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VIA ECFS

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

Dear Ms. Dortch:

The past two weeks have brought revelations about the contents of the upcoming Open Internet Order. On February 4, the Chairman released a “Fact Sheet” identifying various elements of the draft Order.¹ Further details have emerged from the Chairman’s February 9 speech at a Silicon Flatirons event and from statements (and tweets) by other Commissioners and staff.² These revelations give rise to serious concerns that the Open Internet Order will depart drastically from the Commission’s original proposal and therefore violate the Administrative Procedure Act—including an agency’s duty to provide adequate notice of the proposals it is considering in the underlying notice of proposed rulemaking and a meaningful opportunity for comment,³ and its duty not to engage in arbitrary and capricious rulemaking.⁴ If the Commission presses ahead in adopting a final rule that differs as starkly in scope and approach from the Commission’s proposal as is being reported, it would seriously imperil the attempt to finally promulgate valid net-neutrality rules.

¹ Chairman Tom Wheeler, FCC, *Fact Sheet: Chairman Wheeler Proposes New Rules for Protecting the Open Internet* (rel. Feb. 4, 2015) (“Chairman’s Fact Sheet”).

² Remarks of FCC Chairman Tom Wheeler, Silicon Flatirons Center (Feb. 9, 2015) (“Flatirons Speech”); *see also, e.g.*, Cat Zakrzewski, TECHCRUNCH, *Top FCC Lawyer: Agency Will Win ‘Inevitable’ Legal Fight over Net Neutrality* (Feb. 5, 2015), <http://techcrunch.com/2015/02/05/top-fcc-lawyer-agency-will-win-inevitable-legal-fight-over-net-neutrality> (quoting the Chairman’s Special Counsel for External Affairs, Gigi Sohn, as saying that “interconnection is going to be considered a Title II service”).

³ *See* 5 U.S.C. § 553.

⁴ *See id.* § 706(2)(A).

The FCC’s 2014 Notice of Proposed Rulemaking (“NPRM”) announced that the “goal of this proceeding is to find the best approach to protecting and promoting Internet openness.”⁵ The NPRM was singularly focused on strengthening the transparency rules adopted in 2010 and reinstating rules to prevent blocking and unreasonable discrimination. And the NPRM assured commenters that, if the Commission relied on the more invasive Title II authority rather than Section 706 alone, the Commission would “forbear from applying all but a handful of core statutory provisions.”⁶

What has become increasingly clear, however, is that the draft Order is no longer focused on the NPRM’s goal of “ensur[ing] that the Internet remains open,”⁷ abandoning the light-touch approach that the NPRM described in favor of a fundamentally different regulatory paradigm. The forthcoming Order appears to threaten to impose broad-scale common-carrier regulation on Internet Service Providers (“ISPs”) in ways that have *nothing* to do with safeguarding the open Internet. For example, the Chairman’s Fact Sheet indicates that the Order will subject ISPs to oversight of all “charges” to ensure that the Commission or a court has authority to decide whether they are “just and reasonable.”⁸ And ISPs found to impose “unjust” or “unreasonable” charges could be liable for damages and attorney’s fees.⁹ Such sweeping oversight of rates (and all other “practices”) would appear to apply both to ISPs’ retail services and to their “interconnection activities” in the wholesale traffic-exchange marketplace.¹⁰

The NPRM in this proceeding gave insufficient notice that the Commission was contemplating adopting a completely new regulatory paradigm for ISPs. Although the NPRM mentioned Title II as a potential source of authority for new rules, it made clear that the Commission was considering “reclassification and applying Title II *for the purpose of protecting and promoting Internet openness*,” by providing a stronger legal basis for the no-blocking and anti-discrimination rules vacated in *Verizon* and the transparency rules still in force.¹¹ By the same token, in seeking comment on forbearance from Title II, the Commission stated that “[c]ommenters should list and explain which provisions should be exempt from forbearance and which should receive it *in order to protect and promote Internet openness*.”¹² The NPRM did not remotely suggest that the Commission was contemplating the imposition of a range of new Title II duties that have no relationship with the no-blocking and anti-discrimination rules that

⁵ *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 ¶ 4 (2014) (“NPRM”).

⁶ *Id.* ¶ 154.

⁷ *Id.* ¶ 2.

⁸ See Chairman’s Fact Sheet at 3 (describing planned imposition of Sections 201 and 202 of the Act).

⁹ See *id.* (describing planned imposition of Sections 206, 207, and 209 of the Act).

¹⁰ *Id.*

¹¹ NPRM ¶ 149 (emphasis added).

