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February 2, 2015

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: American Cable Association Notice of Ex Parte Presentation, *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 January 29, 2015, Ross J. Lieberman, Senior Vice President Government Affairs, American Cable Association ("ACA"); Betty Zeman, Marketing Manager, Cedar Falls Utilities ("CFU"); Ben Lovins, Senior Vice President, Telecommunications Division, Jackson Energy Authority ("JEA"); Chris Kyle, Vice President Industry Relations & Regulatory, Shenandoah Telecommunications Company ("Shentel"); Thomas W. Cohen, Kelley Drye & Warren and the undersigned, outside counsel to ACA, met to discuss the above-referenced proceedings with, respectively, Matthew Del Nero and Claude Aiken, Wireline Competition Bureau, Andrew Erber and Marcus Maher, Office of General Counsel, and Scott Jordan, Chief Technologist; Gigi Sohn, Daniel Alvarez and Eric Feigenbaum, Office of Chairman Wheeler; and Nicholas Degani, Office of Commissioner Pai. The purpose of the meetings was to discuss the views of ACA[1] and its members that small broadband Internet service providers ("ISPs) lack the incentive and ability to harm Internet openness and they will be harmed if the Commission reclassifies broadband Internet access service under Title II of the Act and does not fully forbear from this action and resolve other collateral issues.

Background on ACA Members. At the meeting, the ACA members discussed briefly background about their companies, the robust competitive environment for broadband Internet access services in their markets, and their recent and planned investments to deploy broadband:

[1] ACA represents more than 800 small and medium-sized cable television operators. No ACA member has more than 1 million subscribers; the medium number of video subscribers per member is about 1,000. These operators aren't only video providers, but have upgraded their one-way cable systems to also provide two-way advanced services such as broadband Internet and voice over Internet Protocol. ACA members combined offer advanced services to nearly 19 million homes (14% of the U.S. total). About 7 million consumers subscribe to video, and more than 6.5 million subscribe to broadband Internet. ACA's membership includes a mix of cable ops, rural telephone companies, and municipalities (nearly 10% of ACA's membership are municipal providers). ACA's members use a mix of broadband technologies – 80% cable modem (DOCSIS), 12% Fiber-to-the-Home ("FTTH"), and 7% digital subscriber line ("DSL"). ACA estimates that its members have invested more than $10 billion in their networks. ACA members provide broadband to smaller markets and rural, hard to serve areas. They have built out broadband to 1.6 million homes that the Commission considers "uneconomic" to serve. ACA members also provide competition to other voice, video and broadband Internet providers (4.8 million homes in urban areas and 0.6 million homes in rural areas.

- Cedar Falls Utilities. Ms. Zeman stated that CFU is a municipal fiber-to-the-home ("FTTH") provider delivering broadband Internet and video services in Cedar Falls, Iowa.[2] CFU today has 12,500 broadband Internet subscribers and competes with both Mediacom and CenturyLink. CFU's standard broadband product, FiberNet Internet service, is up to 1 gigabit per second. To first deploy broadband in 1996 and later upgrade its distribution plant to FTTH, CFU saved cash from subscriber revenues for about half the cost, and raised the rest through debt obligations.

- Jackson Energy Authority. Mr. Lovins stated that JEA too is a municipal public utility in in Jackson, Tennessee using FTTH to provide voice, video and broadband Internet, among other services. JEA passes about 35,000 residences, serving 18,000 broadband Internet subscribers. JEA faces substantial competition – it is the third wireline broadband ISP in the market, competing with Charter and AT&T. It experiences an annualized churn rate of between 20-30%; subscriber acquisition costs are a huge burden and JEA competes hard to keep subscribers from switching. JEA finances its operations and network through subscriber revenues and revenue bonds. Mr. Lovins explained that JEA is actively investing in its network and will increase its investment substantially to expand its gigabit broadband plant; it is planning to spend over $8 million over the next three years.

