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December 10, 2010

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

Re: Ex Parte Notice
GN Docket No. 09-191
GN Docket No. 10-127
WC Docket No. 07-52

Dear Ms. Dortch:

On December 9, 2010, the undersigned and Howard Symons of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo met with Austin Schlick, General Counsel, Peter Karanjia, Deputy General Counsel, and David Tannenbaum, Special Counsel; and separately with Zachary Katz, Legal Advisor to Chairman Genachowski for Wireline Communications, International and Internet Issues regarding the above-captioned proceedings and in particular the sources of the Commission's authority to adopt "open Internet" rules. The substance of our discussions is set out more fully below.

NCTA's "Third Way comments" noted that the Commission "could justify a 'backstop' prohibition on anticompetitive practices by broadband Internet service providers as ancillary to its statutory obligations elsewhere in the Act."^{1/} We noted, however, that the Commission at that time had not put forward a sufficiently definitive proposal and that "it is not possible to say whether openness rules in the abstract would fall within the scope of the Commission's Title I authority."^{2/} Such a proposal has now been presented in the form of proposed legislation recently submitted in the docket by Chairman Waxman.^{3/}

^{1/} Comments of the National Cable & Telecommunications Association, GN Docket No. 10-127 (filed July 15, 2010) at 42-46 ("NCTA Third Way Comments").

^{2/} *Id.* at 44.

^{3/} Letter from Henry A. Waxman, Chairman House Committee on Energy and Commerce, to the Honorable Julius Genachowski, Chairman, FCC, GN Docket No. 09-191, filed Dec. 3, 2010. We note that Chairman Genachowski has stated that the proposal under consideration by the Commission "would build upon the strong and balanced framework developed by" Chairman Waxman. *See* Remarks on Preserving Internet Freedom and Openness (Dec. 1, 2010), at 1 ("Genachowski Remarks") (available at http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1201/DOC-303136A1.pdf).

Having now had a chance to consider the “net neutrality” framework proposed by Chairman Waxman, we believe that adoption of this framework could be justified as reasonably ancillary to a number of the Commission’s statutory duties under Titles II and III, provided that the order adopting the framework does not materially alter the framework.^{4/} On the other hand, we believe that the Commission may not rely on section 628 of the Communications Act or section 706(a) of the Telecommunications Act of 1996 as a basis for asserting authority.

Title II

Adoption of the Waxman framework would be ancillary to the Commission’s responsibilities under several provisions of Title II of the Communications Act. For instance, the Commission could find that adoption of the framework would help facilitate consumer access to broadband-based alternatives to common carrier services such as Voice over Internet Protocol (“VoIP”).^{5/} Other broadband communications services like instant messaging and video conferencing also are replacing the functionality provided by traditional common carrier communications services and therefore also exert competitive pressure on the charges for those services.^{6/} It therefore would be defensible as a means of furthering the Commission’s express statutory duties under section 201 and 202 to ensure that common carrier services continue to be offered on just and reasonable terms and conditions.

By enabling consumers to make informed choices regarding broadband Internet access service, the Commission could decide that the transparency requirements proposed in the Waxman framework would help promote the competitiveness of VoIP and other broadband-

^{4/} See Statement of NCTA President & CEO Kyle McSlarrow Regarding Proposed FCC Rules to Preserve an Open Internet, Dec. 1, 2010 (available at <http://www.ncta.com/ReleaseType/Statement/McSlarrow-Statement-Regarding-Proposed-FCC-Rules-to-Preserve-an-Open-Internet.aspx>) (“Should the order change in any material way from our understanding, we reserve our rights to vigorously challenge any such rule.”). The uncertainty over jurisdiction is a function of having these issues addressed by an agency that must find authority within the limits of existing law, rather than by Congress. Cf. Genachowski Remarks at 3 (“moving this item to a vote at the Commission is not designed or intended to preclude action by Congress”).

