Public Knowledge

October 14, 2020

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: WC Docket Nos. 17-108, 17-287, 11-42
File No. ITC-21420030401-00162

Dear Ms. Dortch:

On Friday October 9, I spoke with Bill Davenport, Chief of Staff to Commissioner Stark, with regard to the above captioned proceedings.

With regard to WC Docket Nos. 17-108, 17-287 and 11-42, I stated that the fundamental and consistent error in the draft Order is that the Order limits the discussion solely to paid prioritization, blocking or degrading content. By focusing solely on the net neutrality rules, the *Order* fails to consider the impact of Title I classification on public safety or Lifeline. It is the utter absence of FCC oversight authority that poses the gravest risk to public safety. Likewise, it is the absence of adequate Commission authority under Title I to prevent providers from disconnecting customers virtually at will that endangers both public safety and the goal of universal access.

The FCC's actions in the Covid pandemic perfectly illustrate this problem. Despite the enormous importance to public safety of maintaining broadband to as many Americans as possible, the FCC has no authority to order providers to do anything. The best the FCC could manage was to secure a voluntary pledge from providers that expired months ago. The FCC cannot even track the number of Americans losing broadband as a consequence of the pandemic, let alone address the single most important public health crisis the nation has faced in a century.

Similarly, the elimination of Title II authority prevents the Commission from gathering data and mandating – where necessary – network reliability standards. As the draft Order acknowledges, communications between public safety responders and the public are critical. But the classification of broadband as Title I deprives the Commission of authority to mandate suitable reporting requirements – let alone impose reliability standards to ensure operation in times of crisis. Indeed, despite the draft Order's assertion that U.S. broadband networks have uniformly performed splendidly during the pandemic, it has produced neither metric to measure this nor evidence to support it. While the network did not experience catastrophic collapse,

significant issues of congestion (especially for upstream) have been reported for numerous networks.[1]

The draft Order also fails to consider other possible courses of action that could mitigate the potential harms of disconnection, poor quality of service, or other issues that are only resolvable via Title II authority. For example, the FCC could reconsider the scope of its ancillary authority, or its authority under Section 706. By failing to consider any of these things, the FCC has failed to consider meaningful aspects of the issue, as required by both the APA and the *Mozilla* remand.

The potential remedies cited by the Commission – reputational harm, antitrust, state consumer protection – are inapplicable to the dangers of disconnection or other unjust and unreasonable practices that endanger the public or compromise Congress' goal of universal deployment. None of these can compel a provider to refrain from disconnecting subscribers during the COVID pandemic. None of these can address the problem of network reliability.

The draft Order also ignores the Mozilla court's skepticism of relying purely on *post hoc* remedies rather than *ex ante* regulation – especially with regard to remedies that rely on parties other than the Commission. We do not wait for people to die of *e.coli* infections from romaine lettuce so that state AGs can bring lawsuits after the fact. We impose *ex ante* regulation to at least try to prevent *e. coli* from infecting romaine lettuce in the first place. The draft Order's determination that it is worth sacrificing a few lives to establish "reputational harm" for carriers that – for example – underinvest in network reliability is both morally reprehensible and contrary to the plain intent of Congress and previous Commission precedent taking a far less cavalier attitude toward the safety of life.

The Commission's prediction that "reputational harm" will prevent life threatening outages is belied by the fact that the American people continue to experience widespread "sunny day" outages that have resulted in cutting off access to 911 for millions of people – or even entire multistate networks being unusable for days. Reputational harm has not worked to stop these

