February 12, 2015

VIA ECFS

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

Dear Ms. Dortch:

On February 10, 2015, Michael Powell, James Assey, and the undersigned of the National Cable & Telecommunications Association (“NCTA”) met with Commissioner Jessica Rosenworcel and Priscilla Delgado Argeris in connection with the above-referenced proceedings. On February 11, 2015, the same group from NCTA met with Commissioner Mignon Clyburn, Adonis Hoffman, and Rebekah Goodheart regarding the same matters.

At these meetings, we reiterated that, in the event of any decision to reclassify broadband Internet access service as a Title II “telecommunications service,” the Commission should grant broad forbearance from Title II’s restrictions and obligations as an integral part of that decision.\(^1\) We explained that doing so is necessary to preserve the deregulatory status quo to the maximum extent possible, and to ensure that such reclassification does not result in unnecessary, investment-stifling regulatory burdens on ISPs.

As in prior meetings,\(^2\) we stressed that it is particularly important to forbear from the directive in Section 201(b) that all “charges” be “just and reasonable,”\(^3\) and that failing to do so

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would authorize the very sort of “rate regulation” that the Chairman, the President, and even the Commission’s recent “Fact Sheet” all purport to disclaim. We explained that allowing post hoc scrutiny of broadband rates through the filing of complaints (either before the Commission or in federal court) is “rate regulation” in the purest sense—no less so than *ex ante* requirements to file tariffs or to seek Commission approval for rate changes. We pointed out that plaintiffs class action lawyers have routinely sought to assert rate-related claims directly under Section 201(b)—independent of whether a carrier allegedly violated any Commission regulation—and that plaintiffs’ lawyers would be certain to target broadband providers with similar claims. We also noted that Section 201(b) is the primary source of authority for many of the Commission’s most sweeping and invasive regulations governing the rates for telecommunications services. Accordingly, we emphasized that the Commission must forbear from the provision in Section 201(b) requiring just and reasonable “charges” if it is to make good on repeated pledges to avoid broadband rate regulation and the attendant harms to broadband investment and innovation.

We further noted that Section 10 authorizes the Commission to grant forbearance from specific language and requirements within sections of Title II. Section 10(a) provides that “the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service” when the statutory elements for forbearance are met. We explained that the Commission can reasonably construe this language

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3 [47 U.S.C. § 201(b).](#)


9 [47 U.S.C. § 160(a) (emphasis added).](#)
as authorizing forbearance not only from entire sections or subsections of Title II, but also from specific language within a section or subsection—and would be entitled to *Chevron* deference in adopting that construction.

We pointed out that the Commission has adopted this construction of Section 10 in the past, most notably when it forbore from applying Section 652(b) to cable operators’ acquisitions of competitive local exchange carriers ("CLECs").\(^{10}\) There, the Commission was presented with a statute providing that "[n]o cable operator . . . may purchase or otherwise acquire, directly or indirectly, more than a 10 percent financial interest, or any management interest, in any local exchange carrier providing telephone exchange service within such cable operator’s franchise area."\(^{11}\) The Commission concluded that Section 652(b)’s reference "any local exchange carrier," on its face, encompassed both incumbent and competitive LECs,\(^{12}\) but then found that transactions between cable operators and CLECs often are procompetitive and thus should not be subject to Section 652(b)’s restrictions.\(^{13}\) Critically, the Commission provided relief not by granting forbearance from Section 652(b) in its entirety. Instead, once the Commission construed “any local exchange carrier” to mean “any incumbent or competitive local exchange carrier,” it forbore only from that implied term “competitive,” and left the remainder of Section 652(b) in place. In doing so, the Commission emphasized that “[S]ection 10 tells the Commission to forbear from ‘applying any regulation or any provision of this Act . . . to a telecommunications carrier’—and the use of ‘any’ highlights that Congress was not restricting the Commission’s forbearance authority to a specific title or portion of the Act but ‘any’ provision within it.”\(^{14}\)

We explained that the same reasoning supports the proposition that Section 10 authorizes forbearance from specific language within Section 201(b), even if the Commission were to keep

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10 *See Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions Between Competitive Local Exchange Carriers and Cable Operators; Conditional Petition for Forbearance from Section 652 of the Communications Act for Transactions Between Competitive Local Exchange Carriers and Cable Operators, Order, 27 FCC Rcd 11532 (2012) (“Section 652(b) Forbearance Order”).*

11 47 U.S.C. § 572(b).

12 *See Section 652(b) Forbearance Order ¶ 14 (determining that “[S]ection 652(b) on its face applies to any LEC, including any competitive LEC that is ‘providing telephone exchange service’ in an acquiring cable operator’s franchise area”).*

13 *See id. ¶ 39 (“In contrast to an incumbent LEC’s acquisition of a cable operator, a cable operator’s acquisition of a competitive LEC likely will not lead to one entity controlling all of the last-mile facilities, or reduce incentives to upgrade existing transmission facilities to enable carriage of new services. Therefore, we find that such mergers frequently are consistent with the purposes of section 652 and advance the goal of the 1996 Act to promote competition in local telecommunications services markets.”).*

14 *Id. ¶ 22 (emphasis added).*
the remainder of that particular statute in place.\textsuperscript{15} Accordingly, the Commission can forbear from oversight of the justness and reasonableness of “charges,” even if it elects to retain authority to require just and reasonable “practices,” “classifications,” and “regulations” by carriers.\textsuperscript{16} We also noted that the fact that the Commission was able to forbear from \textit{implied} terms in Section 652(b) makes it even more clear that the Commission may forbear from \textit{express} terms in Section 201(b). Moreover, even if one were to construe the \textit{Section 652(b) Forbearance Order} as forbearing from a particular \textit{application} of Section 652(b) to a specific class of transactions, the Commission still could rely on that precedent to grant similar relief with respect to Section 201(b)—\textit{i.e.}, by forbearing from the \textit{application} of Section 201(b) to broadband rates.