^{5/} These alternatives include Voice over Internet Protocol (“VoIP”) services offered by broadband Internet access providers as well by “over-the-top” providers such as Vonage and Skype. See, e.g., *In the Matter of IP-Enabled Services*, 24 FCC Rcd 6039, ¶ 12 (2009) (“From the perspective of a customer making an ordinary telephone call, we believe that interconnected VoIP service is functionally indistinguishable from traditional telephone service.”); *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriber Data, and Development of Data on Interconnected Voice Over Internet Protocol (VoIP) Subscriber Data*, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 9691, ¶ 26 (2008) (“Interconnected VoIP service subscribers represent an important and rapidly growing part of the U.S. voice service market, and interconnected VoIP services are becoming increasingly competitive with other forms of local telephone service.”).

^{6/} In recognition of these developments, Congress recently expanded disabilities access requirements to include “advanced communications services” as well as traditional common carrier services. See Twenty-First Century Communications and Video Accessibility Act, Pub. L. No. 111-260; see also 156 CONG. REC. 6005 (daily ed. July 26, 2010) (remarks of Rep. Waxman) (“this legislation before us . . . ensur[es] that Americans with disabilities can access the latest communications technology.”); *id.* at 6004 (remarks of Rep. Markey) (“[t]he bill we are considering today significantly increases accessibility for Americans with disabilities to the indispensable telecommunications . . . tools of the 21st century”).

based communications services. Those transparency requirements would thereby facilitate the operation of market forces to discipline the charges and other practices of common carriers, in fulfillment of the Commission's obligations under sections 201 and 202.

The transparency provisions in the Waxman framework would also be reasonably ancillary to the Commission's authority under section 257.^{7/} Notably, the *Comcast* court acknowledged that "certain assertions of Commission authority could be 'reasonably ancillary' to the Commission's statutory responsibility [under section 257] to issue a report to Congress. For example, the Commission might impose disclosure requirements on regulated entities in order to gather data for such a report."^{8/} As AT&T has explained, section 257's reporting mandate provides a basis for the Commission to require providers of broadband Internet access service to disclose the terms and conditions of service in order to assess whether such terms hamper small business entry and, if so, whether any legislation may be required to address the problem.^{9/}

Title III

The Commission's duties under Title III to preserve and promote the system of local broadcasting could also serve as a source of ancillary authority for adopting the Waxman framework. In particular, section 303(r) gives the Commission authority to impose requirements "as may be necessary to carry out the provisions of this chapter."^{10/} The Commission could decide that, based on the growing importance of broadcast programming distributed over broadband networks to both television viewers and the business of broadcasting itself, ensuring that broadcast video content made available over broadband networks is not subject to unreasonable discrimination or anti-competitive treatment is necessary to preserve and strengthen the system of local broadcasting. Facilitating the availability of broadcast content on the Internet may also help to foster more efficient and intensive use of spectrum, thereby supporting the Commission's duty in section 303(g) to "generally encourage the larger and more effective use of radio in the public interest."^{11/} Such regulation also may advance enumerated objectives within section 309(j)(3), including "the development and rapid deployment of new technologies, products, and services for the benefit of the public."^{12/} As ancillary to both Title II and Title III, adoption of the Waxman framework is sufficient to cover broadband Internet access service provider activities with respect to all lawful Internet content, applications, and services.

^{7/} See Comments of AT&T Inc., GN Docket No. 10-127, at 30-31 (July 15, 2010) ("AT&T Third Way Comments"). See also Reply Comments of Fiber-to-the-Home Council, GN Docket No. 10-127, at 41 (Aug. 4, 2010) ("As the *Comcast* decision recognizes, Section 257 provides the Commission ample authority to impose disclosure requirements on broadband providers to ensure transparency regarding network management and consumer relations practices.") (citations omitted).

^{8/} *Comcast Corp. v. FCC*, 600 F.3d 642, 659 (D.C. Cir. 2010) (emphasis added) ("*Comcast*").

