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November 5, 2014

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 October 27th, the Commission sought "further input" (albeit via blog post[1]) on the "rainbow of legal options" for Open Internet rules." Having twice failed in court on novel legal theories for such rules, one might have thought the Commission disinclined to chase rainbows.

Sadly, that seems not to be the case. According to press reports, the Commission is considering such untested novelties once again, with one story suggesting that the Chairman "is close to settling on a hybrid approach."[2] But the Commission must not set off now on some indefensible new path, and cannot possibly find one better than the law Congress wrote. Title II should apply to broadband Internet access service – and the Commission should apply nondiscrimination duties to an ISP's provision of service to its actual end-users – as Free Press has explained in this proceeding, and as millions of Americans have demanded.

Thus, the reported entertainment of so-called "sender-side" or "edge facing" proposals is especially perplexing. Each of these schemes – including those put forward by Mozilla,[3] by Tim Wu and Tejas Narechania,[4] and by CDT[5] – is fatally flawed. Adopting any of them, or a combination of them, would make for bad law, bad policy, and bad politics. The sender-side approaches would almost certainly fail in court. They would not provide the foundation for strong rules protecting all Internet users from unreasonable fees and discrimination. And even if they were somehow to hold up against the inevitable litigation, these theories would irreparably harm how telecommunications services function and how the Internet works.

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[1] Jon Sallet, Roger Sherman, and Julie Veach, "Looking for the Best Approach to Preserve the Open Internet," Official FCC Blog, Oct. 27, 2014.

[2] Gautham Nagesh, "FCC 'Net Neutrality' Plan Calls for More Power Over Broadband," *Wall Street Journal*, Oct. 30, 2014.

[3] 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, RM-___, GN Docket No. 14-28 (filed May 5, 2014) ("Mozilla Petition").

[4] Letter from Tejas N. Narechania & Tim Wu to Marlene H. Dortch, GN Docket No. 14-28 (filed Apr. 14, 2014) ("Wu/Narechania Proposal").

[5] Comments of the Center for Democracy & Technology, GN Docket No. 14-28, at 20-22 (filed July 17, 2014) ("CDT Comments").

I. The Basic Problem with Sender-Side Schemes

Every day, millions of Americans change their wireless or landline phone provider. They go through the relatively simple process of porting their number to a new carrier, they pay their final bill, and they sever their relationship with their former provider.

Or so they thought.

What they did not realize is that every single person in the world with a phone number is a customer of every single American phone company. Not because those individuals signed up for service, but because every U.S. telecommunications carrier – by the mere act of having reachable numbers – is automatically "offering" service to every single person in the world who might call one of these numbers.

This scenario is plainly absurd. But these and myriad other absurdities are the unavoidable logical outcomes of the so-called "Remote Host" or sender-side regulatory frameworks proposed by Mozilla, Wu/Narechania and CDT. These frameworks turn decades of common sense telecommunications policy on its head, obliterating in the process any meaning behind the concept of interconnection and the customer-carrier service relationship.

What these proposals suggest is remarkable: they ask the Commission to find that every single end point on the Internet is a customer of each ISP that provides service to any single other end point on the Internet. This, to say the least, would be a radical move – one by its very nature fraught with the tremendous uncertainty that the Commission purports to disdain, because such uncertainty undermines the "virtuous cycle" the Commission wishes to foster.

In our initial and reply comments in this proceeding, we chose not to fully address these so-called "hybrids." We did not provide detailed comment on them because they are riddled with blatant legal and practical holes, to such a degree that we assumed they would not receive serious consideration by the Commission. However, given the Commission's recent request for input, we take the opportunity to highlight the obvious defects in these proposals. Each appears to be an ends-driven and unnecessary attempt to avoid the central problem that continues to plague the Commission: the lack of a mass-market broadband telecommunications service market.

