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May 12, 2014

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

Re: Protecting and Promoting the Open Internet, GN Docket No. 14-28

Dear Ms. Dortch:

Comcast has been a strong proponent of Internet openness, and, indeed, is the only broadband provider subject to a legally binding obligation to refrain from blocking consumers' access to lawful web content and services or from engaging in unreasonably discriminatory conduct.¹ While Comcast continues to be a steadfast supporter of openness and remains confident that the Commission can appropriately balance consumer protection with the need to allow network operators to manage their networks reasonably, we believe that any proposal by the FCC to reclassify broadband Internet access as a telecommunications service subject to Title II of the Communications Act would be a destabilizing and counterproductive means of pursuing those important objectives.

Starting with the *Cable Modem Declaratory Ruling* in 2002, the Commission has consistently ruled that broadband Internet access services inextricably combine transmission and information processing, such that they are properly characterized as information services without any severable telecommunications service component.² In the wake of those decisions, and in express reliance on the Commission's determination that common carrier regulation does not (and should not) apply, cable operators and other Internet service providers have invested hundreds of billions of dollars to deploy increasingly robust broadband networks, laying the groundwork for an explosion of innovation in the

¹ *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, ¶ 94 (2011).

² *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002); *see also, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (classifying wireline broadband services as information services); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (classifying wireless broadband services as information services).

Internet ecosystem. This is the foundation on which the extraordinary Internet economy that is the envy of the world emerged and thrived. Any effort to upend that settled legal framework—which has been supported by Commissions and Administrations led by both parties—would be enormously disruptive: It would deter the many billions in additional investment required to connect all Americans and to continue increasing speeds, while subjecting the industry and the Commission to years of debilitating litigation and resulting uncertainty. Just ten years ago, the Commission and the Department of Justice expressly recognized these risks and went to considerable lengths to *avoid* the imposition of common carrier regulation precisely because “[t]he effect of the increased regulatory burdens” likely would have been to prompt ISPs to “postpone or forego plans to deploy new broadband infrastructure, particularly in rural or other underserved areas.”³ The last thing the Commission should do at this stage is to break from the long bipartisan approach that has borne such fruit to date and radically shift to an approach that would curtail broadband investment and impede adoption.⁴

Fortunately, risking such harms is entirely unnecessary. The D.C. Circuit has now confirmed the Commission’s power to prohibit blocking and to ensure commercially reasonable business arrangements between access providers and edge providers pursuant to Section 706 of the Telecommunications Act of 1996, ending a sustained period of uncertainty regarding the Commission’s authority to adopt rules to enforce Internet openness.⁵ While the Commission understandably had contemplated reclassification theories *before* the court upheld its authority to regulate information services, it would make no sense to pursue such a high-risk path now that the D.C. Circuit has validated the Commission’s analysis of potential threats to Internet openness and held that the Commission has ample power to prohibit anticompetitive conduct and prevent harm to consumers.

Moreover, even apart from the substantial legal impediments to abandoning classification decisions grounded in factual findings on which the industry has relied for more than a decade, the purported benefits of invoking Title II as compared to relying on Section 706 are illusory. There is no way to predict how a court would rule on a challenge to imposing Title II, and, in any event, Title II would not necessarily support greater constraints on Internet practices. Common carriers are prohibited only from engaging in *unreasonable* discrimination,⁶ and the relevant precedent makes clear that this standard entails substantial flexibility to differentiate among customers for legitimate

³ Petition for Writ of Certiorari, U.S. Dept. of Justice and FCC, *FCC v. Brand X Internet Servs.*, No. 04-277, at 25-26 (Aug. 27, 2004). The Department of Justice and the Commission further recognized that the Commission’s “forbearance authority is not in this context an effective means of remov[ing] regulatory uncertainty that in itself may discourage investment and innovation”). *Id.* at 28 (internal quotation marks omitted).

⁴ See, e.g., Progressive Policy Institute, *America’s Digital Policy Pioneers*, video recording at <http://www.progressivepolicy.org/2013/12/americas-digital-policy-pioneers/> (including former Chairman Kennard’s endorsement of bipartisan commitment to avoiding heavy-handed regulation of broadband Internet access services).

⁵ *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

⁶ 47 U.S.C. § 202(a).

business reasons.⁷ Thus, to the extent that fears about “paid prioritization” arrangements are driving calls for Title II reclassification, such arrangements would have to be assessed on a case-by-case basis (likely subject to general standards promulgated by the Commission) under Title II, just as under Section 706.

At the same time, reclassifying broadband Internet access services under Title II would risk a host of unintended consequences that proponents of such regulation have scarcely contemplated. For example, as others have pointed out, reclassification could subject a broad range of currently unregulated parties to burdensome obligations designed for monopoly telephone companies, import the dysfunctional access charge regime to the exchange of Internet traffic, and halt the sharing of information necessary to many edge providers’ business models, among various other problems.⁸

As Chairman Wheeler has recognized, the *Verizon* decision offers the Commission an ideal opportunity to devise judicially sustainable, consensus-driven Open Internet rules pursuant to Section 706. In stark contrast, any effort to reclassify broadband Internet access (in whole or in part) under Title II would spark massive instability, create investor and marketplace uncertainty, derail planned investments, and slow broadband adoption. It is hard to imagine a more perilous recipe for pursuing the critical national objectives set forth in the *National Broadband Plan*. The Commission should not put at risk a rare bright spot in the American economy that has been a key engine of economic and jobs growth. Comcast urges the Commission to propose rules that will safeguard the Open Internet pursuant to the authority upheld by the D.C. Circuit, rather than pursuing an approach that would only undermine the public interest objectives at stake.

Sincerely,

/s/ Kathryn A. Zachem

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⁷ See, e.g., *Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003) (upholding carriers’ ability to offer differential discounts to retail customers); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (upholding carriers’ ability to enter into individualized contracts); *Ameritech Operating Cos. Revisions to Tariff FCC No. 2*, Order, DA 94-1121 (CCB 1994) (upholding reasonableness of rate differentials based on cost considerations).

⁸ See, e.g., Letter of Robert W. Quinn, Senior Vice President, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 4-5 (May 9, 2014).

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