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February 13, 2015

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: American Cable Association Notice of Ex Parte Presentation, *Protecting and Promoting the Open Internet, GN Docket No. 14-28; Framework for Broadband Internet Service, GN Docket No. 10-127*

Dear Ms. Dortch:

On January 29, 2015, Ross J. Lieberman, Senior Vice President Government Affairs, American Cable Association (“ACA”); Thomas W. Cohen, Kelley Drye & Warren and the undersigned, outside counsel to ACA, met with Nicholas Degani, Legal Adviser to Commissioner Ajit Pai to discuss the above-referenced proceedings. The purpose of the meetings was to reiterate the views of ACA that small broadband Internet service providers (“ISPs”) lack the incentive and ability to harm Internet openness and will be harmed if the Commission reclassifies broadband Internet access service under Title II of the Act and does not fully forbear from the imposition of new common carrier obligations resulting from this action, consistent with ACA’s previous filings in these dockets.¹

¹ *Protecting and Promoting the Open Internet*, Reply Comments of the American Cable Association, GN Docket Nos. 14-28, 10-127 (filed Sept. 15, 2014) (“ACA Reply Comments”); *Protecting and Promoting the Open Internet*, Comments of the American Cable Association, GN Docket Nos. 14-28, 10-127 (filed July 17, 2014) (“ACA Comments”). ACA maintains that the record in this proceeding confirms that there is no factual or policy justification to impose network management rules or network management disclosure requirements that are more stringent or go beyond those adopted in the 2010 Open Internet Order, especially for small and medium-sized ISPs. In an *ex parte* letter filed January 12, 2015, ACA explained that reclassifying broadband Internet access service as a telecommunications service subject to regulation under Title II of the Act for small and medium-sized broadband ISPs is unsupported by the facts, the record in the above-referenced proceedings, or the Communications Act. *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 Jan. 12, 2015) (reclassification would be arbitrary, capricious, and contrary to law as well as counterproductive from the perspective of a national policy to encourage the deployment of affordable advanced telecommunications services and broadband infrastructure; adopted, the Commission should extend maximum forbearance of Title II regulatory obligations to small and medium-sized broadband ISPs); *Protecting and Promoting the Open Internet*, Letter of Thomas Cohen, Kelley Drye & Warren, LLP, Counsel for ACA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (filed Jan. 20, 2015) (“ACA Jan. 20th Ex Parte”) (asking for relief from consequences for cable Internet provider pole attachment rates upon reclassification); *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 Jan. 27, 2015) (urging the Commission not to burden small and medium-sized ISPs with additional – and utterly unwarranted – enhanced transparency rules); *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) (detailing the views of two municipal broadband members, Cedar Falls Utilities and Jackson Energy Authority, and Shentel, a

ACA and its small and medium-sized ISP members are not contesting adoption of Open Internet “no blocking” and “no throttling rules,” nor are they contesting adoption of rules prohibiting or subjecting to FCC oversight so-called “paid prioritization” arrangements. What ACA is contesting is application of a host of Title II common carrier obligations unrelated to protecting and promoting the open Internet to the smaller ISPs who are demonstrably not the source of any actual open Internet problems today or likely to be in the future.

ACA repeated its request that upon reclassification, the Commission simultaneously exercise its Section 10 forbearance authority to spare smaller ISPs from the substantial direct and indirect economic burdens associated common carrier regulation. Once again, ACA focused its remarks on the burdens associated with the core common carrier provisions of Sections 201 (service on just and reasonable rates, terms and conditions), 202 (no unjust or unreasonable discrimination) and 208 (complaints against common carriers for Title II violations). These include rate regulation – either through *ex ante* rules under the “just and reasonable” standard of Section 201(b) or *ex post* enforcement through the complaint process – unbundling (open access), resale and mandatory collocation, types of obligations that the Commission has previously imposed on common carriers using its Section 201 and 202 authority. ACA stressed its concern that its smaller ISP members, who serve a median of 1,000 subscribers per system, will be forced to defend against Section 208 complaints filed by *any* person before the Commission in Washington or defend against civil suits brought under Section 207, which permits complainants to file suit for recovery of damages for violations of Title II provisions in any district court of the United States. Given that the stakes for liability for rule violations have significantly changed since release of the Notice of Proposed Rule Making in this docket, ACA is concerned that the Commission may adopt one or more of its proposals to make it easier to file informal or formal complaints under Section 208 that would make it less costly and therefore more attractive to both interest groups and individuals.²

ACA is also very troubled with reports that the Commission’s rules will regulate Internet interconnection and peering arrangements in a one-sided manner such that parties seeking to enter into such deals with ISPs can file complaints against them, but ISPs will have no reciprocal rights. Such a concept is offensive to the notion of fair treatment under the law and should not be contemplated, let alone adopted. It would be particularly harsh and unfair to adopt such an enforcement scheme against smaller ISPs, when the record is utterly devoid of evidence that they could harm either Internet edge providers directly or Internet openness in general.

Finally, ACA also discussed the lack of record support for the imposition of *any* enhanced transparency obligations on small ISPs, particularly proposals to require detailed Open Internet disclosures tailored to the needs of edge providers and the lack of demonstrable benefits that would accrue from such reporting.

privately-owned member serving rural areas, that the result of Title II reclassification will be to increase their costs of service and capital and threaten their ability to deploy broadband and provide broadband Internet access services at affordable prices). See also *Protecting and Promoting the Open Internet*, Letter of ACA, NCTA, and WISPA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (filed Jan. 9, 2015) (*ex parte* letter filed on behalf several trade associations, including ACA, representing smaller ISPs pointing out the inadequacy of the Commission’s Initial Regulatory Flexibility Act analysis in this proceeding and requesting action to protect smaller providers).

² See *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, GN Docket No. 14-28, ¶ 171 (rel. May 15, 2014) (creating position of “ombudsperson whose duty will be to act as a watchdog to protect and promote the interests of edge providers, especially smaller entities”) and ¶¶ 172-176 (exploring creation of a separate Open Internet category of informal complaints and anonymous filing processes to make access to Commission processes by individuals or small businesses less cumbersome). Smaller ISPs who will have to defend against Section 208 complaints are no less deserving of such special treatment.

ACA reiterated its position that the Commission should avoid risking the obvious adverse outcomes of reclassification by recognizing that smaller ISPs lack the incentive and ability to engage in unreasonable or discriminatory practices, much less, anticompetitive acts, which harm consumers and Internet edge providers and, on that basis forbear from applying Title II regulatory obligations applicable to telecommunications common carriers, including those found in Sections 201, 202, and 208, and the enforcement provisions related to Section 208 authorizing civil litigation and damage awards under Section 206 (liability for damages and attorney's fees), Section 207 (choice of filing complaint with the Commission or in federal district court), and Section 209 (orders for payment of damages). At the very least, complainants seeking relief against smaller ISPs should be restricted to filing before the Commission for remedial action only under the Commission's existing informal and formal complaint rules. This will balance the needs of complainants for remedial action without threatening the financial viability of smaller ISPs with costly legal proceedings or unwarranted damage awards.

If you have any questions, or require further information, please do not hesitate to contact me directly. Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with the Commission.

Sincerely,



Barbara S. Esbin
Counsel for the American Cable Association

cc (*via email*): Nicholas Degani