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VIA ELECTRONIC FILING

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

Re: *Open Internet Remand Proceeding, GN Docket No. 14-28; Framework for Broadband Internet Service, GN Docket No. 10-127*

Dear Ms. Dortch:

As Verizon has previously explained, any attempt to “reclassify” broadband Internet access service as a Title II telecommunications service would be a radical and risky change to our Nation’s long-standing, bi-partisan communications policy. Such action will cause significant, harmful consequences, and it is unlikely to withstand judicial review.¹ As we have also made clear, the Commission does not need to reclassify broadband to achieve its policy goals with respect to Internet openness, including addressing the concerns identified by President Obama such as blocking, throttling, and paid prioritization. The Commission can achieve these goals by reaffirming that broadband Internet access service is an integrated information service, relying upon its authority under Section 706 and the roadmap set out by the D.C. Circuit for issuing sustainable rules.² All the major broadband Internet access providers and their trade associations agree that the Commission can use its Section 706 authority to prohibit harmful “paid prioritization” arrangements, blocking, and other such practices.

¹ See Verizon Comments, GN Dkt. Nos. 14-28, 10-127, at 46–69 (July 15, 2014) (“Verizon Comments”); Letter from Verizon to FCC, GN Dkt. Nos. 14-28, 10-127, at 1–12 (Oct. 29, 2014) (attaching “*Title II Reclassification and Variations on that Theme: A Legal Analysis*”) (“Verizon White Paper”).

² See Letter from William H. Johnson, Vice President & Associate General Counsel, Verizon, to FCC, GN Dkt. Nos. 14-28, 10-127 (Dec. 15, 2014).

Nonetheless, Title II proponents have pressed ahead, continuing to urge reclassification coupled with some form of forbearance. But as the list of provisions that those proponents say *cannot* be forborne from continues to grow, their ultimate objectives become all the more clear. Their wish list involves several onerous obligations—ranging from rate regulation to mandatory unbundling—that have nothing to do with the openness of the Internet. And the forbearance for which they advocate is not forbearance at all, or would involve forbearance from only those provisions of little practical consequence. Their end game is not rules to ensure an Open Internet, but regulation for regulation’s sake.

In any event, numerous commenters have explained why forbearance is no panacea for the ills of Title II reclassification, all of which goes to show that reclassification is the wrong approach even with forbearance.³ In the first place, even extensive forbearance would do nothing to solve the intractable legal problem that neither the Communications Act nor the Constitution permits the Commission to compel broadband Internet access providers to provide their services as common carrier telecommunications services, or to convert their private networks to a public use.⁴

Nor would forbearance solve the harms from reclassification. Title II proponents inevitably would challenge the scope of the Commission’s forbearance, prolonging legal uncertainty and chilling investment. In addition, the vague standards of Title II themselves breed investment-chilling uncertainty over the scope of future regulation, particularly given the inevitable propensity for regulatory creep. This is no mere rhetoric—a heavy-handed regulatory approach has been tried in Europe and has resulted in nearly 40% *less* investment in broadband infrastructure on a per capita basis than in the United States. Between 2003 and 2013, per capita broadband infrastructure investment in the U.S. averaged \$182.93, as compared to just \$116.93 in the European Union.⁵

Contrary to the recent suggestions of some, the Commission could not soften the blow of Title II by reclassifying broadband now and addressing the more significant forbearance questions later or in other proceedings.⁶ These parties suggest the Commission might either reclassify and then immediately stay enforcement, or apply some form of interim rule. But the

³ *E.g.*, Verizon Comments at 51; Letter from Sen. Thune & Rep. Upton to FCC Chairman Wheeler, at 2 (Nov. 12, 2014) (“Bicameral Republicans Letter”) (“Forbearance is hardly the panacea that reclassification advocates claim.”); Alcatel-Lucent Comments, GN Dkt. Nos. 14-28, 10-127, at 15 (July 15, 2014).

⁴ *See* Verizon Comments at 57–69; Verizon White Paper at 1–9.

⁵ Roslyn Layton & Michael Horney, *Innovation, Investment, and Competition in Broadband and the Impact on America’s Digital Economy*, GN Dkt. No. 14-28, at 55 (Sept. 10, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521867720>.

