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THE BROADBAND ASSOCIATION

WALTER B. MCCORMICK, JR.
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May 14, 2014

The Honorable Tom Wheeler
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

The Honorable Ajit Pai
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

The Honorable Mignon Clyburn
Federal Communications Commission
445 12th Street, SW
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The Honorable Jessica Rosenworcel
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

The Honorable Michael O'Rielly
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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

Dear Mr. Chairman and Members of the Commission:

We are deeply concerned by calls for regulation of broadband internet access as Title II service. As the Commission is aware, Title II has its roots in 1880s railroad regulation – a regulatory regime that bankrupted the railroads, left communities without service, led to the nationalization of rail carriers in the Northeast, and was repealed by the Congress in order to save the nation's railroad networks and stimulate investment in railroad infrastructure. Indeed, Congress repealed similar regulatory regimes for air carriers and motor carriers more than 30 years ago. It is ironic that more than three decades after Congress recognized the failure of this regulatory model for the railroads and adopted a new approach to encourage investment in infrastructure – much like the Clinton FCC did for the Internet – some are calling for this anachronistic 19th Century regulatory regime to be applied to the 21st Century Internet.

Nothing could be more antithetical to the Administration's and the Commission's interests in broadband investment and deployment, job creation, and economic growth. In addition, reversing the course the Commission plotted more than a decade ago by which broadband Internet access service is classified as an information service under Title I of the Communications Act would pose insurmountable legal hurdles. Finally, even after the years of litigation that would undoubtedly ensue if the Commission were to attempt to subject high-speed broadband to a regulatory regime designed in the era of steam locomotives, Title II would not achieve the purported goals identified by advocates of this approach.

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Negative Impact on Investment

Lost in calls to classify broadband Internet access service as a Title II service is the negative effect such classification would have on continued broadband investment. In response to the Commission's decisions treating broadband Internet access service as a Title I information service subject to a "light regulatory touch," broadband providers have invested billions of dollars in expanding their networks – a level of investment that dwarfs that of other industries. In 2013 alone, broadband providers invested more than $70 billion dollars in broadband infrastructure; over the past decade, investment in broadband networks totals more than $670 billion.

Proponents of subjecting broadband to Title II regulation must answer the following questions: (i) why would broadband network investment and innovation continue under a Title II regime; and (ii) what incentives would broadband providers have to expand their infrastructure in the face of regulatory overhang and uncertainty? Google, for example, has invested in deploying Title I broadband networks to homes in Kansas City and elsewhere but has elected not to invest in or provide Title II telephone service to those same homes. Proponents of Title II also should explain how reclassification would aid in efforts to promote broadband adoption. For example, under a Title II regime, programs offering discounted broadband for disadvantaged students, promotional pricing on broadband service, and broadband service with added free security software or storage capabilities would be jeopardized if subject to tariffing and cost support requirements.

Insurmountable Legal Obstacles to Reclassification

Even assuming broadband network investment and broadband adoption programs would continue in the face of Title II regulation – a dubious assumption – classifying broadband Internet access service as a telecommunications service would pose significant legal challenges that proponents of Title II regulation largely ignore.[1]

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[1] Many of the legal issues that prevent the Commission from lawfully subjecting broadband Internet access service to Title II regulation have been discussed at length previously. *See, e.g.*, Letter to Julius Genachowski, Chairman, FCC, from Seth Waxman, Counsel for the United States Telecom Association, GN Docket No. 09-51 (April 28, 2010); Reply Comments of the United States Telecom Association, GN Docket 10-127 (Aug. 12, 2010). Advocates of Title II regulation have not made any serious attempt to address these issues.

Although administrative agencies have the discretion to change their policies so long as they acknowledge and give a reasonable explanation for the change, agencies have a heightened burden to explain a reversal of course where the "new policy rests upon factual findings that contradict those which underlay its prior policy" or its "prior policy has engendered serious reliance interests that must be taken into account."[2]

Classifying broadband Internet access as a Title II telecommunications service would trigger this heightened burden. The Commission's determination that broadband Internet access service constitutes a Title I information service turned on the agency's factual findings about the way in which broadband providers offer a functionally integrated service to the public. Reversing that classification decision would necessarily require a revised view of the facts and a detailed justification for rejecting the Commission's prior factual findings. This would pose an insurmountable hurdle given that the underlying facts upon which the Commission's initial classification decision was premised have not changed.

Indeed, the Commission could not plausibly find that broadband providers are today offering a different service than they offered ten years ago. Broadband providers are still offering Internet access as a functionally integrated service without a separate transmission component. If anything, Internet access is even more of an integrated service offering today because broadband providers currently offer their customers even more ways to store and retrieve information than ten years ago. Put simply, the Commission would not have any factual basis to find that broadband Internet access is anything other than an information service.

