February 4, 2015

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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

Dear Ms. Dortch:

In the study and practice of telecom regulation, there is a notion of good regulation, the evolution of telecom regulation, and the ideal type of the independent telecom regulator. I have the opportunity to work and study with a number of telecom regulation scholars including William Melody, an economist who worked at the FCC at the time of the breakup of the AT&T monopoly and the founding director of LIRNE, an cross-national academic collaboration to facilitate telecom reform and information infrastructure development. Also, an alumna of my department is Lara Srivastava, editor of the 10th Anniversary Telecommunications Regulation Handbook. A review of the principles in this handbook suggest that the FCC is failing when it comes to way in which it has handled the Open Internet discussion.

**Good regulation requires good information**

The foundation of good regulation is good information. At its core, the mission of a regulator is to gather quality information to make informed decisions. To be sure, such information includes qualitative and subjective feedback from various stakeholders, but more important, a telecom regulator must be engaged in factual, objective analysis.

It is true that in the process to develop Open Internet rules, the FCC has hosted a public filing system and has conducted a series of expert roundtables. These activities are helpful to provide perspective and insight, but they do not substitute for the hard analysis that is required to make regulation.

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1 I am an American citizen working as a Ph.D. Fellow at the Center for Communication, Media and Information Studies at Aalborg University in Denmark. The topic of my research is to test the FCC’s “virtuous circle of innovation” theory. I am also a Visiting Fellow at the American Enterprise Institute and a Vice President at Strand Consult. These comments are my own. More information about me is available at [http://roslynlayton.com/about/](http://roslynlayton.com/about/).


As such, the FCC has not conducted the very basic information gathering that is required for the regulation it now contemplates, classifying broadband at a Title II communications service. To make that decision the information would include the following at a minimum

- Survey of network traffic management practices of leading broadband providers
- Hearing of the parties the FCC attempts to regulate
- Impact assessment of proposed regulation.

Ideally such information would be assembled into a report and published in concert with its rulemaking processes. Given the lack of information gathering, analysis and sharing, classifying broadband under Title II is unfounded and illegitimate.

For a point of comparison, I include my article describing the process taken in European Union to gather information as part of their net neutrality rulemaking. The EU regulatory process has included a survey conducted by the Body of European Regulators of Electronic Communications (BEREC), a series of reports by the policy agency of the European Parliament (conducted by an independent party), and an investigation of the content and interconnection markets and the networks of leading European broadband service providers.

It takes time and information to gather resources, but ultimately it leads to better decisions, increased credibility for the regulation, and insulation against legal challenges. It is curious that the FCC has not taken these steps, especially given the extreme media attention of this issue and the Commission’s stated goal to make “strong” Open Internet protections. It would seem that if the agency is so confident of the need for these rules, if the abuses are so rampant, then it would be easy to gather such information.

In the case of the EU, the various reports and investigations suggest that existing laws are sufficient to address net neutrality concerns and new rules are not needed. Indeed a number of national telecom authorities in the EU oppose the proposed rules. Given that the FCC has chosen not to gather information, it leads me to believe that it fears that the evidence would not support classification of broadband under Title II.

**The evolutionary path of telecom regulation**

Another concept in telecom regulation is the evolutionary path. The natural progression is for the market to progress from full monopoly to partial monopoly to partial competition to full competition. Telecom regulation should evolve to facilitate the market to each stage with the end goal being to transition ex ante sector specific regulation to general ex post competition law. That is to say, telecom regulation should have an exit strategy, an end goal to be decommissioned.

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The FCC offers regular reports about the broadband market, speeds, coverage, price, providers and so on. These reports have showed a consistent improvement in American broadband, providing a convincing case of increasing competition. The imposition of Title II to what the FCC itself has recognized as an increasingly competitive market is step backward in the evolutionary path. Instead of moving forward to recognize the increasingly dynamic world in which technology drives competition and adopting the appropriate framework, this FCC swings to the past, embracing and salvaging utility regulation that perpetuated a monopoly for half a century. Implementing Title II is not a logical, reasonable, or justifiable action.

