



**Timothy M. Boucher**  
Suite 250  
1099 New York Avenue, N.W.  
Washington, DC 20001  
Phone 303-992-5751  
Facsimile 303-896-1107

Associate General Counsel

EX PARTE

VIA ECFS

February 4, 2015

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

RE: *In the Matter of Protecting the Open Internet*, GN Docket No. 14-28;  
*In the Matter of Framework for Broadband Internet Service*, GN Docket  
No. 10-127

Dear Ms. Dortch:

CenturyLink<sup>1</sup> echoes its prior filings<sup>2</sup> and the filings of numerous parties in this proceeding that “reclassifying” broadband Internet access (BIA) as a telecommunications service under Title II of the Communications Act would be bad policy and unlawful. CenturyLink also reiterates that any attempt to impose distinct regulatory obligations on different types of ISPs based upon type of technology or underlying platform would also be bad policy and unlawful.

To be clear, CenturyLink does not believe further regulation of the Internet or BIA service is needed at this time. CenturyLink works hard to assure adequate openness is provided to its customers. CenturyLink does so not because of some rule imposed by regulatory fiat, but because all broadband providers operate in a very competitive environment. As a result, they have to design and maintain broadband networks that meet or exceed end-user expectations of openness – or their customers will switch providers. CenturyLink also believes that the function of the Internet as a vehicle of innovation and growth, expression, and civic engagement, and the valuable contributions of broadband providers in the “virtuous cycle,” precede the Commission’s 2010 Open Internet rules and will continue regardless of whether the FCC adopts new/additional rules.

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<sup>1</sup> This submission and all other CenturyLink submissions in these dockets are made by and on behalf of CenturyLink, Inc. and its subsidiaries.

<sup>2</sup> See Comments of CenturyLink, GN Docket Nos. 14-28 and 10-127, filed July 17, 2014 (CenturyLink Comments) and Reply Comments of CenturyLink, GN Docket Nos. 14-27 and 10-127, filed September 15, 2014 (CenturyLink Reply Comments).

But, regardless, the prospect that the Commission will impose onerous new Open Internet obligations and attempt to justify them legally via a Title II reclassification approach threatens to destroy this virtuous cycle as a policy matter. In addition to being unlawful, as discussed further below, treating BIA services as a Title II “telecommunications service” would impose great costs and potentially permit government micromanagement of all aspects of the Internet economy. Moreover, a reclassification approach could also be argued by some to mean that “telecommunications provider” and “telecommunications service” labels would apply to edge providers, CDN providers, and others and their services. As a result, some will likely try to use reclassification as the foundation for the Commission to eventually regulate the broader Internet ecosystem. Anna-Marie Kovacs, a scholar at Georgetown University’s Center for Business and Public Policy recently cautioned:

For investors who fund any level of the broadband ecosystem, the contortions suggested in the docket are threatening. In essence, much of the docket is a recommendation that instead of looking at a service factually to determine its regulatory classification, the FCC should decide on a classification and force the provider to modify the service until it fits. If the FCC agrees with this approach, no provider of either infrastructure or services will be safe from regulation under Title II.<sup>3</sup>

The concerns about the policy impacts of a Title II reclassification approach in these dockets have only increased as these proceedings have evolved in recent months. As CenturyLink and other parties have demonstrated, even a reclassification approach that resulted in application of just a few Title II sections - such as section 201, 202, and 208 - would be extremely damaging as a policy matter.<sup>4</sup> But, as Verizon ably demonstrated in a recent *ex parte*, proponents of heavy-handed Open Internet regulation such as Free Press and Public Knowledge make clear that, in the event of reclassification, they would seek application of a broad variety of Title II provisions to broadband Internet access service – including at least 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.<sup>5</sup> And, Public Knowledge, in fact, seems to suggest that the Commission should not stop there but should consider the potential application of other aspects of Title II in due course.<sup>6</sup> This advocacy epitomizes one key practical danger of a Title II reclassification approach – while this Commission may seek to do so anticipating applying only

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<sup>3</sup> Anna-Maria Kovacs, Ph.D., CFA, Economic Policy Vignette 2015-1-13, Regulation in Financial Translation, Regulatory Uncertainty: the FCC’s Open-Internet Docket (January 2015), available at [http://www.gcbpp.org/files/EPV/EPV\\_Kovacs\\_Jan2015.pdf](http://www.gcbpp.org/files/EPV/EPV_Kovacs_Jan2015.pdf)

<sup>4</sup> See CenturyLink Comments, pp. 48-51; Verizon Notice of Ex Parte, GN Docket Nos. 14-28 and 10-127, filed January 26, 2015 (Verizon Ex Parte), pp. 3-7.

<sup>5</sup> See Verizon Ex Parte, pp. 7-10.

<sup>6</sup> Public Knowledge Notice of Ex Parte, GN Docket Nos. 14-28 and 10-127, filed December 19, 2014, pp. 20-21.

a few aspects of Title II solely to attempt to justify the imposition of Open Internet rules, the clarion call from certain parties for more and more regulation will not cease as the years pass.

