



January 23, 2015

VIA ECFS

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 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:

No matter which legal framework the Commission adopts as a basis for regulation in the above-referenced dockets, it should expressly reaffirm its prior conclusions that broadband Internet access and any separate “telecommunications” component of that service that the Commission may identify, regardless of the medium of transmission, is each an inherently *interstate* service subject to exclusive federal regulation.

Although longstanding precedent unequivocally supports this conclusion, calls for state broadband regulation persist.¹ State regulation of broadband access or any separate “telecommunications” component of that service that the Commission may identify in these dockets, would result in a patchwork of disparate mandates and standards that are guaranteed to sap investment and harm consumers. The Commission must reiterate that states and their public utility commissions are barred from regulating the provision of broadband Internet access or any newly identified “telecommunications” component of that service. Otherwise, whatever regime the Commission ultimately adopts would create needless confusion and uncertainty and would discourage broadband investment and deployment.

¹ See, e.g., Letter from Brad Ramsay, General Counsel, NARUC, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 *et al.*, at 1 (Nov. 6, 2014) (“NARUC has always taken the position that the FCC should impose minimum standards and specify in any orders that the State retains the authority to impose additional requirements and penalties to inhibit the proscribed behavior.”); Comments of the Pennsylvania Public Utility Commission, GN Docket No. 14-28, at 2 (July 15, 2014) (“The PaPUC ... could not support[] a result in which the FCC preempts the states or reaches a forbearance decision that leaves the states with no viable role.”).

Broadband Internet Access is an Inherently Interstate Service. The Commission has long classified broadband Internet access as an inherently interstate service.² Under the Commission’s long-standing end-to-end analysis, it has “determined the jurisdictional nature of communications by the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers.”³ The “points among which” broadband communications travel “are often in different states and different countries.”⁴ Assembling even a single webpage typically requires multiple connections to different content sources that may be located in different states or countries.⁵ Similarly, content is frequently sourced depending on network and server performance and the source location, and transmission path, may vary depending on these factors. Thus, even when the last-mile connection supplied by the broadband provider is itself physically intrastate, the broadband Internet access service, as any transmission component of that access service “is properly considered jurisdictionally interstate for regulatory purposes” because the service and any transmission component carry traffic from multiple jurisdictions that is inseverable from any potentially local traffic.⁶

No party seriously disputes the interstate nature of broadband Internet access. To the contrary, there is wide-ranging agreement that this offering is inherently interstate, including from parties pressing the Commission to reclassify the service as a telecommunications service. For instance, Free Press recently agreed that reaffirming “the interstate character of broadband Internet access” is “the only path the Commission realistically can take” on this issue.⁷ Other

² See, e.g., Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798 ¶ 59 (2002) (“*Cable Modem Order*”) (concluding that the “points among which” broadband communications travel “are often in different states and different countries”); Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd 5901 ¶ 28 (2007) (“Having concluded that wireless broadband Internet access service is an information service, we also find that the service is jurisdictionally interstate.”); Memorandum Opinion and Order, *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, 13 FCC Rcd 22466 ¶ 16 (1998) (“*GTE Order*”).

³ *Id.* at ¶ 17.

⁴ *Cable Modem Order* ¶ 59.

⁵ See, Richard Bennett, G-7 Broadband Dynamics: How Policy Affects Broadband Dynamics, <http://www.aei.org/publication/g7-broadband-dynamics-policy-affects-broadband-quality-powerhouse-nations/> (the average web page requires 37 TCP connections (at 34) (2014).

⁶ Memorandum Opinion and Order, *NARUC Petition for Clarification or Declaratory Ruling That No FCC Order or Rule Limits State Authority to Collect Broadband Data*, 25 FCC Rcd 5051 ¶ 8 n.24 (2010).