The independent telecom regulator
The other essential concept is the independence of the telecom regulatory, or at least the appearance of that independence. Ideally the regulator needs to be immune from influence from the firms it regulates, the interest groups which lobby it, and the politicians which perpetuate it. This is assured through the structural design of the agency, a separate funding mechanism, and its functions. Independence is a term of art, and there is no example in the world of a perfectly independent telecom regulator. However independence can be created by the practices of the agency and the system of checks and balances which govern it.

It seems that this particular FCC does not even care about keeping up the appearance of being independent. A series of events and anecdotes demonstrate that this FCC is captured by political forces which have forced an imposition of Title II.

Consider the following: In November 2014 President Obama made an unprecedented call for the agency to regulate broadband under Title II. On January 29, 2015 the FCC voted 3-2 to increase the definition of broadband to 25 Mbps down/3 Mbps up, after it had just upped the threshold to 10 Mbps down the month before. Earlier FCC Commission Michael O’Reilly published a blog explaining concerns about FCC processes, namely that the agency was circumventing the Administrative Procedure Act (APA) and the Freedom of Information Act (FOIA). Not only was information not published on the FCC website in a timely fashion the Commissioner lamented, he could not even get an advance copy of the proposals on which he was to vote.

The proposed Open Internet rules also include interconnection, a widely recognized competitive market. Given the FCC’s already overstuffed plate with spectrum reform, the IP transition, public safety, and other issues, it is troubling why it would be interested to regulate interconnection, which has no evidence of market failure. The FCC proposes to give itself the authority not only to police last mile

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networks, but the connections between networks and the private agreements of thousands of independent providers.

Over the past year, the streaming video company Netflix made a number of public announcements that the FCC should regulate the market for interconnection and impose price controls. In its recent earnings report, it called for the FCC to raise the broadband definition to 25 Mbps. Just a few hours after the FCC Title II announcement today, the Verge published, “How Netflix helped change the FCC’s definition of net neutrality. Turns out Tom Wheeler isn't such a dingo.”

Netflix is a profitable company that has been able to transform itself from a DVD-by-mail provider to a streaming video company with more than 54 million subscribers globally. It is hardly a company in need of regulatory favors or protection. It complains of abuse by broadband providers, but there is evidence that it slowed its own traffic to win regulatory attention. Moreover an independent study of congestion on American backbone networks shows it is not widespread, but when it does occur, it frequently includes Netflix. I attach my assessment of Netflix’s efforts to win regulatory favors from the FCC in an attached article which appeared in Computerworld.

There is general agreement about the values of an Open Internet. My study of net neutrality rules around the world show that different countries use different approaches. Some countries create parliamentary legislation; some use regulation from telecom authorities; others use competition law. The Nordic countries use multi-stakeholder models, and these have been successful for the last 5 years to deter violation. However the FCC’s Title II regime would be the most extreme regulation of any country for a number of reasons, including the imposition of interconnection, something that has never been regulated before.

Title II is not only inappropriate for today’s broadband market, but its imposition risks impacting internet companies themselves, the so-called edge providers. If Title II is imposed, there is little to stop it from being used to regulate internet companies. It is ironic that the very proposal that is used to protect application and content companies could be used against them, particularly providers of content delivery, analytics, and email services. However this would not be the first time that legislation has unintended consequences.

The key issue is that internet companies increasingly offer “transmission” in addition to content, applications and services. In some cases, these companies even own and operate the facilities used for these transmission services. Plus they offer their services, which include a broadband transmission component, “indifferently” to all comers. This activity puts them squarely in the FCC’s jurisdiction if Title II is imposed.

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Here are some examples of how the rules might be applied to internet companies:

- Any company using an in-house or third-party solution such as a content delivery network (CDN) to ensure quality delivery of content could be subject to rules.
- Any company routing traffic within its own network (using a proxy server to assess traffic from devices) could be subject to the rules.
- The FCC could require internet companies to obtain customer approval before collecting cookies, testing website traffic, running advertisement, or recommending products to customers.
- The FCC could create new obligations for online service providers to modify their services in order to enable electronic surveillance by federal authorities. This would be a particular impact to email service providers and undo their efforts to encrypt email.

The FCC’s Open Internet proposal offers some comments on forbearance, but there is no backstop to ensure it. Moreover a new Chairman could have different ideas. Given the litigious environment in the US, I believe that Title II opens a door for internet companies to bring complaints against competitors and abuse the Title II regime to regulate rivals, just as Netflix has succeeded in doing.