⁶ *See* Letter from Free Press to FCC at 2 (Dec. 4, 2014) (“Free Press Letter”); Letter from Public Knowledge to FCC at 19, 21–22 (Dec. 19, 2014) (“Public Knowledge Letter”); Letter from Marvin Ammori to FCC, GN Dkt. No. 14-28, at 4-5 (Dec. 19, 2014) (“Ammori Letter”).

hollow promise of potential forbearance, of uncertain scope, at some uncertain future time, would be *especially* harmful. Separate forbearance proceedings would likely take years, during which time the unknown scope of forbearance would seriously deter investment in broadband. Indeed, these forbearance proceedings would be especially dangerous for the market because the possibility of legacy Title II regulations would hang over the entire industry like Damocles' sword suspended by a single hair.

Indeed, any theory of reclassification for broadband based on the existence of a telecommunications aspect of that service would create uncertainty throughout the *entire* Internet ecosystem. As the Commission itself has recognized, redefining “telecommunications service” to apply to the telecommunications *component* of an “information service” would result in “all, or essentially all” information services being swept into that definition.⁷ After all, Netflix, Amazon, and other on-line video providers use their own network facilities or those of their vendors to transmit their content and services to a broadband provider’s network; in this respect, on-line video providers “offer” transmission of their traffic just as much as do broadband providers. Likewise, VoIP services such as Vonage necessarily include a transmission component, as do on-line search services. Even if the Commission were to find that broadband includes two separate “services,” that same logic would lead to a finding that online service providers, too, offer distinct “services” to customers and broadband providers. Title II treatment thus could easily be extended to these other service providers in the event that it became politically expedient to do so—if, for instance, interest groups demanded that the Commission regulate the privacy practices of these providers. Reclassification thus threatens to engulf the entire Internet ecosystem, not just broadband providers.

Not only would such a prolonged and uncertain process in and of itself cause harmful consequences, but the partial forbearance favored by Title II proponents would sound the death knell for the U.S.’s successful, light-touch regulatory approach. Title II proponents have repeatedly argued that any form of forbearance should not include several “core” Title II provisions—such as Sections 201, 202, and 208.⁸ But these “core” provisions are also among the broadest and most burdensome sections of Title II and would result in a highly complex regulatory regime.

Specifically, Section 201 codifies the quintessential common carrier obligation to provide service to all comers, and further requires that all such services and charges be consistent with a

⁷ *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd, 11,501, ¶ 57 (1998).

⁸ *E.g.*, Free Press Comments, GN Dkt. Nos. 14-28, 10-127, 09-191, at 83 n.180 (July 17, 2014); Public Knowledge, et. al Comments, GN Dkt. Nos. 14-28, 10-127, 09-191, WC Dkt. No. 07-52, at 89 (July 15, 2014) (“Public Knowledge Comments”); Center for Democracy & Technology Comments, GN Dkt. Nos. 14-28, 10-127, at 15 (July 17, 2014) (“CDT Comments”); Ammori Letter at 4; Letter from COMPTTEL et al. to FCC, GN Dkt. No. 14-28, at 1 (Dec. 30, 2014) (“COMPTTEL Letter”); Letter from Internet Association to FCC, GN Dkt. No. 14-28, at 2 (Jan. 6, 2015) (“Internet Association Letter”).

vague “just and reasonable” standard.⁹ Similarly, Section 202 subjects common carriers to an open-ended prohibition on “unjust or unreasonable discrimination.”¹⁰ Applying Sections 201 and 202 to broadband would, by their terms, open the doors to endless requests for direct price regulation, as well as regulation of providers’ service-related practices. In fact, the price-regulation push has already started in the form of opposition to usage-based pricing and attacks on 800-service-style pricing arrangements.¹¹ Sections 201 and 202 could also be used by advocates of extensive regulation to try to deprive broadband providers of the flexibility necessary to engage in a variety of practices from which consumers could benefit on the paternalistic theory that these advocates, rather than consumers, know what is best for them. And Section 208 gives the Commission, upon the submission of a complaint under Sections 201 and 202, the power “to determine and *prescribe*” “just and reasonable charge[s]” and “just, fair, and reasonable” practices for carriers to follow.¹² The sweep of this prescriptive provision if applied to broadband speaks for itself.