In CenturyLink's view, a Title II reclassification approach, in addition to being bad policy, will also ultimately be determined to be unlawful. CenturyLink has previously stated its own views as to the unlawfulness of Title II reclassification and the existence and scope of any potential Commission legal authority in this area – whether it seeks to enact regulation under Title I/Section 706 or pursuant to any version of a Title II reclassification approach.<sup>7</sup> Others have done the same and the record builds each day as to this unavoidable fact.<sup>8</sup>

Nor does a Title II forbearance approach work legally. As CenturyLink demonstrated in its initial comments,<sup>9</sup> the Commission simply cannot sustain a refusal to forbear from application of Sections 201, 202, 208, or any other Title II provision. Moreover, a Title II forbearance approach misuses the forbearance tool. The use of Section 10 as a central tool in creating an entirely new regulatory regime for broadband Internet access offerings would be flatly inconsistent with that section's clear purpose, which is to remove regulations, not facilitate the radical expansion of the agency's prerogatives. The Act's structure, Section 10's legislative history, and that provision's consistent interpretation by the Commission and the courts all confirm what the text makes clear: that this provision is designed to *deregulate* – to remove requirements.<sup>10</sup> “In reading a statute [a court] must not look merely to a particular clause, but consider in connection with it the whole statute.”<sup>11</sup> Section 10 was part of the Telecommunications Act of 1996 (“1996 Act”), whose purpose was “[t]o promote competition and reduce regulation” in order, among other things, to “encourage the rapid deployment of new telecommunications technologies.”<sup>12</sup> Section 10, moreover, appears alongside Section 11, which

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<sup>7</sup> See CenturyLink Comments, pages 36-73; see also CenturyLink Reply Comments, generally.

<sup>8</sup> See, e.g., Verizon October 29, 2014 white paper, generally, GN Docket Nos. 14-28 and 10-127, filed October 29, 2014; Comcast Corporation Notice of Ex Parte, pp 7-12, GN Docket Nos. 14-28 and 10-127, filed December 24, 2014; see, also, Comments of Verizon and Verizon Wireless (Verizon), pp. 31-33, 46-69, GN Docket Nos. 10-127 and 14-28, filed July 15, 2014.; Comments of AT&T Services, Inc., pp. 39-50, GN Docket Nos. 14-28 and 10-127, filed July 15, 2014; Comments of Charter Communications, Inc., pp. 13-21, GN Docket Nos. 14-28 and 10-127, filed July 18, 2014; Comments of Comcast Corporation, pp. 54-59, GN Docket Nos. 14-28 and 10-127 filed July 15, 2014 (“Comcast Comments”); Comments of Cox Communications, Inc., pp. 31-37, GN Docket Nos. 14-28 and 10-127, filed July 18, 2014; Comments of the United States Telecom Association, pp 31-44, 51-53, GN Docket Nos. 14-28 and 10-127, filed July 16, 2014.

<sup>9</sup> See e.g. CenturyLink Comments, pp. 48-51.

<sup>10</sup> See *id.*, pages 48-51. See, also, *AT&T Inc. v. FCC*, 452 F.3d 830, 832 (D.C. Cir. 2006) (calling Section 10 “[c]ritical to Congress’s deregulation strategy.”).

<sup>11</sup> See *Dada v. Mukasey*, 554 U.S. 1, 16 (2008) (internal quotation marks omitted).

<sup>12</sup> 110 Stat. 56 (preamble).

directs the Commission to review “all regulations” biannually and “determine whether any such regulation is no longer necessary in the public interest.”<sup>13</sup> Another provision of the 1996 Act, codified as Section 230(b), states that “[i]t is the policy of the United States ... to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation....”<sup>14</sup> These provisions form the background against which Section 10 must be evaluated, and demonstrate that Congress did not intend for that provision to abet a massive *expansion* of broadband regulation.

In light of the above, the Commission’s use of Section 10 to create a new regulatory regime for broadband Internet access would flout Congress’s deregulatory intent and the clear purposes of the forbearance provision. The Commission should repudiate this impermissible approach.

At bottom, given the legal infirmities with the Commission’s planned approach and given that, at the very least, a Title II reclassification approach will lead to extensive litigation and years of legal uncertainty, CenturyLink asks that this Commission not impose such a daunting legacy on this industry.

Finally, as noted above, CenturyLink reiterates that any attempt to impose distinct regulatory obligations on different types of ISPs based upon type of technology or underlying platform would also be bad policy and unlawful. As noted, CenturyLink does not believe further regulation of the Internet or BIA service is needed at this time. But, should the Commission choose to adopt such regulations in this proceeding, there is no factual or legal basis in the record to distinguish between different types of technologies or platforms when creating or imposing such obligations. For example, there is no basis for extending such new rules to fixed broadband providers while exempting (partially or entirely) broadband providers who happen to utilize a wireless platform – any more than there is a basis for making such distinctions between different types of fixed broadband providers (e.g., among those using DSL technology, fiber or cable platforms). It would be arbitrary and capricious to regulate one platform differently from another. There is simply no record of differences between and among any other types of technologies/platforms, whether in terms of competition concerns or characteristics of the service or any other arguably relevant factors, that would justify differences in regulatory treatment under Internet openness rules.

