November 19, 2014

***Ex Parte* Notice**

Ms. 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 Monday, November 17, 2014, Shirley Bloomfield, Chief Executive Officer of NTCA–The Rural Broadband Association ("NTCA"), together with the undersigned, met with Jonathan Sallet, General Counsel of the Federal Communications Commission (the "Commission"), and Stephanie Weiner, Associate General Counsel to discuss matters in the above-referenced proceeding. NTCA also held a separate meeting on the same day with Gigi Sohn, Special Counsel to Chairman Tom Wheeler for External Affairs, to discuss the same subject matter.

During the meetings, NTCA urged adoption of a balanced "hybrid" approach to protecting and promoting Open Internet principles that relies upon Section 706 of the Telecommunications Act of 1996 to apply basic "no blocking" and transparency/disclosure requirements to retail broadband Internet access services, paired with targeted application of specific provisions of Title II of the Communications Act of 1934, as amended, specifically and only to transmission and exchange of data across and between underlying networks. *See, e.g.*, Comments of NTCA, GN Docket No. 14-28 (filed July 18, 2014) at 3-17. More specifically and to be unmistakably clear, under this "hybrid" approach, retail broadband Internet access services would remain (as they always have been) interstate information services, while the transmission of data across and between underlying networks for other carriers, providers, and consumers – regardless of where that transmission occurs in the network hierarchy– would be classified as interstate telecommunications services.

We explained that this hybrid approach resembles in many respects the "Third Way" proposal suggested by a prior General Counsel of the Commission in May 2010, and that this approach provides the most straightforward means of ensuring Open Internet principles are served, consumer interests are protected, and regulation is "right-sized" and applied only on a tailored basis to those services and functions where concerns are most likely to arise. We observed further that there is sound legal and industry precedent with respect to classification and regulation that differentiates between retail broadband Internet access services and underlying transmission/data exchange functions, given that: (1) this was the way in which all local exchange carriers offered broadband (DSL) services until 2005; (2) many rural local exchange carriers ("RLECs") continue to offer retail broadband services and transmission in this manner today; and (3) there is nothing "enhanced" about the transmission of data from points A to Z on underlying networks or the exchange of data among such networks for other carriers, providers, and consumers.

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Indeed, the legal underpinnings of this approach were thoroughly explained in the dissenting opinion in *NCTA v. Brand X Internet Services, Inc.*, 545 U.S. 967 (2005), wherein Justice Scalia defined the relevant touchstone as "whether the individual components in a package being offered still possess specific identity to be described as separate objects of the offer, or whether they have been so changed . . .that it is no longer reasonable to describe that way." Looking specifically at the transmission component underpinning broadband services, Justice Scalia then concluded that it "retains such ample independent entity that it must be regarded as being an offer."

NTCA next noted that the Commission should not distinguish between *kinds of transmission* (*e.g.*, last-mile, middle-mile, etc.) in classifying transmission and data exchange underlying broadband as telecommunications services. If data are conveyed from points A to Z or exchanged between networks of any kind, those functions are transmission – and the mere location of that transmission at a given point in the network ecosystem is irrelevant by itself to the regulatory classification of that transmission. Moreover, while certain parties desire to focus on alleged "bottlenecks" or ambiguous "threats" posed by last-mile providers specifically, even if these concerns were valid (and the case has not been made in that regard), this too is simply irrelevant for classification purposes; that is perhaps a question for what level of regulation should or should not apply, but it does not change the fundamental nature of the transmission function itself and the threshold classification determination.

We further explained that an exclusive policy focus on "last-mile" networks risks ignoring (and leaving the Commission relatively powerless to address) broader interconnection disputes that can undermine consumer expectations and harm smaller network providers. Concerns relating to the transmission and exchange of broadband network data in recent years have arisen not out of any mistreatment or malfeasance on the part of retail Internet Service Providers ("ISPs") with respect to their consumers, but rather in disagreements over the economics and technical burdens associated with underlying networks that exchange such data. These disputes and disagreements have involved network operators who serve as peers to one another or provide transit services to smaller operators. Thus, the Commission should examine and address the transmission and exchange of data across *all* networks in lieu of a singular focus on "last-mile" operations.

NTCA next reiterated, consistent with prior filings, that the scope of regulation that follows from any classification determinations must be thoughtfully crafted and narrowly tailored. As noted above and in prior filings, for example, there is no basis for the unprecedented classification and regulation of retail broadband Internet access services provided by ISPs to end users as if they were telecommunications services subject to Title II. Instead, as explained in NTCA's prior filings, these services have always been and remain interstate information services that should be, at most, subject to basic "no blocking" and already existing transparency/disclosure requirements imposed pursuant to Section 706.

Furthermore, with respect to underlying networks, the Commission should not and need not engage in heavy-handed regulation of transmission functions or the exchange of data between networks even if these functions are found subject to Title II. NTCA explained that what is needed is not substantial *ex ante* regulation, but rather greater focus on an *ex post* "regulatory backstop" that ensures network operators know they are not to engage in unjust or unreasonable practices or unjust or unreasonable discrimination, that their operations must be consistent with our national policy of universal service, and that there will be swift and effective enforcement to the extent that they fail in either regard. To this end, NTCA suggested the Commission would need to do little more than apply Sections 201, 202, 208, and 254 to such transmission and data exchange functions, along with some basic transparency

requirements (including optional but *not* mandatory tariffing) to provide visibility into the workings of these markets.[1] In this regard, NTCA analogized to the interstate interexchange marketplace which, while nominally regulated pursuant to Title II, has in fact been virtually regulation-free for decades. *See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, *Implementation of Section 254(g) of the Communications Act of 1934, as amended*, FCC 96-424, Order on Reconsideration (rel. Aug. 20, 1997) (reaffirming commitment to detariffing policies for most interstate long distance services).

Finally, NTCA asserted in the meetings that applying such a light-touch, *ex post* "regulatory backstop" to the transmission and data exchange functions on underlying networks would not equate to "regulation of the Internet." The basic rule under this proposal – "Don't treat other providers unjustly or unreasonably" – would be simple and should be well-understood by every network operator at all familiar with Title II jurisprudence. Such a "golden rule" of network operation can hardly be called "heavy-handed" or characterized as rising to the level of "regulating the Internet." Indeed, under the approach advocated by NTCA, the Commission would specifically *not* subject consumer broadband – retail broadband Internet access services as offered by ISPs – to Title II. Instead, consumer access to the Internet would remain *an interstate information service* subject to basic Section 706 protections of the kind that appear to be supported by providers of all kinds, but the Commission could at the same time be more assured of its ability to examine and address any concerns that may arise among underlying network operators that frustrate the objectives of an Open Internet.

Thank you for your attention to this correspondence. Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed via ECFS.

Sincerely,

/s/ *Michael R. Romano*
Michael R. Romano
Senior Vice President – Policy

cc: Jonathan Sallet
Gigi Sohn
Stephanie Weiner

[1] NTCA anticipates that under this approach RLECs would continue to have the option of offering broadband transmission services under tariff, as they do today.