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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:

On behalf of the National Cable & Telecommunications Association ("NCTA"), I write to underscore our deep concerns regarding recent proposals to reclassify broadband Internet access services (or some component thereof) as telecommunications services subject to Title II of the Communications Act. As explained in NCTA's prior comments in this docket,[1] the existing transparency rules provide a strong foundation for promoting Open Internet principles, and, to the extent the Commission determines that additional safeguards are necessary, the *Verizon* decision provides ample leeway to adopt such measures pursuant to Section 706 of the Telecommunications Act.[2] In light of that recently confirmed authority, it is wholly unnecessary to pursue a Title II reclassification theory. It also would be immensely destabilizing. Indeed, any effort to subject broadband Internet access services to common carrier regulation would do far more harm than good, as such a heavy-handed framework would discourage network investment necessary to fuel the "virtuous cycle" of deployment, innovation, and adoption that the Commission has long sought to promote under Section 706.

As the Commission and numerous stakeholders have recognized, cable operators and telecommunications companies have made massive private investments in broadband networks, unleashing innovation and dramatically increased consumer welfare.[3] The Commission's 2002 determination and subsequent reaffirmations that broadband Internet access is an integrated information service without any severable telecommunications service component were a critical factor in creating the stable regulatory climate that attracted investment and enabled the Internet

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1 Comments of the National Cable & Telecommunications Association, GN Docket No. 14-28 (filed Mar. 26, 2014).

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

3 Federal Communications Commission, *Connecting America: The National Broadband Plan*, at XI (2010).

to become a key driver of our economy and a central aspect of our lives.[4] In fact, the Commission and the Department of Justice ("DOJ") sought Supreme Court review in the *Brand X* case to prevent the imposition of common carrier regulation on broadband services based in large part on the concern that such regulation would entail significant burdens that could prevent or delay the deployment of "new broadband infrastructure, particularly in rural or other underserved areas."[5] The Court upheld the Commission's information-service classification based on the "factual particulars of how Internet technology works and how it is provided."[6]

As a threshold matter, it is far from clear that the Commission could simply abandon the fact-based classification it adopted and repeatedly confirmed over the past 12 years. The classification of broadband Internet access "turns on the nature of the functions that the end user is offered,"[7] and those functions have not materially changed since the Commission analyzed them in its previous orders. Notably, cable operators have *never* provided broadband transmission as common carriers. Moreover, where, as here, such a classification has engendered "serious reliance interests," and any effort to reclassify broadband Internet access would contradict "factual findings … which underlay [the FCC's] prior policy," the Commission would need to "provide a more detailed justification than what would suffice for a new policy created on a blank slate."[8] At a minimum, pursuing Title II reclassification would plunge the broadband industry into a lengthy period of uncertainty while a new round of appellate proceedings ran its course—a process that can be easily avoided by relying on the roadmap provided by the *Verizon* court.

But even assuming the Commission could lawfully reclassify broadband services, it would be profoundly counterproductive to do so. The burdens and uncertainty associated with Title II regulation (or even the threat of such regulation) would deter broadband providers from making the substantial additional investments required to deploy new and upgraded broadband infrastructure. As noted, the Commission and DOJ emphasized that very risk in their petition in

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4 *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) ("*Cable Modem Declaratory Ruling*"); *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).

5 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) ("*Brand X* Cert Petition").

6 *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 991 (2005).

7 *Cable Modem Declaratory Ruling* ¶ 38.

8 *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

the *Brand X* case,[9] and it remains just as serious today. The Commission has estimated that reaching the broadband deployment goals set forth in the *National Broadband Plan* could require as much as $350 billion in private investment,[10] but the specter of Title II regulation would significantly diminish network providers' ability to attract that level of investment. A wide array of financial analysts and industry observers have reached the same conclusion, arguing emphatically that the threat of Title II reclassification would damage broadband providers, discourage infrastructure investment, stifle job growth, and harm consumers.[11]

Indeed, in other contexts where the government has imposed public utility-style regulation, such an approach has led to chronic *under*-investment in basic infrastructure. One need only examine our nation's ailing public infrastructure to appreciate the potential dangers to the continued expansion and growth of broadband networks.[12] The contrast is striking when one compares the crisis in public utility infrastructure with the dynamism and stable investment in broadband Internet services.[13]

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9 *Brand X* Cert Petition at 25-26.

10 *See* FCC Staff Presentation, *September 2009 Commission Meeting*, at 45 (Sep. 29, 2009), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293742A1.pdf.