- Shenandoah Telecommunications Company. Mr. Kyle described Shentel, a 113 year old publicly-traded rural provider focusing today on delivering voice, video and broadband Internet over both cable and telephone plant in portions of Virginia, West Virginia, and western Maryland. Shentel's cable broadband network passes 170,000 households and its DSL networks pass about 22,000 households. Shentel has 51,000 cable broadband subs and about 11,500 DSL subscribers. The company was recognized as being the first 100 gigabit network to be built in Virginia. Shentel's annualized churn for its Internet service is close to 30% per year; the loss of subscribers is very expensive due to need for truck rolls and Shentel also competes hard to try to avoid losses. Shentel also serves a lot of very small and remote communities such as Rural Retreat and Farmville, Virginia with at most only a few thousand households, and also serves economically depressed areas such as McDowell County, West Virginia, the second poorest county in the nation. Although Shentel faces less competition in these areas, Shentel must offer good quality service at a reasonable price to attract customers who have never subscribed to Internet access service.[3] To finance its network, Shentel relies on subscriber revenues and risk capital from the private financial markets.

Perspectives of Small ISPs on Why Title II is the Wrong Approach. In a series of filings, ACA has informed the Commission that reclassification is the wrong approach for small and medium-sized ISPs who lack the incentive and ability to harm Internet openness from a factual, policy and legal perspective, but that if the Commission takes this unnecessary and unwarranted action, it must avoid imposing burdens on these smaller ISPs that will not benefit either consumers or Internet content,

[2] CFU does not offer voice service, although it has reviewed this decision periodically. One reason that CFU does not offer voice service is that it wished to avoid the regulatory burdens associated with offering such service.

[3] In addition to keeping prices affordable, Shentel is working on a variety of efforts to increase adoption in these economically-depressed areas to address issues such as lack of computers and equipment in the home and digital literacy.

applications and services ("edge") providers.[4] CFU, JEA and Shentel buttressed these arguments by describing how they do not, cannot, and do not wish to engage in practices that would harm Internet openness either because they face competition or are striving to drive up adoption, and because they lack the negotiating power to extract compensation from Internet edge providers. CFU, JEA and Shentel described the challenges of serving smaller markets where they face competition from other broadband Internet providers. Shentel also described the challenge of attracting and serving low-income subscribers in areas where there is less competition. They explained that their networks are financed through revenues derived from rates paid by their subscribers and in part through the financial markets in the form of debt. Accordingly, these providers must take a consumer-centric approach to providing service. They explained how harming Internet openness would depress consumer satisfaction with their networks and interfere with their ability to maintain a revenue stream sufficient to cover operations and to repay debt obligations and finance network upgrades and extensions.

Small ISPs Adhere to Open Internet Principles and Lack the Incentive and Ability to Harm Edge Providers. Rather than having an incentive to harm the openness of the Internet, available evidence demonstrates that smaller ISPs are supportive of an open Internet. Ms. Zeman described CFU's support for an open Internet and for the balanced obligations imposed on ISPs by the Commission's 2005 Internet Policy Statement and its 2010 Open Internet rules. CFU, which considered itself a proponent of net neutrality rules under Section 706 of the Act, does not throttle or prioritize traffic on its network, and does not cap throughput. CFU serves in a competitive

[4] *Protecting and Promoting the Open Internet*, Reply Comments of the American Cable Association, GN Docket Nos. 14-28, 10-127 (filed Sept. 15, 2014) ("ACA Reply Comments"); *Protecting and Promoting the Open Internet*, Comments of the American Cable Association, GN Docket Nos. 14-28, 10-127 (filed July 17, 2014) ("ACA Comments"). ACA maintains that the record in this proceeding confirms that there is no factual or policy justification to impose network management rules or network management disclosure requirements that are more stringent or go beyond those adopted in the 2010 Open Internet Order, especially for small and medium-sized ISPs. *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905 (2010) ("2010 Open Internet Order"), aff'd in part, vacated and remanded in part sub nom. *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) ("Verizon"). In an *ex parte* letter filed January 12, 2015, ACA explained that reclassifying broadband Internet access service as a telecommunications service subject to regulation under Title II of the Act for small and medium-sized broadband ISPs is unsupported by the facts, the record in the above-referenced proceedings, or the Communications Act . *Protecting and Promoting the Open Internet*, Letter of Barbara S. Esbin, Cinnamon Mueller, Counsel for ACA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (filed Jan. 12, 2015). Such an action would therefore be arbitrary, capricious, and contrary to law as well as counterproductive from the perspective of a national policy to encourage the deployment of affordable advanced telecommunications services and broadband infrastructure. *Id.* at 3. ACA urged that if the Commission nonetheless adopts the reclassification approach, it should extend maximum forbearance of Title II regulatory obligations to small and medium-sized broadband ISPs, including those contained in Sections 201, 202 and 208, deem broadband Internet access to be an interstate telecommunications service and take action to prevent cable ISPs from paying the telecommunications rate for their pole attachments. *Id.* at 10. ACA also joined in an *ex parte* letter filed on behalf several trade associations representing smaller ISPs pointing out the inadequacy of the Commission's Initial Regulatory Flexibility Act analysis in this proceeding. *See Protecting and Promoting the Open Internet*, Letter of ACA, NCTA, and WISPA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (filed Jan. 9, 2015). In addition, ACA filed an *ex parte* letter highlighting the potential for reclassification of the broadband Internet access service provided by its cable operator members to result in increased pole attachment rates under the telecommunications rate formula in certain circumstances. *Protecting and Promoting the Open Internet*, Letter of Thomas Cohen, Kelley Drye & Warren, LLP, Counsel for ACA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (filed Jan. 20, 2015) ("ACA Jan. 20th Ex Parte") (addressing pole attachment issues). Most recently, ACA filed an *ex parte* letter urging the Commission not to burden small and medium-sized ISPs with additional – and utterly unwarranted – enhanced transparency rules. *Protecting and Promoting the Open Internet*, Letter of Barbara S. Esbin, Cinnamon Mueller, Counsel for ACA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (filed Jan. 27, 2015).

