March 7, 2024

***Ex Parte* Notice**

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
45 L Street, N.E.
Washington, D.C., 20554

RE: Safeguarding and Securing an Open Internet

WC Docket No. 23-320

Dear Ms. Dortch:

On Tuesday, March 5, 2024, the Affordable Broadband Campaign, which convenes a diverse group of entities dedicated to addressing the challenge of finding a long-term solution to affordable broadband for low-income households met with Trent Harkrader, Terri Natoli, Lisa Zaina, and Callie Coker of the Wireline Competition Bureau.[1] The group explained during the course of the meeting why forbearance from application of section 254(d) of the Communications Act of 1934, as amended, as proposed in the above-captioned proceeding is unnecessary and not supported by the record. As set forth in more detail below, and discussed in the meeting, should the Commission conclude that broadband service is a telecommunications service, that decision alone is insufficient to give rise to an immediate obligation to contribute to the universal service fund. Instead, the Commission, as it has done in the past, would need to conduct a proceeding focused on whether and how the contribution obligation would be undertaken because Section 254(d) requires that "every telecommunications carrier that provides interstate telecommunications service shall contribute" to the "*mechanism designed by the*

[1] The Affordable Broadband Campaign is a 501(c)(4) organization dedicated to ensuring that everyone in the United States can benefit from what broadband Internet access enables. Attendees included Greg Guice, Chair of the Affordable Broadband Campaign (Vernonburg Group), Andrew Jay Schwartzman and Drew Gardner (Benton Institute for Broadband & Society); Ceilidh Gao and Cheryl Leanza (Communications Workers of America), Michael Romano (NTCA – The Rural Broadband Association), Derrick Owen and Gerry Duffy (WTA – Advocate for Rural Broadband), Harold Feld and John Bergmayer (Public Knowledge), Amina Fazlullah (Common Sense), Raza Panjwani (Open Technology Institute), and Alexander Jeffries and Emily Keshap (Vernonburg Group)

Commission to preserve and advance universal service"[2] If the Commission reclassifies, the next step is for the Commission to design a mechanism by which new contributors would participate. As explained here, the Commission has previously followed a process which provides ample time for the Commission to consider the details that must be addressed before contributions begin to flow into the USF.

Forbearance in Unsupported and Unnecessary

In the Safeguarding and Securing an Open Internet NPRM, the FCC sought comment on forbearing from applying section 254(d) contribution obligations to broadband service should it reclassify broadband service as a "telecommunications service" under Title II.[3] In order for the Commission to forbear, it must find:

1. "Enforcement of the regulation or provision is not necessary to ensure that charges, practices, classifications or regulations…are just and reasonable and are not unjustly or unreasonably discriminatory."
2. "Enforcement…is not necessary for the protection of consumers."
3. "Forbearance is consistent with the public interest."[4]

The current record does not meet this standard. The NPRM did not offer any analysis to meet the three-part test and the comments added little support to the Commission's proposal. To the extent the record is developed on this point, it argues against forbearance. As a number of groups explained in their comments, forbearance at this time is unnecessary and would be detrimental to the Commission's ability to fully act as Congress intended to design an equitable and nondiscriminatory contribution mechanism that is specific, predictable and sufficient.[5]

Given the record opposing forbearance and the incompleteness of a record on the actual standard required under Section 10, the Commission would be on legally-suspect ground if it were to forbear in this instance.

1. In 2015, when the FCC issued its temporary forbearance decision in the Open Internet Order, the FCC cited as justification the pending referral to the Federal-State Joint Board

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[2] 47 U.S.C. §254(d) (emphasis added).

[3] Safeguarding and Securing the Open Internet, WC Docket No. 23-320, *Notice of Proposed Rulemaking*, FCC 23-83 (Oct. 20, 2023).

[4] 47 USC §160.

