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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 17, 2015, Ross J. Lieberman, Senior Vice President Government Affairs, American Cable Association (“ACA”); Thomas Cohen, Kelley Drye and Warren; and the undersigned, outside counsel to ACA, met with FCC General Counsel, Jonathan Sallet, Associate General Counsel, Stephanie Weiner, and Matthew DelNero, of the Wireline Competition Bureau, to discuss ACA’s position that it would be a mistake to impose any Title II common carrier regulation on small Internet service providers (“ISPs”) that goes beyond the three “bright line” Open Internet rules described in Chairman Wheeler’s Feb. 5<sup>th</sup> Fact Sheet<sup>1</sup> – no blocking, no throttling and no paid prioritization – and that in tandem with the adoption of new Open Internet regulations the Commission should forbear under Section 10 from applying Sections 201(b), 202, 206, 207, 208 and 209 to these small ISPs and exempt them from any enhancements to the current transparency rule.<sup>2</sup>

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

<sup>2</sup> ACA’s discussion was consistent with its previous filings in these dockets. *See, e.g., 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) (“ACA Jan. 12<sup>th</sup> Ex Parte”) (reclassifying broadband Internet access service as a telecommunications service subject to regulation under Title II of the Act for small 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 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 Commission not to burden small ISPs with additional – and utterly unwarranted – enhanced transparency rules); *Protecting and Promoting*

Mr. Lieberman discussed the same matters the previous day during a teleconference with Gigi Sohn, Office of Chairman Wheeler. Mr. Lieberman also discussed these matters in teleconferences with Rebekah Goodheart, Legal Adviser – Wireline to Commissioner Clyburn, on February 17 and 18, 2015.

ACA's discussion in the meeting focused on three main areas: (i) the substantial and tangible burdens that would be imposed on small ISPs by virtue of being involuntarily relegated to common carrier status in their provision of broadband Internet access service for the first time pursuant to Sections 201 and 202, together with being subject to the complaint and enforcement provisions applicable to common carriers in Sections 206-209; (ii) the extent of Title II forbearance sought by small ISPs and the legal support for its issuance; and (iii) the appropriate definition of, and legal and policy rationale for, "small" for purposes of both the requested forbearance and exemption from additional transparency rule enhancements, particularly those aimed at providing Internet edge providers with detailed information about network performance characteristics.

Title II Regulation Would Impose Unwarranted and Onerous Burdens on Small ISPs. ACA explained that, while it understands why the Commission wants all ISPs to be subject to three "bright line" Open Internet rules described in Chairman Wheeler's Feb. 5<sup>th</sup> Fact Sheet<sup>3</sup> – no blocking, no throttling and no paid prioritization – it cannot understand its treating all ISPs alike with respect to other core Title II common carrier provisions. ACA believes that the small ISP marketplace is functioning quite well today, and the case for applying any rules on smaller ISPs has not been made,<sup>4</sup> but particularly with regard to imposing regulations beyond the three "bright line" Open Internet rules, such as the rules that attach automatically upon classification of a provider as a common carrier.

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*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. 2<sup>nd</sup> 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 small ISPs pointing out the inadequacy of the Commission's Initial Regulatory Flexibility Act analysis in this proceeding and requesting action to protect small providers).

<sup>3</sup> See Wheeler Fact Sheet at 2.

<sup>4</sup> The record shows small and medium-sized ISPs lack the incentive to try to block or throttle edge providers, either because of their strong customer service ethic, their need to drive broadband adoption in low-income areas, or the competition that they face, and lack the ability to succeed in inflicting the type of harm to Internet edge providers and openness posited as the reason for the Open Internet protections proposed by the Commission. See ACA Feb. 2<sup>nd</sup> 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"). See also *Protecting and Promoting the Open Internet*, Letter from 43 Municipal Broadband ISPs to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (filed Feb. 10, 2015) (letter describing lack of incentive or ability to harm Internet edge providers and protesting Title II regulation by 43 municipal broadband ISPs); *Protecting and Promoting the Open Internet*, Letter from Twenty Four of Nation's Tiniest Wireline Internet Service Providers, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (filed Feb. 17, 2015) (letter protesting Title II regulation as "regulatory overkill" by 24 ISPs with 1,000 or fewer subscribers).

