



October 5, 2023

Ex Parte Notice

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
45 L Street, NE
Washington, DC 20554

RE: *Safeguarding and Securing the Open Internet, WC Docket No. 23-320*

Dear Ms. Dortch:

On Tuesday, October 3, 2023, Joshua Seidemann and the undersigned on behalf of NTCA-The Rural Broadband Association (“NTCA”) spoke with Justin Faulb, chief of staff and legal advisor for wireline and national security to Commissioner Geoffrey Starks, regarding matters in the above-referenced proceeding. NTCA looks forward to providing its more specific perspectives on the proper regulatory treatment of broadband Internet access services in forthcoming filings. The instant discussion, however, focused specifically upon two areas in the draft Notice of Proposed Rulemaking (“Draft NPRM”) circulated by the Chairwoman of the Federal Communications Commission (“Commission”) in advance of the October open meeting.

First, if it will examine Internet traffic exchange and the broadband marketplace,¹ NTCA urged the Commission to recognize and seek input on the multi-sided nature of the Internet ecosystem. While the Draft NPRM appears to presume that concerns regarding the ability and incentives to engage in certain kinds of conduct arise only from one set of parties (retail Internet Service Providers (“ISPs”)), the Draft NPRM *itself notes specifically* that the fulfillment of consumer needs and demands with respect to online access typically involves not only a “last-mile” ISP but also an “edge provider or an intermediary with the ISP’s network.”² Accordingly, given the bilateral or multilateral nature of data transmission and exchange, there is no logical basis to focus solely upon the incentives and ability of a single party to such arrangements. Moreover, NTCA highlighted the far-fetched nature of any notion that small rural ISPs offering retail broadband services somehow possess market power to extract concessions from or demand terms of dominant edge providers and platforms, nationwide Internet backbone operators, or even regional middle mile networks; if anything, market power likely often resides on the other side of those interconnection points. Therefore, if the Commission determines to proceed with such inquiries as proposed in the Draft NPRM, NTCA urges a broader exploration with respect to the possession and exercise of dominant market power by participants of *all kinds* in the broadband and Internet ecosystem and the agency’s jurisdictional authority to address such concerns where they arise, rather than focusing arbitrarily on last-mile retail ISPs as a purportedly monolithic class with the singular capability to give rise to such concerns.

¹ See *Safeguarding and Securing the Open Internet*, WC Docket No. 23-320, Draft NPRM, FCC-CIRC2310-01 (rel. Sept. 28, 2023), at ¶¶ 65, 112, and 122-128.

² *Id.* at ¶¶ 65 and 112.

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Second, if the Commission proceeds with this rulemaking, NTCA urged the use of open-ended questions to develop a meaningful and balanced record regarding the potential benefits and costs of proposed forbearance from contribution obligations that would arise under Section 254(d) of the Communications Act of 1934, as amended, if broadband Internet access services were to be reclassified as proposed in the Draft NPRM. NTCA observed that the Draft NPRM articulates neither basis nor rationale for its tentative conclusion that such forbearance is warranted beyond the mere fact that such forbearance was temporarily applied previously.³ NTCA asserted that a record should be developed as to whether forbearance in this regard at this particular point in time, based upon changes in circumstances and current conditions, would promote or undermine Commission objectives with respect to the ability of every American to participate in a meaningful way in the broadband and Internet ecosystem.

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 Romano

Michael Romano

Executive Vice President

cc: Justin Faulb

³ See *id.* at ¶ 104 (“With respect to section 254, we proposed to forbear in part from the first sentence in section 254(d) and our associated rules ‘insofar as they would immediately require new universal service contributions associated with’ [broadband Internet access services], as the Commission did in 2015, and seek comment on this proposal.”); see also *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5835 (2015), at ¶¶ 488-489 and n. 1471 (noting the adoption of forbearance pending referral of contribution reform matters for review and development of recommendations by the Federal-State Joint Board on Universal Service).