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January 21, 2015

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

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

Dear Ms. Dortch:

On January 16, 2015, Steve Morris and Jim Partridge of the National Cable & Telecommunications Association (NCTA), Mary McManus of Comcast, Terri Natoli and Jason Weil of Time Warner Cable, Jennifer Prime of Cox, Alex Hoehn-Saric of Charter, and Emmett O’Keefe of Cablevision (collectively the Cable Representatives) met with Scott Jordan, Matt DelNero, Mark Stone, Aaron Garza, Jerusha Burnett, John B. Adams, and Kurt Schroeder to discuss transparency issues that have been raised in the above-referenced proceeding.

The Cable Representatives explained that their companies strive to provide consumers with relevant information regarding the services they offer and that there is no need for changes to the transparency rules adopted by the Commission in 2010. We explained that there have been no formal complaints arising from those rules, either from retail customers or from edge providers, and that unverified concerns raised in informal complaints, such as those cited in the NPRM in this proceeding, do not form an appropriate basis on which to adopt burdensome new rules.<sup>1</sup>

The Cable Representatives explained that they made significant efforts to update their online disclosures to retail customers following adoption of the 2010 rules and that they continually update those disclosures as warranted by developments in the marketplace. We explained the challenge of balancing the need for completeness and accuracy in disclosure statements with the objective of making such disclosures easy to find and useful for consumers. We expressed concern that rules that added significant detail to required disclosures could lead to overwhelming complexity, as is common in the context of Title II tariffs, while rules that require overly simplistic disclosures, e.g., broadband “nutrition labels,” may not reflect the reality of

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<sup>1</sup> Comments of the National Cable & Telecommunications Association, GN Docket No. 14-28 (NCTA Comments), at 48 (“While the NPRM suggests that there have been “hundreds” of informal complaints — a relatively low number given the 163 *million* broadband Internet access connections reported by the Commission — the mere existence of these filings, absent any indication that they resulted in actual findings of wrongdoing, plainly does not justify additional transparency rules.”) (emphasis in original).

how services are offered.<sup>2</sup> As explained in NCTA’s comments, we support the Open Internet Advisory Committee’s recommendation that the Commission “work with the industry to develop a voluntary labeling program.”<sup>3</sup>

The Cable Representatives also explained why it would be irrational to impose obligations on ISPs regarding the performance of particular applications and services offered by edge providers. As the Commission has acknowledged, the performance experienced by a consumer is affected by many factors beyond the control of an ISP, including the home equipment and network of the consumer, the performance of other network providers, such as transit providers and content distribution networks (CDNs), and choices made by the content provider itself.<sup>4</sup> With rare exception, there is no direct relationship between ISPs and edge providers and consequently no way for an ISP to measure or monitor the performance of a particular edge provider without inspecting all the packets crossing its network. As NCTA explained in its comments, this is an untenable approach.<sup>5</sup>

Given the wide variety of factors that may affect the performance of an application or service, and the inability of an ISP to predict exactly what types of information an edge provider might need, adding burdensome new disclosure requirements solely on ISPs is unlikely to lead to improved performance. The better approach to solving performance issues across networks would be for all companies to post a point of contact for troubleshooting such issues. The Cable Representatives explained that their engineers frequently work with engineers from other companies to identify and fix performance issues that affect their customers and that encouraging these voluntary efforts would be more productive than mandating additional disclosures.

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<sup>2</sup> NCTA Comments at 51 (“NCTA previously has identified a number of concerns that would arise in connection with any mandatory labeling program for broadband services. The Open Internet Advisory Committee report that the Commission cites as the basis for this proposal also recognized that there are numerous complexities associated with standardized labels and potential concerns about such labels misleading consumers.”).

<sup>3</sup> *Id.*, citing Open Internet Advisory Committee, 2013 Annual Report, at 87-88 (“The Transparency Working Group recommends that the FCC work with the industry to develop a voluntary labeling program, in which ISPs would disclose in a simple and consistent manner, relevant information about their broadband Internet access services.”).

<sup>4</sup> *See, e.g.*, 2014 MEASURING BROADBAND AMERICA REPORT at 5-6 (“Although many factors contribute to end-to-end consumer broadband performance, this Report focuses on those elements under the direct or indirect control of a consumer’s ISP, from the consumer gateway—the modem or router used by the consumer to access the Internet—to a nearby major Internet gateway point. Thus, any bandwidth limitations or delays incurred in the consumer’s home, or in segments of the Internet outside an ISP’s network, are not reflected in the results.”); Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on “Need for Speed” Information for Consumers of Broadband Services*, 26 FCC Rcd 5847, 5850 (2011) (“A variety of factors will influence a broadband consumer’s experience. Some of those factors are in the consumer’s control, some are in the service provider’s control, and some are outside of the control of both. How can these determinants of network performance best be conveyed to consumers so that they can optimize their broadband service quality?”).

<sup>5</sup> NCTA Comments at 51 (tracking performance of applications would “impose tremendous burdens on ISPs and could raise significant concerns because it likely would require the substantial use of deep packet inspection.”).

