



May 5, 2010

**ELECTRONIC FILING**

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

**Re: *Ex Parte*, GN Docket Nos. 09-191 & 09-51, WC Docket No. 07-52**

Dear Ms. Dortch:

This is to inform you that yesterday, I met with Austin Schlick, General Counsel of the FCC. We discussed Skype's Reply Comments in the above-reference docket. In particular, I stressed that whatever legal theory is ultimately selected to establish openness rules or implement provisions of the National Broadband Plan, this theory should neither expand nor restrict existing rights and obligations established pursuant to section 251(c)(3) of the Act or disturb the status of private carrier arrangements.

A number of parties in this and other proceedings have conflated the idea of "unbundling" with the nondiscrimination safeguard proposed in the NPRM. Skype understands "unbundling" to mean at least two things: requesting carrier unbundled network element access pursuant to section 251(c)(3) of the Act; and Computer III transmission unbundling previously utilized by independent ISPs. We take this opportunity to reiterate Skype's view that the Commission should keep these policies entirely separate from network neutrality rules and should not expand or contract 251(c)(3) or Computer III rights and responsibilities.

Put simply, an openness rule that stops a carrier from discriminating unreasonably is very different from a regime designed to provide wholesale access rights. Skype seeks neither rights under Section 251(c)(3) of the Act nor entitlements to wholesale access like those established by Computer III. Instead, Skype supports a common-sense safeguard that protects a Skype user's right to use the Internet connection they paid for, free of unreasonable discrimination.

Classifying broadband Internet access services as Title II telecommunications services would not require a return to a regulatory regime of Computer III non-structural safeguards on the telecommunications component of broadband access services, or unbundling requirements or other wholesale access requirements.<sup>1</sup> With respect to the unbundling requirements of Section 251(c)(3) of the Act, the Commission made clear in its 2005 *Wireline Classification Order* that the classification of broadband Internet access services does not expand or restrict an incumbent operator's 251(c)(3) unbundling obligations because the operative question is whether the competitive carrier requesting unbundled elements is offering a telecommunications service.<sup>2</sup> This is the correct analysis and is undisturbed by classifying retail broadband Internet access service.

Furthermore, if the transmission component of broadband Internet access services is classified as a Title II telecommunications service, such classification should be narrowly focused on "last mile" transmission facilities of broadband Internet access services and not to services provided by Internet backbone networks. Retail broadband Internet access services are different services entirely from services provided by Internet backbone networks, and classification of the transmission component of the former should have no bearing on the latter. For example, when the Commission classified broadband Internet access services as Title I information services, such classification did not address nor have any bearing on the classification of backbone networks.<sup>3</sup>

Internet backbone operators are generally considered private carriers.<sup>4</sup> The relevant case law and Commission precedent establish a multi-factor test to distinguish private carrier arrangements from common carrier services. This test generally evaluates whether the arrangement at issue is "individualized," "medium-to-long range" and, significantly, whether the entity providing the service possesses market power.<sup>5</sup> With respect to Internet backbone services —

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<sup>1</sup> See Reply Comments of Skype Communications S.A.R.L., GN Docket No. 09-191, WC Docket No. 07-52, at 2 (filed Apr. 26, 2010).

<sup>2</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order, FCC 05-150, ¶ 127 (2005).

<sup>3</sup> See generally *id.* at ¶ 9 (discussing the scope of broadband Internet access services covered by the *Wireline Classification Order*).

<sup>4</sup> See Jonathan E. Nuechterlein & Philip J. Weiser, *Digital Crossroads: American Telecommunications Policy in the Internet Age*, at 213 (2005) ("Examples of . . . private carriers include the Internet backbone operators . . .").

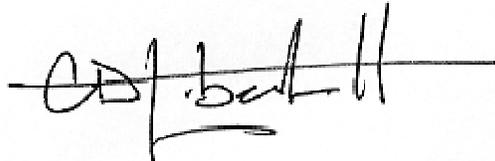
<sup>5</sup> In considering whether a service provider may operate as a private carrier, the Commission has considered four relevant factors: (1) whether the provider will engage in "individualized" negotiations resulting in contracts "tailored to the needs of particular customers"; (2) whether the customers are sophisticated business entities; (3) whether the contracts will be "medium-to-long range"; and (4) whether the provider

such as services offered between backbone providers or between a backbone provider and a web hosting provider – straightforward application of these factors support considering these services as falling under a private carriage regime.

A number of parties have filed Reply Comments in the Open Internet proceeding which introduce arguments calculated to distract the Commission from its core goal of preserving an open Internet. The Commission should not be fooled into confusing 251(c)(3)-style rights with the six-principle framework described in the NPRM. We therefore urge the Commission to remain focused on preserving openness on the connection that most Americans use to access the Internet – residential broadband Internet access service.

Please do not hesitate to contact me if you have any further questions.

Respectfully submitted,



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possesses “market power” with respect to the services at issue. *NORLIGHT Request for Declaratory Ruling*, Declaratory Ruling, 2 FCC Rcd 132, 134, ¶¶ 19-21 (1987). With respect to Internet backbone services, as opposed to retail broadband Internet access services, these factors – particularly the second and fourth – support such backbone services being offered under private carriage. *See also* Nat’l Ass’n of Regulatory Comm’rs v. FCC, 525 F.2d 630, 642 (D.C. Cir. 1976) (discussing the distinction between common carrier and private carrier services); *Virgin Islands Tel. Co. v. FCC*, 198 F.3d 921, 922 (D.C. Cir. 1999) (upholding the FCC’s determination that AT&T’s submarine cable system in the U.S. Virgin Islands is a private or noncommon carrier); *Cable & Wireless, PLC*, Cable Landing License, FCC 97-204, 12 FCC Rcd 8516, 8520-23, ¶¶ 11-17 (1997) (finding that C&W’s submarine cable can be operated on a private carriage basis based in part on C&W’s lack of control over bottleneck facilities).