In addition, we explained that there is no basis to conclude that the “charges” provision of Section 201(b) is “necessary” to protect consumers or advance the public interest for purposes of Section 10.\textsuperscript{17} Broadband providers have never been subject to a legal obligation to offer service at “just and reasonable” rates, yet over the past decade-plus, market forces have yielded steadily \textit{declining} per-megabyte prices for broadband service, and have done so at the same time that broadband speeds have dramatically improved.\textsuperscript{18} These trends will only accelerate as the broadband marketplace grows more and more competitive—thus belying any notion that the “charges” provision of Section 201(b) is necessary today or would somehow become so in the future. Indeed, the Chairman’s repeated pledge that the Commission will not engage in “rate regulation” is a stark acknowledgement that such regulation is unnecessary to protect consumers or advance the public interest.\textsuperscript{19} The Commission thus can and should grant forbearance from the provision in Section 201(b) authorizing regulation of a provider’s “charges.”

Finally, in response to a question raised during the meeting with Commissioner Clyburn, nothing prevents the Commission from relying on Section 10 to forbear from Sections 206 and 207. The plain language of Section 10 allows the Commission to “forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service.”\textsuperscript{20} Sections 206 and 207, by their terms, clearly “apply[] . . . to a telecommunications

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  \item[\textsuperscript{15}] Indeed, reports indicate that the Commission may be considering forbearing from a single sentence in Section 254(d) in the upcoming Order—an approach that would be no different from forbearing from specific language in Section 201(b). \textit{See} Feb. 4 Fact Sheet at 3 (noting that the grant of forbearance in the draft Order results in the “partial application of Section 254”).
  \item[\textsuperscript{16}] 47 U.S.C. § 201(b).
  \item[\textsuperscript{17}] \textit{Id.} § 160(a).
  \item[\textsuperscript{18}] \textit{See} NCTA Dec. 23 Ex Parte at 19-20 (collecting record evidence demonstrating that broadband providers have delivered constantly improving services at declining per-megabyte prices to an ever-growing number of consumers absent any Title II obligations).
  \item[\textsuperscript{19}] \textit{See supra} notes 4, 6.
  \item[\textsuperscript{20}] 47 U.S.C. § 160(a).
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carrier or a telecommunications service.” Section 206 provides that, if a common carrier violates a provision of Title II, “such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation”—and accordingly “appl[ies]” to telecommunications carriers by subjecting them to damages claims. Section 207 provides that a person “may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act”—and thus likewise “appl[ies]” to telecommunications carriers by subjecting them to lawsuits. The Commission’s Section 652(b) Forbearance Order is instructive here as well; while the Commission acknowledged in that context that Section 652(b) “may be read as only governing the conduct of cable operators,” it concluded that the statute is “best read[ ]” as “applying” to telecommunications carriers as well, given the “real-world consequences” of Section 652(b)’s cable buyout prohibition for CLECs. By the same token, Sections 206 and 207 plainly would have “real world consequences” for broadband providers by exposing them to damages claims and private lawsuits, and thus are subject to forbearance under Section 10.

And indeed, the Commission plainly should use its authority under Section 10 to forbear from Sections 206 and 207 in the broadband context. Private suits and damages awards have never been necessary to protect broadband consumers in the past, and leaving these two provisions in place would be immensely destabilizing to the broadband industry. As noted above, the application of Sections 206 and 207 to broadband would open the floodgates to abusive class action lawsuits seeking exorbitant damages based on any broadband charges or practices with which plaintiffs’ lawyers might choose to take issue. Such a regime would be anything but “light touch,” and would be particularly devastating for smaller ISPs, many of which cannot afford the cost of litigating or settling class action lawsuits. Forbearance from these provisions thus is not only permissible; it is imperative for ensuring that ISPs, large and small, can continue to devote their resources to the deployment of advanced broadband networks across the country.

22 Id. § 207.
23 Section 652(b) Forbearance Order ¶ 23; see also id. (noting that the statute “limits [CLECs’] ability to obtain capital and to migrate services from leased to owned facilities”).
24 If Congress had wanted to prohibit the Commission from forbearing from Sections 206 and 207, it clearly knew how to do so, as Section 10 specifically limits the Commission’s ability to forbear from Sections 251(c) and 271. See 47 U.S.C. § 160(d).
25 See supra note 7; see also, e.g., Marc D. Manson v. MCI, Inc. and Telecom*USA, Inc., No. 04-73374, 2005 U.S. Dist. LEXIS 43734 (E.D. Mich. Feb. 24, 2005) (involving a putative class action lawsuit against MCI and Telecom*USA, alleging that the defendants had engaged in improper billing practices with respect to certain domestic and international long distance telephone services under Sections 201(b), 206, and 207).
Please contact the undersigned if you have any questions regarding these issues.

Sincerely,

/s/ Rick Chessen

Rick Chessen

cc: Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Adonis Hoffman
Rebekah Goodheart
Priscilla Delgado Argeris