Smaller ISPs have been able to invest and provide advanced services in both urban markets where they face competition and in low-income, rural and hard-to-serve markets due in part to the flexibility available to address consumer needs without undue regulatory burdens. Such flexibility will be sharply curtailed and operating costs increased for small ISPs under traditional common carrier regulation. This is particularly true under Section 201(b), which subjects to regulatory scrutiny under the “just and reasonable” standard, “all charges, practices, classifications, and regulations for and in connection with [interstate] communications service,” and declares that “any such charge, practice, classification, or regulation that is unjust and unreasonable is hereby declared to be unlawful.” This, together with the companion Section 202 prohibition on unjust and unreasonable discrimination, is a highly prescriptive approach that will entail costly compliance measures, whether applied prospectively by rulemaking or declaration or after-the-fact through adjudication, and will be highly disruptive to the relationship between providers and subscribers. While the Commission may view reclassification as necessary to provide a legal base for its “no blocking,” “no throttling” and no “paid prioritization” rules, it brings along with the automatic imposition of these more broadly focused common carrier obligations.<sup>5</sup>

The Commission has a Sufficient Record to Forbear from Applying Core Title II Provisions for Small ISPs as a Class on a Nationwide Basis. ACA clarified that the Commission can adequately attain the goals of this rulemaking and protect and preserve the open Internet without imposing unnecessary and unduly burdensome additional common carrier economic regulation such as that contained in Sections 201(b) and 202 on small ISPs that goes beyond the three “bright line” Open Internet rules described in Chairman Wheeler’s February 5th Fact Sheet.<sup>6</sup> For these reasons, ACA asked that the Commission, should it move forward with its plan to reclassify broadband Internet access from an “information” to a “telecommunications” service, to exercise its forbearance authority under Section 10, and refrain from applying Sections 201(b), 202, 206, 207, 208 and 209 to small ISPs as a class, on a nationwide basis.

This approach would more than adequately protect and promote an Open Internet from alleged threats posed by smaller ISPs by leaving these providers subject to the “no blocking,” “no throttling” and “no paid prioritization” rules. This would be the case regardless of whether these three

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<sup>5</sup> As noted herein, ACA’s members do not engage in practices that harm the open Internet, and neither ACA nor its members contested the Commission’s 2010 Open Internet Order, nor do they contest the Commission’s adoption of “no blocking,” “no throttling” and “no paid prioritization” rules pursuant to Section 706, despite reservations over the need for such rules given the paucity of violations of the Commission’s Open Internet principles in the last decade. However, adopting such rules pursuant to reclassification under Title II raises the major concern for ACA and its members that the costs of both *ex ante* and *ex post* rate regulation under Sections 201(b) and 202 could be substantial for small 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. This is also true if subjected to regulation of the Internet interconnection and peering arrangements under Section 251.

<sup>6</sup> The focus of ACA’s remarks during the meetings was on economic regulation under Sections 201 and 202, backed up by the related Section 208 common carrier complaint and enforcement provisions. However, ACA also remains concerned about additional and potentially costly compliance burdens associated with other Title II provisions discussed as likely to be applied in the February 5<sup>th</sup> Fact Sheet, such as telecommunications service customer privacy requirements under Section 222 and disabilities access requirements pertaining to telecommunications services under Section 225 and 255. While these rules undeniably serve important public values, they were written with telephone services in mind and now will be applied to broadband Internet access service in a novel and potentially costly way.

“bright line” Open Internet rules are adopted pursuant to the Commission’s authority to promote broadband deployment under Section 706 or under Sections 201 and 202. This small business-friendly approach would also avoid subjecting small ISPs to other and utterly unnecessary forms of regulation and Section 208 complaints or federal lawsuits concerning their provision of broadband Internet access service under these provisions of Title II. The formal complaint procedures established in the Commission’s 2010 Open Internet Order, which are based on its Part 76 cable access complaint rules that, as the Commission said, “best suit the needs of open Internet disputes that may arise” can govern formal complaints brought against small ISPs,<sup>7</sup> and the Commission’s informal complaint procedures pursuant to Section 1.41 of the Commission’s rules will continue to apply to informal complaints brought under the Open Internet rules, as specified in that Order.