¹² *Id.* ¶ 154 (emphasis added).

were vacated by the *Verizon* court. To the contrary, after President Obama endorsed Title II reclassification as his preferred means of authorizing strong open Internet rules, Chairman Wheeler confirmed that the *sole* purpose of any such reclassification would be “to reach the outcomes sought by the 2010 rules.”¹³ Even proponents of reclassification likewise made clear that they wanted only “light-touch” regulation that would ensure “bright-line” open Internet rules.¹⁴

As a result of the fundamentally different aims and approaches of the NPRM and the current understanding of the draft Order, the regulatory framework that is apparently set forth in the proposed Order is completely different from the framework in the NPRM. The NPRM made clear that if the Commission reclassified broadband as a telecommunications service subject to Title II, the Commission would “forbear from applying all but a handful of core statutory provisions.”¹⁵ Four provisions were listed among this “core”: Sections 201 and 202 (just and reasonable services and charges without discrimination), Section 208 (FCC investigation of complaints), and Section 254 (universal service).¹⁶ In addition, the NPRM listed two provisions that *might* be saved from forbearance because, although outside the core of provisions that the Commission deemed necessary to promote Internet openness, “they have attracted longstanding

¹³ Press Release, *FCC Chairman Tom Wheeler’s Statement on President Barack Obama’s Statement Regarding Net Neutrality* (rel. Nov. 10, 2014).

¹⁴ *See, e.g.*, Letter from Congressman Henry A. Waxman to Chairman Wheeler, GN Docket No. 14-28, at 1 (Oct. 3, 2014) (“The vitality of the Internet is inextricably linked to its openness. I believe this vitality can be protected by reclassifying broadband providers as telecommunication services and then using the modern authority of section 706 to set bright-line rules to prevent blocking, throttling, and paid prioritization.”); Letter from Congresswoman Anna G. Eshoo to Chairman Wheeler, GN Docket No. 14-28, at 3 (Oct. 22, 2014) (“[A] ‘light-touch’ Title II approach, which I urge you to adopt, recognizes that the entirety of Title II’s 47 sections are not necessary to ensure the FCC retains oversight of broadband for net neutrality, consumer protection and universal service goals.”); Letter from Senator Ron Wyden to Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai, and O’Rielly, GN Docket No. 14-28, at 2 (Sept. 15, 2014) (“Congress acted in the 1996 Telecommunications Act to ensure that the FCC has discretion to forbear from applying all but the few Title II provisions needed to do to the job. And there is broad consensus that the FCC would only need to apply a handful of Title II provisions in order to preserve an open Internet.”); Letter from Representative Zoe Lofgren to Chairman Wheeler, GN Docket No. 14-28, at 1-2 (Oct. 8, 2014) (“It is true that reclassifying all broadband Internet access services as title II services is not without some concern, which is why it should be done as narrowly—with as much restraint as possible—and solely to accomplish the goals of net neutrality[.]”).

¹⁵ NPRM ¶ 154.

¹⁶ *See id.*

and broad support in the broadband context”: Section 222 (consumer privacy) and Section 255 (access by persons with disabilities).¹⁷

The Chairman has now announced, however, that under the rules he has urged the Commission to approve, ISPs should be subject not only to all six of those sections, but also to an array of other, unrelated provisions that were not listed in the NPRM, that are neither “core” provisions essential to the Commission’s openness objective nor broadly supported, and that interested parties accordingly had no idea they should address in their comments.¹⁸ Because these new provisions are quite burdensome, they will likely have far-reaching effects for ISPs. Most notably, the Chairman’s draft apparently proposes to subject ISPs to a laundry list of litigation-focused provisions—Sections 206, 207, 209, 216, and 217—that will authorize private federal lawsuits against ISPs with damages, vicarious liability, and attorney’s fees. While FCC proceedings under Section 208 will already encumber ISPs, private lawsuits will greatly magnify the burden. Providers may well have to defend meritless, but costly, class actions every time a trial lawyer thinks he can argue that a charge or practice or service is “unjust” or “unreasonable” even where the claim has no correlation to protecting an open Internet. Simply fending off frivolous complaints under these nebulous statutory standards will impose burdensome costs, unnecessarily draining ISPs’ resources and detracting from their ability to promote the “virtuous circle of innovation” by investing in network improvements, which the Commission has found drives innovative network uses.¹⁹ And no benefit to consumers will offset the costs.

To pass muster under the APA, the Commission is required to “fairly apprise interested persons of the subjects and issues before the agency” *before* the comment period commenced by “describ[ing] the range of alternatives being considered with *reasonable specificity*.”²⁰ To allow meaningful comment, the objectives of the rulemaking and the concerns motivating the agency’s final action must also be apparent from the proposal.²¹ “Given the strictures of notice-and-

¹⁷ *Id.* (internal quotation marks omitted).

¹⁸ *See* Chairman’s Fact Sheet at 3.

¹⁹ *See, e.g.*, NPRM ¶ 26.

²⁰ *Prometheus Radio Project v. FCC*, 652 F.3d 431, 449-50 (3d Cir. 2011) (emphasis added) (quoting *Horsehead Res. Dev. Co., Inc. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994)) (internal quotation marks omitted).

