

February 20, 2015

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

Re: Notice of Ex Parte Communications, GN Docket Nos. 10-127, 14-28

Dear Ms. Dortch:

On February 19, 2015, Harold Feld, Senior V.P., and Gene Kimmelman, President of Public Knowledge (“PK”), spoke with Jon Sallet, General Counsel, with regard to the above captioned proceedings.

PK urged that the Commission should affirm that it would be unjust and unreasonable for a broadband Internet access provider to engage in practices with respect to the exchange of Internet traffic between the provider’s end user customers and edge providers or other networks that have the purpose or effect of circumventing or undermining the effectiveness or goals of the Commission’s open Internet rules.

PK argued that such language would not imply or create any authority for traditional ratemaking. The Commission’s authority to explicitly set prices through ratemaking procedures, and to require substitution of its own price based on acceptable rate elements, reasonable rates of return, and other traditional mechanisms of price regulation rely on Sections 203-05 and, where directly applicable to interconnection disputes, Sections 251-52. Because the Commission would be adjudicating this matter as a conduct matter under Sections 201-02, rather than as an interconnection matter under Section 251, the Commission’s authority under Section 251 (and 252 in cases where relevant) would be inapplicable to any complaint brought under the open Internet rules.¹

If the Commission explicitly forbears from Sections 203-05, it lacks authority to conduct traditional rate regulation and set a specific rate. As the Supreme Court has explained, Section 203 constitutes the “heart of the common carrier section of the Communications Act.”² Congress explicitly enacted Sections 203-05 to address perceived deficiencies in the rate regulation of

¹ The Commission would not, and should not, opine on the application of its powers to set rates in interconnection cases involving IP interconnection generally, which is properly considered as part of the “Tech Transition” docket in Docket No. 13-05 and related proceedings. Nor would any opinion here limit the Commission’s general enforcement power, or prejudice the result of any ongoing investigation. Such questions are properly reserved for another day, when they are properly before the Commission.

² *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 229 (1994).

common carriers under the Interstate Commerce Commission under the Mann-Elkins Act of 1910.³ As the D.C. Circuit explained in *Orloff v. FCC*, forbearance from Section 203-05 “dissolve[s] what the Supreme Court described as the ‘indissoluble unity’ between § 203’s tariff-filing requirement and the prohibition against rate discrimination in § 202.”⁴ Rather, as the *Orloff* Court explained, Sections 201/202 prevents rates and conduct that are unreasonable. Such authority clearly extends to prohibiting conduct that is inherently unreasonable. It also authorizes the Commission to act where lack of competition “or other market failures limit[] the ability of consumers to protect themselves.”⁵ In this, Sections 201/202 generally resemble the traditional powers of consumer protection agencies and the anti-trust laws to restrain predatory pricing, address onerous terms and conditions, and prohibit anti-competitive conduct.⁶ This kind of pro-competitive and pro-consumer regulation is found in numerous agencies that do not engage in traditional rate making and are not considered to be exercises in “rate regulation” simply because they limit or prohibit what a business may charge a customer.

In this regard, *Ad Hoc Telecommunications Users Committee v. FCC*⁷ is likewise instructive. As noted there, forbearance from Section 203-05 and application solely of Sections 201/202 and 208 constitutes a shift from traditional ratemaking to a more generalized duty not to “gouge” customers.⁸ Likewise, *Ad Hoc* explicitly endorsed a combination of Section 706 authority and Section 201/202 authority to take “action forcing” decisions that facilitate investment in infrastructure.⁹ To the extent that the proposed language requires providers to invest adequately in their interconnection facilities, it is fully consistent with and authorized by Section 706 and does not constitute “rate regulation.”

Need To Retain Sections 206 & 207.

