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February 11, 2015

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20054

Via Electronic Filing

**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,

On Monday, February 9, 2015, I met with Matthew DelNero, Deputy Chief of the Wireline Competition Bureau, to discuss matters in the above-captioned dockets. I spoke again with Mr. DelNero by telephone on Wednesday, February 11. This *ex parte* notification summarizes my presentations made on both of these dates.

During the initial meeting, I focused on two topics: (1) Free Press's concerns with what the Commission's Open Internet Fact Sheet, released February 4, 2015,¹ described as a decision "to classify the service that broadband providers make available to 'edge providers'" as "a Title II telecommunications service"; and (2) the importance of prohibiting access fees that are improperly described as "interconnection fees" in the parlance of disputes caused by the practices of the nation's largest broadband Internet access providers.

During the telephone conversation, I raised two additional topics: (3) the contours of what the Fact Sheet describes as a general Open Internet conduct standard²; and (4) advisable clarifications to the "No Throttling" rule as described in the Fact Sheet.³

With respect to a telecommunications service arguably offered to edge providers, I reiterated and referenced the concerns that Free Press articulated on this subject in our letter submitted in the above-captioned dockets on November 5, 2014.⁴ We appreciate the distinction between now and November, illustrated by the Fact Sheet's explanation that Commission recognition of such a service for the first time is not a so-called "hybrid" approach of the variety that our November 5 letter addressed.

¹ "Fact Sheet: Chairman Wheeler Proposes New Rules for Protecting the Open Internet," at 1 (rel. Feb. 4, 2015).

² *Id.* at 2.

³ *Id.*

⁴ See Letter from Free Press to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 14-28, 10-127 (filed Nov. 5, 2014).

Nevertheless, as I explained in the Monday meeting, there are legal obstacles to recognizing this construct as a “telecommunications service” as defined in 47 U.S.C. § 153(50) and (53). And there are policy consequences that would be undesirable, to say the least, that could emanate from the creation of such a service and relationship between edge providers and end-users’ broadband Internet access service providers.

On the statutory definition question, as we noted in our earlier letter, services purportedly offered to a “remote” edge provider – when there is no physical connection between that edge provider and the carrier in question – are not services offered “directly” to the edge provider according to any precedent we could find.⁵ If there is no physical connection, and thus no obvious “direct” relationship between the carrier and the remote edge provider, it is hard to imagine how the service can qualify as a telecom service under Section 153(53) of the Act. That subsection stipulates that a telecom service must be offered “directly” to the recipient.

Likewise, as we also noted in our letter, even in the rare case where there is a direct interconnection with an edge provider this is likely private carriage. Such arrangements are negotiated on an individual basis with the broadband provider, not offered indiscriminately on a common carrier basis “to the public” under the same definition in subsection (53).⁶

Even if the Commission could surmount these statutory barriers, the policy question remains: why would it want to? Our November 5 letter described the seemingly absurd results that could flow from recognizing such a relationship between edge providers and end-users’ broadband providers. Would such an approach suggest or even mandate that every single end point on the Internet is a customer of each and every ISP that provides service to any other single end point on the Internet?⁷ Put more colloquially, would every website in the world become a customer of any broadband Internet access service provider whose end-users visit that website?

That bizarre and dangerous result is not necessary to establish Commission jurisdiction over interconnection practices that unreasonably discriminate against and harm end-users.⁸ Nor is that result commanded by the D.C. Circuit’s decision in the *Verizon* case that rejected the authority theory underpinning the Commission’s 2010 Open Internet rules.⁹ For these reasons, I noted in the Monday meeting that we remain skeptical of both the viability and wisdom of such an approach.

I next turned to the question of the access charges that many broadband carriers have implausibly but persistently characterized as “interconnection fees,” purportedly charged to offset the cost of terminating traffic from specific websites, applications, or transit providers.

⁵ See *id.* at 3-5.

