

July 16, 2014

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, NW
Washington, DC 20554

Re: *Protecting and Promoting the Open Internet*, GN Docket No. 14-28

Dear Ms. Dortch:

On July 14, 2014, Brad Burnham, Fred Wilson and Nick Grossman of Union Square Ventures, Jim Robinson, Will Porteus, Steve Schlafman, Tom Loverro, and Rifki Zable of RRE, Eric Hippeau of Lerer Hippeau Ventures, Hans Morris of Nyca Partners, Jeremy Phillips of Spark Capital, David Pakman of Venrock, Deven Parekh of Insight Venture Partners and Josh Guttman of Softbank (the “participants”) met with Chairman Wheeler, FCC General Counsel Jonathan Sallet and the undersigned.

The participants spoke generally of the need for the small and medium sized companies in which they invest to be able to continue to innovate on the internet without having to ask for permission or special treatment from broadband internet service providers (ISPs). They stated that new open internet rules should preserve the internet of the past 20 years, which allowed content and service providers to have access to all consumers without discrimination, resulting in enormous economic growth and vibrant democratic discourse. Mr. Burnham noted that open internet rules that permitted such discrimination would be a “radical departure” from the way the internet has operated for the past several decades. Mr. Pakman argued for “bright line rules” that would ban paid prioritization. He added, “We and our lawyers believe that, as currently drafted, the proposed rules would not ban paid prioritization and would in fact permit discrimination of internet traffic and would allow the creation of fast lanes, representing a radical departure from the internet of the last 20 years.” The participants argued further that the rules should continue to preserve the principle of “user choice,” which has governed the Internet since its inception. As Mr. Pakman explained: “We want an Internet where users, not cable companies, are the king makers who decide which applications succeed.”

Mr. Hippeau addressed the question of whether broadband ISPs would reduce investment in their networks if they were subject to bright line open internet rules. He said that because of the lack of last-mile competition, ISPs were reticent to invest, and that in any event, there was no guarantee that ISPs would invest if they increased their revenues through access fees charged to content providers.

Mr. Burnham pointed out that the relationship between innovation in the network and innovation on the network is more nuanced than often assumed. For

example, integrating the network more closely with applications by making the network application-aware may be advantageous from a business perspective, because it allows access providers to control the economics and the innovation at the application layer. Mr. Burnham recalled that when he worked at AT&T, at a time when that company introduced several application-aware network architectures in an effort to compete with Internet, the network engineers there were so worried that changes in the network would break applications, that innovation in the network was very rare. At the same time, investment and innovation in and on the Internet was growing exponentially because the Internet's layered architecture separated the applications from the network and allowed each to evolve independently. He argued that regulatory policy that continues to separate the network and applications layers by requiring ISPs to manage their networks in ways that are application agnostic will promote innovation not limit it.

The participants generally agreed that the same open internet rules should apply to mobile and fixed internet access, since there is little differentiation between the two services. Mr. Wilson and Mr. Burnham both spoke in opposition to “zero rating” by carriers, that is, allowing some applications to be exempt from data caps while subjecting similar applications to those same data caps (*e.g.*, T-Mobile’s treatment of some streaming music services). Mr. Burnham asked what would happen if electric companies zero-rated some refrigerators and not others. It would, in his words, “skew the market.”

The participants talked generally about the relative merits of using Title II of the Communications Act of 1934 and Section 706 of the Telecommunications Act of 1996 as legal authority for the open internet rules. Mr. Wilson and Mr. Burnham specifically asked that the Commission reclassify broadband internet access service as a telecommunications service subject to Title II. Mr. Burnham argued that Title II gave the FCC “clear authority” to adopt open internet rules, and that the FCC could declare paid prioritization to be unjust and unreasonable. Mr. Burnham also stated that he did not believe 1-800 telephone service was a useful example of an existing “pay for priority” service, because, to his knowledge, in that example, the terminating access provider is not using its exclusive control over access to a specific subscriber to extract additional “access” fees from an applications provider trying to deliver a service to that subscriber. Mr. Wilson said that any concerns about applying outdated sections of Title II to internet access service could be resolved through forbearance.

The participants then discussed the FCC’s proposed “commercially reasonable” standard for deciding whether an ISP is engaging in discriminatory conduct. Mr. Burnham expressed concern that such a standard would allow ISPs to determine what is commercially reasonable. Mr. Wilson expressed a preference for no rules over a case-by-case approach. Mr. Pakman expressed concern that a case-by-case approach and even a presumption against paid prioritization would not produce the kind of certainty that small start-ups need. Mr. Robinson said that a

case-by-case approach, while appearing “Solomonic,” favors those who can afford to litigate, namely deep-pocketed ISPs with armies of lawyers and lobbyists.

Mr. Burnham expressed sympathy for the difficulty of the Chairman's position. He acknowledged the cable companies and the telephone companies had a strong financial incentive to use the market power inherent in their terminating access monopolies to move beyond the business of Internet access to control the economics of the Internet itself. The potential value of their market position is so great that access providers have invested heavily through lobbying and campaign donations to prevent any regulation that might limit their ability to use that position to extract rent from applications providers or to favor their own applications layer services. Mr. Burnham went on to say the Chairman will have to decide whether to support reclassification of Internet access as an essential service under Title II or to bend to the pressure and propose a complex, obscure compromise that will not create certainty for start-ups and will almost certainly be twisted by the Internet access providers to their advantage. Because those access providers are the loudest voices at the table, it may, today, seem easier to propose a compromise but, Mr. Burnham argued, if the Chairman chooses to pursue his current proposal, the users of the Internet will quickly recognize that the FCC has acceded to the interests of the cable companies and the telcos and sanctioned a fundamental change in the way the Internet works. When they do, he could find himself on the wrong side of history as Internet users find their voice and make it clear they will not allow anyone to take away the open Internet they have come to know.

This letter is being filed in accordance with Section 1.1206(b) of the Commission's rules.

Sincerely,

Gigi B. Sohn
Special Counsel for External Affairs
Office of Chairman Tom Wheeler

cc. Chairman Wheeler
Jonathan Sallet