Via ECFS
November 1, 2017
Marlene H. Dortch
Secretary
Federal Communications Commission

Re: Ex Parte Communication of Brent Skorup; In the Matter of Restoring Internet Freedom, WC 17-108

Dear Ms. Dortch:

On October 31, 2017, Canyon Brimhall, Mike Jayne, and I met with Nathan Leamer, Policy Advisor to Chairman Pai, and Jay Schwarz, Wireline Advisor to Chairman Pai, to discuss the Commission's proposal to revisit the 2015 Open Internet Order and eliminate Internet regulations.[1]

During the meeting I highlighted arguments made in my August 30 reply comments in the proceeding.[2] First I pointed out that the Supreme Court decision in *NCTA v. Brand X* never held that the classification of Internet access was ambiguous and never questioned that Internet access is an information service. [3]

Second, I explained the First Amendment vulnerabilities of the Open Internet Order. Specifically, the FCC should reevaluate the dubious constitutionality of the Order in light of the Supreme Court's First Amendment decision *Reed v. Town of Gilbert* case,[4] which was released in June 2015, a few months after the release of the Open Internet Order.

The OIO on its face draws distinctions based on the content conveyed by ISPs. In footnote 575 of the order, the FCC says that offering "family friendly" filtering to users is a form of "beneficial," permitted network management.[5] The Order therefore imposes content-based burdens on media distributors (Internet service providers) that cannot survive strict scrutiny from a court.

The Supreme Court stated in *Town of Gilbert* that facially content-based regulations, like the OIO's "reasonable network management" exception, are automatically "subject to strict

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[1] FCC, "In the Matter of Restoring Internet Freedom," WC Dkt. No. 17-108, Notice of Proposed Rulemaking, para. 31, released Apr. 27, 2017, https://apps.fcc.gov/edocs_public/attachmatch/DOC-344614A1.pdf.
[2] Reply Comments of Brent Skorup, August 30, 2017, WC Dkt. No. 17-108, https://ecfsapi.fcc.gov/file/10830271311126/Skorup-Restoring-Internet-Freedom-Mercatus-Comment-v1.pdf.
[3] Nat'l Cable Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 996-97 (2005) (holding that the Communications Act "fails unambiguously to classify facilities-based *information-service providers* as telecommunications-service offerors. . ..") (emphasis added).
[4] Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015).
[5] FCC, Protecting and Promoting the Open Internet, GN Dkt. No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order 102–3 n.575 (rel. Mar. 12, 2015).

scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."[6]

The FCC should analyze the 2015 Order under *Town of Gilbert*'s new standard for evaluating content-based regulations. The Order and its rules clearly evince an intent by the FCC to allow "family-friendly" filtering and to prohibit other types of filtering. These rules are subject to facial challenge and unlikely to survive strict scrutiny by a court.

Third, I noted that the Order is, at best, ineffective at encouraging open Internet norms. At worst, it actively encourages Internet service providers to filter content. In the words of the FCC attorney when defending the OIO before the DC Circuit Court of Appeals in 2015, a curated service will "drop out of the definition of Broadband Internet Access Service and the rules don't apply. . . ."[7] The Order therefore injects a brand-new regulatory asymmetry into the broadband market: conventional broadband service is regulated heavily under Title II; any curated Internet service, however, is a lightly-regulated service falling outside Title II.

Fourth, I pointed out that existing economics scholarship suggests that a permissioned approach to new services, like that proposed in the Open Internet Order,[8] inhibits innovation and new services in telecommunications. As a result of an FCC decision and a subsequent court decision in the late 1990s, for 18 to 30 months, depending on the firm, carriers were deregulated and did not have to submit new offerings to the FCC for review.[9] After the court decision, the FCC required carriers to file retroactive plans for services introduced after deregulation.[10]

This turn of events allowed economist James Preiger to analyze and compare the rate of new services deployment in the regulated period and the brief deregulated period. Preiger found that "some otherwise profitable services are not financially viable under" the permissioned regime.[11] Critically, the number of services carriers deployed "during the [deregulated] interim is 60%-99% larger than the model predicts they would have created" when preapproval was

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[6] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015) (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)).

[7] Brent Skorup, Why the FCC's Net Neutrality Rules Could Unravel, Plain Text (Mar. 1, 2016), https://readplaintext.com/why-the-fcc-s-net-neutrality-rules-could-unravel-cc26c6b96418 (quoting audio from U.S. Telecomm. Ass'n oral arguments).

[8] FCC, Protecting and Promoting the Open Internet, GN Dkt. No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order para 230 (rel. Mar. 12, 2015) ("Any entity that is subject to the Commission's jurisdiction may request an advisory opinion regarding its own proposed conduct that may implicate the rules we adopt in this Order . . . .").

[9] James E. Preiger, Regulation, Innovation, and the Introduction of New Telecommunications Services, 84 Rev. Econ. & Statistics 704, 708 (2002).

[10] James E. Preiger, Regulation, Innovation, and the Introduction of New Telecommunications Services, 84 Rev. Econ. & Statistics 704, 705 (2002).

[11] James E. Preiger, Regulation, Innovation, and the Introduction of New Telecommunications Services, 84 Rev. Econ. & Statistics 704, 705 (2002).

required.[12] Finally, Preiger found that firms would have introduced 62% more services during the entire study period if there was no permissioned regime.[13] This is suggestive evidence that the Order's "Mother, May I?" approach will significantly harm the Internet services market.

Finally, I argued in favor of eliminating the "paid prioritization ban." The ban biases the evolution of the Internet in favor of cache-able services (like web browsing and streaming video) and against real-time or interactive services like teleconferencing, live TV, and gaming. These latter services may need (costly) end-to-end capacity reservation and reliability assurances from ISPs. By banning or heavily regulating priority agreements, the FCC forecloses the possibility of innovations in real-time IP services and encourages large ISPs to acquire independent innovators in order to avoid Title II's regulation of arms-length priority agreements.

This letter is being filed electronically pursuant to section 1.1206 of the Commission's rules.

Respectfully submitted,
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cc: Nathan Leamer
Jay Schwarz

[12] James E. Preiger, Regulation, Innovation, and the Introduction of New Telecommunications Services, 84 Rev. Econ. & Statistics 704, 705 (2002).
[13] James E. Preiger, Regulation, Innovation, and the Introduction of New Telecommunications Services, 84 Rev. Econ. & Statistics 704, 705 (2002).