Furthermore, there are serious legal and equitable interests at stake based upon the fact that, for more than 10 years, broadband internet service providers and investors have relied upon the Commission's light regulatory touch in making decisions regarding investment and deployment. As noted above, the industry has invested billions of dollars in network infrastructure in reliance on the Commission's classification of Internet access as an information service regulated under Title I. This has led to a broadband "arms race," as providers have deployed robust networks in an effort to keep up with their competitors and offer faster broadband speeds and greater network coverage in an attempt to secure a competitive advantage.

The network infrastructure required to deliver robust broadband service to millions of homes and business is not cheap, requiring far more every year than the United States spent as a country to put a man on the moon or to build the entire interstate highway

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[2] *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

system.[3] The degree to which broadband providers commit their resources to investment in infrastructure is indicated by the comparatively low levels of cash maintained by these companies as compared to Internet edge providers that rely on broadband networks.[4] These investments have driven innovative broadband services such as FiOS, U-Verse, DOCSIS 3.0, LTE, and Gigabit Ethernet; improved DSL technologies including ADSL2+ and VDSL; faster satellite broadband; and numerous new Wi-Fi hotspots and cell towers. Reversing regulatory course at this juncture would upset the reasonable reliance interests of broadband providers in deploying these services and guarantee that a reviewing court would view skeptically any effort to regulate broadband Internet access under Title II.

Even if the Commission were determined to change the way the Internet is regulated, it would be estopped from changing the facts to fit its preferred policy goal. Judicial estoppel bars a party from changing its position after prevailing in an earlier case simply because its interests have changed.[5] The Commission represented to the Supreme Court in the *Brand X* case that broadband Internet access service is a functionally integrated service and that broadband providers do not offer a separate transmission component.[6] The Supreme Court relied upon these representations in upholding the Commission's classification of broadband Internet access as an information service and not a telecommunications service. Having convinced the Supreme Court that broadband providers offer a functionally integrated service without a separate transmission component, the Commission could not lawfully take a different factual position now.

Title II Would Fail to Achieve the Objectives Sought by its Proponents

Finally, Title II also is not the absolute bar on "discrimination" that advocates claim. Because 47 U.S.C. § 202 only prohibits "unjust and unreasonable" discrimination, it would not prevent a broadband provider from offering different service arrangements to customers, provided these differences were reasonable and such arrangements were made available to other similarly situated customers.

In addition, Title II regulation would not cover a telecommunication carrier's dealings with Internet edge providers (except to the extent those providers chose to purchase the carrier's tariffed transmission services under the *Computer Inquiry* framework, which

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3 http://www.ustelecom.org/broadband-industry/broadband-industry-stats

4 *The Wall Street Journal*, Cash and Equivalents Table, B1 (Jan. 3, 2011).

5 *Comcast Corp. v. FCC*, 600 F.3d 642, 647 (D.C. Cir. 2010) (citing *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

6 *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 991 (2005).

they rarely, if ever, did). This is because "the focus of a § 202 inquiry is on discrimination among customers" purchasing telecommunications service from a common carrier.[7] Thus, even if broadband Internet access service were classified as a telecommunications service under Title II, Section 202 would not apply to a carrier's business relationships with a third party purchasing non-telecommunications services, such as a paid prioritization arrangement with an edge provider. That Section 202 would not prohibit, let alone even address, the alleged evil about which advocates of Title II regulation are allegedly concerned is fatal to this proposed regulatory approach.

The Commission should reject calls to regulate broadband internet access under Title II as being inconsistent with national objectives, established law, and the public interest.

Sincerely,

Walter B. McCormick, Jr.

c: Daniel Alvarez
Rebekah Goodheart
Amy Bender
Nicholas Degani
Priscilla Delgado Argeris

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[7] *Z-Tel Communications, Inc. v. SBC Communications Inc.*, 331 F. Supp.2d 513, 556 (E.D. Tex. 2004); *accord Sixth Memorandum Opinion and Order, Petition for Forbearance of the Indep. Tel. & Telecomms. Alliance*, 14 FCC Rcd 10840, ¶ 10 (1999) ("section 202 of the Act . . . prohibits unreasonable discrimination among customers and rates that are unjust and unreasonable"); *Notice of Proposed Rule Making, Bundling of Cellular Customer Premises Equip. and Cellular Serv.*, 6 FCC Rcd 1732, ¶ 2 n.2 (1991) ("Section 202(a) of the Act prohibits carriers from discriminating unreasonably among customers in the 'charges, practices, classifications, regulations, facilities, or services' for 'like' communication service.").