February 5, 2015

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

Re: GN Docket No. 14-28, Protecting and Promoting the Open Internet; GN Docket No. 10-127, Framework for Broadband Internet Service

Dear Ms. Dortch:

Chairman Wheeler’s announcement this week made clear that the Commission is poised to vote on a proposal to reclassify broadband Internet access service as a “telecommunications service” subject to Title II. As many have explained in filings and meetings, this approach is not only legally suspect but entirely unnecessary, since the Commission can accomplish the goals identified by the Commission and President Obama using its authority under Section 706: a ban on paid prioritization, blocking, and throttling.1

By way of background, I am a technology entrepreneur (CEO and founder of Auroras Entertainment, a digital media services company now doing business as Vubiquity), the author of TheNewRural.Com (about the role of technology in rural economic development), founder of American Rural (a 501-c-6 devoted to rural and small town prosperity) and an investor, advisor and board member to numerous tech-focused organizations nationwide, including Mobile Future who has been an active participant in this proceeding. I am also a former executive with

1 See, e.g., Akamai Technologies Comments, GN Docket Nos. 14-28, 10-127, at 9-12 (July 15, 2014) (warning of drag on investment under Title II); AT&T Comments, GN Docket Nos. 14-28, 10-127, at 30-38, 51-63 (July 15, 2014) (observing that the Commission can ban paid prioritization under Section 706 and cataloging negative consequences of Title II approach); Communication Workers of America & NAACP Comments, GN Docket No. 14-28, at 14-20 (July 15, 2014) (detailing how Commission can achieve goals under Section 706).
formidable history with the 1996 Telecom Act, particularly Title II. This background, coupled with my ongoing work in the areas of technology and entrepreneurship, gives me substantial knowledge and experience to speak out on the issues raised in this docket.

Title II reclassification poses serious risks for all Internet players, not just broadband service providers (or “ISPs”). This is especially true for providers of online applications and services – the very groups that are supposed to benefit from the Commission’s proposal – particularly providers of Internet search, application and email services, and content providers.

This is because these groups increasingly offer transmission services as part of what they provide to consumers. In some cases, these companies even own and operate the facilities used for these transmission services. And they make their applications and services (together with transmission) available to anybody that wants to use them, such as consumers of their online services and ISPs. As a result, online service providers are in precisely the same position as ISPs in terms of the legal factors that the Commission might rely on in reclassifying broadband as a common carrier “telecommunications” service: They offer their services, which include a broadband transmission component, “indifferently” to all comers.

As a result, any effort to reclassify broadband as a common-carrier telecommunications service would inevitably ensnare online application and service providers as well. The consequences would be disastrous for these providers and the efficient functioning of the Internet. As explained below, Title II regulation would require online service providers to follow rules that were designed for a completely different era and are largely incompatible with their established business models. For example, they could be required to obtain customer approval before collecting cookies, running targeted ads, or recommending specific products to customers. This regulation will have the effect of stifling innovation and shifting investment to lesser regulated “private” networks and services. Not only will this have potentially disastrous repercussions for the Nation, but particularly for those parts of the country with costly to serve customers and less robust investment ecosystems. In other words, entrepreneurs and customers living outside Silicon Valley, Boston, and the standard VC top ten list of cities.

Like Broadband Providers, Online Application and Service Providers Engage in Transmission.

Some commenters assume that broadband providers are engaged in “transmission,” whereas online service providers supply just “content.” But that view is woefully incomplete and simply wrong. Broadband providers do not offer a standalone “transmission” service; they transmit data only in connection with further processing of that information. Many broadband providers also include content for their customers. In other words, the transmission that

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broadband providers sell is just a part of a larger service offering that is ultimately about making information available to consumers to interact with and use.\(^3\)

Nor, conversely, do online service providers offer standalone “content” that is separate from the underlying transmission piece of their information service. For example, a range of content, application, and search providers have for years used in-house or third-party private networks to ensure high quality delivery of content to consumers.\(^4\) Amazon, Facebook, Apple, and Microsoft have all purchased or built their own substantial broadband facilities.\(^5\) Meanwhile, Netflix and Apple have built their own content delivery networks (CDNs), while media companies such as Huffington Post, Hulu, and Disney all use third-party CDNs to deliver part or all of their websites to end users. These CDNs, which aggregate traffic and deliver it to ISPs, are projected to carry up to half of all Internet traffic by 2018.\(^6\) Online service providers also frequently vertically integrate by purchasing transit from a backbone provider or leasing transit capacity from ISPs, effectively reselling that transmission service to their end users. Just as with broadband Internet access service, an essential part of the service offered by online service providers includes delivery of traffic over the Internet.

Many large providers of online services have begun to provide transmission themselves and carry their traffic and hand off directly to so-called last-mile providers. This reduces the distance that their traffic must travel on backbone networks of others and delivers it faster. Netflix is perhaps the most well-known example, but such arrangements have been around for years and numerous other online service providers have pursued them too. Here, too, online service providers are doing far more than simply creating content; they are engaged in transmitting data services and content to consumers, and implementing optimal ways of doing so.

