CINNAMON MUELLER

BARBARA S. ESBIN
Admitted in the District of Columbia
besbin@CinnamonMueller.com

WASHINGTON, DC
1875 Eye Street, NW
Suite 700
Washington, D.C. 20006

direct: 202-872-6811
fax: 202-683-6791

ST. LOUIS
1714 Deer Tracks Trail
Suite 215
St. Louis, MO 63131

CHICAGO
307 N. Michigan Ave
Suite 1020
Chicago, IL 60601

phone: 312-372-3930

February 19, 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 February 13, 2015, Matthew M. Polka, President and Chief Executive Officer and Ross J. Lieberman, Senior Vice President of Government Affairs, American Cable Association ("ACA"); Robert Gessner, President, MCTV and ACA Board Chairman; William Beaty, Executive Vice President of Cable TV, Comporium Communications; Geoff Oxnam, Vice President of Operations, Easton Utilities; and the undersigned, outside counsel to ACA, met with Commissioner Mignon Clyburn and Rebecca Goodheart, Legal Adviser – Wireline, and later met with Priscilla Delgado Argeris, Senior Legal Advisor to Commissioner Rosenworcel. The purpose of the meetings was to discuss, in regard to the above-referenced proceedings, ACA's position that it would be a mistake to impose Title II common carrier regulation on small and medium-sized Internet service providers ("ISPs") that goes beyond the three "bright line" Open Internet rules described in Chairman Wheeler's Feb. 5th Fact Sheet[1] – no blocking, no throttling and no paid prioritization.[2]

[1] *See* Federal Communications Commission Document, Fact Sheet: Chairman Wheeler Proposes New Rules for Protecting the Open Internet at 2 (rel. Feb. 4, 2015), *available at* http://www.fcc.gov/document/chairman-wheeler-proposes-new-rules-protecting-open-internet.

[2] ACA's discussion was consistent with its previous filings in these dockets. *See 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); *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) (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 and would therefore 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; if the Commission nonetheless reclassifies, it 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) (asking for relief upon reclassification from pole attachment rate consequences for cable Internet providers); *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

ACA Member Profiles. At the meetings, the ACA members briefly discussed background about their company, the competition they face and recent and planned investments to deploy broadband.

- MCTV. Mr. Gessner described MCTV, in its 50th year as a family-owned business in Massillon, Ohio. MCTV began as a traditional cable operator, later adding broadband Internet, voice and home security services. MCTV serves between 40,000 to 45,000 subscribers, with Internet subscriptions soon to surpass video subscriptions. It faces a competitive environment for Internet, with AT&T U-verse, Time Warner Cable and CenturyLink present in its service area. MCTV is expanding broadband deployment to more rural areas. MCTV does not block, throttle, offer paid prioritization or enforce "data caps" against its subscribers.
- Comporium Communications. Mr. Beaty explained that Comporium is a 120 year-old company headquartered in Rock Hill, SC, under ownership by the same family for 103 years. It began as a traditional phone company in 1894 when the Bell System refused to extend lines to the area, and over time added new services such as cable and broadband Internet as a service to the community. Today, Comporium serves 90,000 Internet and 65,000 cable subscribers, and has grown primarily through acquisitions. It serves both relatively urban areas, such as Rock Hill, and very rural areas such as Gilbert, SC with technologically advanced services. Driving broadband adoption in hard-to-serve and lower-income areas is a key focus, which requires the company to be highly cost-conscious. Comporium provides 23 of its counties with Gigabit Internet service, even at a time when its profit margins on video service are shrinking; it has extended lines without subsidy by putting its own capital at risk.
- Easton Utilities. Mr. Oxnam stated that Easton Utilities is a not-for-profit municipal broadband utility in Easton, MD. Easton Utilities provides an array of utility services, including cable and broadband Internet, and has about 6,000 cable and Internet subscribers. It has built a fiber-to-the-home network, and has partnered to deploy broadband to community institutions including hospitals and schools to build out broadband when others declined, and as a municipal utility is focused on providing excellent service the residents of its communities to whom it is accountable.