^{9/} AT&T Third Way Comments at 31.

^{10/} 47 U.S.C. § 303(r).

^{11/} 47 U.S.C. § 303(g).

^{12/} 47 U.S.C. § 309(j)(3)(A).

Section 628 and Section 706 Do Not Support Adoption of the Waxman Framework

As described above, the Commission would have ancillary authority under various provisions of Title II and Title III to adopt the Waxman framework. By contrast, the Commission may not rely on section 628(b) or 706(a).

Section 628. Section 628(b) cannot serve as a source of direct or ancillary authority for the Commission to impose any net neutrality regulations. By its terms, section 628(b) of the Communications Act is limited to addressing unfair practices by cable operators or satellite cable programmers that prevent or significantly hinder the ability of *multichannel video programming distributors* (“MVPDs”) to provide “*satellite cable programming.*”^{13/} Video delivered over the Internet has not been – and cannot be – construed to be “satellite cable programming,”^{14/} and the Commission has expressly declined to hold that Internet-based providers of video services constitute MVPDs.^{15/} Indeed, the Commission routinely separates and distinguishes between providers of Internet-delivered video and MVPDs.^{16/} Section 628(b) therefore cannot be applied directly to cable operators acting in their capacity as providers of broadband Internet access service.^{17/} The fact that a cable operator is an MVPD for some purposes does not empower the Commission to impose MVPD regulations on the operator’s other businesses, including its broadband service. Congress and the Commission have made clear that a cable operator’s non-cable businesses are not subject to regulation as MVPD.^{18/}

^{13/} 47 U.S.C. § 548(b) (emphasis added).

^{14/} See 47 U.S.C. § 605(d)(1) (defining “video programming that is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to subscribers”).

^{15/} See e.g. *Sky Angel U.S., LLC, Emergency Petition for Temporary Standstill*, 25 FCC Rcd 3879, ¶ 7 (2010) (video delivered via a subscriber’s Internet transmission path is not MVPD-delivered).

^{16/} See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, 19 FCC Rcd 10909, ¶¶ 74, 75 (2004) (asking how “currently available real-time Internet video compare to traditional MVPD and broadcast programming”); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 14117, ¶ 62 (2005) (seeking comment on “what criteria should be used to compare picture quality of Internet-based video to video programming distributed by traditional broadcasters and MVPDs.”). *Compare Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, 18 FCC Rcd 20885, ¶ 57 (2003) (applying copy protection encoding rules “to all MVPDs”) with 47 C.F.R. § 76.1901(b) (specifying that encoding rules “shall not apply to distribution of any content over the Internet”).

^{17/} The same is true with respect to the applicability of section 616’s prohibitions, which apply only to “cable operators or other multichannel video programming distributors.” For the reasons explained herein, those prohibitions only apply to MVPDs when they are acting in their capacity as MVPDs.

^{18/} See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd 4798, ¶¶ 60-69 (2002) (“cable modem service [i.e., broadband Internet access service offered by a cable operator over a cable system] is not a ‘cable service’ under the definition prescribed by the Act”), *cert denied*, *Nat’l League of Cities v. FCC*, No. 04-460 (Sept. 30, 2004), 543 U.S. 1021 (2004). See also H.R. Rep. No. 934, 98th Cong., 2d Sess. 44 (noting that “many cable systems provide a wide variety of cable services and other communications services as well” and including “all voice communications” on a list of “non-

Nor can section 628(b) serve as a source of ancillary authority to impose net neutrality requirements because such regulation would not further any of that provision's objectives. There is no basis for asserting that any cable operator or common carrier's practices with respect to Internet-delivered video could somehow "prevent or significantly hinder" an MVPD from providing satellite cable programming. There is no empirical support for the proposition that an MVPD is somehow prevented or significantly hindered from offering satellite cable programming unless it also offers Internet-delivered video. Indeed, millions of MVPD subscribers today receive satellite cable programming without subscribing to high-speed Internet service.^{19/}

