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January 23, 2015

VIA ELECTRONIC FILING

Tom Wheeler, Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20054

Re: ***Protecting and Promoting the Open Internet,*** **GN Docket No. 14-28**

Dear Chairman Wheeler:

We appreciate your recognition that the principle of "innovation without permission" remains fundamental to the success of the information technology sector in the United States.[1] The experience of participating in the remarkable expansion of products and services available to the communicating public over that past 20 years leaves us with a deep conviction that this principle must continue to apply to the Commission.

We believe the existence of new products and services associated with the Internet and IP networks owes to the long standing and mutually exclusive dichotomy – endorsed by the Commission for over 50 years – that information (or enhanced) services are fundamentally different from and should not be regulated like telecommunications services. That principle has been the bedrock of the computing and larger information technology industry as well as the Internet ecosystem for decades.

Now, at the urging of President Obama, the Commission appears poised to eviscerate both principles, ignoring the successes they have brought, by seeking to regulate broadband Internet access services under Title II of the Communications Act. The contradiction of the desire to implement open Internet rules by ending the unregulated paradigm responsible for creating the vibrant Internet ecosystem continues to make imposing Title II on IP networks "unthinkable."

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[1] Remarks of Tom Wheeler, Chairman, Federal Communications Commission, Mid-Atlantic Venture Association, Washington, D.C., at 5 (Nov. 4, 2014).

There exists nothing in the record or daily experience to suggest the need to question the long standing definitions that have left the computing sector, the information technology industry, and the Internet ecosystem beyond the reach of the Communications Act. The Title II framework – which predates the transistor and precursors of computing in the modern era – offers neither a track record suggesting confidence nor a basis for regulating 21st century communications. The plan to impose Title II obligations on IP networks reflects an improper attempt to short circuit the legislative process, with the challenges that this process entails, and to bypass enforcement of antitrust laws, without any case of market failure. Whatever the motivations, the Commission makes no attempt to quantify the uncertainty and risk inherent with ending a decades' long policy of leaving IP networks unregulated.

As a threshold matter, the change of policy comes without any advance notice of the theory upon which the Commission plans to rely in imposing Title II regulation on broadband. The Administrative Procedure Act ("APA") requires that a notice of proposed rulemaking include "reference to the legal authority under which the rule is proposed."[2] "The required specification of legal authority must be done with particularity,"[3] and courts have set aside agency action for failing to provide notice of the specific provision of the U.S. Code supplying legal authority for the proposed rules.[4] Put simply, an agency cannot "change[] its mind halfway through th[e] proceeding" about the source of its legal authority without issuing a new notice.[5]

Here, in its *2014 NPRM*, the Commission did not identify Title II as the source of its legal authority but rather "propose[d] to adopt rules to protect and promote the open Internet ... under section 706, consistent with the D.C. Circuit's opinion in *Verizon v. FCC*."[6] Although the Commission sought "comment on the nature and the extent of the Commission's authority

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2 5 U.S.C. § 553(b)(2).

3 Sen. Doc. No. 248, 79th Cong. 2d Sess. 258 (1946); *accord* Attorney General's Manual on the Administrative Procedure Act at 30 (1947) ("The reference [to the authority under which the rule is proposed] must be sufficiently precise to apprise interested persons of the agency's legal authority to issue the proposed rule.").

4 *See Global Van Lines, Inc. v. ICC*, 714 F.2d 1290, 1298 (5th Cir. 1983) (agency failed to cite 49 US.C. § 10923(d)(1) in the NPRM); *Nat'l Tour Brokers Ass'n v. United States*, 591 F.2d 896, 900 (D.C. Cir. 1978) (agency failed to cite 49 U.S.C. 302, 303, 304, 305, 311, and 320, and 5 U.S.C. 553 and 559 in the NPRM); *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 759 (D.C. Cir. 1987) (agency failed to cite 42 U.S.C. § 1395x(v)(1)(A)(ii) in the NPRM), *aff'd*, 488 U.S. 204 (1988).

5 *Nat'l Tour Brokers Ass'n*, 591 F.2d at 899.

6 *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, GN Docket No. 14-28, FCC 14-61, ¶ 142 (rel. May 15, 2014) ("*2014 NPRM*"); *see also id.* ¶ 4 ("Per the blueprint offered by the D.C. Circuit in its decision in *Verizon v. FCC*, the Commission proposes to rely on section 706 of the Telecommunications Act of 1996"); *id.* ¶¶ 143-47.

to adopt open Internet rules relying on Title II,"[7] the Commission never proposed adopting rules under any specific provision of Title II and failed to cite a single Title II provision in the ordering clause of the *2014 NPRM*.[8] Under the circumstances, the Commission "effectively deprived the [public] of any opportunity to present comments" on the "'precise'" source of Title II authority for its proposed Open Internet rules, when statutory authority "was one of the principal issues"—if not the critical issue—"raised in the[se] proceedings."[9]

Beyond these APA problems, regulation of broadband under Title II destroys the telecommunications and information service dichotomy. This dichotomy, which evolved through the *Computer Inquiry* proceedings before being enshrined in the Telecommunications Act of 1996, reflects an operational and physical separation of the networks supporting computing capabilities and traditional telephone services.