Specifically regarding mobile versus fixed networks, there is clearly no basis to distinguish based on the characteristics of these services. Mobile wireless and wireline broadband platforms face similar technical challenges that can be addressed by adopting rules that allow flexible network management practices. As CenturyLink and other parties have previously demonstrated, both types of networks experience, to name a few, such factors as

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<sup>13</sup> 47 U.S.C. § 161.

<sup>14</sup> *Id.* § 230(b)(2).

bandwidth limitations due to distance, capacity limitations, and bandwidth demand swings.<sup>15</sup> Thus, both types of networks have the need to engage in “reasonable network management” to ensure that their networks can support a quality consumer broadband experience. But, perceived technical differences can be addressed through the process of evaluating the reasonableness of a given policy or practice, and could not lawfully be cited as the basis for a different regulatory treatment.

Nor can any distinct treatment of fixed and mobile broadband service be rationalized based on any differences in the relevant state of competition impacting each service. As the comments and other filings already in the record in this proceeding demonstrate, competition in the broadband market overall is thriving and ever increasing.<sup>16</sup> And, this is equally true for wireline and wireless broadband services. Indeed, mobile services are adequate substitutes for wireline broadband services for purposes of determining levels of competition. It is also clear that wireless broadband networks are no longer “an earlier-stage platform than fixed broadband” as was purportedly the case when the Commission distinguished between fixed and mobile services in its 2010 Open Internet Order.<sup>17</sup> Rather, it is self-evident that investment in mobile applications has skyrocketed paying huge dividends to mobile broadband providers and app developers. By way of example, as NCTA noted in its comments, “mobile data consumption is up 81 percent as the world turns more to tablets and smartphones, especially to watch video,” and “mobile now accounts for 25 percent of web usage, up from 14 percent a year ago.”<sup>18</sup> And, as Bright House demonstrated:

- 89% of US Consumers have mobile broadband subscriptions, more than 60% of them use their phones for online browsing, and 50 million of them watched video on them in 2014;
- One-third of mobile users mostly use their cell phones to access the Internet; and

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<sup>15</sup> See e.g. CenturyLink Comments, pp. 23-25. Comcast Comments, pp. 40-42; Comments of National Cable & Telecommunications Association, p. 69-76, GN Docket Nos. 14-28 and 10-127, filed July 15, 2014 (“NCTA Comments”).

<sup>16</sup> See e.g. CenturyLink Comments, pp. 8-14; Comcast Comments, pp. 4, 6-11, 50; Reply Comments of Verizon, pp. 2-3, 7, 14, GN Docket Nos. 10-127 and 14-28, filed September 15, 2014; Comments of United States Telecommunications Association, p. 7, GN Docket Nos. 10-127 and 14-28, filed July 16, 2014; Reply Comments of United States Telecommunications Association, pp. 6-7, GN Docket Nos. 10-127 and 14-28, filed September 15, 2014; Comments of AT&T, pp. 17, 19, 22, GN Docket Nos. 10-127 and 14-28, filed July 15, 2014.

<sup>17</sup> *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 ¶ 94 (rel. Dec. 23, 2010) (*2010 Open Internet Order*).

<sup>18</sup> NCTA Comments, p. 72, n 234 (citing recent report by Mary Meeker of Kleiner Perkins).

- There are now more than 62.5 million connected 4G LTE devices in the U.S.<sup>19</sup>

Nor are “speed, capacity, and penetration” any longer a differentiating characteristic. Top 4G LTE speeds already exceed 50 Mbps, and the average mobile data connection speed is projected to reach 14.4 Mbps by 2017.<sup>20</sup> Additionally, analysts predict that there will be 224 million 4G subscriptions in the United States by 2018, that aggregate smartphone traffic will be 11x greater than it is today, with a cumulative annual growth rate of 63% by 2018, and that traffic from wireless and mobile devices will exceed traffic from wired devices by that same date.<sup>21</sup>

Pursuant to Section 1.1206(b) and consistent with Section 1.49(f) of the Commission’s rules, a copy of this notice is being filed electronically in the appropriate docket.

Respectfully,

/s/ Timothy M. Boucher

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<sup>19</sup> See e.g. , Comments of Bright House (Bright House Comments), p. 4, nn. 3-7, GN Docket Nos. 14-28 and 10-127, filed July 15b, 2015 (citing reports).

<sup>20</sup> *Id.*, p. 4, n. 8 (citing report).

<sup>21</sup> See NCTA Comments, p. 74, n 242; Bright House Comments, p. 4, nn 9, 10.