



April 21, 2010

Ex Parte

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Preserving the Open Internet GN Docket No. 09-191, Broadband Industry Practices, WC Docket No. 07-52, Comment Sought on the Role of the Universal Service Fund and Inter-carrier Compensation in the National Broadband Plan, NBP Notice #19, GN Docket Nos. 09-47, 09-51, and 09-137

Dear Ms. Dortch:

Following the D.C. Circuit's recent decision in *Comcast Corp. v. FCC*,¹ some have suggested that the Commission ought to reclassify cable modem service as a telecommunications service, subject to Commission authority under Title II of the Communications Act. Vonage submits this *ex parte* to note that there is no need for such a reclassification—nothing in the *Comcast* decision forbids the Commission from adopting network neutrality principles of the sort it sought to enforce against Comcast pursuant to its ancillary jurisdiction. In *Comcast*, the court held that the Commission had not identified a statutory basis for its actions; the court did not hold that the Commission could not do so. Nevertheless, if the Commission does reconsider its decision to classify Comcast's cable modem service as an information service, Vonage urges the Commission to focus any reclassification decision on broadband *transmission* services, not applications that are delivered over broadband. There is no need, and can be little justification, for subjecting IP-delivered applications to extensive Title II regulation. Finally, Vonage notes that nothing in the *Comcast* decision calls into question Vonage's

¹ No. 08-1291 (Apr. 6, 2010).

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earlier analysis of the Commission’s authority to establish a broadband-focused universal service support mechanism or to require recipients of such support to offer broadband on a standalone basis.²

1. The Commission Has Ancillary Authority To Adopt The Net Neutrality Principles It Sought To Enforce Against Comcast.

In its *Comcast Order*,³ the Commission found that some of Comcast’s network management practices—in particular, its secret interference with transmissions associated with certain peer-to-peer applications—violated the network neutrality principles the Commission announced in its Internet Policy Statement.⁴ The D.C. Circuit vacated the Commission’s *Comcast Order*, holding that “the Commission has failed to tie its assertion of ancillary authority over Comcast’s Internet service to any ‘statutorily mandated responsibility.’”⁵ Notably, however, the court did not say that the Commission could not promulgate and enforce such network neutrality principles under its ancillary authority. Instead, the court held that the Commission had not identified an appropriate statutory basis for doing so. The Commission could address the D.C. Circuit’s concern by anchoring its exercise of ancillary jurisdiction to alternative statutory bases—bases the Commission’s brief to the D.C. Circuit in *Comcast* has already suggested.

In *Comcast*, the D.C. Circuit explained that the Commission may exercise its ancillary jurisdiction when two conditions are satisfied: “(1) the Commission’s general jurisdictional grant under Title I ... covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”⁶ As the court observed, there is no dispute that the first prong of this test is easily met.⁷ Moreover, though the court held that the Commission had not yet done so, the Commission could adopt the net neutrality principles it sought to enforce against Comcast because those principles are, indeed, “reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”

As the Commission explained in its brief, Section 706(a) of the Telecommunications Act provides that the Commission “shall encourage the deployment

² See, e.g., Letter from Brita D. Strandberg, Counsel to Vonage Holdings Corp., to Marlene Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, and 09-137 (filed Jan. 27, 2010) (“*Vonage Jan. 27, 2010 ex parte*”).

³ *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd 13028 (rel. Aug. 20 2008) (“*Comcast Order*”).

⁴ See *id.* at 13058 ¶ 51; see also *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14986 (rel. Sept. 23, 2005) (“*Internet Policy Statement*”).

⁵ *Comcast*, slip op. at 36, quoting *Am. Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005).

⁶ *Comcast*, slip op. at 7, quoting *Am. Library*, 406 F.3d at 691-92.

⁷ *Comcast*, slip op. at 7-8.

on a reasonable and timely basis of advanced communications capability.”⁸ The D.C. Circuit acknowledged that this provision “contain[s] a direct mandate” but noted that in a prior Commission order, the Commission had concluded that Section 706(a) did not constitute an independent grant of regulatory authority.⁹ Because the Commission had not explicitly reconsidered that conclusion, Section 706(a) could not serve as the statutory basis for the *Comcast Order*. But nothing would prohibit the Commission from doing just that, and concluding that Section 706(a)—and for that matter, Section 706(b)¹⁰—does indeed provide a statutory grant of authority.¹¹

Even without reconsidering Section 706, though, the Commission can point to a statutory mandate that justifies its exercise of ancillary authority to enforce network neutrality. In particular, the network neutrality principles the Commission sought to enforce against Comcast are reasonably ancillary to the Commission’s authority under Section 201 of the Act.¹² To take just one obvious example, interconnected Voice over Internet Protocol (“VoIP”) service offers competition to traditional telephony services that are regulated under Section 201. Any interference with VoIP services by a broadband service provider would threaten that competition. But that would directly conflict with the Commission’s duty to ensure “just and reasonable” rates (as mandated by Section 201), which the Commission pursues by promoting competition.