The arrival of the commercial Internet and Voice over Internet Protocol (VoIP) services put the heavily regulated telephone network and lightly regulated IP networks into direct competition. The migration of communications capabilities from the PSTN to IP networks reflects the collective preference of entrepreneurs, investors, and the communicating public for unregulated services as opposed to regulated services. What rationale does the

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[7] *Id.* ¶ 142; *see also id.* ¶¶ 4, 148-55.

[8] *Id.* ¶ 183 (citing 47 U.S.C. §§ 151, 152, 154(i)-(j), 303, 316, 1302); *see also Nat'l Tour Brokers Ass'n*, 591 F.2d at 900 (explaining that "[s]uch a reference would have included something along the lines of" an ordering clause in the final order). Although Title II advocates have proposed various theories to regulate broadband under Title II and suggested certain Title II provisions for new Open Internet rules, "notice necessarily must come—if at all—from the Agency." *Small Refiner Lead Phase–Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983); *see also Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991); *Nat'l Min. Ass'n v. Mine Safety & Health Admin.*, 116 F.3d 520, 531 (D.C. Cir. 1997); *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991); *Am. Fed'n of Labor & Cong. of Indus. Organizations v. Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985).

[9] *Global Van Lines*, 714 F.2d at 1298 (the APA "necessarily requires that interested parties be given a fair chance to 'comment.' None was provided here, and on that ground alone the Commission [will] be reversed."). To the extent the Commission seeks to rely upon its 2010 Notice of Inquiry to comply with APA notice requirements, *2014 NPRM* ¶ 149 n.302, such reliance is misplaced. In light of the Commission's 2010 *Open Internet Order*, the D.C. Circuit's vacatur in *Verizon v. FCC*, and the Commission's initiation of a new proceeding with a new docket number to "respond directly to that remand," the proceeding initiated in 2010 is irrelevant for APA purposes. *Id.* ¶ 24; *see AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 86-87 (D.D.C. 2007) (holding that an earlier NPRM could not give notice of a new rule where a court vacated the earlier rule (following *Mobil Oil Corp. v. EPA*, 35 F.3d 579, 584-85 (D.C. Cir. 1994), and *Action on Smoking & Health v. CAB*, 713 F.2d 795, 800 (D.C. Cir. 1983)). "If one rulemaking proceeding has culminated and another has begun, then new notice and comment procedures are required." *Action on Smoking & Health*, 713 F.2d at 800. Thus, having the Bureau refresh the record in the earlier proceeding is not an adequate substitute for a new Commission-level NPRM containing a precise legal theory for regulating broadband under Title II. *See, e.g., Sprint Corp. v. FCC*, 315 F.3d 369, 376 (D.C. Cir. 2003) (holding that the Common Carrier Bureau could not provide notice of a proposed rule).

Commission offer for vetoing this choice by regulating previously unregulated services, thereby punishing success and rewarding failure?

From the standpoint of an entrepreneur, there exists an entirely different risk profile for investments in regulated and unregulated networks and services. **It is imperative for innovators and investors to understand clearly where that regulatory line is drawn.** Since the AT&T Consent Decree in 1956, the Commission has recognized a line distinguishing unregulated information services from regulated telecommunications services through definitions that are mutually exclusive. The Commission's belated embrace of Title II fails to give entrepreneurs and investors any basis for judging the regulated/unregulated line going forward and ignores the self-evident and consistent track record of entrepreneur and investor antipathy for regulated spheres.

For IP-based services, the Commission historically has focused on whether such services rely upon the PSTN in determining their regulatory treatment.[10] For example, when it found pulver.com's Free World Dialup (FWD) offering to be an unregulated information service, the Commission found persuasive that FWD members "must have an existing broadband Internet access service," "must acquire and appropriately configure Session Initiation Protocol (SIP) phones or download software that enables their personal computers to function as 'soft phones,'" and must utilize a Pulver-assigned FWD number rather than a NANP number to make free VoIP or other types of peer-to-peer communications to other FWD members. [11]

Likewise, in establishing its interconnected VoIP regime, the Commission was persuaded that the ability of users to connect to the PSTN was a critical factor in imposing Title II-like regulation.[12] Indeed, the definition of interconnected VoIP requires offering a means for users to receive calls from and terminate calls to the PSTN. 47 C.F.R. § 9.3.

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[10] *See, e.g.*, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, ¶ 39 (1998).

[11] *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, ¶ 5 (2004) ("*Free World Dialup Order*"). Indeed, the Commission specifically declined "to extend our classification holdings to the legal status of FWD to the extent it is involved in any way in communications that originate or terminate on the public switched telephone network, or that may be made via dial-up access." *Id.* ¶ 2, n.3.

