

May 2, 2014

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

Re: Open Internet Remand, GN Docket No. 14-28

Dear Ms. Dortch:

On May 1, 2014, Harold Feld, Senior Vice President, Public Knowledge (PK), met with Priscilla Argeris, Advisor to Commissioner Rosenworcel, with regard to the above captioned proceeding.

PK expressed grave concerns with regard to the press reports that the Commission would propose paid prioritization under a “commercially reasonable” standard. PK repeated its concerns with the commercially reasonable standard as set forth in the comments filed by PK on March 21, 2014.<sup>1</sup>

PK went on to recommend, consistent with the March 21 comments, that the Commission seek comment on whether (a) the Commission must consider whether the common carrier prohibition prevents the FCC from adequately addressing the concerns the Commission identified in the 2010 Open Internet Order, which the *Verizon* court explicitly found (a) reasonable, and (b) adequately supported by the record. The Commission should make abundantly clear that if it finds that it cannot adequately address these concerns because of the limitations of Section 706 or the limitations of the “common carrier prohibition,” then the Commission *will* reclassify broadband access as a Title II service.

In this regard, PK notes that while the Chairman is correct that Title II would *permit* reasonable discrimination, it does not, as some seem to insist, *require* reasonable discrimination and therefore Title II would require paid prioritization. To the contrary, where the Commission has found conduct *inherently* unjust, unreasonable, or subject to abuse, it has affirmatively prohibited this conduct with no allowance for exception.

For example, in *Carterfone*, the FCC found that it was *inherently* unjust and unreasonable to permit a carrier to interfere with the ability of a subscriber to attach a device to a network. Because it determined that it was impossible to adequately police discriminatory conduct by the network operator, the FCC established Part 68 and affirmatively prohibited common carriers offering residential telephone service from *ever* discriminating under *any*

---

<sup>1</sup> <http://apps.fcc.gov/ecfs/document/view?id=7521094713>

*circumstance* between devices or ever varying from the Part 68 standard because discriminating between devices would never be ‘just and reasonable.’

Similarly, in the *Computer I* proceeding, the Commission initially permitted Common Carriers to offer “hybrid services” under a set of safeguards designed to protect against anti-competitive conduct. Only a few years later, the Commission concluded in the *Computer II* proceeding that it was inherently impossible to permit common carriers to offer “enhanced services” except through complete structural separation. Judge Green, in applying the antitrust laws, reached a similar conclusion with regard to the provision of long distance services by local networks. Only complete structural separation and a complete prohibition on the practice could prevent anticompetitive and anti-consumer conduct.

Accordingly, PK urges that the NPRM explicitly seek comment on the following.

- A. Is the practice of paid prioritization intrinsically incompatible with the Chairman’s stated goal of providing “to ensure that everyone has access to an Internet that is sufficiently robust to enable consumers to access the content, services and applications they demand, as well as an Internet that offers innovators and edge providers the ability to offer new products and services.”<sup>2</sup>
- B. Specifically, does the ability to offer paid prioritization present the same detection and enforcement problems that prompted the Commission to declare other practices inherently unjust and unreasonable?
- C. Are there alternative reasons why permitting paid prioritization under any circumstances would frustrate the goals of the Communications Act or create a disincentive to investment contrary to the requirement of the Commission to facilitate investment in infrastructure under 47 U.S.C. 1302. Specifically, the *Verizon* court found the Commission’s concern that paid prioritization would frustrate the “virtuous cycle” that has, until now, forced providers to invest in enhanced capacity as a means of generating revenue both reasonable and supported by the evidence in the record. How can the Commission adequately address these concerns given the common carrier prohibition identified by the court.
- D. Alternatively, should the Commission follow the same course it followed in the *Cable Modem Declaratory Ruling* when it expressly determined that the Ninth Circuit had erred in defining cable modem service as a “telecom service” and found – in direct contravention of the Ninth Circuit – that cable modem service was an “information service.” Given that the Supreme Court upheld this exercise of statutory interpretation in

---

<sup>2</sup> Chairman Tom Wheeler, “Finding the Best Path Forward To Protect An Open Internet,” <http://www.fcc.gov/blog/finding-best-path-forward-protect-open-internet>

both *Brand X* and *City of Arlington*, the FCC should expressly solicit comment on the meaning and scope of the “common carrier prohibition.”

- E. The Commission should expressly solicit comment on how it will ensure, if it permits paid prioritization, that carriers continue to invest in their networks. Given that Commission has already found – and the D.C. Circuit found this conclusion both reasonable and supported by record evidence – that the ability to monetize scarcity creates an incentive to defer investment in actual deployment, how will the Commission ensure that investment in infrastructure continues pursuant to 47 U.S.C. 1302? Should the Commission prohibit prioritization if the rate of investment in infrastructure declines? If the Commission cannot adequately address this concern, it should explicitly state that it will classify broadband access as a Title II telecommunications service on a finding that permitting paid prioritization is intrinsically contrary to the purposes of the Communications Act and that only by exercise of Title II authority can the Commission prohibit paid prioritization.

### **Enforcement and Market Definition**

The Commission should explicitly solicit comment on whether insertion of monitoring devices, similar to those voluntarily used in the Sam Knows study, should be mandatory so that the Commission and users can guarantee that service is not artificially degraded.

