



February 19, 2015

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, SW
Office of the Secretary, Room TW B204
Washington, DC 20554

Re: *Protecting and Promoting the Open Internet; Framework for Broadband Internet Service; GN Docket No. 14-28, GN Docket No. 10-127*

Dear Ms. Dortch:

The University Corporation for Advanced Internet Development (d/b/a “Internet2”) submits these *ex parte* comments regarding the scope of the rules under consideration in this docket. Internet2, which owns and operates a national research and education network, has long championed the principle of network openness as fundamental to a free and educated society. This openness has resulted in significant advancements in science, research, and education, and a history of continuous innovation. Internet2 has operated and will continue to operate its network according to open network principles.

Internet2 urges the Commission, however, to clarify in any final order issued in this docket that the scope of the rules it adopts and the reach of any Title II reclassification of broadband in which it may engage do not apply to private networks or specialized network arrangements provided pursuant to customized agreements. Accordingly, the Commission should provide clear parameters so that Internet2 and similarly situated entities are not adversely impacted by any unintended consequences stemming from the Commission’s efforts to protect consumers of mass-market retail broadband services.

The Commission historically has treated enterprise and mass-market retail broadband offerings differently – a difference embodied in its 2010 *Open Internet Order*.¹ In that decision, the Commission ruled that the open Internet rules should apply only to “mass market” Internet access services that are “marketed and sold on a standardized basis” to retail end users.² In contrast, the Commission explicitly excluded

¹ *Preserving the Open Internet*, Report and Order, 25 FCC Rcd. 17,905, ¶ 47 (2010) (“*Open Internet Order*”).

² *Id.* at ¶¶ 44-46.

from the open Internet rules enterprise services, which the Commission noted “are typically offered to larger organizations through customized or individually negotiated agreements.”³

This distinction between standardized broadband offerings to retail consumers and individually negotiated network arrangements tailored to a particular user’s needs takes on added importance as the Commission considers adopting open Internet rules based on its legal authority under Title II, which is applicable to common carriers.⁴ Indeed, the test for common carriage is universally recognized as having the following two criteria: “(1) whether the carrier ‘holds himself out to serve indifferently all potential users’; and (2) whether the carrier allows ‘customers to transmit intelligence of their own design and choosing.’”⁵

Consistent with the principles of *private* carriage, the Internet2 Network provides specialized network solutions to each of its members, and Internet2 actively manages the services it provides for its members’ benefit. The Internet2 Network is uniquely designed and engineered to meet the needs of some of the most demanding Internet users in the country, namely scientists, academics, and researchers in the nation’s leading academic and research institutions. These users have expectations that they can move massive amounts of data on demand and that the network will deliver a predictable throughput at all times. In order to accomplish these objectives, Internet2 must manage its network and make specialized provisions to ensure that the Internet2 Network is meeting its members’ demands. For example, the service Internet2 provides to a member to enable telesurgery must be provisioned and managed differently than the service Internet2 provides to a member to transport the massive amounts of raw data generated by the Large Hadron Collider. In both cases, however, the network services Internet2 provides are quantitatively and qualitatively different from the mass-market retail broadband services that have been the focus of the net neutrality debate. The Internet2 Network must provide more abundant bandwidth, latency control, and resiliency than a network that is offered to the general public, while still maintaining its principles of openness.

³ *Id.* at ¶ 58.

⁴ *See, e.g.*, 47 U.S.C. § 201(a) (“It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor.”).

⁵ *U.S. Telecom Association v. FCC*, 295 F.3d 1326, 1329 (D.C. Cir. 2002) (citation omitted); *see also Qwest Commc’ns Corp. v. City of Berkley*, 146 F. Supp. 2d 1081, 1095 (N.D. Cal. 2001) (“The Supreme Court defined a common carrier as one that ‘makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing.’”) (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979)); *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) (“The primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently.”).

The FCC introduced the 2010 open Internet rules to solve a particular problem – that is protecting consumers of mass-market retail broadband services. As was the case in 2010, the record in this proceeding confirms that no similar problem exists with respect to enterprise or other specialized services that would warrant extending the proposed open Internet rules to these services or subjecting them to regulation under Title II. Commenters in this proceeding that have discussed enterprise services have not advocated that the Commission upend the well-settled distinction between mass-market and enterprise services, or between common and private carriage.⁶ Therefore, the Commission should adopt its tentative conclusion to exclude specialized networks and enterprise services from the reach of any new open Internet rules that the Commission imposes.⁷

To the extent necessary, the Commission also should clarify that any rules it adopts relative to Internet traffic exchange arrangements should not apply in the context of specialized networks.⁸ Internet2 urges the Commission to be circumspect in terms of the scope of the rules that it adopts and provide clear parameters to avoid hampering the research and education community. Simply put, specialized networks are not mass-market retail broadband networks and should not be treated as such. Networks that are not designed or managed to serve the general public, but rather are tailored to meet a particular user's needs, should continue to operate according to the principles that serve the individual user's best interests and outside of the open Internet rules or Title II regulations being considered. Any other approach may have the unintended consequence of abrogating specialized network agreements that both the provider and user find mutually beneficial and that are necessary to carry out the missions of Internet2 members.

⁶ Similarly, as representatives from the nation's higher education institutions, the American Library Association, EDUCAUSE, and others have persuasively established, the open Internet rules likewise should not apply to private networks, such as private campus networks that are not available to the general public. *See* Comments of American Association of State Colleges and Universities, *et al.*, at 13-14 (noting that no commenters have advocated extending the open Internet rules to the operation of private networks and that there is substantial precedent “for treating private networks differently from networks available to the general public.”) (available at <http://apps.fcc.gov/ecfs/document/view?id=7521701640>); *see also* Reply Comments at 14 (available at <https://www.aau.edu/WorkArea/DownloadAsset.aspx?id=15499>). Although private carriage and private networks are distinct concepts, the common thread between these two regulatory constructs is that they are not common carrier services that can be regulated under Title II because they are not offered indiscriminately to the public at large. Accordingly, Internet2 supports the higher education community's request that the Commission clarify that private networks are excluded from the open Internet rules under consideration.

⁷ *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd. 556 ¶ 58 (2014).

⁸ *Id.* at ¶ 59.



In sum, the Commission should not paint with too broad a brush. Otherwise, its ruling could have a negative impact on research and education in the United States.

Respectfully submitted,

/s/ John S. Morabito
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cc:
Chairman Tom Wheeler
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