⁶ See *id.* at 5-6. Interconnection obligations between two carriers certainly could arise in this context, but that is very different from describing the relationship between such carriers as a telecommunications service offered by one to the other carrier – or indeed, from mandating that this interconnection be offered as a common carrier service. See *id.* (discussing the D.C. Circuit’s *VITELCO* and *NARUC I* decisions); see also *id.* at 8-9.

⁷ See *id.* at 2.

⁸ See *id.* at 11-12.

⁹ See *id.* at 6-7.

As Free Press explained in our initial comments in this proceeding, the poor performance of broadband providers in delivering such traffic is a classic terminating access issue rather than an “interconnection” or “peering” dispute.¹⁰ And this issue clearly is a “Net Neutrality” concern that can and should be dealt with in the current proceeding, because some carriers’ desires to impose terminating access charges on the so-called senders of traffic who use their “pipes” is what first brought Net Neutrality into the national spotlight a decade ago.

The Commission is often confronted with claims about the necessity or fairness of charging such access fees, based on the suggestion that the traffic from a particular sender or type of sender is asymmetrical, meaning that there is more data flowing from a specific edge provider to the broadband provider’s customers than there is flowing back upstream. Yet the principle of cost causation shows just how wrong and self-serving these claims about asymmetrical traffic ratios really are. In the streaming video context for example, it is the broadband provider’s end-user who causes the marginal cost (if any) of delivering a streaming video. The edge provider does not send a stream to the broadband provider unless the broadband provider’s end-user requests that stream.¹¹

Broadband users deserve access to the content, services and applications of their choosing, and they deserve access to such data at the speeds for which those end-users are paying. If the Commission’s rules in this proceeding are intended to prevent broadband Internet access service providers’ blocking, degrading or impairing the delivery of such traffic as sent and received by Internet users, then the rules should clearly prevent the imposition of such access charges – even in the guise of “interconnection fees” – along with other harmful conduct at the interconnection point with a broadband Internet access service provider’s last-mile network.

In our telephone conversation on Wednesday, I touched briefly on the two additional topics outlined above.

I indicated the importance of the Commission retaining its authority under Sections 201 and 202 to consider and then address any and all types of unreasonable discrimination engaged in by broadband Internet access service providers. These may include technical and economic forms of discrimination enumerated in the rules currently on circulation, as well as technical and economic forms of discrimination not contemplated by those specific bright-line bans. But in either case, the Commission’s “general conduct” rule should not extend to the practices of non-telecommunications carriers, nor should it apply solely according to any illustrative factors set out in the forthcoming order. One of the many benefits of Title II is that it restores the Commission’s flexible and yet bounded authority to prevent unreasonable discrimination by telecom carriers as those practices may mutate over time.

¹⁰ See Comments of Free Press, GN Docket Nos. 14-28, 10-127, 09-191, at 144 (filed July 18, 2014).

¹¹ See *id.* at 146. Thus it is incorrect to suggest that end-users are subsidizing the costs caused the “sender” of the traffic, because it is end-users themselves who demand the traffic and cause those costs. It is also incorrect to suggest that low-bandwidth end-users are subsidizing the costs caused by high-bandwidth users. While all end-users pay a portion of the fixed costs that the broadband Internet access service provider recovers from its subscribers, different end-users can and do subscribe to the different speed tiers offered by those broadband providers. The case in which low-bandwidth users may be over-paying is when the broadband provider’s customer service representatives have been instructed to upsell subscribers on speed tiers that far exceed their needs.

Finally, with respect to the No Throttling rule, I suggested that the Commission clarify that rule's applicability to discrimination against classes of applications. I indicated that the rule as described in the Fact Sheet should be read to ban such discrimination in any case. Yet making this protection explicit would safeguard Internet users against superficial carrier claims that impairing or degrading an entire category of applications (such as all VoIP applications or all streaming video applications) would be reasonable so long as the impairment applied equally to all applications in the class.

Respectfully submitted,

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cc: Matthew DelNero