

February 10, 2015

**VIA ECFS**

The Honorable Thomas Wheeler  
Chairman  
Federal Communications Commission  
455 12th Street, SW  
Washington, DC 20544

**Re: Ex Parte Submission, Protecting and Promoting the Open Internet, GN Docket No. 14-28; Framework for Broadband Internet Service, GN Docket No. 10-127**

Dear Chairman Wheeler:

The undersigned, municipal providers of broadband Internet access service,<sup>1</sup> are strong supporters of net neutrality and an open Internet but are staunchly opposed, like other, small and medium-sized Internet service providers (ISPs) who are privately held, to the reclassification and regulation of this service as common carriage under Title II of the Communications Act.

As smaller ISPs, we do not have an incentive to harm the openness of the Internet. All of the undersigned face competition from one or more wireline ISPs, and we compete hard to attract and serve customers who would depart to our competitors if we engage in any business practices that interfere with their Internet experience. Accordingly, we follow the Commission's 2005 Open Internet principles and do not block, throttle, or discriminate among types of Internet traffic; nor do we charge Internet edge providers for priority delivery on our networks. We also comply with the requirement in the Commission's 2010 transparency rule for a unitary set of disclosures covering our service characteristics and network management practices. It is good business to inform our customers that we engage in practices that promote an open Internet, and none of us has received complaints either from consumers or edge providers about the types of level of disclosure.

As smaller ISPs, none of us individually has the market power to compel payments for unblocking, non-discriminatory treatment or paid prioritization services because we serve too few Internet subscribers to matter to edge providers such as Netflix, Amazon or Hulu, who have hundreds of millions of subscribers in the U.S. and internationally. Like the three small ISPs, including the municipal providers the Commission heard from last week, we have to work to even get the attention of companies such as Netflix for the purpose of entering into mutually beneficial settlement-free caching and peering arrangements.<sup>2</sup> Some of us have succeeded; some are still trying. Simply put, ISPs of our size lack the ability to harm particular Internet edge providers or the openness of the Internet in general.

Because we lack the incentive and ability to harm Internet edge providers, there is no basis for the Commission to reclassify our Internet service for the purpose of imposing any Title II common carrier obligations, but most particularly the core common carrier requirements contained in Sections 201, 202 and 208.

Further, we fear that Title II regulation will undermine the business model that supports our network, raises our costs and hinders our ability to further deploy broadband. The Commission in the past has relied upon Sections 201 and 202, together with the complaint procedures contained in Section 208, to impose rate regulation – either by rule or by addressing complaint cases – resale, unbundling (open access) and collocation requirements on common carriers. Our ability to repay current debt

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<sup>1</sup> We serve on average 4,393 residential Internet subscribers; no one of us has more than 16,000 subscribers.

<sup>2</sup> Protecting and Promoting the Open Internet, Letter of Barbara S. Esbin, Cinnamon Mueller, Counsel for ACA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (filed Feb. 2, 2015).

obligations and raise capital at attractive rates could well be adversely affected if we lose control over our retail rates or the use of and access to our networks. Because our rates must be set to recover costs, we would be forced to flow these additional costs of service through to our subscribers.

The fact that at the present time the present Commission apparently does not plan to impose rate regulation under Section 201 or require tariffs under Section 203, last-mile unbundling under Section 251, or accounting standards such as those applied to incumbent local exchange carriers offers at best cold comfort.<sup>3</sup> The Commission has in the past imposed structural separations, service unbundling and resale obligations under Sections 201 and 202, and this Commission cannot bind the actions of a future Commission should it wish to institute rate regulation, tariffing, unbundling or any other form of before-the-fact regulation, creating deep and lasting regulatory uncertainty. Moreover, even this Commission will be obligated to respond to complaints about rates or seeking open access to facilities by third-party providers. This potential for liability for violations of Section 201 or 202 (unjust, unreasonable or unreasonably discriminatory rates; failure to provide service upon reasonable request) via the Section 208 complaint process is especially troubling given the Commission's intention to refrain from forbearing from enforcement provisions that are related to its Section 208 authority, including the recovery and awards of monetary damages under Sections 207 and 209 for violations of the provisions of Title II, and carrier liability for the acts and omissions of its agents under Section 217.

Notwithstanding the recent indication that the rules will impose no new burdensome administrative filing requirements, as smaller ISPs, we also anticipate that significant new common carrier compliance and reporting obligations – potentially at the state as well as federal level – would inevitably flow from the reclassification of our Internet service as a telecommunication service. These would lead to direct and substantial out-of-pocket costs to hire compliance staff and engage outside consultants and attorneys conversant with common carrier regulation. In addition, adoption of the proposed enhanced transparency requirements, including those intended to inform edge providers about our business practices and real-time congestion on our networks, could be significantly burdensome for providers of our size without providing any real benefit to edge providers or consumers.

Consequently, should the Commission move forward with Title II reclassification, we urge it to forbear from applying any new regulatory obligations applicable to Title II telecommunications carriers, including those contained in Sections 201, 202 and 208; declare broadband Internet to be an interstate service and preempt inconsistent state regulation of the service; exempt small and medium-sized ISPs from any new and enhanced transparency obligations; and ensure smaller ISPs that utilize poles that are subject to the cable rate formulate are not forced into paying higher fees based on the telecommunications rate.

In closing, we ask that you not fall prey to the facile argument that if smaller ISPs are not blocking, throttling, or discriminating amongst Internet traffic on their networks today, they have nothing to fear because they will experience no harm under Title II regulation. The economic harm will flow not from following net neutrality principles, which we do today because we think it is beneficial to all, but from the collateral effects of a change in regulatory status that will trigger consequences beyond the Commission's control and risk serious harm to our ability to fund and deploy broadband without bringing any concrete benefit for consumers or edge providers that the market is not already proving today without the aid of any additional regulation. We ask that you take note of the significant economic impact Title II regulation will have on small and medium-sized ISPs and fashion relief accordingly, and fashion appropriate relief from the untoward effects of reclassification on small and medium-sized ISPs, as you are required to do under law.<sup>4</sup>

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<sup>3</sup> Daily Releases, Fact Sheet: Chairman Wheeler Proposes New Rules for Protecting the Open Internet, available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2015/db0204/DOC-331869A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0204/DOC-331869A1.pdf).

<sup>4</sup> Regulatory Flexibility Act, as amended, 5 U.S.C. § 603(c) (federal agencies must consider significant alternatives which minimize any significant economic impact of proposed rules on small entities).

Pursuant to Section 1.1206 of the Commission's rules, this letter is being filed electronically with the Commission via the Electronic Comment Filing System.

Respectfully submitted,

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