connection to a broadband Internet access service provider’s network. We also stressed the need for the Commission to consider the harms that could flow from regulating Internet traffic-exchange arrangements. Among other concerns, limiting broadband providers’ ability to impose market-based charges for significantly unbalanced traffic-exchange arrangements would threaten to (a) undermine incentives for edge providers and CDNs to cooperate in ensuring efficient traffic management, and (b) foist significant cost increases on consumers. Moreover, such a move would cause widespread disruption to existing, long-term contractual relationships and business models and create significant opportunities for arbitrage, with implications that the Commission has not even begun to explore and consider. And finally, we noted that, in light of the Commission’s interest in resolving the many complexities presented by revisiting the

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<sup>23</sup> 2010 *Open Internet Order* ¶ 67 n.209.

<sup>24</sup> NPRM ¶ 59.

<sup>25</sup> Bryce Baschuk, *Wheeler: Peering Not a Net Neutrality Issue But FCC Spokesman Says It Will Be Watched*, Bloomberg BNA, Apr. 2, 2014, available at <http://www.bna.com/wheeler-peering-not-n17179889335/>; see also NPRM, Statement of Chairman Tom Wheeler (explaining that traffic-exchange “is a different matter that is better addressed separately” from the open Internet proceeding).

<sup>26</sup> See NCTA Comments at 79.

<sup>27</sup> See Letter of Christopher Libertelli, Netflix, Inc., to Commissioner Ajit Pai, FCC (Dec. 11, 2014), at 1-2, attached to Letter of Henry Goldberg, Counsel to Netflix, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (filed Dec. 11, 2014).

appropriate classification of broadband Internet access and evaluating proposals for comprehensive forbearance from Title II obligations, all within a compressed time frame, further expanding the scope of this proceeding to include Internet traffic-exchange arrangements would be ill-advised.

But even if the Commission were inclined to propose new regulations to govern Internet traffic-exchange arrangements, in spite of all these reasons to refrain from doing so, the NPRM does not provide notice of any proposal to adopt any new Internet traffic-exchange regulations pursuant to Title II. Rather, the portions of the NPRM seeking comment on the application of Title II are focused on the potential reclassification of *retail* broadband Internet access service as a telecommunications service.<sup>28</sup> Nowhere did the Commission remotely indicate that it was considering classifying the distinct *wholesale* Internet traffic-exchange services that ISPs provide to other network owners as Title II telecommunications services. The Administrative Procedure Act therefore bars the Commission from subjecting such arrangements to regulation under Title II.<sup>29</sup>

**C. The Commission Should Ensure That Its Rules Are Properly Tailored to the Relevant Policy Interests in Other Respects**

We also briefly noted that the Commission likewise should uphold the tentative conclusion in the NPRM that specialized services should remain outside the open Internet rules. The assertions by some in the record that ISPs could “evade” the application of open Internet rules through the offering of specialized services are baseless. Indeed, the existing definition of

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<sup>28</sup> See NPRM ¶¶ 148-50 (seeking comment on whether the Commission should revisit its “classification of broadband Internet access as an information service”); see also *id.* at ¶¶ 151-52 (seeking comment on alternative proposals from Mozilla and others to identify a separate telecommunications service that broadband providers furnish to edge providers). Critically, the NPRM explained that the Commission understood the latter proposals to “include the flow of Internet traffic *on the broadband providers’ own network*, and *not* how it gets *to* the broadband providers’ networks.” *Id.* ¶ 151 (emphasis added). The Commission cannot now assert that regulating the exchange of Internet traffic *between* two networks is a logical outgrowth of the NPRM, given that it expressly disclaimed any such intent.

<sup>29</sup> Nor can the Commission’s separate, ongoing investigation of peering practices justify the adoption of rules in the open Internet proceeding. Parties have submitted confidential responses to questions posed by the Commission, thus depriving the Commission of any public record that could be invoked in support of new rules. In all events, the Commission would be better served by completing its careful, fact-based inquiry into peering practices than by short-circuiting that inquiry for purposes of political expediency.

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broadband Internet access service already includes any “functionally equivalent” service or one “that is used to evade the protections set forth in this part.”<sup>30</sup>

Finally, we argued that whatever flexibility the Commission affords to licensed providers of wireless broadband services to engage in reasonable network management should extend equally to unlicensed Wi-Fi services. If anything, given that Wi-Fi networks face spectrum constraints and congestion issues that can pose particular network-management challenges, such flexibility is even more vital.<sup>31</sup> We noted that the *2010 Open Internet Order* fostered confusion about whether Wi-Fi services would fall under rules for fixed or mobile broadband providers. We thus explained that, to the extent the Commission heeds calls to harmonize the treatment of fixed and mobile services, it should make sure that Wi-Fi is in no way disadvantaged.<sup>32</sup>

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Please contact the undersigned if you have any questions regarding these issues.

Sincerely,

/s/ Matthew A. Brill  
Matthew A. Brill  
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cc: Claude Aiken  
Matthew DelNero  
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<sup>30</sup> 47 C.F.R. § 8.11(a); *see also* NPRM ¶ 55 (proposing to retain definition of “broadband Internet access service” without modification).

<sup>31</sup> *See* NCTA Dec. 23 Ex Parte at 25.

<sup>32</sup> *See id.*; NCTA Comments at 69-76.