Finally, online service providers are increasingly involved in routing decisions, and some even route traffic as if they were ISPs. All Internet traffic on the Kindle Fire, for example, gets routed to Amazon’s proxy servers first, and is then rerouted as needed out to the rest of the Internet. These features enable providers of Internet-based services to see how customers are interacting with their services, including which webpages customers are viewing. Control over

\(^3\) See id. at 990 (explaining, by analogy, that “a car dealership ‘offers’ cars, but does not ‘offer’ the integrated major inputs that make purchasing the car valuable, such as the engine or the chassis”).

\(^4\) See generally Akamai Comments, at 4 -7 (describing prevalence and benefits of content delivery networks); Jon Brodkin, Why YouTube Buffers: The Secret Deals That Make—And Break—Online Video, Ars Technica (July 28, 2013).


traffic routing certainly helps providers better monetize their traffic. And it is yet another way in which they are performing the same transmission functions as ISPs.

All of these various types of transmission that are part of an online application or service provider’s package to consumers are made available to anybody who wants them and is willing to pay any applicable fee for them. These providers do not pick and choose their users but provide service to all who come to their on-line doorstep.

**Title II Classification of Online Services Logically Follows From Reclassification Of Broadband.**

Due to these similarities between online applications, services, and broadband, if the Commission reclassifies broadband as a Title II service based on the fact that broadband Internet access service is provided via telecommunications, then Title II classification of many online service providers ultimately would follow.

It has been suggested that the Commission could reclassify broadband Internet access service by reinterpreting the definition of “telecommunications service” in the Telecommunications Act to encompass only the so-called transmission component of an information service. But there simply is no way to reclassify the “transmission component” of broadband Internet access service without establishing an interpretation of Title II that simultaneously covers the transmission component of other online services as well. That is because, as explained above, the offerings of online application and service providers include a transmission component—sometimes leased or purchased from third parties, but sometimes even provided over the online service provider’s owned-and-operated facilities—just like the offerings of broadband providers do. Broadband and online services are simply mirror images of each other: in both cases, the end user interacts with an entity that is transmitting information to and from that person.

These similarities are why the Commission previously recognized, and the Supreme Court agreed, that if an Internet service is deemed to be a “telecommunications” service just because it includes transmission, “all, or essentially all, information services [would] fall into the telecommunications service category.” If the Commission goes down this road, there is simply no rational way to distinguish between broadband providers and online service providers. Likewise, if the Commission finds that broadband providers count as common carriers because they make their service available to all, the same will be true for online service providers.

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7 Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11,501, 11,529 ¶ 57 (1998); see also Brand X, 545 U.S. at 994 (warning that expanding the definition of “telecommunications service” to include broadband Internet access service would sweep in all Internet-based services that “use telecommunications as an input to provide information service to the public”).
Title II Classification of Online Services Would Cause Major Regulatory Disruption.

The ramifications of extending Title II regulation to online application and service providers would be far-reaching. For starters, newly classified online providers could be prohibited from using or disclosing Customer Proprietary Network Information (CPNI) without “approval of the customer.” Customer approval of varying degrees—including the maximum requirement of individualized, affirmative “opt-in” approval—could be required to use CPNI for collecting cookies, testing website traffic, running targeted advertisements, and making specific purchase recommendations to customers. Title II regulation could thus overturn the current privacy practices of nearly all online service providers, hamper their ability to tailor customers’ web experience, seriously undermine their advertiser-supported business models, and last (but certainly not least) subject their internal CPNI practices to annual FCC review and scrutiny.

To take another example, the Communication Assistance for Law Enforcement Act (CALEA) would also apply, creating new obligations for online service providers to modify their services in order to enable electronic surveillance by federal law enforcement and submit their surveillance practices to the FCC for approval. Specifically, online service providers—especially email providers—would be required to install new software or hardware and increased security so that the government, and only the government, could intercept certain transmissions. This could kill recent efforts by large search and email providers to encrypt customer data in order to prevent government surveillance. These regulations are just the tip of the iceberg.

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8 47 U.S.C. § 222(c)(1).

9 See id. § 222(h)(1)(A) (defining CPNI as “information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier”).

10 See 47 C.F.R. § 64.2009.


12 See id. § 1001(8) (defining “telecommunications carrier” subject to CALEA to include an “entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire” as well as an “entity engaged in providing commercial mobile service (as defined in section 332(d) of this title)”).

13 See id. §§ 1002(a)-(b) (describing system capability and decryption requirements), 1004 (describing system security requirements).

Imposition of either CPNI or CALEA to a start-up technology company would result in costs far beyond the reach of most entrepreneurs. For example, when I raised the first $3M for Auroras Entertainment, less than a decade ago, we already had 11 employees who were working virtually for free. That $3M allowed us to invest in our technology development, product roll-out, and subsistence salaries for these employees. Had we been forced to divert funds to CPNI or CALEA compliance, Auroras Entertainment might have been stopped in its tracks. Today I work with numerous start-up companies in similar positions and fear for their futures should the Commission burden them with even the most streamlined Title II regulation.

In sum, if the Commission finds that broadband providers offer a telecommunications service to consumers, it will be impossible to avoid the conclusion that online service providers do exactly the same. Every Internet player—customers, broadband providers, and online service providers too—will be better off if the Commission abandons this misguided and legally doomed proposal for Title II reclassification.

Respectfully submitted,

/ Diane Smith /

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