environment and has found that it is a good business decision to comply with the Commission's Open Internet principles as they are widely accepted by the public and all Internet providers. In affirmation of CFU's commitment to the Open Internet principles, Ms. Zeman confirmed that CFU has logged *zero* Open Internet service or disclosure complaints from consumers or traffic management inquiries from edge providers.[5] Mr. Lovins and Mr. Kyle confirmed that neither JEA nor Shentel throttles or prioritizes traffic on its network and that neither has received consumer or edge provider complaints about its network management practices or Open Internet disclosures. Mr. Lieberman stated that the views of Ms. Zeman, Mr. Lovins, and Mr. Kyle are consistent with those of all small and medium-sized ISPs.

Some Open Internet proponents assert that large ISPs that also offer video services have an incentive to thwart the availability of over-the-top ("OTT") video options; however, this is not true for smaller ISPs. CFU, JEA and Shentel have embraced facilitating over-the-top video viewing for their subscribers by entering into local caching arrangements with online video distributors such as Netflix and Amazon as well as by offering OTT video options as features on their set-top boxes, even though they recognize that embracing of OTT services may lead to an erosion of their subscription multichannel video programming distributor base.

These operators described how, rather than trying to congest their interconnection points for the purpose of demanding payments from edge providers, they have had to work hard to even get the attention of OTT video distributors for the purpose of enabling a better consumer experience. All three ACA member companies reported similar Internet interconnection experiences with large edge providers: getting the attention of an edge provider like Netflix to even discuss entering into mutually-beneficial settlement-free caching arrangements such as Netflix's Open Connect program is an effort for smaller ISPs. They confirmed that Netflix will not even begin to discuss these arrangements with them until the ISP's Internet traffic reached a certain traffic volume. Mr. Kyle stated that once Shentel had reached that level of traffic, it was able to enter into amicable settlement-free collocation arrangements with Netflix, Akamai, Google and others.[6] Ms. Zeman and Mr. Lovins described similar experiences at CFU and JEA. Ms. Zeman stated that CFU had to "beat down the door" to get the attention of Netflix. Mr. Lovins reported that JEA struggled to get Netflix to pay attention when the network was at 2 gigabits, and is still unsuccessfully trying to negotiate a Netflix app for its set-top boxes. Mr. Lieberman noted that these operators' experiences are consistent with the experiences of other ACA members, hundreds of whom would benefit from entering into settlement-free caching arrangements, but are too small to meet the minimum traffic levels required by edge providers.

Not only do small and medium-sized ISPs lack the incentive, but they lack the ability to harm the openness of the Internet as well. The lack of interest of edge providers to enter into a caching arrangements with hundreds of smaller ISPs demonstrates that a single member company has no ability to successfully demand payment for access to their subscribers or for priority delivery of traffic over their last-mile networks. Ms. Zeman summed the situation up by stating that, "Netflix would laugh us out of the room if we asked for money."