ACA submits that the Commission has a sufficient record to undertake the forbearance requested by ACA and its members. Section 10 directs the Commission to forbear from “applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets” upon its determination that the three prongs of the test for forbearance are met.<sup>8</sup> Any blanket forbearance analysis concerning a class of small ISPs under the three prongs should be straightforward, particularly because the record supports such action and the Commission here would not be removing existing rules, but rather refraining from imposing them in the first instance.<sup>9</sup>

Commission precedent supports granting nationwide forbearance in the streamlined fashion ACA requests, and such forbearance would meet Section 10 requirements because application of these Title II provisions is not necessary for the protection of consumers or to advance the public interest. First, applying any regulation or provision of Title II is unnecessary “to ensure that the charges, practices, classifications, or regulations by, for, or in connection with [broadband Internet access services] are just and reasonable and are not unjustly or unreasonably discriminatory” given the extent of competition in markets served by small ISPs and the fact that Section 706 is available as a fully sufficient regulatory backstop. Second, the record is devoid of evidence that there have been any harms caused by small ISPs that makes Title II regulation “necessary for the protection of consumers” of broadband Internet access service. Indeed, absent any Title II regulation of broadband Internet access service, consumers in these markets have reaped tremendous and increasing benefits from these ISPs. Third, and finally, forbearance would be consistent with the public interest and promote continued broadband investment and competition, as demonstrated by the variety of providers and broadband options available in the marketplace today, as well as the scale of investment by these providers, which developed in the absence of Title II regulation.<sup>10</sup> Accordingly, the Commission is on solid ground in granting the forbearance ACA requests.

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<sup>7</sup> *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, ¶ 155 (2010) (“2010 Open Internet Order”), aff’d in part, vacated and remanded in part sub nom. *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (“Verizon”).

<sup>8</sup> 47 U.S.C. § 160(a).

<sup>9</sup> See *Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd 7866, ¶ 73 (2010) (Commission initiated forbearance from application of provisions of Title II unnecessary to protect Internet openness would stand in a “different regulatory posture” than the usual forbearance petition). See also *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, ¶ 137 (1994).

<sup>10</sup> 47 U.S.C. § 160(a)(1)-(3). See ACA Jan. 12<sup>th</sup> Ex Parte at 10-11. See also *Protecting and Promoting the Open Internet*, Letter From Kathryn A. Zachem, Senior Vice President, Comcast Corp., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 23-25 (filed Dec. 24, 2014) (Indeed, in view of the

The Commission Can Derive Definitions of “Small” ISP for Title II Forbearance and Transparency Enhancements Exemption from the Communications Act and its Decisions. In response to questions as to how ACA would define “small” for purposes of the relief it has previously requested, ACA acknowledged that Congress and the Commission have defined “small” in various ways.<sup>11</sup> For purposes of forbearance from application of Sections 201(b), 202, 208 and the related enforcement provisions of Title II to the provision of broadband Internet access service by small ISPs, ACA suggested that the Commission should first look to the Communications Act and of most relevance would be Section 251(f),<sup>12</sup> which was adopted as part of the Telecommunications Act of 1996. Section 251(f) provides 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<sup>13</sup> until a state commission rules otherwise<sup>14</sup> 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.”<sup>15</sup> At the time the 1996 Act was enacted, there were more than 150 million access lines.<sup>16</sup> Access lines today are estimated to be about 80 million,<sup>17</sup> 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.<sup>18</sup> 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

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broadband industry’s long history of delivering higher speeds, greater value, and more choices to consumers, along with the Commission’s proposed safeguards, the forbearance analysis under Section 10 should be straightforward and readily demonstrate that no Title II requirements should be imposed on broadband Internet access service providers. The competitive conditions in today’s broadband marketplace, which is free of obligations imposed pursuant to Title II, are even more compelling than those that warranted forbearance from much of Title II other circumstances.); *Protecting and Promoting the Open Internet*, Letter From Matthew A. Brill, Latham & Watkins LLP, Counsel for the National Cable & Telecommunications Association to GN Docket Nos. 14-28, 10-127, at 19-21 (filed Dec. 22, 2014) (“As explained below, the Commission could grant forbearance from Title II in accordance with Section 10 by relying on two key considerations – the extraordinary benefits that broadband ISPs have delivered to consumers absent any Title II regulation, and the existence in Section 706 as a regulatory backstop if the Commission were to conclude that further regulation of ISPs is warranted.”).

<sup>11</sup> See, e.g., *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, Appendix B, Initial Regulatory Flexibility Analysis, ¶¶ 45-46 (2014) (small cable companies and systems; small cable operators).