These three provisions of Title II are the historic cornerstones that have supported 80 years of extensive rate regulation for common carriers, as well as extensive regulation of their service-related practices. Indeed, they are the fundamental sources of statutory authority for most regulation of telecommunications services. The Parts of the Code of Federal Regulations enacted pursuant to Sections 201 and 202 span at least *530 pages*.¹³ And the Commission’s adjudicatory decisions on complaints filed pursuant to Section 208 that allege violations of Sections 201 and 202 fill volumes upon volumes of the FCC Record.

Given the ill-defined nature of the obligations covered by Sections 201 and 202, Title II proponents could inundate the Commission with complaints under those sections to challenge virtually any business model or practice that they do not like—no matter how much consumers may desire or benefit from those practices. Their objective, of course, would be to push the Commission into ever more intrusive regulation of providers’ business models, rates, and the like. Applying these provisions to broadband would thus force providers to defend themselves at every turn from parties seeking a prescribed, one-size-fits-all regulatory model. The resulting death by a thousand cuts would discourage providers from experimenting or introducing innovative new models (such as T-Mobile’s Music Freedom, which gives subscribers unlimited access to music streaming without counting toward any data caps) that consumers may want.

⁹ 47 U.S.C. § 201(a), (b).

¹⁰ *Id.* § 202(a), (b).

¹¹ *See, e.g.*, Public Knowledge Comments at 48–60 (criticizing data caps and sponsored data plans and calling for Commission regulation of both practices); Electronic Frontier Foundation Comments, GN Dkt. No. 14-28, at 25 (July 15, 2014) (criticizing implementation of zero-rating practice that exempts certain edge-provider services from a subscriber’s data cap).

¹² 47 U.S.C. § 208(a) (emphasis added).

¹³ *See* 47 C.F.R. Parts 4, 8, 10, 20, 51–54, 59, 61, 63–65, 69.

Thus, even if “only” Sections 201, 202 and 208 were applied to broadband, that would be enough to transform a largely unregulated, intensively competitive industry with huge capital investment requirements into a rate-regulated public utility with pervasive regulatory policing of broadband providers’ rates, business models and practices. But the modern Internet ecosystem is not the railroad complex of the 19th Century or the Bell Telephone System of the 20th Century. These provisions are not only unnecessary, they are also deeply problematic. As the Department of Justice has recognized, “care must be taken to avoid stifling the infrastructure investments needed to expand broadband access. In particular, price regulation would be appropriate only where necessary to protect consumers from the exercise of monopoly power and where such regulations would not stifle incentives to invest in infrastructure deployment.”¹⁴

Public Knowledge and others try to downplay just how disastrous such regulation would be by pointing to the Commission’s experience with CMRS, advocating that the Commission forbear to the same extent it did with respect to that service.¹⁵ But this is an apples-and-oranges comparison. The issue there was what regulations should be applied to *voice* services, which had *always* been regulated under Title II. And in 1993, Congress adopted Section 332 in order to create a *less* onerous regulatory framework for that new entrant by giving the Commission specific forbearance authority for that service.¹⁶ By contrast, broadband has *never* been subject to Title II; to the contrary, it has, since inception, consistently and repeatedly been deemed an information service expressly protected from such regulation. Whereas forbearance in the CMRS context provided a measure of regulatory relief, forbearance in the broadband context that leaves intact the core provisions of Title II would create significant new regulation. Thus, reclassification at this stage in the evolution of broadband would jettison the light-touch regulatory approach under which broadband providers collectively have invested hundreds of billions of dollars in favor of a more intrusive regulatory regime, rather than freeing them from regulatory constraints as occurred with wireless voice providers.¹⁷

¹⁴ Ex Parte Submission of the United States Department of Justice, GN Dkt. No. 09-51, at 7 (Jan. 4, 2010).

¹⁵ See Public Knowledge Letter at 20–21; see also COMPTEL Letter at 1–2 (urging application to broadband of the policy framework that has governed “the mobile wireless industry for over 20 years”); Internet Association Letter at 2 (asserting that “these same sections have been applied to wireless voice services within a successful Title II regulatory framework”).