11 *See, e.g.*, Anna-Maria Kovacs, *The Internet Is Not a Rotary Phone*, Re/code, May 12, 2014, *available at* http://recode.net/2014/05/12/the-internet-is-not-a-rotary-phone/ (comparing robust investment in broadband in the U.S. to diminished investment in Europe, which "has continued to regulate its telecommunications industry along the lines of Title II"); Bret Swanson, *Title II Communications Is the 'Slow Lane'*, Tech Policy Daily, May 13, 2014, *available at* http://www.techpolicydaily.com/communications/title-ii-communications-slow-lane/ (explaining that "[a]s the mostly unregulated Internet piles success upon success, boosting bandwidth and transforming each industry it touches, with no end in sight, the old, heavily regulated, Title II network is barely an afterthought and is rapidly approaching full retirement"); *see also* Letter of Robert W. Quinn, Senior Vice President, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 2-4 (May 9, 2014) ("AT&T May 9 Letter") (summarizing other analysts' commentary on the risks of Title II reclassification theories).

12 A recent study found that most of America's drinking water infrastructure is nearing the end of its useful life and will need $1 trillion in investment in the coming decades, and that America's electric grid will require a $736 billion shot in the arm by 2020 to keep it from failing. *See* American Society of Civil Engineers, *2013 Report Card for America's Infrastructure*, *available at* http://www.infrastructurereportcard.org. The same study found that one in three major U.S. roads is in poor or mediocre condition and that repairing and maintaining these roads will require an estimated $170 billion in annual investment, and that one in four bridges is either functionally obsolete or structurally deficient. *Id.*

13 Broadband speeds have increased 1500 percent in the last decade. Michael Powell, *Keynote Remarks: 2014 Cable Show* (Apr. 29, 2014), at 3, *available at* https://www.ncta.com/sites/prod/files/NCTA-MichaelPowellKeynoteRemarks_0.pdf.

And the risks associated with Title II regulation would extend far beyond the chilling of investment and innovation by broadband Internet access providers. If the transmission component(s) of broadband Internet access were to be treated as distinct telecommunications services, there is no sound principle that would justify limiting such a classification to last-mile providers; to the contrary, other entities that provide transmission (such as backbone providers and content delivery networks) could become subject to Title II.[14]

Nor could the Commission overcome such obstacles by forbearing from unwanted and overbroad aspects of Title II. Any such undertaking would be massively complex and contentious, given the myriad provisions that are included in Title II and relevant Commission precedent. As a result, the forbearance process *itself* would engender enormous uncertainty, as the Commission has previously recognized.[15] And any grant of forbearance would be subject to judicial challenge and/or potential revocation by a later Commission.

Moreover, subjecting broadband access providers to regulation under Title II would not even accomplish the goal that reclassification proponents apparently seek. Reclassification would not support a categorical prohibition on Internet "fast lanes" any more than Section 706 would. Section 202 of the Act does not impose a duty of "nondiscrimination," but rather proscribes only "unjust" or "unreasonable" discrimination.[16] The relevant precedent makes clear that carriers subject to this standard have considerable flexibility to differentiate among customers for various legitimate business reasons.[17] Accordingly, whatever the Commission's ultimate judgment about the potential benefits and harms associated with paid prioritization and

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Moreover, as the Commission is aware, America's Internet providers have invested well over $1 trillion dollars since 1996 to make America's Internet world-class. *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Eighth Broadband Progress Report, 27 FCC Rcd 10342 (2012).

14 As AT&T has pointed out, reclassification of last-mile transmission under Title II also could import the broken intercarrier compensation scheme to the exchange of Internet traffic, among various other unintended and disruptive consequences. *See* AT&T May 9 Letter at 5.

15 *See Brand X* Cert Petition at 28 (explaining that "forbearance authority is not in this context an effective means of remov[ing] regulatory uncertainty that in itself may discourage investment and innovation").

16 47 U.S.C. § 202(a).

17 *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).

similar arrangements, any such practices will have to be reviewed on a case-by-case basis pursuant to general standards promulgated by the Commission, regardless of whether the Commission seeks to rely on Section 706 or Title II.

As reflected in our recent comments, NCTA seeks to be a constructive partner in any new dialogue about new Open Internet rules. While the substance of proposed rules can be fairly debated, there is no sound reason to pursue reclassification under Title II.

Sincerely,

/s/ Rick Chessen

Rick Chessen