The FCC’s action to impose Title II may succeed in the short run and please a select set of political stakeholders. However the damage to the agency long term will come in lost credibility. The inevitable court challenge will bear this out. In the meantime consumers, innovators, and investors will suffer from the lack of certainty.

Sincerely,

Roslyn Layton
Ph.D. Fellow
Center for Communication, Media and Information Technologies, Department of Electronic Systems
Aalborg University
Frederikskaj 12, 3rd Floor
Copenhagen, Denmark 2450
As part of net neutrality rulemaking in the European Union, at least three different documents from three different government entities are available to guide net neutrality rulemaking. These include a survey from the body of national regulatory authorities (NRAs) of telecommunications, an investigation by competition authorities, and a report by a European Parliament committee. In the US, however, there has been extensive opportunity for public and expert comment, but no official investigations or surveys. It would seem that the imposition of any major regulatory regime, especially the regulation of the Internet under Title II, would merit some official investigation, but sadly, that is not the case in the US.

Already in 2012, the Body of European Regulators of Electronic Communications (BEREC) conducted a survey of network management practices, data caps and specialized services. Some thirty-two NRAs participated along with 381 operators (266 fixed and 115 mobile), covering 140 million fixed and 200 million mobile connections. The study found that 18% of fixed operators and 36% of mobile operators had terms and conditions that allow them to restrict peer-to-peer traffic.

Some have misinterpreted the study as a report on practices, but it is rather a study on disclosures. While some operators noted in their terms that they reserve the right to conduct certain practices when needed, most of them never do. And, as BEREC noted in its latest annual report, “For the time being, the situation appears to be mostly satisfactory and problems are relatively rare, though this assessment should be nuanced, as the situation varies significantly between national markets […]BEREC is committed to the open Internet, and believes that the existing regulatory tools, when fully implemented, should enable NRAs to address net neutrality-related concerns.” Indeed, the Swedish regulator and 2014 head of BEREC noted that the European law proposed in April would be a step backward for the country, which has made significant progress with a transparency regime.

In another instance, information was gathered on actual operator practices when the European Commission raided the offices of a number of large European operators. In a press release dated October 3, 2014, the Commission found no evidence of abuse in content or interconnection markets among the operators in the surprise investigation.

Most recently, the Directorate General for Internal Policies of the European Parliament published Network neutrality revisited: Challenges and responses in the EU and US at the request of the Internal Market and Consumer Protection Committee, which drives net neutrality legislation. Author J. Scott Marcus, an American engineer, economist, and consultant who has been based in Europe for some years, provided this report as a follow up to his 2011 analysis. The study focuses on the relevant
technological, economic, and public policy principles underlying the net neutrality debate, and concludes that concerns that network operators would create fast and slow lanes are “speculative or overblown.” The author also maintains his position from the 2011 report “that it is important to avoid inappropriate, disproportionate, or premature action […] Preventative measures for threats that may or may not appear risk doing more harm than good.”

The study is not the official position of the European Parliament, but it attempts to provide information in an objective and unbiased way. Net neutrality is a complex topic, and the debate has grown increasingly contentious. The academic research on the issue is inconclusive, though many papers suggest that market-based solutions are likely superior to regulatory ones.

The FCC, which plans to vote on net neutrality rules on February 26, has commissioned no official analysis but is still determined to vote on rules. The closest the US has to an official analysis is the 2007 Federal Trade Commission report, which concluded that America’s broadband market is increasingly competitive and urged caution on net neutrality rulemaking. It’s stunning to think that five commissioners will decide on sweeping Internet regulation without having a single official report to reference.

It is interesting to ponder why no such reports have been commissioned. If it was the case that abuse is rampant – or threats are so imminent – as many net neutrality supporters claim, then a report would certainly support FCC rulemaking efforts. More likely, a report or investigation would conclude, as similar reports have in the EU, that abuse is rare and can be managed effectively with existing rules.

It may be the case that those who support heavy-handed measures such as regulating the Internet like a utility under Title II want to pursue their policy regardless of the evidence or existing laws. In Washington on this debate, politics appear to be winning over analytics once again.