¹⁶ See 47 U.S.C. § 332(c)(1)(A); *Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, ¶ 8 (1994) (“*CMRS Order*”) (explaining that common carrier mobile services were subject to partial or full Title II regulation prior to the Omnibus Budget Reconciliation Act of 1993’s amendments to the Communications Act of 1934).

¹⁷ While previous Commissions have been relatively restrained in regulating wireless voice services, that service has not been the object of the intensely political noise that Title II proponents have generated with respect to broadband, making future requests to future Commissions for yet more regulation virtually inevitable. In fact, their wish list already includes far more than just these three provisions of Title II. See *infra* at 6–10.

Even setting aside that fundamental difference, this argument also ignores that broadband is already far more competitive than the wireless voice marketplace was two decades ago when Congress addressed the latter service. It would be nonsensical to use the history of CMRS as a model for the reclassification of broadband, a context in which there is even *less* justification for regulatory intervention than there was with respect to wireless voice.

Indeed, applying Title II to the dynamic and varied industry of broadband would be far more dangerous in terms of competition than applying Title II to CMRS was in 1993. At that time, Congress specifically directed the Commission to apply Title II to CMRS but *not* to other services that might develop, such as mobile broadband.¹⁸ The policy reasons for that considered judgment decision should be obvious: Title II hampers the ability to experiment with different business models and to roll out new technologies quickly. The wisdom of Congress' decision is even more apparent today. If the Commission reverses course and subjects mobile broadband to Title II regulation, it would undermine the flexibility that wireless providers currently enjoy and simply must have in order to make mobile broadband, in particular, an even stronger competitor to cable and other providers in the market for Internet access service.

Finally, CMRS has benefited from “a stable, predictable regulatory environment that facilitates prudent business planning”¹⁹ because the Commission defined CMRS from the get-go in such a way as to establish “clear rules for the classification of mobile services” that “result in the durability of our regulatory classifications.”²⁰ Reclassification of broadband promises just the opposite: the Commission's unprecedented redefinition of “telecommunications service” would pull the rug out from under the very companies that have invested hundreds of billions of dollars in reliance on the Commission's previous decisions, and would require tenuous line-drawing that would only foster regulatory uncertainty.

In short, any “forbearance” that leaves in force Sections 201, 202, and 208 would be forbearance in name only and leave providers vulnerable to rate regulation or other pervasive regulation of all aspects of their services, which is especially pernicious for mobile broadband. There is nothing “restrained” or “light-touch” about such a regulatory regime for broadband.²¹

¹⁸ Compare 47 U.S.C. § 332(c)(1)(A) (requiring Title II treatment of CMRS) *with id.* § 332(c)(2) (prohibiting Title II treatment of private mobile service “*for any purpose* under this Act”) (emphasis added). Congress has since continued to distinguish Internet access service from Title II services. Both the 1998 Internet Tax Freedom Act and Section 231 expressly provide that the term “Internet access service” “does not include telecommunications services.” *Id.* § 151 note (discussing Section 1101(e)(2)(B)); *id.* § 231(e)(4). Likewise, in Section 620, Congress separately listed “telecommunications service” and “Internet access service” in the list of services to be made accessible to low-income individuals who are deaf-blind. *See id.* § 620(a).

¹⁹ *CMRS Order*, ¶ 22.

²⁰ *Id.* ¶ 25.

²¹ COMPTTEL Letter at 1-2.

While “[f]requently an issue of this sort will come ... clad ... in sheep’s clothing, . . . this wolf comes as a wolf.”²²

There is no reason to believe, moreover, that applying Title II would ultimately stop at these three “core” provisions. Many of the most vocal Title II proponents have openly encouraged the Commission to apply a long list of additional Title II requirements to broadband providers—and their list of must-have provisions continues to grow. Free Press, for example, insists that the “Commission should not forbear from and thus retain all or part of Sections 201, 202, 208, 222, 251, 255 and 256,” as well as Section 254 and parts of Section 214.²³ These provisions involve even more common carrier obligations, and they have nothing to do with the Open Internet goals of preventing any harmful paid prioritization, blocking, or throttling. For example:

