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January 14, 2015

Via ECFS

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

Re: Notice of Ex Parte Communication, GN Docket No. 10-127; GN Docket No. 14-28

Dear Ms. Dortch:

On January 12, 2015, Brendan Kasper, Senior Regulatory Counsel of Vonage Holdings Corp. (“Vonage”), along with William B. Wilhelm and the undersigned of Morgan, Lewis & Bockius LLP, as outside counsel to Vonage, met with Rebekah Goodheart, Legal Advisor and Carter McMillan, Law Clerk, both in the Office of Commissioner Mignon Clyburn.

Vonage discussed its positions advocated in its previous filings in the above referenced dockets. Specifically, Vonage emphasized its support for re-adoption of the Commission’s 2010 Open Internet rules except grounded in the Commission’s legal authority pursuant to Title II of the Communications Act. In addition, Vonage reiterated its view that there should be a presumption against paid prioritization, but that such a presumption could be overcome where a provider obtains the prior consent of the Commission by demonstrating that such conduct would be in the public interest. Vonage also stated that should the Commission undertake a reclassification under Title II that it should not forebear from Sections 201, 202 and 208. Vonage also supports the positions advanced by Google in its December 30, 2014 filing regarding the inappropriateness of forbearing from Section 224.

Vonage also explained its view that there is sufficient factual and legal support for the Commission to apply similar network neutrality rules on both wireline and wireless providers. In support of this proposal, Vonage specifically rebutted the claims of Verizon and CTIA that the Commission lacks legal authority to apply Open Internet rules to mobile wireless services,¹ because the definition of CMRS in Section 332(d) plainly anticipates the Commission modifying

¹ See Letter from William H. Johnson, Verizon, to Marlene H. Dortch, FCC, at p. 6 (Dec. 24, 2014) (“Verizon 332 Notice Letter”); Letter from Scott Bergmann, CTIA, Attachment, Section 332’s Bar Against Common Carrier Treatment of Mobile Broadband: A Legal Analysis (Dec. 22, 2014) (“CTIA 332 Paper”).

the terms “interconnected “ and “public switched network” as used in the definition of CMRS.² Vonage also reiterated that the Commission has ample discretion to determine that mobile broadband is the functional equivalent of CMRS and thus is not a Private Mobile Service under Section 332(d)(3).

Vonage further explained that the Commission has provided ample notice of its intent both to consider applying Title II and more particularly to consider revising its treatment of mobile broadband services under Section 332.³ Unlike the agencies faulted for failing to provide notice in the cases Verizon and CTIA cite,⁴ the Commission plainly put interested parties on notice that it was considering rules based in Title II and that it would explore alternative constructions of the statutory terms applicable to mobile broadband under Section 332.

Lastly, Vonage discussed the applicability of the Commission’s 2010 Open Internet rules to mass market services, including small business customers. The 2010 *Open Internet Order* applied the Open Internet rules to “mass market services” which it defined as services “marketed and sold on a standardized basis to residential customers, small businesses, and other end user customers such as schools and libraries.”⁵ Vonage, consistent with its position that the Commission should, with few exceptions, re-adopt the 2010 Open Internet rules under a Title II framework, also

² 47 U.S.C. § 332(d)(1)-(2).

³ See, e.g., Public Notice, *Wireline Competition Bureau Seeks to Refresh the Record in the 2010 Proceeding on Title II and Other Potential Legal Frameworks for Broadband Internet Access*, GN Docket No. 10-127, 29 FCC Rcd 5856, DA 14-748 (rel. May 30, 2014); *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, GN Docket No. 14-28, FCC 14-61 ¶ 4 (“the Commission will seriously consider the use of Title II...; seeks comment on the benefits of both section 706 and Title II... recognize[ing] that both section 706 and Title II are viable solutions.”); ¶ 148 (asking whether Commission “should revisit...classification of broadband Internet access services as an information service”); ¶ 149 (asking whether “Commission ...should ...alter its approach to wireless broadband Internet access” and citing “section 332”) (rel. May 15, 2014); *Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd 7866, 7907 ¶¶ 104-105. (2010).

⁴ See *Verizon 332 Letter* at p. 6 (Dec. 24, 2014) (citing *Small Refiner Lead Phase Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983); *Allina Health Svcs. v. Sebelius*, 746 F.3d 1102, 1107 (D.C. Cir. 2014) and *Envil. Integrity Project v. EPA*, 425 F.3d 992, 997-98 (D.C. Cir. 2005); CTIA 332 Paper at pp. 6, 13-14 (Dec. 22, 2014). In each of the above cases the DC Circuit considered whether the agency’s decision was the logical outgrowth of its notice to interested persons. In each case, the Court found the notice insufficient because the agency gave no indication its decision might create the opposite result from that proposed in the agency’s notice. As is plain from n. 3 *supra*, that is not the case here as the Commission’s pending NPRM and NOI plainly indicated that reclassification of wireline broadband under Title II was a possibility and that the Commission would also consider revisiting its treatment of wireless broadband under Section 332, including the possibility of determining wireless broadband to be the “functional equivalent “ of CMRS under Section 332(d)(3). Such notice plainly complies with the Commission’s notice obligations under the Administrative Procedure Act and the D.C. Circuit’s precedent that requires the notice provide “interested parties a reasonable opportunity...to present relevant information on the central issues.” *Nuvio v. FCC*, 473 F.3d 301, 310 (2006) quoting *WJG Tel. Co. v. FCC*, 675 F.2d 386, 389 (D.C. Cir. 1982).

⁵ *Preserving the Open Internet*, 25 FCC Rcd 17905, 17932 ¶¶ 44- 45 (2010) *aff’d in part, vacated and remanded in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

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urges the Commission to apply its new rules similarly and retain the definition of “mass market services” adopted in 2010.

Respectfully submitted,

/s/ Joshua M. Bobeck

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cc: R. Goodheart
C. McMillan
B. Kasper
W. Wilhelm