Smaller ISPs Adhere to Open Internet Principles, Lack the Incentive and Ability to Harm Edge Providers and Would Be Harmed by Title II Regulation. In each meeting, Mr. Polka explained that, like MCTV, Comporium and Easton Utilities, the more than 800 small and medium-sized cable and broadband ISP members of ACA have been living under the Commission's 2005 Open Internet Policy Statement and transparency rule adopted in 2010. ACA's members do not block or throttle

---

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) (ACA Feb. 2nd Ex Parte Letter) (detailing the views of two municipal broadband members, Cedar Falls Utilities and Jackson Energy Authority, and Shentel, a 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 Barbara S. Esbin, Cinnamon Mueller, Counsel for ACA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (filed Feb. 13, 2015) (reiterating request for relief from Title II common carrier rules, including Sections 201, 202, 208 and related enforcement provisions). *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).

and do not seek payment for priority delivery service from Internet content, applications and services ("edge") providers. Because of their small size, they have no means to extract fees, terms, or conditions from large Internet edge providers, and they are too small to matter to start-ups concerned with the practices only of the largest ISPs.[3] Mr. Polka explained that these small and medium-sized ISPs will be unjustifiably harmed if the Commission, for the purpose of protecting an Open Internet, reclassifies broadband Internet access service under Title II of the Act and does not fully forbear from the imposition of new common carrier obligations unrelated to the three bright line Open Internet rules resulting from this action. Moreover, application of other forms of Title II regulation will have a far more dramatic adverse economic impact on smaller ISPs than it will on larger ISPs.[4]

Illustrating smaller ISPs' inability to harm Internet edge providers, Mr. Gessner explained that MCTV had to chase Netflix down to discuss mutually beneficial settlement-free caching arrangements to improve Netflix's customers' Internet experience when it learned Netflix was offering them to some ISPs. It was only after MCTV increased its available capacity to a level that met Netflix's minimum requirements did Netflix permit MCTV to participate in its Open Connect program. Collocation of Netflix servers improved their customer service experience immensely, which was expected given that Netflix alone accounts for 40% of MCTV's peak Internet traffic. Easton Utilities, with 6,000 Internet subscribers, has never even contemplated asking Netflix to collocate, believing that getting Netflix's attention would be futile.

The representatives for the three operators each discussed different ways that the application of Title II regulations on their businesses would be harmful. Mr. Oxnam explained that Easton Utilities has a cable and Internet department staffed by 15 employees, and that the employee in charge of troubleshooting outside plant problems via truck rolls is also in charge of regulatory compliance and a variety of other matters. The additional regulatory compliance burdens associated with common carrier status would adversely impact this employee's ability to perform other necessary operational tasks and respond to customer needs. Common carrier status, Mr. Gessner stated, will put future investments by MCTV to get to Gigabit-level service at risk by creating a high level of regulatory uncertainty about MCTV's ability to monetize its investment through subscription revenues. As a family-owned business, MCTV is hesitant to put money in the ground until it has a greater level of certainty that a return on investment will be forthcoming. Mr. Beaty, in the meeting with Ms. Argeris, explained that Comporium is integrated into and responsive to the communities that it serves. Mr. Beaty stated that running a cost-effective operation in the rural and lower income areas it serves is vital to Comporium, and expressed his fear that smaller ISPs like Comporium will be the "road kill on the information superhighway" if the Commission departs from its traditional light regulatory touch with regard to broadband Internet access service and reclassifies the service without

[3] *See* ACA Feb. 2rd Ex Parte Letter at 4 (describing remarks of Betty Zeman, Marketing Manager, Cedar Falls Utilities, concerning CFU's inability, with 12,500 Internet subscribers, to assess caching or terminating access charges on large Internet edge providers: "Netflix would laugh us out of the room if we asked for money").

[4] ACA and its members are not contesting adoption under Section 706 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 and maintenance of the 2010 transparency rules together with the advisory guidance subsequently issued by the General Counsel and Enforcement Bureau Chief. *See FCC Enforcement Bureau and Office of General Counsel Issue Advisory Guidance for Compliance with Open Internet Transparency Rule*; Public Notice, 26 FCC Rcd 9411 (2011). This guidance was critical to alleviating the burdens of the transparency rule as codified in the Code of Federal Regulations for smaller providers by allowing additional flexibility in meeting the letter of the law, and likely played a significant role in gaining OBM approval for the record collection obligations associated with the transparency rule. *See* 47 C.F.R. § 8.3. While affirming its support for the current level of disclosure required by the 2010 transparency rules, ACA opposes 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.

granting adequate relief to smaller ISPs from common carrier regulation. Mr. Polka summarized by stating that Title II regulation that harms these operators' finances can harm their ability to serve, invest and expand broadband.