⁷ Letter from Matthew F. Wood, Policy Director, Free Press, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 & 10-127, at 2 (Dec. 14, 2014); see also *id.* at 5 (“[B]ased on

proponents of more stringent rules appear to agree.⁸ Similarly, any separately identified “telecommunications” component that carries broadband Internet access traffic must also be interstate. Indeed, in 2005, the Commission expressly recognized the interstate jurisdictional nature of DSL transmission services provided as “telecommunications services.”⁹ Moreover, Congress expressly preempted state rate and entry regulation of wireless broadband Internet access services (both PMRS and CMRS) in Section 332(c)(3)(A) of the Communications Act of 1934, as amended.¹⁰

The Commission Enjoys Exclusive Jurisdiction Over Interstate Services Such as Broadband Internet Access. As an interstate service, broadband Internet access service, and any “telecommunications” component of that service, can be subject to regulation only at the federal level. Section 152 of the Communications Act of 1934, as amended, endows the Commission with jurisdiction over “all interstate and foreign communication by wire or radio,”¹¹ and limits state authority to matters concerning “*intrastate* communication.”¹² “Under this regulatory framework, the Commission has plenary and comprehensive jurisdiction over interstate and foreign communications, the regulation of which is entrusted to the Commission. The Commission’s jurisdiction over interstate and foreign communications is exclusive of state authority, Congress having deprived the states of authority to regulate the rates or other terms and conditions under which interstate communications service may be offered in a state.”¹³ The fact that individual broadband transmissions may originate and terminate within the same state does nothing to change this fact, as the Commission recognized in its 2010 *Open Internet Order*.¹⁴

Commission precedent and the observable nature of broadband-facilitated communications, broadband access is properly classified as an interstate telecommunications service.”). To be sure, we disagree with Free Press’s views on the consequences of broadband’s inherently interstate character, and with its insistence that broadband Internet access should be classified as a telecommunications service.

⁸ See Comments of Public Knowledge, Benton Foundation, and Access Sonoma Broadband, GN Docket No. 14-28, at 108 (July 15, 2014).

⁹ *GTE Order*, 13 FCC Rcd 22466 ¶ 16.

¹⁰ 47 U.S.C. § 332(c)(3)(A).

¹¹ 47 U.S.C. § 152(a).

¹² *Id.* § 152(b) (emphasis added).

¹³ Memorandum Opinion and Order, *Operator Services Providers of America Petition for Expedited Declaratory Ruling*, 6 FCC Rcd 4475 ¶ 10 (1991) (footnotes and citations omitted).

¹⁴ See *Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 25 FCC Rcd 7905 ¶ 121 n.374 (2010), *vacated on other grounds Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (“The Commission historically has recognized that services carrying Internet traffic are jurisdictionally mixed, but generally subject to federal regulation.”) (citation omitted).

Commission precedent makes clear that the agency retains its exclusive authority over interstate services regardless of whether they are classified as *information* services¹⁵ or *telecommunications* services.¹⁶ Thus, even if the Commission were to reclassify broadband Internet access as a telecommunications service (notwithstanding the myriad reasons why it should not), doing so would not alter the service's inherently interstate character or the Commission's exclusive jurisdiction over it.

Section 706 Does Not Authorize States to Regulate Broadband Internet Access.

Nothing in Section 706 of the Telecommunications Act of 1996¹⁷ or the *Verizon* court's discussion of that provision disrupts this settled jurisdictional framework.¹⁸ While Section 706 contemplates action by "[t]he Commission and each State commission"¹⁹ to encourage the deployment of advanced telecommunications capability, the *Verizon* court made clear that that section "must be read in conjunction with other provisions of the Communications Act."²⁰ These include, in particular, Section 152's dictates regarding the appropriate spheres of federal and state authority. As the Supreme Court repeatedly has held, "indefinite congressional expressions" such as the reference to state commissions in Section 706 "cannot negate plain

¹⁵ See, e.g., *Minnesota Pub. Serv. Comm'n v. FCC*, 483 F.3d 570, 582-83 (8th Cir. 2007) (affirming preemption of state regulation of interstate information service); *Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307 ¶ 16 (2004) ("[F]ederal authority has . . . been recognized as preeminent in the area of information services, and particularly in the area of the Internet and other interactive computer services."); *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry) et al.*, Report and Order, 104 FCC 2d 958 ¶ 343 (1986) (subsequent history omitted) (explaining that the FCC "preemptively deregulated [information] services, foreclosing the possibility of state regulation of such offerings").

