

October 22, 2014

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

*Via Electronic Filing*

**Re: Notice of Ex Parte Communications, GN Docket Nos. 10-127, 14-28**

Dear Ms. Dortch:

On October 20, 2014, Sarah Morris, Senior Policy Counsel for New America Foundation's Open Technology Institute (OTI) and Michael Weinberg, Vice President, and Harold Feld, Senior Vice President for Public Knowledge (PK), met with Priscilla Delgado Argeris, Legal Advisor to Commissioner Jessica Rosenworcel. During that meeting, both groups made the following presentation regarding the Commission's Open Internet Proceeding.

In discussing the various proposed alternative legal theories currently in the record<sup>1</sup>, OTI and PK noted that the soundest, clearest path forward for strong open Internet protections is through reclassification of broadband as a Title II service under the 1996 Telecommunications Act (the Act) with appropriate forbearance either through a separate proceeding or immediately as part of the current rulemaking. OTI and PK expressed their appreciation that other groups are carefully considering alternative options for authority in this proceeding, though the groups also detailed their concerns with each alternative.

In particular, OTI noted that the Mozilla Petition is legally riskier than straightforward reclassification, relying on untested definitions and relationships among Internet Service Providers (ISPs), Internet users, and what Mozilla terms "remote hosts." PK also expressed concern that it is unclear whether the proposal would protect against prioritization by an ISP of their own vertically-integrated content. Finally, OTI noted its concerns about the potential long-term effects of codifying the aforementioned new

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<sup>1</sup> See e.g., Mozilla, Petition to Recognize Remote Delivery Services in Terminating Access Networks and Classify Such Services as Telecommunications Services Under Title II of the Communications Act, GN Docket Nos. 09-91, 14-28 (May 5, 2014) ("Mozilla Petition"); Letter from Senator Henry A. Waxman, Ranking Member, Committee on Energy and Commerce, United States Senate, to FCC Chairman Tom Wheeler (May 14, 2014); Letter from Andrew W. Guhr, Counsel to AOL Inc., to Marlene H. Dortsch, Secretary, FCC, GN Docket No. 14-28 (Jul. 21, 2014). Alternatives discussed and cited here include the "Mozilla Petition," and a suggestion by AOL that the "Commission would be justified in making the factual finding that the information-service component of broadband Internet access service can be readily separated from the transport component. But this need not entail Title II regulation. The FCC would have the authority to forbear totally from Title II rules, so long as the continued existence of effective Section 706 rules makes Title II unnecessary to protect consumers."

definitions and relationships into law and noted the risk that as a nuanced proposal, it may be incorrectly interpreted by a reviewing court or future Commissions.

With regard to suggestions that the Commission could reclassify immediately but forbear from every section under Title II, OTI and PK expressed additional reservations that such an approach might be arbitrary and capricious, and reiterated that Title II is actually an appropriate, bounded source of authority for strong open Internet protections. PK also noted that §706 is not a general-purpose statute, and that its limits are not yet well-tested.

Finally, OTI and PK offered criticisms of the CTIA argument regarding the use of Title II for wireless network neutrality protections. OTI and PK pointed out that the Commission itself introduced any ambiguity surrounding the definitions of PMRS and CMRS services in 2007, and has the flexibility today to resolve those ambiguities by reclassifying both wired and wireless internet access service as a Title II telecommunications service.

Particularly given the broad, diverse support in the record for strong network neutrality rules grounded in Title II authority, OTI and PK urge the Commission to refrain from alternative approaches in this proceeding that are unduly complicated or legally risky.

Pursuant to the Commission's rules, this notice is being filed in the above-referenced dockets for inclusion in the public record.

Respectfully submitted,

/s/ Sarah Morris

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Cc: Priscilla Delgado Argeris