The Commission Must Forbear From Unnecessary and Burdensome Title II Regulation to Smaller ISPs. 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 with common carrier regulation, leaving in place only the new Open Internet behavioral rules – no blocking, no throttling and no paid prioritization. Once again, ACA focused its remarks on relief from 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 small and medium-sized ISP members, who serve a median of 1,000 subscribers per system, will be forced to defend against costly 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 Rulemaking 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.[5]

In short, ACA is concerned that the costs of both *ex ante* and *ex post* rate regulation under Title II could be substantial for smaller ISPs. Direct costs will arise if members have to hire new regulatory compliance staff, consultants or attorneys to review their current rates, terms, conditions and practices in connection with service and planned service changes against the "just and reasonable" standard of Section 201(b), and even if they ultimately are able to successfully defend against complaints pursuant to Section 208.

In addition, ACA reiterated its request that the Commission not burden small and medium-sized ISPs with additional and unwarranted enhanced transparency obligations by exempting them from any enhancements to the current rule. ACA and its members support the provision to consumers of clear and adequate information concerning the services provided – this is good for ISPs, good for consumers and already covered by numerous consumer protection laws. ACA submits that the existing unitary transparency rule already in effect does the job without unduly burdening smaller providers and is sufficient to protect both consumers and Internet edge providers from potential violations of the Open Internet rules. ACA noted that obligations on small and medium-sized ISPs to provide new disclosures for the benefit of edge providers would be both

[5] *See Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, ¶ 171 (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.

burdensome and lack justification. Mr. Lieberman stated that only the network management practices of the very largest ISPs are likely of any interest to edge providers.

Definition of Smaller ISP for Title II Forbearance/Transparency Enhancement Exemption. In response to a question from Ms. Goodheart as to how ACA would define "small" for purposes of the relief requested, ACA acknowledged that Congress and the Commission have defined "small" in various ways. ACA suggested that the Commission should first look to the Communications Act and of most relevance would be Section 251(f),[6] which was adopted as part of the Telecommunications Act of 1996 and which provides for relief for rural and mid-sized carriers from key Title II common carrier obligations in Section 251(c), including interconnection, unbundling, resale, and collocation. This provision gives an automatic exemption to a rural telephone company[7] until a state commission rules otherwise[8] and enables an incumbent carrier with fewer than 2% of the nation's access lines to petition a state commission for relief, which shall be granted if necessary "to avoid imposing a requirement that is unduly economically burdensome."[9] At the time the 1996 Act was enacted, there were more than 150 million access lines.[10] Access lines today are estimated to be about 80 million,[11] an amount similar to the number of broadband Internet access service subscribers. This would produce a definition of a small entity as one serving fewer than about 1.6 million broadband subscribers.[12] In sum, ACA explained that Section 251(f) adopts a standard that is probably the closest analogous definition of an entity warranting exemption from regulatory obligations that, if applied, would be unduly economically burdensome to the provider and have an adverse impact on users of the service generally.[13]

* * *

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

[6] *See* 47 U.S.C. § 251(f). *See also* 47 C.F.R. §§ 51.401, 51.403, 51.405.

[7] Rural Telephone Company is defined in 47 U.S. C. § 153(37) and included in the definition are carriers that provide "telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines."

[8] *See* 47 U.S.C. § 251(f)(1).

[9] *See* 47 U.S.C. § 251(f)(2).

[10] *See* Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission Report, Local Telephone Competition at the New Millennium, at 7 (rel. Aug. 31, 2000).

[11] *See* Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission Report, Local Telephone Competition: Status as of December 31, 2013, at 1 (rel. Oct. 16, 2014).

[12] *Id. See* Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission Report, Internet Access Services: Status as of December 31, 2013 at Tables 1-4 (rel. Oct. 16, 2014).

[13] *See* 47 U.S.C. § 251(f)(2)(A). In further recognition of the need to afford mid-sized carriers relief from such obligations, state commissions are authorized to suspend enforcement of the requirements with respect to the petitioner. *Id.*

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 Esbin

Barbara S. Esbin
Counsel for the American Cable Association

cc (*via email*): Commissioner Mignon Clyburn
Rebekah Goodheart
Priscilla Delgado Argeris