Nothing in the D.C. Circuit's opinion in *NCTA v. FCC*^{20/} supports the view that section 628(b) can address cable operator practices that do not affect the provision of satellite cable programming by MVPDs. To the contrary, the D.C. Circuit itself cautioned against efforts to use section 628(b) in order to take "unreasonably overbroad action to achieve an objective Congress never intended to authorize."^{21/} Because there is no basis for contending that the regulation of video delivered over the Internet advances the Commission's duty to regulate unfair practices that prevent or significantly hinder MVPDs from delivering satellite cable programming, section 628(b) cannot be invoked as a source of ancillary authority.

cable services"). See also *Bell Atlantic Tel. Cos. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (when a firm provides both a common-carrier service and a private-carrier service, it cannot be characterized as a "common carrier" insofar as it provides the private-carrier service); *NARUC v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) ("[I]t has long been held that 'a common carrier is such by virtue of his occupation,' that is by the actual activities he carries on. Since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others"); *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 5101, ¶121 (2007) (franchise authorities' "jurisdiction" under Title VI over mixed use network offering cable and non-cable service "applies only to the provision of cable services over cable systems"). This principle is widely applied in other fields as well. See also *National Security Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (in interpreting a statute holding out reduced FOIA fees for any "representative of the news media," the court agreed that a journalistic firm is entitled to reduced fees only to the extent that it is engaged in news-gathering activities: "There is no reason to treat an entity with news media activities in its portfolio, such as CBS, Inc. or the Washington Post Co., as a 'representative of the news media' when it requests documents, from let us say the SEC, in aid of its nonjournalistic activities."); *Flanigan v. General Electric*, 242 F.3d 78, 87 (2d Cir. 2001) (fiduciary duties apply only when entity or person is acting in its capacity as a fiduciary); *Keach v. U.S. Trust Company*, 239 F. Supp. 2d 820, 826 (C.D. Ill. 2002) ("It is well-established that a fiduciary can only be liable to the extent that it was acting 'as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.'" (quoting *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000))); *Stewart v. Dutra Construction Company*, 343 F.3d 10, 14(1st Cir. 2003) ("Where, as here, the same entity is both employer and vessel owner, the question becomes whether the dual capacity defendant's alleged acts of negligence were committed in its capacity qua employer (for which it is immune from tort liability under §905(a)) or qua vessel owner (for which it may be held liable under § 905(b))").

^{19/} Relying on data from SNLKagan, NCTA estimates that, as of September 2010, there are 60.4 million Basic cable subscribers and 43.8 million high-speed Internet subscribers. <http://www.ncta.com/Statistics.aspx>.

^{20/} *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

^{21/} See *id.*, 567 F.3d at 666.

Apart from these fatal substantive infirmities, the Commission has failed to identify section 628(b) as a possible source of ancillary jurisdiction in any of its notices even as it sought comment on whether other provisions of the Act – including other provisions of Title VI – might give it authority to adopt net neutrality rules.^{22/} The Commission thus has no basis now to rely on this particular provision. Section 4(a)(2) of the Administrative Procedure Act (“APA”) provides that rulemaking notices must include a “reference to the legal authority under which the rule is proposed.”^{23/} The House report on this provision stated that the “required specification of legal authority must be done with particularity.”^{24/} The failure to identify this particular provision in any of its notices precluded fair and effective comment and thus forecloses the Commission from relying on it now given that the basis of the Commission’s statutory authority is central in this proceeding.^{25/}

Section 706(a). Nor may the Commission rely on section 706(a) of the Telecommunications Act of 1996. In its 1998 *Wireline Deployment Order*, the Commission exhaustively reviewed the language, legislative history and policy behind Section 706(a) and rightly concluded that this provision does not establish a separate grant of regulatory authority.^{26/} The *Comcast* court rejected reliance on section 706(a) because the FCC was bound by this prior determination that, like ancillary authority itself, section 706 requires the Commission to look to substantive statutory authority under other provisions of the Act.^{27/}