²¹ *See, e.g.*, *Council Tree Commc’ns, Inc. v. FCC*, 619 F.3d 235, 253-54 (3d Cir. 2010) (“[T]he Second Report and Order makes clear that the FCC’s real concern in promulgating the 50% impermissible-relationship rule was not to prevent DEs from being unduly influenced by large entities or groups of entities, but rather was to ensure that DEs are primarily engaged in offering wireless services to the public. But the [notice of proposed rulemaking] had not so much as hinted that this was the objective of the rulemaking: it mentioned ‘service to the public’ only twice, both times in the course of describing the FCC’s obligation to ensure that DEs have access to capital to help them provide such service. Instead, as we have explained, the FNPR[M] was focused on maintaining the independence of DEs from larger entities.” (citation omitted)); *Int’l*

comment rulemaking, an agency’s proposed rule and its final rule may differ only insofar as the latter is a ‘logical outgrowth’ of the former.”²²

In light of the Commission’s limited focus on supporting new open Internet rules—and its repeated confirmations that any reliance on Title II would be limited to that goal—the NPRM failed to give “fair notice” of the expansive new regulatory framework the Commission reportedly intends to impose.²³ Likewise, the regulatory framework apparently contemplated by the draft Order is not a “logical outgrowth” of anything in the NPRM. To the contrary, while the NPRM proposed to follow “the blueprint offered by the D.C. Circuit in its decision in *Verizon v. FCC*” to “protect[] and promot[e] Internet openness,”²⁴ new details still emerging about the forthcoming Order make clear that the changes being contemplated are intended to transform the regulatory treatment of ISPs in areas wholly unrelated to Internet openness. Given the sweeping scope of the Order now in circulation, the Commission was required to do more than mention the prospect of using Title II authority to support new open Internet rules.²⁵ There is no way to read the NPRM in this proceeding and conclude that the Commission was contemplating a massive sea-change in the regulation of ISPs in areas that have no reasonable nexus with the stated concerns about blocking and discrimination in the delivery of Internet content.

Notably, when the Commission has previously considered Title II regulation in other contexts, it has expressly sought comment on the *specific* obligations that should apply. For example, in the CMRS proceeding, the Commission outlined its regulatory approach in the notice of proposed rulemaking, providing a preliminary application of the legal standard based on an assessment of the existing marketplace.²⁶ More recently, the *IP-Enabled Services NPRM* provided a detailed examination of the issues related to the statutory classification and regulatory treatment of interconnected VoIP services, devoting roughly half of the document to such

Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1260 (D.C. Cir. 2005) (“[T]he Secretary could not have expected interested parties to realize that she would consider abandoning her proposed regulatory approach [and impose a *maximum* velocity cap] based on empirical research indicating such a cap was potentially dangerous to miners, simply because she invited commentary on a proposed rule that included a *minimum* air velocity”).

²² *Env'tl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005).

²³ *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

²⁴ NPRM ¶ 4.

²⁵ *See, e.g., Prometheus Radio Project*, 652 F.3d at 450 (faulting the Commission for using vague, “open-ended” terminology when it intended to make a “significant revision” to its regulatory scheme).

²⁶ *See Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, Notice of Proposed Rulemaking, 8 FCC Rcd 23 ¶¶ 56-68 (1993).

matters.²⁷ The NPRM here, by contrast, had no meaningful discussion of the regulations that the draft Order now appears poised to inflict on ISPs.

The same disconnect between the NPRM and the draft Order also would render the Order arbitrary and capricious under the APA. The Supreme Court has long held that, in order to survive arbitrary-and-capricious review, agency action must be grounded in a “rational connection between the facts found and the choice made.”²⁸ But because the NPRM focused only on the establishment of open Internet rules, the Commission simply cannot draw a “rational connection” between the factual record that arose from that NPRM and any choice to subject ISPs to wide-ranging regulation that has nothing to do with Internet openness. The stark difference between the limited policy objectives of the NPRM and the expansive regulatory regime apparently imposed under the Order is itself a strong indication that the Commission is acting in an arbitrary and capricious manner. Indeed, an order that departs from the NPRM’s limited focus on net neutrality so fully as to create a new private right of action (including class actions seeking massive damages) based on entirely unrelated rates and practices would epitomize arbitrary and capricious decisionmaking. Relatedly, an Order that imposes wide-ranging common-carrier obligations on ISPs—and ignores the overwhelming evidence of the inevitable harms to broadband investment and innovation that would result from such a regime—also would be deemed arbitrary and capricious for failing to “examine the relevant data and articulate a satisfactory explanation” for the course taken.²⁹

The Commission has been reversed for adopting rules that were not logical outgrowths of the underlying notices of proposed rulemaking.³⁰ Having already twice failed in efforts to impose open Internet rules, the Commission should resist that temptation to overreach here by making the same mistake again. The Commission should reject this new effort to regulate the Internet. At a minimum, the Commission should disclose its new proposal and provide for a new round of comments on it, so that the public has an opportunity to address the lack of need for and immense burdens caused by the draft Order’s expanded scope, and so that the Commission can develop a proper record on these expansions that considers feedback from interested parties.

Sincerely,

/s/ Rick Chessen

Rick Chessen

²⁷ See *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 ¶¶ 42-78 (2004).

²⁸ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

²⁹ *State Farm*, 463 U.S. at 43.

³⁰ See, e.g., *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 169-71 (2d Cir. 2013); *Prometheus Radio Project*, 652 F.3d at 450-54; *Council Tree Commc’ns*, 619 F.3d at 253-58.