Article from Computerworld.com
Obama’s Internet plan plays favorites and Netflix is one of the darlings
December 1, 2014

The president seems ready to make big concessions to a company that can’t be said to be suffering without them.

President Obama recently announced his plan to regulate the Internet under Title II of the 1934 Communications Act. This law nurtured America’s telephone monopoly for 50 years. If pursued, Internet service will be treated like a public utility, subject to rate regulation and state utilities commission oversight. The plan Obama proposes to prevent Internet service providers (ISPs) from
playing favorites with content, ironically reveals Obama to be playing favorites with content providers such as Netflix.

Indeed Obama’s plan includes a goodie that Netflix has been lobbying for: Federal Communications Commission (FCC) oversight on Internet transit and interconnection, an efficient market which has never been regulated since the advent of the Internet.

To create the impression that it is being “oppressed” by ISPs, Netflix employs a tactic from its popular show “Orange is the New Black.” Season 2 depicts “shot quotas” in which each prison guard must record five inmate infractions per week. Both guards and inmates know that the writing of “shots” is not an accurate reflection of inmate behavior, but it is part of a political appearance that the prison system needs to demonstrate that it does its job.

Netflix calls its own “shots” with its ISP Speed Index, a pseudo-transparent ranking of speeds which it uses to shakedown ISPs into adopting its proprietary content delivery network, Open Connect, rather than alternative solutions. In truth, speed and quality of streaming video are based on a complex set of factors which have little to do with the broadband package that people buy.

Even more egregious is Netflix’s waging of a global campaign under the guise of “net neutrality.” It has hijacked the concept’s hallowed language of freedom of speech and the digital commons in an attempt to win regulated price controls. What Netflix paid its transit providers for in the past, it now wants to get for free. The company that praises the virtues of the Open Internet has a low regard for its own transparency. Its covert political spending put it dead last in the 2014 CPA-Zicklin Index of Corporate Political Disclosure and Accountability.

Networks generally exchange traffic on a settlement free basis, meaning that there are no capacity fees if the amounts exchanged are equal. In rare cases, such as with Netflix which accounts for a third of America’s network traffic, the parties negotiate an agreement so operators can provision extra capacity to manage the load. But here’s the rub: by regulating interconnection at the prize of zero, instead of Netflix bearing some of the cost of interconnection, all the Internet customers, whether or not they watch Netflix, foot the bill. Incidentally the upgraded network is largely idle during the day as Netflix traffics spikes from 8p to midnight.

When pressed, billionaire Netflix CEO Reed Hastings admitted that the amount of money at stake for Netflix was “trivial”, probably 0.4 percent of revenue for a company with $5 billion in annual revenues. Nevertheless Netflix persists in its campaign, even holding its own customers hostage during negotiations with ISPs. A number of independent sources cite evidence that Netflix deliberately slowed its own traffic in an attempt to gain attention from the FCC, which subsequently opened an investigation on the backbone market. Incidentally an MIT-University of California-San Diego study of
congestion on American backbone networks shows it is not widespread, but when it does it occur, it frequently includes Netflix. In any case regulators have found no evidence of abuse by ISPs on Internet transit markets.

The President’s supposed plan about ensuring a free and open Internet has different rules for different players. To be fair, Netflix’s call for “equal access to online content” entailing that ISPs provide interconnection for free should be matched by Netflix offering its service for free.

The broadband networks Netflix so maligns have allowed Netflix to transform itself from a DVD-by-mail company to the world’s leading on demand streaming video service with more customers than any cable provider. As Netflix boasts of doubling its operating income and a 40 percent contribution margin, it is hardly in need of regulatory favors and is certainly not being subjected to anticompetitive practices from ISPs. The explosion of Internet content proves the success of limited regulation and why the FCC should reject government overreach and Netflix’s self-serving crusade.

If anything, Netflix, with its exclusive offerings and growing customer base, could withhold content from ISPs networks as a bargaining chip. Being one of the President’s darlings, Netflix could get away with it. Perhaps Orange is the new blackmail.

American Roslyn Layton is a Ph.D. Fellow at the Center for Communication, Media and Information Studies at Aalborg University in Copenhagen, Denmark.