PK also urged the Commission to consider whether to permit prioritization when only a single wireline provider serves the relevant market. In such a case, edge providers could be foreclosed from the market because the single provider could refuse service. Similarly the Commission should consider whether to permit prioritization where only two wireline providers serve a geographic market. If yes, should different rules apply to the dominant wireline provider? To the extent parties argue that wireless providers offer acceptable alternatives, then wireless providers should be subject to the same rules on the offering of prioritized service. To the extent the Commission continues to differentiate wireless from wireline, it cannot simultaneously maintain that wireless provides an acceptable alternative for reaching customers.

### **Effectiveness of “Commercially Reasonable” Standard In Data Roaming.**

The Commission apparently proposes to use the “commercially reasonable” standard developed in the *Data Roaming* proceeding and upheld by the D.C. Circuit in *Cellco Partners* as permissible under the “common carrier prohibition.” Before concluding that this standard provides adequate protection to consumers and competitors, the Commission should explicitly

solicit comment from wireless carriers to determine the effectiveness of the “commercial reasonableness” standard when invoked by competitors. What improvements should the Commission consider in the standard, consistent either with Title I or, if necessary, should it invoke Title II?

### **Relationship of Network Neutrality To Interconnection**

Traditionally, the Commission has declined to address peering and interconnection issues under its network neutrality rules, although has left the door open to using this authority if events warranted.<sup>3</sup> Recently, however, the Chairman has indicated that the FCC would consider issues such as the complaints by Netflix, Cogent and Level 3 as interconnection disputes.<sup>4</sup>

While prioritization in the last mile and concerns over interconnection are different, they are clearly related issues. As an initial matter, it is reasonable to believe that providers would have incentive to allow their links to congest so as to encourage edge services to pay for prioritized service. The Commission should explicitly seek comment on the connection between these issues and whether a duty to maintain a basic level of service for subscribers of necessity includes a responsibility with regard to maintaining links with other networks. The Commission should also explicitly consider whether behavior with regard to peering or interconnection is best addressed pursuant to Section 706 as a discouragement to infrastructure investment or under Title II pursuant to Section 251(a).

### **Virtual Redlining**

PK notes that the debate has assumed that providers will offer prioritization to all customers. From a technological standpoint, however, there is no reason why providers cannot sell prioritization in smaller increments or target – at the request of edge providers – more “desirable” customers. For example, a service provider may wish to market prioritized markets only in the top urban markets. In addition, history teaches us that providers of goods and services have often used zip codes or other apparently neutral proxies to bypass poor urban neighborhoods or market to minority communities based on stereotypes.

Over time this could potentially lead to certain prioritized services becoming available only in urban areas, or being unavailable to poor and minority communities. At the same time, however, there are many reasons why an edge provider may wish to discriminate with regard to which

---

<sup>3</sup> See Marvin Ammori, “Interconnection Disputes Are Network Neutrality Issues,” April 7, 2014, available at <http://ammori.org/2014/04/07/interconnection-disputes-are-network-neutrality-issues-of-netflix-comcast-and-the-fcc/>

<sup>4</sup> See “Finding The Best Path Forward” *supra* note 2.

customers on a particular broadband access network it desires to reach. For example, providers of local news content might rationally conclude that only subscribers local to the events would want prioritized access, and paying for system-wide prioritization would be unduly costly for small, local providers.

Nevertheless, the potential for “virtual redlining” implicates the policies of 47 U.S.C. §§ 151, 254(b)(3), 257, and 1302. Nor could the Commission require broadband access providers to offer prioritization only on an “all or nothing” basis to ensure uniform service to all subscribers, since the *Verizon* court explicitly found that a mandate to serve all customers identically is “the essence of common carrier obligation.”

Accordingly, PK suggests that the Commission solicit comment on the following:

- A. In light of the Commission’s past experience with discriminatory deployment of services, should the Commission regard the potential for “virtual redlining” – either on the basis of an urban/rural divide or on some other basis – as a concern.
- B. If so, how would the Commission monitor to determine whether virtual redlining was occurring?
- C. Finally, even if the Commission determined that virtual redlining was occurring at a level as to significantly impact rural or minority communities, what authority would the Commission have to remedy to problem in light of the common carrier prohibition?

### **Classification of Prioritized Service.**

As conceived by the *Verizon* court, broadband service necessarily encompasses a two-sided market in which the broadband access provider sells service to both the residential customer on one side and the edge provider the subscriber has downloaded content from on the other. As the Commission declined to appeal this finding, it is now stuck with it.

However, as the D.C. Circuit has previously observed, *see Ad Hoc Telecoms Users Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009), there are significant differences between the residential broadband market and the business broadband market. The service which the D.C. Circuit envisions as being “sold” to edge providers is different and distinct from the service “sold” to subscribers.

PK agrees with the April 14 *ex parte* filed by Professors Tejas N. Narechania and Tim Wu arguing that this prioritization service is clearly a Title II service.<sup>5</sup> The Commission should seek comment on the classification of the prioritization service. PK notes that the service does not come bundled with any of the information services identified by the Commission in the *Cable Modem Order* as included in the “offer” to residential subscribers. Indeed, because the offer to prioritize does not even begin until the edge provider delivers traffic to the last mile provider’s network, the last mile provider does not even offer independent DNS routing.

---

<sup>5</sup> <http://apps.fcc.gov/ecfs/document/view?id=7521098085>



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: Priscilla Argeris