<sup>12</sup> See 47 U.S.C. § 251(f). See also 47 C.F.R. §§ 51.401, 51.403, 51.405.

<sup>13</sup> “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.”

<sup>14</sup> See 47 U.S.C. § 251(f)(1).

<sup>15</sup> See 47 U.S.C. § 251(f)(2).

<sup>16</sup> See Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission Report, Local Telephone Competition at the New Millennium, at 7 (rel. Aug. 31, 2000).

<sup>17</sup> 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).

<sup>18</sup> See Federal Communications Commission Report, Internet Access Services: Status as of December 31, 2013, at Tables 1-4 (rel. Oct. 16, 2014).

economically burdensome to the provider and have an adverse impact on users of the service generally.<sup>19</sup>

With respect to exemption from the imposition of any enhanced transparency requirements under consideration by the Commission, particularly those intended to inform edge providers, ACA suggested that Section 251(f) would also be an appropriate definition. The record confirms that transparency enhancements aimed at providing edge providers better visibility into ISP network management practices and network performance should only be required of the nation's largest "eye-ball ISPs," who collectively serve the vast majority of broadband Internet subscribers.<sup>20</sup>

In response to questions about whether the Commission has used other definitions of "small," ACA noted that the Commission did so in its 2013 Rural Call Completion Order. There, the Commission imposed both behavioral and recordkeeping obligations on providers that initiate long-distance voice service to address demonstrable problems with call completion in rural areas. However, the Commission created an exception for covered providers that were deemed small from the recording, retention and reporting rules, in recognition of the fact that compliance "would burden many providers with new obligations without significantly improving the data that are filed with the Commission."<sup>21</sup> The Commission set the threshold for the exception at 100,000 subscriber lines, after finding that "the 100,000 subscriber-line threshold should capture as much as 95 percent of all callers."<sup>22</sup>

Irrespective of which definition of small that is chosen by the Commission, exempt ISPs would still be required to comply with the transparency requirements contained in Section 8.3 of the Commission's rules today, which requires them to post a unitary set of disclosures aimed at both consumers and edge providers, as provided for in the guidance issued by the Commission's General Counsel and Enforcement Bureau Chief in 2011.<sup>23</sup> Consumers and edge providers would remain protected by these disclosures, as they have been since they went into effect four years ago. The lack of verified complaints and enforcement actions is testimony to the fact that the current disclosures are working and that no harm will befall either the consuming public or Internet edge providers of any size if small ISPs remain subject only to the 2010 transparency requirements.

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<sup>19</sup> 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.*

<sup>20</sup> Indeed, it is evident in the record in this and other proceedings that when edge providers argue that ISPs are implementing interconnection or network management practices that in their opinion violate Open Internet principles, their concerns are only focused on a handful of "large eye-ball" ISPs. ACA Reply Comments at 12 n.23, 63-64. In fact, in stating their concerns, these commenters explicitly disclaim that small ISPs are part of the problem. *Id.* For example, in its comments in the Comcast-TWC-Charter merger proceeding, Cogent explains that "smaller residential broadband networks continued to upgrade both peering and transit ports and Cogent has had no congestion problems with those networks." *Id.* (citing *Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, Comments of Cogent Communications Group, Inc., GN Docket No. 14-57, at 27 (filed Aug. 26, 2014)).

<sup>21</sup> *Rural Call Completion*, Report, Order, and Further Notice of Proposed Rulemaking, 28 FCC Rcd 16154, ¶ 27 (2013).

<sup>22</sup> *Id.*, ¶ 27.

<sup>23</sup> 47 C.F.R. § 8.3; *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).

ACA ended by once again urging the Commission to avoid risking the obvious adverse and unnecessary outcomes of reclassification for small ISPs and 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) that are not necessary to protect the open Internet once the commission has adopted its "no blocking," "no throttling," and "no paid prioritization" rules. At the very least, complainants seeking relief against small ISPs should be restricted to filing before the Commission for remedial action only under the informal and formal complaint rules adopted by the Commission in its 2010 Open Internet Order. This will balance the needs of complainants for remedial action without threatening the financial viability of small 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*): Gigi Sohn  
Jonathan Sallet  
Stephanie Weiner  
Matthew DelNero  
Rebekah Goodheart