[5] NTCA Reply Comments at 12-16; Communications Workers of America Reply Comments at 21-23; WTA – Advocates for Rural Broadband Comments at 2 (arguing the forbearance standard would not be met) 8-10; NASUCA and Connecticut Office of Consumer Counsel at 15-16; Ad Hoc Telecom Users Committee Comments at 32; INCOMPAS Comments at 54, 55; AARP Comments at 16; Nat'l Consumer Law Center at 4; ACLU ex parte at 2 (Dec. 19, 2023); NDIA Comments at 3; Next Century Cities Comments at 11-13; OTI Comments at 37-41; ACLU Comments at 10-11.

on Universal Service seeking a recommendation on modifications to the contribution mechanism. That condition is not present this time and the Commission has not provided another rationale for forbearance.[6]

2. The viability of the USF mechanism and the ability for the Commission to support broadband affordability in the future would be drastically undermined by forbearing at this time, which would be inconsistent with the public interest.
3. Forbearance without a more detailed analysis could lead to a contribution mechanism that is inequitable and discriminatory, contrary to Section 254(d)'s direction.

In short, a bare assertion to forbear, even on an ostensibly temporary basis, falls short of the standard for forbearance.

Past Precedent Offers Two Options

The Commission has at its disposal two alternatives that are far less consequential than forbearance and provide more reasonable opportunities to consider whether and in what manner a contribution obligation should be implemented.

Option 1:

Even if the Commission finds that broadband is a telecommunications service, while the change to classifications will occur immediately, the contribution obligation need not. Once the classification determination occurs, pursuant to the statute, the Commission must design a "mechanism." Developing that mechanism by referring development of a contribution mechanism for broadband to another proceeding, such as the USF Contribution Methodology proceeding (WC Docket No. 06-122), would be consistent with past decisions by the Commission to develop a specific record on the question of contribution.

Indeed, under similar circumstances in the past when it was determined that certain services were assessable, the Commission has not required immediate contribution from them. As laid out here, the Commission took five years to design the contribution mechanism for mobile service and at least two years for VOIP and in its 2005 reclassification of wireline broadband it maintained the status quo, while referring the determination on contribution to the Contribution Methodology docket.

Wireline Broadband - In the 2005 decision to classify wireline broadband internet access service as an information service, the Commission delayed the effect of reclassification for a specific period (270 days) or until new contribution rules were established in the Commission's

[6] Preserving and Promoting the Open Internet, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling and Order, 30 FCC Rcd 5601 (2015).

docket for addressing contribution obligations. It did so to preserve existing funding and to avoid "a precipitous drop in funding levels." [7]

- While the reverse is at issue here (the classification of broadband could broaden the "contribution base"), what is critical and works equally well here is the Commission's past willingness to use its authority to make the decision that, on an interim basis, it could preserve the status quo while it considers in the Contribution Methodology Docket how to implement a contribution obligation.

- "We have ample authority to take interim actions to preserve the status quo" citing *Competitive Telecommunications Ass'n v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002) ("[a]voidance of market disruption pending broader reforms is, of course, a standard and accepted justification for a temporary rule." Indeed, "[s]ubstantial deference must be accorded an agency when it acts to maintain the status quo so that the objectives of [related proceedings] will not be frustrated.").

Mobile service – The Commission first found that mobile providers were telecommunications carriers for the purpose of contributing to USF in 1997 (when it first established the USF contribution mechanism). It deferred making a decision on how mobile providers would contribute for a year as it considered how to determine whether revenues were interstate or intrastate, given that mobile providers did not assign revenue on a jurisdictional basis.[8]

- Even then it was only an "interim decision" as it considered further how best to attribute revenues and other issues related to assessing mobile providers.

- The final determination was not made until 2002, five years after establishing that mobile providers were subject to contribution.

VoIP service – When the Commission considered the classification of VoIP services beginning in 2004 it sought comment on the contribution obligations of interconnected VoIP.[9]

- "In this proceeding, we broaden that inquiry by asking commenters to address the contribution obligations of both facilities-based and non-facilities-based providers of IP-enabled services."

