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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*
GN Docket No. 09-191, *Preserving the Open Internet*

Dear Ms. Dortch,

On Wednesday, October 1, 2014, Matt Wood and I met with Jonathan Sallet, General Counsel; Stephanie Weiner, Associate General Counsel; and Matthew DelNero, Deputy Chief of the Wireline Competition Bureau. We discussed matters in the above-captioned dockets, with specific focus on the substance of Free Press's reply comments.[1]

In recent statements, both Chairman Wheeler[2] and the Wireline Competition Bureau Chief[3] have suggested that the Commission is considering a litany of options as it strives to craft rules to protect the open Internet. This apparent reconsideration of the proposed rules released in May[4] is good, but it is not enough for the Commission to stop at considering new approaches. Since then, it is true that parties have presented the Commission with a "rainbow of options"—some of which display a reticence, for various political and profit-driven reasons, to support rules that rely squarely on the Commission's Title II authority. Yet Free Press continues to support Title II, which provides the clearest and most legally sound path to protecting Internet users by reclassifying broadband as the telecommunications service it is.

While the policy outcomes sought by the Commission are laudable, the foremost question before the agency remains the correct interpretation of the Communications Act.[5] Classifying broadband as a telecom service is the right reading of the law.

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[1] *See* Reply Comments of Free Press, GN Docket Nos. 14-28, 10-127, 09-191 (filed Sept. 15, 2014) ("Free Press Reply Comments.").
[2] *See, e.g.*, Julian Hattem, "FCC 'very much' eyeing Web rules shakeup," *The Hill*, Sept. 17, 2014.
[3] *See* Julie Veach, Chief, Wireline Competition Bureau, "Exploring New Ideas for Protecting and Promoting the Open Internet," Official FCC Blog, Sept. 22, 2014.
[4] *See In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014).
[5] Free Press Reply Comments at 6-7.

Moreover, Section 706 does not provide a sufficient basis for rules that would prohibit paid prioritization, nor other unjust or unreasonable discrimination and abuses.[6] The Commission must reclassify broadband Internet access as a telecom service and adopt no-blocking and non-discrimination rules on that solid foundation.

Unlike Section 706, Title II of the Communications Act permits the Commission to do just that. The Commission has the power and flexibility under Title II to declare certain practices unreasonable. Furthermore, and contrary to the obtuse claims of carriers and those parroting their talking points, Section 202 does not allow blocking or prioritization so long as the abuse is applied "indiscriminately" to all users. Indeed, the Wireline Competition Bureau's Pricing Policy Division recently rejected such a claim when it concluded a proposed tariff violated Sections 201 and 208.[7] There, a carrier required its customers to block calls originating from or terminating to the carrier's network if those customers wanted to cancel their service. Because the Commission had already established that blocking and restricting calls is an unjust and unreasonable practice under section 201(b) of the Act, the Division readily found the practice unlawful.

Clearly, this does not mean that Title II is somehow divorced from "case by case" review of the traffic management practices that broadband providers may adopt. It simply means that upon finding any such practice to be unreasonable—and therefore unlawful—in a particular case, the Commission has unquestionable authority to adopt a bright-line ban on those practices.

Not only does Title II afford the Commission this power and flexibility, it represents a highly deregulatory framework for competitive markets. Title II is already the law of the land for many rural DSL providers, enterprise broadband services, and wireless voice. The characterization of Title II as heavy-handed regulations suited only for monopolies is not based in reality.[8] In fact, the characterization of Title II as a pre-determined set of regulations at all is inaccurate: the law grants the FCC the authority and, most notably, the discretion to apply some rules and forbear from others, as it has done for each of the above sectors and services.

Beyond evidencing Title II's compatibility with competitive markets, wireless voice service also highlights the adequacy of the Commission's forbearance process. The agency may use the same successful approach to forbear from provisions of Title II for broadband access as it did for wireless voice, where the agency implemented Section 332(c)(1)(A) by preserving the nondiscrimination protections and other sections of the Act while eliminating others on its own motion. Nothing precludes the agency from taking similar action for broadband, concurrent with

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[6] *See Verizon v. FCC*, 740 F.3d 623, 649-650 (D.C. Cir. 2014) ("Even though section 706 grants the Commission authority to promote broadband deployment by regulating how broadband providers treat edge providers, the Commission may not…utilize that power in a manner that contravenes any specific prohibition contained in the Communications Act.... Given the Commission's still-binding decision to classify broadband providers not as providers of 'telecommunications services' but instead as providers of 'information services,' such treatment would run afoul of section 153(51).").

[7] *In the Matter of GS Texas Ventures, LLC, Tariff F.C.C. No. 1*, WCB/Pricing File No. 13-2, Order, DA 14-1294 (rel. Sept. 8, 2014).

[8] *See* Free Press Reply Comments at 22-30.

an Order in this proceeding. Thus, claims that a lengthy and difficult petition process would be the only mechanism for forbearance are patently false and should be ignored.

Finally, upon concluding this review of Free Press's reply comments and the merits of various legal proposals before the Commission, we discussed briefly the concept of "specialized services." Specifically, we described the role that the Commission should play in evaluating when such services afford reasonable accommodations to providers and their customers, and when instead such services might be put forward as a means either of avoiding the Commission's Open Internet rules or avoiding its oversight of other Title II and Title VI offerings.

Respectfully submitted,

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cc: Jonathan Sallet
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