- Section 214 requires carriers to “obtain[] from the Commission a certificate” of “public convenience and necessity” for any new lines or to discontinue service to a community.²⁴ For providers subject to these obligations, the mantra of permissionless innovation would no longer hold true, and the resulting regulatory delays as providers sought to introduce, discontinue, and change their services would harm consumers by deterring the investment and innovation that otherwise could occur. And there is no connection between this provision and the specific concerns that have been identified in terms of maintaining an open Internet.
- Section 222 imposes a duty on common carriers to protect, among other things, “customer proprietary network information.”²⁵ It is unclear what these privacy protections would even mean in the broadband context: there is, for instance, no “information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer” in the provision of broadband Internet access service.²⁶ As even some Title II proponents recognize, privacy issues thus “are beyond the scope of the current record and not necessary to determining the questions in this proceeding.”²⁷ And although the Federal Trade Commission (“FTC”) is already looking at privacy issues in the Internet context—something that may no longer be possible if the Commission reclassifies broadband as a common-carriage service, given the jurisdictional divide between the FTC and the FCC with respect to

²² *Morrison v. Olson*, 487 U.S. 654, 699 (1988).

²³ Free Press Letter at 1 (emphasis in original); *see also, e.g.*, CDT Comments at 15 (urging the Commission to preserve Sections 201, 202, 208, 222, 254, and 255); Ammori Letter at 4–6 (urging the Commission to preserve Sections 201, 202, and 208, and consider retaining Sections 222, 254, 255, and “likely” no other provisions).

²⁴ 47 U.S.C. § 214(a), (c).

²⁵ *Id.* § 222(c).

²⁶ *Id.* § 222(h)(1).

²⁷ Ammori Letter at 4.

common carriers²⁸—some advocates may seek to use this ill-fitting set of FCC regulations to impose heightened restrictions throughout the entire Internet ecosystem. Yet any additional restrictions tied to those that applied to legacy voice telephone services could disrupt many of the innovations consumers already enjoy. Moreover, for many other Internet players—including for example, search engines, advertising networks, social networks, email providers, and the like, who could easily fall within the ambit of Section 222 if the FCC extends Title II to the Internet—these restrictions are inconsistent with their privacy policies and practices and thus could discourage their efforts to provide broadband in a variety of innovative ways.

- Section 251 requires certain local exchange carriers, among other things, to “provide . . . nondiscriminatory access to network elements on an unbundled basis.”²⁹ Even aside from the fact that those provisions apply only to “local exchange carriers,” and broadband providers are not such carriers and thus could not lawfully be subject to those requirements under any scenario, imposing unbundling requirements on broadband providers would have destructive consequences. Far from enhancing consumers’ Internet experience, forced unbundling of broadband would only create prohibitive complexities in the delivery of distinct information and telecommunications services. And applying Section 251 could result in still further price regulation based on the FCC’s radical TELRIC pricing standards.³⁰ As the Commission has recognized, mandatory unbundling would lead to a lower return on broadband providers’ investment, which would lead to decreased investment in fiber and decreased incentives for new entrants to deploy their own fiber.³¹ The complexities of unbundling also would lead—as they have in Europe—to slower access speeds, chilled investment in broadband technology, and higher prices.³² And, of course, there is no

²⁸ See 15 U.S.C. § 45(a)(2) (exempting common carriers subject to the Communications Act from FTC authority to regulate unfair competition and unfair or deceptive practices).

²⁹ 47 U.S.C. § 251(c)(3).

³⁰ See, e.g., Shelanski Decl., Verizon Telephone Companies Comments, *In re Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, WC Dkt. No. 03-173, at ¶¶ 3–14 (Dec. 16, 2013) (explaining how TELRIC pricing results in rates *below* carrier’s costs, thereby discouraging new entrants and diminishing incumbents’ incentives to make further investment).

³¹ *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report & Order & Order On Remand & Further Notice of Proposed Rulemaking, 18 FCC Rcd 16,978, 16,984 ¶ 3 (2003); *id.* ¶ 272 (finding that “relieving incumbent LECs from unbundling requirements for [next-generation] networks will promote investment in, and deployment of, next-generation networks”); *id.* ¶ 288 (declining to require unbundling of broadband offered over hybrid loops for the same reasons).