¹⁶ See, e.g., *Crockett Tel. Co. v. FCC*, 963 F.2d 1564, 1566 (D.C. Cir. 1992) ("The FCC has exclusive jurisdiction to regulate interstate common carrier services . . ."); *Mobile Telecommunications Technologies Corp.*, Memorandum Opinion and Order, 6 FCC Rcd 1938 ¶ 15 n.16 (1991) ("[T]he Communications Act . . . grants this Commission exclusive authority to regulate the charges and services of interstate common carriers.").

¹⁷ 47 U.S.C. § 1302.

¹⁸ *Verizon*, 740 F.3d 623.

¹⁹ 47 U.S.C. § 1302(a).

²⁰ *Verizon*, 740 F.3d at 640.

statutory language and cannot work a repeal or amendment by implication.”²¹ Here, there is simply *no* evidence that Congress intended to eviscerate the jurisdictional framework that has governed the communications landscape for nearly a century. Nor did the *Verizon* court hold that Section 706 trumps Section 152’s jurisdictional boundaries. The respective roles of state and federal authority over broadband Internet access were not even at issue in the *Verizon* litigation, were not briefed by the parties, and were not resolved by the court’s decision. Indeed, the D.C. Circuit noted with approval the Commission’s consistent findings that broadband is an interstate service,²² and never even questioned the Commission’s extensive precedent preempting state regulation of interstate communication services.

To be sure, states retain certain legal prerogatives that may affect broadband Internet access service. To this end, consistent with Section 706, state commissions may take certain action to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”²³ For example, states and their subdivisions retain authority over the siting and placement of broadband facilities, subject to limitations established elsewhere in the Communications Act.²⁴ Likewise, states might pursue in-state adoption initiatives that do not purport to govern the ways in which broadband Internet access is provisioned. And states of course retain authority to implement certain generally applicable consumer protection requirements. Their actions must not, however, purport to regulate the provision of interstate services. No matter whether broadband Internet access is classified as

²¹ *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981). For this reason, the Court found in 1986 that Section 220 of the Act, which authorizes the Commission to set depreciation rates, did not override Section 152(b)’s reservation of state authority over intrastate matters. The Court held where a general provision is in conflict with a jurisdictional provision in the same statute, it was “disinclined to favor the provision declaring a general statutory purpose, as opposed to the provision which defines the jurisdictional reach of the agency formed to implement that purpose.” *Louisiana PSC v. FCC*, 476 U.S. 355, 370 (1986). It did “not find the meaning of [Section 220] so unambiguous or straightforward as to override the command of § 152(b)...” *Id.* at 377.

²² *Verizon*, 740 F.3d at 629 (“Since the advent of the Internet, the Commission has confronted the questions of whether and how it should regulate this communications network, which, generally speaking, falls comfortably within the Commission’s jurisdiction over ‘all interstate and foreign communications by wire or radio.’”) (quoting 47 U.S.C. § 152(a)).

²³ 47 U.S.C. § 1302(a); *see also Verizon*, 740 F.3d at 640.

²⁴ *See, e.g.*, 47 U.S.C. § 153; *id.* § 332(c)(7).

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an information service, or a telecommunications service, or whether some transmission component of that service is separately identified by the Commission, , states may *not* disregard a century's worth of precedent by imposing economic regulation on these inherently interstate offerings.²⁵

Respectfully submitted,

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²⁵ To this end, if the Commission reclassifies broadband Internet access service, or identifies a separate “telecommunications” component that falls under Title II, and forbears from various Title II requirements under Section 10 of the Act, it should emphasize that provision’s edict that “[a] State commission may not continue to apply or enforce any provision” from which the Commission has forborne. 47 U.S.C. § 160(e).