PK also stressed the need to retain Sections 206 and 207 as essential consumer protections. Section 206 imposes liability for damages for violations of rules or for engaging in

³ See, e.g., *A Legislative History of the Communications Act of 1934* (Max D. Paglin, Ed.), Oxford University Press (1989) at 437-442 (letter of Senator Dill, Chair of the Senate Commerce Committee to Sam Rayburn, Chair, House Commerce Committee, explaining Senate bill and differences with existing Interstate Commerce Act provisions). It is useful to note that the carriers of the time made the same hysterical claims that Title II regulation would result in companies unable to function due to bureaucratic interference and uncertainty, and that regulation was wholly unnecessary in light of the low prices, high quality of service, and competitive nature of the communications market in 1934. See *Id.* at 199-221 (Statement and examination of Walter S. Gifford, President American Telephone & Telegraph, before the Senate Commerce Committee).

⁴ *Orloff v. FCC*, 352 F.3d 415, 418-19 (D.C. Cir. 2003).

⁵ *Id.* at 420.

⁶ Indeed, in light of the Common Carrier Exception in the Fair Trade and Competition Act, Sections 201/202

⁷ 572 F.3d 903 (D.C. Cir. 2009).

⁸ *Id.* at 909-10.

⁹ *Id.* at 910-11.

unjust and unreasonable conduct. This provision is necessary to mandate refunds in cases where consumers are overcharged. While Section 201/202 prohibit as unlawful particular practices, and the Commission has general authority to impose fines, its ability to order refunds or other compensation for abusive conduct is less clear. Retaining Section 206 provides clear statutory authority to order providers engaged in abusive conduct to make appropriate recompense.

Similarly, Section 206 is necessary to allow edge providers or other commercial providers harmed by the conduct of the carrier to recover the damages caused by the carrier's unlawful or unreasonable conduct. Without the ability to recover damages, the limited ability of the Commission to impose fines would not create sufficient deterrence to a carrier from repeated violations against vulnerable rivals or edge providers. Forbearing from liability from damages would render enforcement provisions ineffective, and make vindication under Section 208 a Pyrrhic victory of little value to those the Commission intends to protect by the rule.

Finally, as documented by the M-Lab Study of the widespread impacts of the congestion caused by recent interconnection fights,¹⁰ conduct implicated by the rules can cause significant widespread damage to parties helpless to resolve the dispute. Section 206 provides a necessary means of making such parties whole, and provides a strong incentive to providers to avoid conduct with potentially widespread consequences.

Section 207 is equally vital as a means of allowing consumers and edge providers, particularly those located in rural areas, to bring complaints in the court of their choice. Congress recognized in adopting Section 207 that permitting consumers to bring complaints where convenient for them, before magistrates familiar with local conditions, local expectations and local standards of conduct was a necessary element of consumer protection. It ensures that, if a future Commission proves less than diligent in processing complaints, that consumers have a way to secure much needed relief in the provision of a vital service.

As 80 years of history have shown, Sections 206 and 207 have never resulted in a “bonanza for lawyers” or imposed undue litigation burdens on providers. Surely if “unjust and unreasonable trolls” were going to appear, they would have already done so. No critic has pointed to any evidence that lawyers previously capable of suing under Section 207 for damages under Section 206 would suddenly “wake up” to the possibility for the first time in 80 years as a consequence of the Commission's decision to leave these provisions in place. As a final safeguard, in the event the hypothetical swarm of unjust and unreasonable trolls do emerge from whatever dark crevices or mountain lairs in which they lie hidden, the Commission can subsequently forbear and drive the unjust and unreasonable trolls back to their caves.

¹⁰ M-Lab, “ISP Interconnection and Its Impact On Consumer Internet Performance,” October 28, 2014. Available at: http://www.measurementlab.net/static/observatory/M-Lab_Interconnection_Study_US.pdf



In accordance with Section 1.1206(b) of the Commission's rules, this letter is being filed with your office. If you have any further questions, please contact me at (202) 861-0020.

Respectfully submitted,

/s/ Harold Feld
Senior Vice President
PUBLIC KNOWLEDGE

cc: Jonathan Sallet