Title II Regulation Would Harm the Finances of Smaller ISPs and Hinder Their Ability to Deploy Broadband. ACA and its member companies next described the direct and indirect economic harms they anticipate should the Commission reclassify broadband Internet access service. They focused primarily on harms arising under Sections 201, 202 and 208 of the Act immediately apparent

[5] Ms. Zeman stated that if CFU received a call from an edge provider about its network management practices, it would put the caller directly in touch with its Chief Technical Officer for an answer.

[6] *See* ACA Comments, Declaration of Edward McKay, ¶ 12 (describing Shentel's efforts to enter into direct peering arrangements with large Internet content providers).

under a reclassification scheme, that, even assuming some forbearance, are provisions likely to be applied to ISPs.[7] These include rate regulation – either through *ex ante* rules or *ex post* enforcement through the complaint process – unbundling (open access), resale and mandatory collocation, types of obligations that the Commission has previously imposed on common carriers using its Section 201 and 202 authority.

Ms. Zeman stated that it would be extremely burdensome for CFU to have to defend its practices, rates, terms and conditions of service before the Commission in Washington, D.C. Mr. Lovins explained that JEA is defending against a complaint by a third-party ISP concerning open access to its network before the Tennessee Public Regulatory Authority, which is costly to defend. He too fears having to respond to such requests before the Commission, which would be even more costly and difficult.

Ms. Zeman and Mr. Lovins also related how CFU's and JEA's ability to raise funds for network investment through debt offerings would be adversely impacted if they were to lose control over their rates through either direct rate regulation or adjudication of complaints about rates, terms and conditions of service. Loss of control over pricing would also threaten their ability to repay current debt obligations. Ms. Zeman explained that CFU can raise money at favorable rates to pay for network investments today because the investor community sees that CFU has control over its rates. Rate regulation that impairs CFU's ability to control it rates and therefore its ability to repay its debt would likely lower its bond ratings for future borrowings. Mr. Lovins explained that JEA's bonds were taken years ago, but that JEA has to pay that debt and that it does so through revenues derived from subscriber rates. The imposition of open access mandates whereby a third-party ISP is able to ride over JEA's broadband network and compete for end-users would seriously threaten JEA's ability to repay its debt obligations by driving down subscriber revenues and therefore harm its ability to attract financing for continued upgrades and deployment in the future. Ms. Zeman agreed. CFU's network was neither built nor financed on the premise that it would be subject to open access conditions, and such an obligation would be detrimental to its future.

Classification of Services as Interstate and Preemption of State Regulation Are Necessary. ACA also discussed the need for the Commission, should it reclassify, to declare the reclassified broadband Internet access service to be a jurisdictionally interstate service and to preempt any state regulation of the service. In view of the heavy burden of new federal regulations, also permitting states to regulate could be suffocating for smaller ISPs.

Lack of Need for Enhanced Transparency Rules for Small ISPs. ACA also discussed the lack of record support for the imposition of *any* enhanced transparency requirements for small ISPs, particularly proposals to maintain a separate set of Open Internet disclosures tailored to the needs of edge providers and to disclose, on a real-time basis, information about network congestion and the

[7] ACA understands that the model contemplated currently by Commission staff is that of commercial mobile radio service ("CMRS") under Section 332, added to the Communications Act of 1934 by the Omnibus Budget Reconciliation Act of 1992, codified at 47 U.S.C. § 332. CMRS providers are classified as common carriers, subject to Sections 201, 202 and 208 of the Act, but are not rate regulated by the Commission. States that wished to continue to regulate cellular rates, for example, were required to petition the Commission for permission. *See* 47 C.F.R. § 20.13. Several states including California submitted such petitions in the mid - 1990s; none of these petitions were granted. *FCC Denies State Petitions to Regulate Rates for Commercial Mobile Radio Services*, Report No. WT 95-8 (May 11, 1995); *see also* Edmund L. Andrews, *FCC Rejects States' Efforts to Regulate Cellular Prices*, NEW YORK TIMES, May 12, 1995, at D6, available at: http://www.nytimes.com/1995/05/12/business/fcc-rejects-states-efforts-to-regulate-cellular-prices.html. For this reason, it focused the discussion at the meetings on the provisions most likely to be applied to its members, post-reclassification. ACA addressed the harms of other consequences of reclassification in its Comments and Reply Comments. See ACA Comments at 62-66.

