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VIA ELECTRONIC FILING

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

**Re: Notice of *Ex Parte* Presentation, *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 21, 2015, Lynn Charytan and the undersigned from Comcast, along with Matthew Brill of Latham & Watkins LLP, met with Stephanie Weiner and Marcus Maher of the Office of General Counsel; Julie Veach (by phone) and Claude Aiken of the Wireline Competition Bureau; and Scott Jordan, Chief Technology Officer for the Commission, in connection with the above-referenced proceedings.

At the meeting, we reiterated Comcast's strong support for the adoption of legally enforceable transparency, no-blocking, and anti-discrimination rules under the Commission's broad and judicially confirmed authority under Section 706. We also emphasized our continued opposition to reclassifying broadband Internet access service as a "telecommunications service" under Title II, in light of the overwhelming record evidence that Title II reclassification would be inconsistent with the factual particulars of broadband service, would harm broadband investment and innovation, and would be unnecessary to accomplish the Commission's core public interest objectives in this proceeding.

We further explained, consistent with Comcast's *ex parte* submission of December 24, 2014,¹ that if the Commission chooses to pursue reclassification, it can and should grant forbearance to broadband providers from *all* of the obligations and restrictions in Title II.² We noted that both President Obama and Chairman Wheeler have stated that the sole purpose of

¹ See Letter of Kathryn A. Zachem, Comcast Corp., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (filed Dec. 24, 2014) ("Comcast Dec. 24 Ex Parte").

² See *id.* at 13-25.

reclassifying broadband Internet access service would be to adopt strong open Internet protections, not to impose the panoply of Title II requirements that were designed to regulate monopoly telephone carriers.³ The NPRM here similarly contemplated Title II classification for the sole purpose of supporting open Internet rules, and never suggested that the Commission was considering the imposition of (or even establishment of authority to impose) any other regulatory obligations. Granting blanket, nationwide forbearance from all of the restrictions and obligations of Title II—including Sections 201 and 202—would thus be consistent with the Commission’s notice obligations under the APA and would also be the surest way to mitigate the harms posed by Title II reclassification and to maintain the deregulatory status quo that has fostered the unprecedented and transformative investment and innovation in broadband services over the past 15 years.

In addition, we noted Comcast’s agreement with the position of the National Cable & Telecommunications Association (“NCTA”) that, if the Commission opts not to forbear from Sections 201 and 202 in their entirety, it should at most rely on these provisions as sources of substantive legal authority for its open Internet rules.⁴ We explained that keeping Sections 201 and 202 in place *beyond* the adoption of open Internet rules would not only have the notice flaws described above, but would present significant risks to broadband providers, and in particular would undercut assurances that reclassification would not result in rate regulation,⁵ as extending the mandate in Section 201(b) of just and reasonable “charges” would in fact create a serious threat of rate regulation.⁶ By the same token, mandating just and reasonable “practices” under Section 201(b) would subject every other aspect of our broadband service to regulatory second-guessing and micromanagement—an outcome that likewise would go well beyond the limited purpose of reclassification identified by the Chairman and the President. In all events, we explained that the upcoming Order should make clear that the Commission will not engage in

³ See Press Release, *FCC Chairman Tom Wheeler’s Statement on President Barack Obama’s Statement Regarding Net Neutrality* (rel. Nov. 10, 2014) (“Wheeler Nov. 10 Statement”) (explaining that the Commission’s “goal [is] simple: to reach the outcomes sought by the 2010 rules”); 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> (“Obama Nov. 10 Statement”) (grounding calls for reclassification in desire to “create a new set of rules protecting net neutrality,” and noting that, “[i]f the FCC appropriately forbears from the Title II regulations that are not needed . . . [,] it will help ensure new rules are consistent with incentives for further investment in the infrastructure of the Internet”).

⁴ See Letter of Matthew A. Brill, Counsel for NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 4 (filed Jan. 14, 2015) (“NCTA Jan. 14 Ex Parte”).

⁵ See, e.g., Obama Nov. 10 Statement (calling for forbearance from “rate regulation and other provisions less relevant to broadband services”).

⁶ 47 U.S.C. § 201(b).

any form of broadband rate regulation pursuant to Title II and will not entertain complaints challenging the reasonableness of a broadband provider's rates.