In light of the *Comcast* decision, the Commission sought comment on whether it should revisit its conclusion that section 706(a) is not an independent source of regulatory authority and whether section 706(b) provides authority to impose net neutrality rules.^{28/} The Commission has no sound basis to reverse its prior legal conclusion that section 706(a) is not an independent grant of authority. That provision states that the FCC “shall encourage the deployment” of advanced telecommunications capability “by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating

^{22/} See *Preserving the Open Internet; Broadband Industry Practice*, GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 ¶ 83 (2009) (“*Open Internet NPRM*”) (citing *Comcast Network Management Practices Order* and Brief for Respondents in *Comcast v. FCC*, which refer to several provisions of the Cable Act but not section 628); *Framework for Broadband Internet Service*, GN Docket No. 10-127, Notice of Inquiry, FCC 10-114, ¶ 47 (June 17, 2010) (“*Third Way NOI*”) (seeking comment regarding the appropriateness of sections 624 and 629).

^{23/} 5 U.S.C. §553(b)(2).

^{24/} H.R. Rep. No. 1980, 79th Cong., 2d Sess. 24 (1946).

^{25/} See, e.g., *Global Van Lines, Inc. v. ICC*, 714 F.2d 1290, 1297-98 (5th Cir. 1983) (failure to identify particular provision in rulemaking notice or subsequent order violates APA). See also *National Tour Brokers Assoc. v. ICC*, 591 F.2d 896 (D.C. Cir. 1978).

^{26/} *In re Deployment of Wireline Serv. Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, 13 FCC Rcd 24011 ¶ 69 (1998).

^{27/} *Comcast*, 600 F.3d at 658-59.

^{28/} *Open Internet NPRM* ¶ 84; *Third Way NOI* ¶¶ 36-38, 46.

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methods that remove barriers to infrastructure investment.”^{29/} As various commenters pointed out, section 706(a) is a statement of policy or purpose, which, much like statutory preambles, do not confer statutory authority.^{30/}

Moreover, to the extent section 706(a) confers any authority, it is to promote infrastructure deployment in areas where such deployment has not been “reasonable and timely.” Even if section 706(a) established independent authority for the Commission to Act, there is no link between the closely defined statutory goal of promoting infrastructure investment in targeted areas and the blanket imposition of net neutrality rules – even those as tailored as in the Waxman proposal – on all providers of broadband Internet access service.^{31/} As to rules that go beyond the Waxman framework, it would be arbitrary and capricious for the Commission to conclude that they would “encourage the deployment” of broadband capability in the face of a record overwhelmingly demonstrating that such rules will undermine and hamper incentives for further investment.

A copy of this notice is being served on the Commission participants in the meetings.

Sincerely,

/s/ Rick Chessen

Rick Chessen

cc: Austin Schlick
Peter Karanjia
David Tannenbaum
Zachary Katz

^{29/} 47 U.S.C. § 1302(a).

^{30/} See, e.g., Comcast Open Internet Comments at 25 (noting that “preambles and statutory statements of policy (which have come to replace preambles in modern federal legislation) are ‘not an operative part of the statute, and [do] not enlarge or confer powers on administrative agencies.’”) (quoting *Ass’n of Am. RRS, v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977)); AT&T Open Internet Comments at 217-218 (Section 706(a) “is a statement of general policy” and the “courts have made clear that the Commission does not have ancillary authority to enforce a mere policy”); Progress and Freedom Foundation Open Internet Comments at 50-51.

^{31/} See, e.g., Cablevision Systems Corp. Open Internet Reply Comments (filed Apr. 26, 2010) at 24; Center for Democracy and Technology Open Internet Comments at 16.