lack of demonstrable benefits that would accrue from such reporting. Ms. Zeman confirmed that real-time network congestion disclosures would be highly burdensome for a small ISP. Placing an obligation on ISPs only in a competitive marketplace tips the balance in favor of other Internet players. As noted above, ACA member companies are complying with the current unitary disclosure requirements, which, although somewhat burdensome, strike the right balance between edge provider and consumer needs for pertinent information and the need to provide ISPs with some flexibility in how they disclose pertinent information. None have received complaints about the level of their current Open Internet disclosures and all post points of contacts for consumer and edge provider questions. In short, there is no need to impose *any* enhanced transparency requirements aimed at edge providers on small ISPs. Should the Commission nonetheless adopt such requirements, it must exempt small ISPs from their scope.

Adverse Consequences on Pole Attachment Rates Must be Avoided. Finally, ACA discussed the need for the Commission to avoid unintended adverse consequences of reclassification for its cable members who today pay the cable rate for pole attachments used for the provision of cable and Internet services. Upon reclassification, as ACA has previously explained, its cable members would be subject to assessments at the telecommunications rate for pole attachments, which can be significantly higher under certain circumstances.[8] Ms. Zeman explained that CFU uses some of the poles maintained by its electric utility affiliate and some poles under a joint use agreement with the incumbent local exchange carrier ("ILEC"). For attachments on poles owned by the ILEC, it currently pays the cable rate. Mr. Kyle explained that for Shentel, a rural operator which has a large number of pole attachments and fewer homes per square mile subscriber base over which to spread fixed costs, pole attachment rates are a significant issue. Shentel's pole attachment rates would rise considerably if assessed the telecommunications rate. These changes would affect broadband pricing for all of the affected ISPs. This price increase would be particularly difficult for Shentel, which serves many low-income communities and fights to increase penetration by keeping its broadband rates affordable. Actions by the Commission that would increase an ISP's cost of service would likely flow through to consumers in the form of higher prices, in part if not in whole, a result antithetical to the national policy of increasing broadband deployment and adoption.

* * *

Mr. Lieberman stated that the experiences of ACA's member companies demonstrate that the market is working today to bring broadband deployment and advanced services to small and hard-to-serve areas of the country, consistent with the goals of Section 706 of the Act and the National Broadband Plan. Providers like CFU, JEA and Shentel lack the market power or negotiating leverage to harm Internet edge providers like Netflix, Amazon or Hulu, even if those OTT video providers lessen their video subscriptions simply because they represent too few "eyeballs" to matter. This reality is confirmed by the fact these edge providers will not even return their calls until they reach certain Internet traffic volumes on their networks. Even small or new-entrant edge providers are unlikely to be concerned over these ISPs' network management practices; their make-or-break relations with ISPs are only with the very largest ISPs, who provide access to multiple millions of subscribers. The smaller ISPs simply lack the incentive or ability to harm Internet edge providers or their own subscribers through discrimination, throttling, blocking or seeking payment for priority delivery. In short, they present no problem to the open Internet for which Title II regulation is the solution.

As such, ACA maintains that should the Commission reclassify broadband Internet access as a Title II service, it must eschew imposing unwarranted and burdensome Title II regulatory obligations and allowing unintended adverse consequences such as higher pole attachment rates, and avoid

[8] ACA Jan. 20th Ex Parte at 2.

imposing unnecessary and burdensome enhanced transparency requirements. There is a significant risk that the consequences of reclassification will be far worse than the Commission believes, with absolutely no demonstrable corresponding benefit to either the Internet community as a whole or the residents of the communities served by smaller ISPs. The Commission may avoid risking such adverse outcomes by recognizing that smaller ISPs lack the incentive and ability to engage in unreasonable or discriminatory practices, much less, anticompetitive acts, which harm consumers and Internet edge providers and, on that basis (i) forbear from applying the regulatory obligations applicable to Title II telecommunications carriers, including those found in Sections 201, 202 and 208; (ii) declare broadband Internet to be an interstate service and preempt inconsistent state regulation; (iii) exempt smaller ISPs from any new and enhanced transparency obligations; and (iv) and protect cable ISPs from increases in their pole attachment rates under the telecommunications rate formula.

If you have any questions, or require further information, please do not hesitate to contact me directly. Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with the Commission.

Sincerely,



Barbara S. Esbin
Counsel for the American Cable Association

cc (*via email*): Matthew Del Nero
Claude Aiken
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