- But the Commission deferred the decision for reform to the contribution methodology to the Contribution Methodology docket.

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[7] Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, *Report and Order and Notice of Proposed Rulemaking*, 17 FCC Rcd 3019, 3081-3082, paras. 112-113 (2005)

[8] *See* Federal-State Board on Universal Service, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, Docket No. 96-45, 13 FCC Rcd 21252, 21257 (1998).

[9] IP-Enabled Services, WC Docket No. 04-36, *Notice of Proposed Rulemaking*, 19 FCC Rcd 4863, 4903-4908, paras. 63-66 (2004).

- "These [contribution obligation] questions are also intertwined with issues raised in our separate Universal Service Contribution Methodology proceeding, which explores possible ways to reform our current methodology for assessing universal service contributions. We leave questions of whether to reform the current methodology to the separate Universal Service Contribution Methodology proceeding."

- VoIP was not subjected to contribution until 2006[10] as part of the Contribution Methodology Docket after the decisions in 2005 to subject VoIP to regulation for purposes of E-911[11] and CALEA obligations.[12]
  - The FCC built a specific record on how to treat the revenues earned for jurisdictional purposes.
  - Even when it subjected VoIP to contribution in 2006, it did so on an interim basis initially while it continued to develop the record on how VoIP would contribute:
    - "We conclude that immediate interim measures to revise the existing approach to USF contributions are necessary and in the public interest to preserve and advance universal service. There is widespread agreement that the Fund is currently under significant strain. The size of the Fund has grown significantly, with disbursements rising from approximately $4.4 billion in 2000 to approximately $6.5 billion in 2005 and is projected to grow even further in the coming years. Moreover, changing market conditions, including the decline in long distance revenue and the growth of wireless and interconnected VoIP services, are eroding the assumptions that form the basis for the current revenue-based system."[13]

It is clear from these examples and the statute that the obligation to contribute based upon classification is not self-effectuating. The FCC would need to release a further notice of proposed rulemaking (or at least a Public Notice) seeking comment on how to implement this obligation in

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[10] Universal Service Contribution Methodology, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006).

[11] E911 Requirements for IP-Enabled Service Providers, WC Docket No. 05-196, *First Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 10245, 10257-58, para. 24 (2005).

[12] Communications Assistance for Law Enforcement Act and Broadband Access and Services, ET Docket No. 04-295, RM-10865, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, 14991-92, para. 8 (2005).

[13] Universal Service Contribution Methodology, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7528-29, para. 17 (2006).

order to develop the statutorily-required mechanism, which would afford parties an opportunity to comment upon the scope and details of any such obligation.

Furthermore, a decision not to forbear on this record does not prohibit an entity from filing its own petition for forbearance and offering a more detailed presentation and examination of issues.

Option 2:

At a minimum, if the Commission does not make an affirmative finding that it has not met the Section 10 forbearance standard, the Commission should issue a further notice of proposed rulemaking to seek comment on whether Section 10 is met with respect to BIAS USF contributions. The Further Notice would allow the Commission to move reclassification forward but allow a specific record to be built on how best to proceed with regard to contributions. It would avoid the difficulties of forbearing on this issue in this docket in the short term, when it is possible the Commission may find, in the future, that contributions to USF from broadband internet access services are warranted. The Commission would face a high burden to conclude that Section 10 is met when the Commission reclassifies but it is no longer met a few months down the road. Similarly, the Commission would have to distinguish other decisions to forbear via Section 10 with this potential decision to forbear with respect to contributions. Better that the Commission take the time necessary to consider the facts and law via a further notice than to rush to a legally risky decision to forbear without an adequate record.

Conclusion

For these reasons, the groups would caution the Commission against forbearing from section 254(d) and instead urge the Commission to adopt one of the alternative approaches outlined above.

Sincerely,

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