

July 23, 2014

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

Re: Protecting and Promoting the Open Internet, GN Docket No. 14-28; Framework for Broadband Internet Service, GN Docket No. 10-127; Preserving the Open Internet, GN Docket No. 09-191; Broadband Industry Practices, WC Docket No. 07-52

Dear Ms. Dortch:

On July 21, 2014, Harold Feld, Senior Vice President; Michael Weinberg, Vice President; and Aalok Mehta, Google Policy Fellow, of Public Knowledge (PK) met with FCC General Counsel Jonathan Sallet and Stephanie Weiner, Associate General Counsel.

PK reiterated its position that reclassification of broadband access service as a Title II telecommunications service offers the best and most legally sustainable path forward for protecting the open internet, particularly in limiting practices that harm residential end users such as paid prioritization.<sup>1</sup> PK, however, is not currently prepared to reject as infeasible other solutions that classify only a *portion* of broadband access service under Title II, such as the *Mozilla Petition*.<sup>2</sup>

PK's support for Title II reclassification follows directly from *Verizon v. FCC*,<sup>3</sup> in which the court ruled that the Commission cannot implement common carrier rules without reclassifying broadband access service under Title II. This means that any outright bans on paid prioritization using Title I authority would likely not be allowed, and any paid priority restrictions that resemble common carrier rules would face a high risk of being overturned via as-applied court challenges. PK also expressed reservations that applying a no-blocking rule under Section 706 authority, as advocated by AT&T, "because the Commission could reasonably conclude that a restriction on such prioritization is not a *per se* common-carriage regulation of broadband Internet access providers,"<sup>4</sup> would survive court scrutiny.

In addition, PK outlined concerns about relying on a rebuttable presumption standard for addressing paid prioritization, including lingering uncertainty and shifting standards of proof. A

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<sup>1</sup> See Comments of Public Knowledge et al., to the *Notice of Proposed Rulemaking* in Protecting and Promoting the Open Internet, GN Docket Nos. 14-28, 10-127, 09-191, WC Docket No. 07-52 (July 15, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521480282>.

<sup>2</sup> See Petition to Recognize Remote Delivery Services in Terminating Access Networks and Classify Such As Telecommunications Service Under Title II of the Communications Act, Docket No. 14-28 (filed May 5, 2014).

<sup>3</sup> *Verizon v. FCC*, 740 F.3d 623 (2014).

<sup>4</sup> Comments of AT&T Services, Inc., to the *Notice of Proposed Rulemaking* in Protecting and Promoting the Open Internet, GN Docket Nos. 14-28, 10-127, at 33 (July 15, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521679206>.

ban on paid prioritization under Title II, on the other hand, would offer a clear, bright-line rule, with a waiver process that squarely places the burden of proof on the party asking for an exception. PK also emphasized that defining paid prioritization only in terms of speed is overly narrow and that any discussion of paid prioritization should include the full spectrum of potential prioritization schemes, including zero rating and other differential treatment of data.

PK argued that the Commission does not face significant administrative challenges in forbearing from provisions of the Communications Act if it reclassifies broadband access service under Title II. For instance, the Commission's forbearance decisions have historically been viewed favorably by the courts.<sup>5</sup> Moreover, even if the Commission makes a strong case that the broadband market is inadequately competitive, the Commission would still be able to forbear from Title II provisions, as competition is just one among many relevant factors in forbearance proceedings. PK also pointed out that in the Commission's order mandating voice and text roaming on a fair basis under Title II authority,<sup>6</sup> only Sections 201, 202, and 208 were left intact. Since doing so, the Commission has never had to revisit the framework and few problems have been reported.<sup>7</sup> On the other hand, the Commission's *Data Roaming Order*,<sup>8</sup> which uses a Title I and III framework, has failed to adequately address issues in the data roaming market.<sup>9</sup>

PK noted that under existing administrative law, the Commission does not need to provide a more detailed explanation for reclassifying broadband than it did when examining the issue *de novo*<sup>10</sup> and that the Commission has numerous strong reasons for revisiting the classification of broadband access service. First, *Brand X*<sup>11</sup> established that a change in administrations is one reason agencies might revisit their expert determinations. Second, the Commission can point to factual changes regarding broadband access service, notably that what is now being advertised and sold is a two-way transmission component with other components in the offer (such as email) no longer as relevant. Moreover, PK argued that the Commission should revisit its definition of DNS, but that even if it does not, broadband access service still involves a transmission component that does not rely on DNS. Third, the Commission might point out that it made its original determination on the then-reasonable expectation that robust intermodal competition would emerge, but which has not materialized in reality.

Finally, PK pointed out that the Commission has broad authority to apply existing standards as interim rules to minimize economic and other harms from reclassification while it

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<sup>5</sup> See, e.g., *Ad Hoc Telecomm. Users Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009).

<sup>6</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15,817 (2007).

<sup>7</sup> Comments of Public Knowledge et al., to *Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc.*, WT Docket No. 05-265 (July 10, 2014) at 3-4, available at <http://apps.fcc.gov/ecfs/document/view?id=7521374919>.

<sup>8</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, Second Report and Order*, 26 FCC Rcd 5411 (2011), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-11-52A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-52A1.pdf).

<sup>9</sup> See *Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc., Petition*, WT Docket No. 05-265 (May 27, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521151798>.

<sup>10</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

<sup>11</sup> *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

more fully explores what sections of Title II to forbear from applying to broadband access providers.

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/ Aalok Mehta  
*Google Policy Fellow*  
PUBLIC KNOWLEDGE

CC: JONATHAN SALLET  
STEPHANIE WEINER