February 18, 2015

VIA ELECTRONIC SUBMISSION

Ex Parte

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

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

Dear Ms. Dortch:

It is likely that the FCC will attempt to justify the reclassification of broadband Internet access service as a Title II "telecommunications service" based on its view that a broadband provider purportedly enjoys a "terminating access monopoly" that warrants the imposition of a whole array of Title II regulation on an industry that has invested over a trillion dollars in building the Internet relying on the light touch framework of Title I.[1] This "terminating access monopoly" theory has been espoused by several commenters, although none offers any cogent factual or legal basis for the theory.[2] The notion that a broadband provider enjoys a "terminating access monopoly" that supports Title II regulation is fundamentally flawed.

As a threshold matter, as Judge Silberman noted in *Verizon v. FCC*, the concept of a "terminating monopoly" is "largely invented," "does not appear to be an accepted economic term" and went without any explanation from the FCC of its "economic significance."[3]

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[1] Any notion that broadband Internet access is somehow not an essential and integral part of the Internet is simply wrong. *See,* "What is the Internet," Robert E. Kahn and Vinton G. Cerf, (1999)(the Internet is "not only the underlying communications technology, but also higher-level protocols and end user applications ….")

[2] *See, e.g.*, Notice of *Ex Parte* Meeting of Matthew F. Wood, Free Press, GN Docket Nos. 14-28 and 10-127, at 2 (filed Dec. 4, 2014); Notice of *Ex Parte* Meeting of Alan Davidson and Sarah Morris, New America's Open Technology Institute, Harold Feld, Public Knowledge, and Marvin Ammori, GN Docket Nos. 10-127 and 14-28, at 1-2 (filed Nov. 19, 2014); Notice of *Ex Parte* Meeting of Colleen Boothby, Ad Hoc Telecommunications Users Committee, GN Docket No. 14-28, at 2 (filed Nov. 12, 2014).

[3] *Verizon v. FCC*, 740 F.3d 623, 663 (2014) (Silberman, J., concurring in part, dissenting in part).

The "terminating access monopoly" label is borrowed from the voice world and invented to describe a particular problem caused by the FCC's own Title II regulatory policies. In particular, the FCC mandated a "calling party network pays" regime under which the network of the calling party must pay the called party's network for completing (or "terminating") a call. In turn, tariffs allowed this regime to become enforceable without negotiations between network providers, since a tariff approved by the FCC created a legal obligation for networks to pay to have their calls terminated. That this Title II regime of mandatory payment and tariffing could result in abuses and required constant regulatory supervision is clear.[4] However, where even one part of that regulatory construct failed, for example when the Commission removed the ability of wireless companies to tariff access charges for terminating calls to their customers, the entire "terminating access monopoly" was demonstrated to be economically meaningless.[5]

No comparable regulatory framework exists for broadband traffic delivered over Internet networks. Because the Internet ecosystem developed under Title I, there is no calling party network pays requirement. And, even if there were, the terminating broadband provider could not mandate payment through tariffs because no tariff mechanism exists for Title I information services.

In this proceeding, the Commission observed that its "terminating access monopoly" construct was premised upon its finding "that customers may incur significant costs in switching from one provider to another, thus creating 'terminating monopolies' for content providers needing high-speed broadband service to reach end users."[6] As USTelecom has demonstrated, however, this finding regarding "significant" switching costs is unsupported by the Commission's own data and the record evidence.[7]

Furthermore, the Commission's focus on switching costs allegedly incurred by end users when changing broadband providers turns the "terminating access monopoly" theory on its head. In regulating CLEC rates for terminating access service, the Commission was persuaded that the "market for access services does not appear to be structured in a manner that allows competition to discipline rates" because the *calling party network* had no choice but to pay the tariffed terminating access rates of "whichever LEC provides terminating access to a particular customer."[8] Any costs faced by the end user in switching LECs was irrelevant to the

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[4] *Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685, ¶ 24 (2005) (citing *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order, 16 FCC Rcd 9923 (2001) (establishing benchmark rates for CLEC access charges) ("*CLEC Access Reform Order*").

[5] *Petitions of Sprint PCS and AT&T Corp. For Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd 13192 (2002) (allowing CMRS access charges only pursuant to contracts with IXCs).

[6] *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, ¶ 46 (2014) (*quoting Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, ¶ 34 (2010).

[7] Comments of the United States Telecom Association, GN Docket No. 14-28, GN Docket No. 10-127, at 11-14 (filed July 15, 2014); Reply Comments of the United States Telecom Association, GN Docket No. 14-28, GN Docket No. 10-127, at 15-16 (filed Sept. 15, 2014).

[8] *CLEC Access Reform Order* at ¶¶ 11 & 32.

Commission's original analysis, which further confirms that the "terminating access monopoly" is an illusory concept that has no economic significance in this context.

In apparent recognition of the problems inherent with the Commission's approach, some commenters now assert that a broadband provider is a "a terminating access monopolist" because it "controls the only means of access by which others may reach the end user regardless of whether the end user itself had a competitive choice."[9] But this assertion ignores the absence of the regulatory framework discussed above and seems bereft of any real world economic reality.

If broadband providers are "terminating access monopolists," one would expect to see them charging Internet backbone providers for terminating traffic to their end-user customers (like CLECs did by tariffing high termination rates that long distance companies were required to pay). In fact, however, broadband Internet access providers either have settlement free peering arrangements or pay for transit arrangements with backbone providers for connectivity to the broader Internet.[10]

Indeed, across the broad array of broadband providers that USTelecom represents, the vast majority *pay* to request and receive Internet traffic. Specifically, they must purchase middle mile transport to carry traffic to and from Internet connection points and then pay for transit services to get traffic to and from the Internet. In fact, a number of USTelecom's member companies allow large edge providers to locate servers in their facilities free of charge (for example, without renting space or paying for electricity) in order to reduce somewhat the substantial charges they pay to gain access to that edge provider's content. It belies common sense and economics to suggest that a broadband provider that is paying to receive Internet traffic has a meaningful "terminating access monopoly."

Furthermore, companies that provide broadband service to consumers have no more of a terminating (or originating) access monopoly than do those companies that provide broadband service to edge providers. Thus, under the "terminating access monopoly" theory espoused by some commenters, a broadband provider that connects an edge provider such as Netflix to the Internet is as much a "terminating monopolist" with respect to traffic going to that edge provider as is a broadband provider connecting an end-user consumer to the Internet. Similarly, the broadband provider connecting Netflix to the Internet would appear to have an "originating access monopoly" to the same degree that any "terminating access monopoly" exists. Under the circumstances, no basis exists for the Commission to conclude that any "monopoly" exists in any economically meaningfully way with respect to "terminating access" provided by a broadband Internet access provider.

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[9] *Ex Parte* Letter from Angie Kronenberg, COMPTEL, to Marlene Dortch, Secretary, FCC, GN Docket No. 14-28 (Jan. 21, 2015).

[10] *See* P. Faratin et al., Complexity of Internet Interconnections: Technology, Incentives and Implications for Policy, at 9-11 (Sept. 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2115242.

Pursuant to Commission rules, please include this ex parte letter in the above-identified proceedings.

Sincerely,

Jonathan Banks
Senior Vice President, Law & Policy

c: Jonathan Sallet
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