We further stressed that the Commission should issue its grant of forbearance in conjunction with any reclassification decision, and noted that bifurcating reclassification and forbearance would create enormous uncertainty, needlessly prolong the disputes already before the Commission on forbearance issues, and distract from other regulatory priorities. Moreover, given (i) broadband providers' substantial reliance on the Commission's repeatedly reaffirmed classification of broadband Internet access as an information service, and (ii) the fact that reclassification *without* broad forbearance from Title II obligations and restrictions would affirmatively undermine the broadband deployment goals embodied in Section 706 and Commission policy (as the Commission has repeatedly acknowledged),⁷ refusing to grant forbearance in conjunction with the adoption of a Title II classification would be arbitrary and capricious—and would even more squarely implicate the notice and comment shortcomings described above.

We also urged the Commission to reject calls to adopt rules regulating the well-functioning Internet traffic-exchange marketplace, and specifically to rebuff efforts by some commenters to inject the prospect of Title II regulation of Internet traffic exchange into this proceeding. As NCTA correctly pointed out, the NPRM in this proceeding failed to provide any notice that the Commission might classify backbone services or Internet traffic-exchange arrangements under Title II.⁸ In any event, there is no basis in the record for such a classification, as ISPs provide paid peering services on a private carrier basis (*i.e.*, outside the Title II common carrier framework).⁹ The record conclusively demonstrates that ISPs exercise discretion as to whether and on what terms to deal with other network owners and reach agreements on an individualized basis¹⁰—a fact that even proponents of traffic-exchange regulation readily acknowledge.¹¹ Any effort to subject Internet traffic exchange to Title II would ignore these realities.

⁷ See Comcast Dec. 24 Ex Parte at 13-20 (discussing the integral interrelationship between any assertion of Title II authority and broad forbearance from Title II obligations and restrictions).

⁸ NCTA Jan. 14 Ex Parte at 8.

⁹ See *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (explaining that the paradigmatic case of private carriage is one where “the carrier chooses its clients on an individual basis and determines in each particular case ‘whether and on what terms to serve’ and there is no specific regulatory compulsion to serve all indifferently” (internal citations omitted)).

¹⁰ See Letter of William H. Johnson, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 7-9 (filed Dec. 17, 2014) (describing private carriage offering of traffic exchange).

¹¹ See *id.* at 9 (collecting citations to Level 3 and Netflix).

We also reiterated what Chairman Wheeler expressly recognized when the NPRM was released—that Internet traffic exchange “is a different matter that is better addressed separately” from the open Internet proceeding.¹² We noted that COMPTTEL’s recent submissions aim to rewrite history in suggesting that the *2010 Open Internet Order* somehow recognized the need to regulate paid peering arrangements.¹³ While the Commission suggested that insisting on payment as a condition of accepting a particular edge provider’s traffic could amount to blocking, it expressly recognized that this concern would *not* apply to or affect paid peering arrangements.¹⁴ Moreover, the record before the Commission confirms that Comcast makes ample capacity available for edge-provider traffic to reach Comcast’s broadband subscribers through settlement-free transit links.¹⁵ Accordingly, no edge provider is compelled to pay Comcast for a direct connection to its network, and indeed, very few do so; those that choose to do so have decided that they have sufficient traffic to merit arranging dedicated, assured connection capacity—a notion entirely distinct from paying for the right to access the ISP’s customers, which is available through so many other sources. Thus, we urged the Commission to reaffirm its long-held view that Internet traffic exchange presents distinct issues and considerations that are not part of the open Internet debate, and to refrain from short-circuiting the separate inquiry the Commission has been conducting into these issues.¹⁶

In all events, we explained that if the Commission insists on subjecting Internet traffic exchange to regulation, it should assert jurisdiction in an evenhanded manner to avoid distorting

¹² NPRM, Statement of Chairman Tom Wheeler.

¹³ See Letter of Angie Kronenberg, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 4 (filed Jan. 13, 2014); Letter of Angie Kronenberg, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 1-3 (filed Jan. 21, 2014).

¹⁴ See *Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 25 FCC Rcd 7905 ¶ 67 n.209 (2010) (“*2010 Open Internet Order*”) (declining to extend the 2010 open Internet rules to “existing arrangements for network interconnection, including existing paid peering arrangements”); see also NPRM ¶ 59 (explaining that “the *Order* . . . did not apply the no-blocking or unreasonable discrimination rules *to the exchange of traffic between networks*, whether peering, *paid peering*, [CDN] connection, or any other form of inter-network transmission of data”) (emphasis added).