For similar reasons, network neutrality rules are ancillary to the Commission’s authority under Title III of the Act. More than 40 years ago, the Supreme Court upheld the Commission’s authority to prohibit cable television systems from importing distant broadcast signals into other markets in order to protect local broadcasting, an important responsibility of the Commission’s.¹³ Unreasonably discriminatory network management practices by Internet Service Providers today likewise could threaten local broadcasters, and can be regulated under the same principle.¹⁴ In short, broadband Internet service can

⁸ Brief for Respondents Federal Communications Commission and United States of America at 40, *Comcast Corp v. FCC*, No. 08-1291 (filed Sept. 21, 2009), citing 47 U.S.C. § 1302(a) (formerly codified at 47 U.S.C. § 157 nt.) (“*Comcast FCC Br.*”).

⁹ See *Comcast*, slip op. at 30-31.

¹⁰ Section 706(b) provides that the Commission shall periodically determine whether advanced telecommunications capabilities are being deployed to all Americans on a reasonable and timely basis and, if it concludes they are not, “it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.” 47 U.S.C. § 1302(b).

¹¹ See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810-11 (2009) (noting that an agency is entitled to change its mind).

¹² The Commission’s brief recognized this point, see *Comcast FCC Br.* at 44-45, although the D.C. Circuit concluded that the reasoning in the Commission’s brief was not adequately set forth in the *Comcast Order* itself, see *Comcast* at 33-34.

¹³ See *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

¹⁴ The Commission’s brief also recognized that network neutrality principles could be promulgated as ancillary to Title III. See *Comcast FCC Br.* at 43-44. But here again, the

be used to deliver services that are similar to, compete with, and directly affect services that are regulated under the Commission's authority under Title II and Title III of the Communications Act. The Commission's ancillary authority extends to communications over wire and radio that have an effect on services that are regulated under those provisions, and so the Commission may adopt network neutrality principles pursuant to its ancillary authority.¹⁵

2. If the Commission Reclassifies Broadband Internet Service As A Telecommunications Service, It Should Reclassify Only Transmission Service.

Some have suggested that the Commission ought to reclassify broadband Internet service as a telecommunications service in order to put the Commission's authority over such services beyond any question. Such an approach, in Vonage's view, is uncalled for, because, as set forth above (and as detailed in the Commission's brief to the D.C. Circuit), the Commission's ancillary authority is broad enough to support network neutrality rules. But if the Commission does choose to reconsider the classification of broadband Internet services, it should proceed cautiously, reclassifying only services like DSL and cable modem services that are fundamentally *broadband transmission* services. The Commission should distinguish such services from IP-based *application* services, which should not be classified as telecommunications services.

The Commission is properly focused on finding a way to ensure that its network neutrality principles can be lawfully enforced. But even if the Commission determines that the best way to enforce those principles is by reclassification of Internet services, there is no need for the Commission to extend Title II regulation to any IP-based application services. To take the example of Vonage's service, the Commission has never found it necessary to regulate Vonage as a common carrier under Title II in order to impose appropriate regulations relating to 911,¹⁶ universal service,¹⁷ CALEA,¹⁸ and

D.C. Circuit declined to consider the argument, concluding that the Commission had not relied on that authority in the *Comcast Order*. See *Comcast* at 34.

¹⁵ Vonage has previously encouraged the Commission to codify its Internet Policy Statement and to adopt certain additional principles regarding network management practices to protect consumers. See Comments of Vonage, WC Docket No. 07-52 (filed Feb. 13, 2008).

¹⁶ See *E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245 (rel. June 3, 2005).

¹⁷ See *Universal Service Contribution Methodology*, 21 FCC Rcd 7518 (rel. June 27, 2006).

¹⁸ See *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, 20 FCC Rcd 14989 (rel. Sept. 23, 2005).