[1] *See, e.g.,* Tara Lachapelle, "How's the Internet Doing? Depends Where You Look?" Washington Post (April 8, 2020). Available at: https://www.washingtonpost.com/business/energy/hows-the-internet-doing-depends-where-you-look/2020/04/08/aa406204-7999-11ea-a311-adb1344719a9_story.html?mc_cid=92837450be&mc_eid=bf11efc24c&utm_campaign=Newsletters&utm_medium=email&utm_source=sendgrid; Stan Schroeder, "Internet Slowing in Europe, U.S." Mashable (April 8, 2020) (finding comparable degradation of speed in both the U.S. and European countries). Available at: https://mashable.com/article/internet-slowing-down-eu-us/; Alex Perry, "Internet Slowed Down In Some Major Cities After Coronavirus forced People to Stay Home," Mashable (March 20, 2020). Available at: https://mashable.com/article/internet-speeds-coronavirus-broadbandnow/; Broadband Now Analysis, "Internet Speed Analysis: Rural, Top 200 Cities, March 29th-April 4th Available at: https://mashable.com/article/internet-speeds-coronavirus-broadbandnow/ (finding significant disruptions, particularly in rural areas).

"sunny day" outages. But the draft Order offers no explanation as to why reputational harm will suddenly make broadband providers

To make matters worse, the draft Order deliberately obfuscates the discussion of Lifeline by referring to "voice service" as if it were a Title II common carrier service. But the FCC represented to the 8th Circuit in *Charter Advanced Services v. Lange* that the FCC considers VOIP – the dominant form of voice service offered by carriers – an "information service" and that it has preempted the states from imposing common carrier obligations on VOIP service. The 8th Circuit agreed, and found the authority of the states to regulate VOIP providers largely pre-empted. The draft Order nowhere discusses the implications of this pre-emption in the 8th Circuit and the confusion it engenders elsewhere. Nor does the Commission take the opportunity to resolve the status of VOIP as a Title II service, which would at least justify the draft Order's reasoning with regard to state regulation of "voice service" as a common carrier for Lifeline purposes or for pole attachment purposes.

With regard to File No. ITC-21420030401-00162, Verizon/Tracfone Application, I urged that the Commission deny streamlined treatment and put the application out for public notice. As an initial matter, the application on its face does not appear to qualify, since Tracefone is a wholly owned subsidiary Mexico's dominant carrier America Movil. More importantly, the merger raises important issues that the FCC can only address through the normal processes.

First and foremost, Tracfone is one of the most significant participants in the Lifeline program. Verizon has traditionally avoided participation in Lifeline. Taking Verizon at their word that Tracfone is intended as an entry into the market is not sufficient to protect Lifeline recipients from the real possibility that Verizon may subsequently change course. Verizon was quite sincere in developing Go90 as a competing video service and spent billions of dollars on the requisite content and technology. But a few years later, Verizon was forced to scrap the effort. Verizon might decide in a few years that it no longer has interest in Lifeline participation. Only a thorough examination by the Commission – with the opportunity for civil society to weigh in on the possible impacts – can the Commission determine if Verizon has a long-term commitment to Lifeline or if conditions are necessary to protect vulnerable Lifeline participants.

Additionally, Verizon's acquisition of Tracfone completes a radical transformation of the mobile market by eliminating the last significant independent MVNO. Post-transaction, all major MVNOs will be vertically integrated with one of the national facilities based carriers (or a would-be national facilities based carrier). This may have significant impacts on the market overall. For example, carriers may no longer wish to sell network capacity to independent MVNOs, preferring to reserve capacity for their own affiliate. Carriers may deny access to the 5G portion of their network to even their own MVNOs to force customer to become more expensive post-paid customers.

To be clear, PK does not say that these issues require rejection of the application, or that potential concerns about Lifeline and competition could not be fixed with suitable conditions. At this stage, it is important to recognize that the transaction is sufficiently transformative of the industry, and places the future of the Lifeline program at sufficient risk, to warrant a through

examination by the Commission. Accordingly, the Commission should not grant the request for streamlined processing.

In accordance with Section 1.1206(b) of the Commission's rules, this letter is being filed with your office. If you have any further questions, please contact me at (202) 861-0020.

Respectfully submitted,

/s/ Harold Feld
Senior Vice President
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cc: William Davenport