³² Christopher S. Yoo, *U.S. v. European Broadband Deployment: What Do the Data Say?*, at i–ii (June 2014), <https://www.law.upenn.edu/live/files/3352-us-vs-european-broadband-deployment>.

connection between unbundling, which would require providers to *separate* their offering into distinct components, and the articulated concerns of preventing paid prioritization, blocking, or throttling.

- Section 254 imposes a duty on telecommunications carriers to “contribute, on an equitable and nondiscriminatory basis,” to the universal service fund.³³ Congress established the universal service fund to promote access for low-income and rural consumers in high cost areas. But imposing mandatory fees on broadband providers would only increase end-user costs for that access, to say nothing of the costs in state and local taxes that would result from reclassification itself. These added consumer costs have been estimated to be, at a minimum, \$11 billion annually, or about \$90 per household.³⁴ And again, end-user access to broadband has nothing to do with paid prioritization, blocking, or throttling.

Other regulatory advocates have gone even further. Public Knowledge urges the Commission not to forbear from over *twenty-six* separate Title II provisions.³⁵ Public Knowledge takes the position that Sections 201, 202, 203, 204, 205, 206, 207, 208, 209, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 222, 225, 251, 254, 255, 256, and 257 should all apply to broadband Internet access service. For still further provisions, it exhorts the Commission to stay the rule, but “implement interim provisions” until the Commission can handle those additional aspects of Title II “in due course.”³⁶ Consideration of just a few of these additional Title II rules, however, demonstrates the unjustified burden they would impose, not to mention the fact that they are totally unnecessary to protect consumers or the Open Internet:

- Sections 203, 204 and 205 are all key adjuncts to the rate-making process authorized by Sections 201, 202, and 208, discussed above. Section 203 requires traditional tariffing of carrier charges; Section 204 allows the Commission to hold hearings on the lawfulness of charges and suspend charges; and Section 205 authorizes the Commission to prescribe just and reasonable charges.³⁷ The fact that Public Knowledge insists upon non-forbearance from these provisions is telling.

³³ 47 U.S.C. § 254(e).

³⁴ See Progressive Policy Institute, *No Guarantees When It Comes To Telecom Fees* (Dec. 16, 2014) (estimating annual costs of \$67 per wireline connection and \$72 per wireless connection in state and local fees, for 121.7 million households), available at <http://www.progressivepolicy.org/issues/economy/no-guarantees-when-it-comes-to-telecom-fees>.

³⁵ Public Knowledge Comments at 88–89, 93.

³⁶ Public Knowledge Letter at 21 (discussing interim provisions for 47 U.S.C. § 258 and 47 C.F.R. §§ 64.2400–64.2401, among others).

³⁷ 47 U.S.C. §§ 203–205.

- Section 211 requires common carriers to “file with the Commission copies of *all* contracts, agreements, or arrangements with other carriers ... in relation to any traffic affected by the provisions of this chapter.”³⁸ This provision would reach deep into the business affairs of broadband providers. It also would be regulation for regulation’s sake as it lacks any connection to the goals of the Open Internet.
- Section 212 provides that no person may serve as an “officer or director of more than one carrier” without authorization from the Commission.³⁹ Under this provision, the Commission would directly regulate the corporate personnel of broadband providers, delving far into their internal affairs. It is hard to imagine what corporate governance rules have to do with the Open Internet.

In light of all of this, it should be apparent that what the Title II proponents urge in touting forbearance is not a light-touch approach at all, but instead the full weight of Title II public utility regulation. The end result would be unnecessary, massive regulatory intervention into the broadband market that has no nexus with the goals of *this* proceeding. Thus, whether purportedly minimal, extensive, or deferred, forbearance is not the answer to how to deal with reclassification, because reclassification is the wrong approach to begin with.

For all of these reasons, the Commission should not reclassify broadband Internet access service and should instead rely upon its established authority under Section 706 in adopting Open Internet rules.

Respectfully submitted,



William H. Johnson

³⁸ *Id.* § 211 (emphasis added).

³⁹ *Id.* § 212.