CPNI.¹⁹ And nothing in the D.C. Circuit’s decision in *Comcast* calls into doubt the Commission’s authority relative to any of those issues.²⁰

Without burdensome regulation as common carriers, there are low barriers to entry to the market for IP-based applications. This makes it much easier—especially for startups, entrepreneurs, and small businesses—to innovate and offer new services. Indeed, this is part of the great promise of the Internet, one recognized by Congress when it declared that “[i]t is the policy of the United States -- to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”²¹ The Commission should continue to pursue this policy by refraining from classifying IP-based *applications* that are transmitted over the Internet as telecommunications services subject to Title II.

3. Nothing In *Comcast* Undermines The Commission’s Authority To Establish A Universal Service Fund Mechanism For Broadband Or To Require Recipients To Offer Standalone Broadband.

Vonage has previously encouraged the Commission to modify the Universal Service program to support broadband services for more Americans as well as to require recipients of broadband support to offer broadband service on a standalone basis, without tying it to voice or video services, and has explained that the Commission has authority to do so.²² Nothing in the D.C. Circuit’s decision in *Comcast* calls into question any of Vonage’s analysis in that regard.

The D.C. Circuit’s decision in *Comcast* dealt only with the Commission’s authority to enforce network neutrality principles pursuant to its ancillary authority. The court there concluded that the Commission had not adequately tethered its exercise of its ancillary authority to a statutory basis. Vonage, however, has explained that Section 254 of the Act provides all the authority necessary for the Commission to establish a universal service support mechanism for broadband service.²³ Indeed, Vonage’s analysis did not even mention the Commission’s ancillary authority. So, while the Commission could

¹⁹ See *Implementation of the Telecommunications Act of 1996*, 22 FCC Rcd 6927 (rel. April 2, 2007).

²⁰ The Commission has a specific statutory mandate with regard to each. See 47 U.S.C. § 251(e)(3) (911); 47 U.S.C. § 615a-1 (in a statute passed after the Commission had imposed 911 obligations on VoIP providers, confirming that the FCC had such authority without calling into question the Commission’s earlier action); 47 U.S.C. § 254(d) (universal service); 47 U.S.C. §§ 1001-10 (CALEA); 47 U.S.C. § 222 (CPNI).

²¹ 47 U.S.C. § 230(b)(2).

²² See *Vonage Jan. 27, 2010* ex parte.

²³ See *id.* (arguing that 47 U.S.C. § 254 provides the Commission with authority to establish a broadband support mechanism).

also cite its ancillary authority in establishing such a support mechanism,²⁴ the *Comcast* decision does not pose any obstacle for the Commission to establish the support mechanism Vonage described.

* * *

The D.C. Circuit's decision in *Comcast*, though it has received a great deal of attention, did not mark a dramatic change in the law. As the court saw it, it was merely applying a test it had set out years before (which it had "distilled" from cases from decades earlier).²⁵ More to the point, the decision did not fundamentally challenge the Commission's authority to establish and enforce network neutrality principles pursuant to its ancillary authority. Neither did it call into question the Commission's authority to impose the regulations it has already imposed on VoIP providers like Vonage, without the need to reclassify such services as telecommunications services—even if the Commission chooses to reclassify broadband transmission services as telecommunications services. Nor did the *Comcast* decision cast doubt on the Commission's authority to establish a universal service broadband support mechanism along the lines that Vonage has advocated.

Judge Tatel closed his opinion for the court in *Comcast* by emphasizing the court's agreement with the Commission that "Congress gave the [Commission] broad and adaptable jurisdiction so that it can keep pace with rapidly evolving communications technologies" and that "[t]he Internet is such a technology." The court granted the petition for review not because these fundamental principles were in question, but rather because the Commission had not, in that case, adequately identified the statutory responsibility to which its exercise of jurisdiction was tied.²⁶

If you have any questions or require any additional information, please do not hesitate to contact me at (732) 444-2216.

Respectfully submitted,

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²⁴ Such a mechanism would, after all, in addition to being authorized by Section 254, be reasonably ancillary to the statutory mandate embodied in Section 254 to establish the universal service fund.

²⁵ See *Comcast*, slip op. at 6-7 (explaining that the two-part test of *American Library Ass'n* was "distilled [from] the holdings of" *Southwestern Cable*, 392 U.S. 157, *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972), and *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979)).

²⁶ See *Comcast*, slip op. at 36.