¹⁵ See, e.g., Letter of Kathryn A. Zachem, Comcast, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 3-4 (filed Nov. 10, 2014) (explaining that “Comcast has frequently noted that it has dozens of settlement-free routes into its network, along with many other CDN and paid transit arrangements,” and that “[a]ny and all of those routes offer edge providers ample opportunities to deliver their traffic to Comcast without any need to enter into a direct-connection agreement”).

¹⁶ See FCC News Release, *Statement by FCC Chairman Tom Wheeler on Broadband Consumers and Internet Congestion*, Jun. 13, 2014, available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-327634A1.pdf.

competition. We noted that both sides to any traffic-exchange arrangement should be subject to the same classification and regulation, as they each provide comparable (if not identical) “telecommunications” functionalities. At a bare minimum, the Commission should leave open the possibility of asserting such jurisdiction over non-ISP transit providers and CDNs, including self-provided edge provider CDNs. We pointed out that, where the Commission has sought to regulate only one party to an interconnection arrangement, the result has been ineffective and an invitation to arbitration. Indeed, recent efforts to regulate interconnection in the voice arena—including both the Commission’s adoption of rules governing non-access traffic exchanged between LECs and CMRS carriers¹⁷ and pending proposals regarding IP-to-IP interconnection¹⁸—recognize that the public interest typically is best served by the imposition of at least certain reciprocal obligations on both parties to an interconnection arrangement. The same approach would be needed here to ensure a level playing field and to avoid regulatory arbitration and gamesmanship.

Finally, we reiterated several points made in an earlier meeting attended by Comcast and other broadband providers regarding the Commission’s transparency-related proposals.¹⁹ We explained that Comcast strongly supports transparency, and in particular supports the disclosure rules imposed in 2010 and upheld by the *Verizon* court. At the same time, we noted that mandating new disclosures on “congestion” would be ineffective and thus needlessly burdensome. We explained that broadband providers usually lack the information necessary to determine where “congestion” is occurring; broadband providers can determine levels of *utilization* of any given port, but that information alone says nothing about whether “congestion” has occurred (*i.e.*, whether packet loss is the result).²⁰ Indeed, if the Commission insists on imposing new reporting mandates, it should ensure that edge providers are included in any reporting regime, as they are in the best position to determine whether congestion has affected a particular online service or application. We noted that there is often 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. Further, congestion may be occurring because of problems on an intermediate provider’s

¹⁷ See 47 C.F.R. § 20.11 (subjecting LECs and CMRS carriers to reciprocal interconnection duties).

¹⁸ See *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 ¶¶ 1353-58 (2011) (describing proposals to extend IP-to-IP interconnection obligations to all IP-based carriers).

¹⁹ See generally Letter of Steven F. Morris, NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (filed Jan. 21, 2015).

²⁰ We also explained that there is no basis to impose separate utilization-related reporting requirements on ISPs, as parties with direct interconnection arrangements already receive utilization information as part of the joint planning process, and consumers have no use for such information in the abstract.

Ms. Marlene Dortch

January 23, 2015

Page 6

network on which the edge provider is relying.²¹ Thus, at a minimum, the Commission should leave the door open to gathering additional information from edge providers or imposing new reporting requirements on such entities in the future. But in all events, we questioned why and how such congestion or even utilization information could be useful for consumers or even edge providers, given that the source of the congestion will often be in dispute, may be caused by the edge provider or transit provider or CDN, and, if significant and persistent, would likely already be the subject of public discourse. Finally, we noted Comcast's support for disclosure rules modeled on the collaborative, multi-stakeholder approach reflected in the Measuring Broadband America program.

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

Respectfully submitted,

/s/ Kathryn A. Zachem

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cc: Claude Aiken
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²¹ See, e.g., Dan Rayburn, StreamingMediaBlog.com, *Cogent Now Admits They Slowed Down Netflix's Traffic, Creating a Fast Lane & Slow Lane* (Nov. 5, 2014), available at <http://blog.streamingmedia.com/2014/11/cogent-now-admits-slowed-netflixs-traffic-creating-fast-lane-slow-lane.html>.