[12] *See generally IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, ¶ 24 n.78 (2005); *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, ¶ 80 (2006) (concluding that the "origination or termination of a communication via the PSTN is 'telecommunications,' and over-the-top interconnected VoIP providers, like other resellers, are providing telecommunications when they provide their users with the ability to originate or terminate a communication via the PSTN, regardless of whether they do so via their own facilities or obtain transmission from third parties").

When Congress intended for the Commission to regulate IP-based services that do not connect to the PSTN, it expressly granted the Commission such authority. For example, in the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA), Congress required non-interconnected VoIP providers to participate in and contribute to the Telecommunications Relay Service Fund. 47 U.S.C. § 715. Non-interconnected VoIP service enables real-time voice communications that originate from or terminate to the user's location using IP or any successor protocol, requires IP compatible customer premises equipment, and does not include any service that is an interconnected VoIP service. 47 U.S.C. § 153(36). Had Congress intended for the Commission to regulate broadband or to treat broadband as regulated "telecommunications services" under Title II, Congress plainly would have said so.

In the absence of specific Congressional authority, IP-based services without a connection to the PSTN are appropriately classified as unregulated information services. This deregulatory approach is consistent with the Commission's refusal to allow states to impose "public-utility type regulation" on IP-based offerings because doing so would be inconsistent with the "preeminent" federal authority "in the area of the Internet and other interactive computer services, which Congress has explicitly stated should remain free of regulation."[13] The Commission appears poised to impose that very "public-utility type regulation" on the IP networks that comprise the Internet, which Congress directed and the Commission concurred should be free from such regulation.

To be sure, the Commission may try to ameliorate the impacts of "public-utility type regulation" of broadband by forbearing from some or all of the substantive provisions of Title II. But again, the Commission has not provided the notice required under the APA to inform the public of its specific forbearance proposals and allow the public to comment on such proposals. The D.C. Circuit recently clarified that granting forbearance requires the Commission to comply with the APA's notice and comment rulemaking procedures.[14] If the Commission seeks to regulate broadband under Title II but simultaneously forbear from specific Title II requirements, the Commission is required to issue an NPRM giving notice of the proposed scope of forbearance from Title II. Instead, the multi-trillion dollar information and communication technology industry must speculate about the nature of the Commission's forbearance plans.

Furthermore, regardless of the specific Title II provisions from which the Commission may decide to forbear, regulating broadband services as a Title II "telecommunications services" will have two immediate consequences.

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13 *Free World Dialup Order*, ¶ 16.

14 *Verizon & AT&T v. FCC*, 770 F.3d 961, 966-67 (D.C. Cir. 2014).

First, distinguishing between regulated and unregulated services will become impossible. In contrast to a bright-line test that relies upon use of the PSTN as the basis for regulation, treating broadband as a "telecommunications service" will make it impossible for entrepreneurs to know whether their IP-based offering will be subject to Title II regulation. This concern is particularly acute in an era where the all new consumer electronics and information technologies include a component the Commission could conceivably view as a "telecommunications service."

The powers of interpretation and knowledge of the future the Commission must assert to sweep away the long-standing treatment of IP networks as unregulated mocks decades of work toward operational and mutually exclusive definitions of telecommunications and information services. If the Commission proceeds down the Title II path, for the first time, we will live in a world where the combination of two or more "information services" yields a "telecommunications service." The resulting need to bring all classification questions to the Commission for case-by-case analysis promises regulatory gridlock, open ended litigation, and certain injury to one of the most robust sectors of the economy.

Second, even assuming the Commission could concoct a cognizable theory by which regulation of IP-based services is cabined only to broadband Internet access, other IP-based services will not be immune from Title II regulation in the future. Once the demarcation between information services and telecommunications services has been breached, whether any particular IP-based service will be subject to future regulation will depend upon the political composition of the Commission and the partisan goals of the President. Introducing an explicitly political dimension to the distinction between regulated and unregulated services transforms and scrambles the landscape for an entrepreneur deciding whether to invest in a new communications offering.

We assure you by long and direct experience that no substitute exists for the present regime by which IP networks are presumed to be unregulated. A change in that regime resulting from Title II regulation of broadband will undermine the very innovation and investment that the Commission purportedly seeks to protect.

For the foregoing reasons, we respectfully urge the Commission to continue to treat broadband Internet access as an unregulated information service consistent with the longstanding and critical distinctions separating unregulated information services and regulated telecommunications services.

Sincerely,

/s/ Daniel Berninger
Daniel Berninger, founder, VCXC

/s/ Mark Cuban
Mark Cuban, founder, AXS TV

/s/ Charlie Giancarlo
Charlie Giancarlo, Sr. Advisor, Silver Lake

/s/ George Gilder
George Gilder, author

/s/ Bryan Martin
Bryan Martin, Chairman and CTO, 8x8

/s/ Jeff Pulver
Jeff Pulver, co-founder, Zula

cc: Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Commissioner Michael O'Rielly