The Cable Representatives also discussed the challenges of developing accurate and reliable information on the performance of interconnection links between networks. As Professor kc claffy has explained, “measurement of interconnection is inherently more challenging [than measuring a single network], since it represents ‘the space in between’ autonomous networks.<sup>6</sup> While researchers have found that congestion on interconnection links is not a widespread problem,<sup>7</sup> there is evidence that disagreements between pairs of networks can affect the performance experienced by customers of those two networks.<sup>8</sup>

We explained that there is no basis for imposing mandatory disclosure obligations on the ISP side of those interconnection arrangements without placing a parallel obligation on the network on the other side of the arrangement. ISPs typically have a direct contractual relationship with CDNs and transit providers which set forth the rights and responsibilities of the two parties to the arrangement. Imposing obligations on one side of those arrangements and not the other would be the essence of arbitrary agency decision-making. As the M-Lab report concluded, “these issues cannot be laid at the feet of any one Access ISP, or any one Transit ISP; no Access ISP performs badly to all Transit ISPs, and no Transit ISP performs badly for all Access ISPs. Therefore, if the problem is not at one end, and not at the other, it must be in the middle around the interconnection between the two.”<sup>9</sup>

Moreover, we explained that any obligation on either party to report congestion would be exceedingly difficult. As explained in the MIT Report, “[c]ongestion does not always arise over time, but can come and go essentially overnight as a result of network reconfiguration and decisions by content providers as to how to route content.”<sup>10</sup> Reporting on such an ephemeral phenomenon would be especially challenging because there is no uniform industry definition of congestion and no feasible method for reporting such information in a meaningful time frame and at a meaningful level of granularity. A disclosure or measurement regime that did not establish a congestion reporting metric that would be reliable and accurate for all types of networks would be ineffective and confusing to consumers,<sup>11</sup> but the record in this docket contains no evidence that would support establishment of such a metric.

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<sup>6</sup> Ex Parte submission of Professor kc claffy, GN Docket No. 14-28 (Oct. 29, 2014) at 3 (Claffy).

<sup>7</sup> Massachusetts Institute of Technology, Information Policy Project, MEASURING INTERNET CONGESTION: A PRELIMINARY REPORT, available at <https://ipp.mit.edu/sites/default/files/documents/Congestion-handout-final.pdf> (MIT Report) at 2 (“Our data does not reveal widespread a congestion problem among the U.S. providers.”).

<sup>8</sup> ISP INTERCONNECTION AND ITS IMPACT ON CONSUMER INTERNET PERFORMANCE, A Measurement Lab Consortium Technical Report (Oct. 28, 2014) (M-Lab Report).

<sup>9</sup> M-Lab Report at 31.

<sup>10</sup> MIT Report at 2.

<sup>11</sup> Indeed, it is not difficult to imagine a regime in which one party to an interconnection agreement might have significant concerns about the other party disclosing details regarding the performance of the links between the networks. See, e.g., *Verizon Threatens to Sue Netflix Over Congestion Claims*, C-NET (June 5, 2014), at <http://www.cnet.com/news/verizon-threatens-netflix-with-lawsuit-over-congestion-accusations/#!>.

Given these significant challenges, the Cable Representatives suggested that the best way for the Commission to gather and distribute data regarding performance across multiple networks is through a collaborative process involving a broad cross-section of participants,<sup>12</sup> similar to the Measuring Broadband America program. The Commission consistently has recognized the value that such a collaborative approach brings to its work in measuring broadband performance.<sup>13</sup> We committed to fully participating in such a process (as we have with the MBA program since its inception) and encouraged the Commission to request the participation of other segments of the Internet ecosystem in such a process, as we have on numerous previous occasions.<sup>14</sup> We believe such a process would be essential in developing a measurement regime that all parties could rely on and support and which could provide the Commission and consumers with meaningful information. Indeed, after decades of consistently taking a hands-off regulatory approach to Internet interconnection and traffic exchange, a voluntary collaborative effort along the lines of the MBA program is an appropriate and necessary first step before the Commission considers burdensome mandates.

Respectfully submitted,

**/s/ Steven F. Morris**

Steven F. Morris

cc: S. Jordan  
M. DelNero  
M. Stone  
A. Garza  
J. Burnett  
J. Adams  
K. Schroeder

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<sup>12</sup> Claffy at 2-3 (advocating creation of “[e]xternal advisory board (including not only ISPs, but edge providers, researchers, other stakeholders) to guide development of metrics and measurement methods and funding of measurement infrastructure.”).

<sup>13</sup> 2014 MEASURING BROADBAND AMERICA REPORT at 5 (“This Report, like the Reports that preceded it, could not have been produced without the counsel of a broad array of individuals and entities, collectively and informally referred to as “the broadband collaborative”, which includes the participating ISPs, equipment manufacturers, M-Lab, Level 3 Communications, and academics. Participation in this group is open and voluntary.”).

<sup>14</sup> *See, e.g.*, Comments of the National Cable & Telecommunications Association, CG Docket No. 09-158 (filed May 26, 2011) at 9 (“[C]ustomers have a direct relationship with application and content providers and therefore it is important that those providers be included in any future process. Indeed, the role of application providers may become more important over time as customers rely more heavily on cloud services. When a customer’s vital information is held in the cloud, rather than on their own computer, consumers may need more, or different, types of information from application providers than they have in the past.”).