II. Transmitting Senders' Data Cannot Possibly Be "Telecom Services" Under the Act

The Commission must overcome several insurmountable hurdles to define a relationship (commercial or otherwise) between end-user ISPs and distant "senders" of information as a "telecommunications service" under the Communications Act. It does not matter ultimately how strong any rules founded on such an approach may appear to be on paper, or whether they purport to ban or regulate harmful practices. If they are based on a sender-side legal theory, then those rules cannot and will not stand once the Commission's legal authority argument fails. Last week's reports suggest that the rules currently under contemplation are not even very strong, and that they would still allow special deals and unreasonable discrimination; but the primary legal question remains whether the Commission can concoct such new services from thin air and defend any resultant rules in court.

Other parties have already explained well the challenges inherent in first finding that any such purported services are "telecommunications services" offered "for a fee" to senders, and then simultaneously purporting to ban such fees.[6] But that is not the only statutory hurdle, and perhaps not even the most intractable one if the Commission counter-intuitively – and disastrously – decides not just to allow such sender-side fees, but essentially mandates them.[7]

A. Remote Host and Sender-Side Services Are Not "Direct" Offerings to the Public

The Act defines a "telecommunications carrier" as any provider of "telecommunications services."[8] Telecom service is in turn defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[9] Finally, the term "telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[10]

The Act does not define the term "directly," but the Commission has found that the term means what its vernacular meaning would suggest[11]: a physical connection between the carrier and the customer, not a connection between the carrier and customer made via an intermediary or intermediaries (*i.e.*, not an "indirect" customer or connection).[12] An indirect relationship with a remote sender is not transformed into a direct relationship by the fact that some service may be offered to an intermediary or intermediaries who in turn directly serve the public.[13]

Therefore, a so-called Remote Host Service or sender-side service, if it were to exist at all, would not be offered directly to the public or to such classes of users as to be effectively available directly to the public. As such, it could not be classified as a telecom service.[14]

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[6] Barbara van Schewick and Alec Schierenbeck Comments on Mozilla's Proposal, GN Docket Nos. 14-28, 09-191 (Oct. 30, 2014).

[7] *See id.* at 16 ("An FCC effort to ban access fees under Mozilla's proposal is unlikely to succeed because Mozilla's interpretation is 'in conflict with the plain meaning" of the Communications Act. The best the FCC could do under that proposal is ensuring that these fees are just, reasonable and not unreasonably discriminatory.").

[8] 47 U.S.C. § 153(51).

[9] *Id.* § 153(53) (emphases added).

[10] *Id.* § 153(50).

[11] Dictionaries define "directly" as "in immediate physical contact," (Merriam-Webster); "with nothing or no one in between," (Oxford); "without anything intervening; not by secondary, but by direct means" (Wiktionary).

[12] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶ 997 (1996) (*Local Competition Order*) (providing an example of an "indirect" connection made through an intermediary). The distinction of "direct" from "indirect" customer service is seen in many of the Commission's activities, as it oversees entities that directly offer services to end users, and those that offer service indirectly via resellers or other intermediaries that directly offer services to the public. *See, e.g.*, "Instructions for Local Telephone Competition and Broadband Reporting (FCC Form 477)," which distinguishes between those lines provided directly to end users, and those end users served by unaffiliated resellers.

[13] *See AT&T Submarine Systems, Inc.*, 11 FCC Rcd 14885 (1996) (*AT&T-SSI*).

[14] The language of "classes of users as to be effectively available directly to the public" would not apply to the customer-carrier relationship the Mozilla Petition would have the Commission recognize. This language refers to a *subset* of users, but does not alter the term "directly" in the definition, which still requires a direct carrier-customer relationship without any intervening carriers. *See AT&T-SSI*, ¶ 25 (1996):

Under Mozilla's proposal, for example, a "local end-user subscriber" to an Internet access service still would use her own ISP to send and receive information from the Internet.[15] Mozilla suggests that the Commission could continue to treat this direct connection as an "information service" under the Act. Yet the proposal suggests that as this user's data traverses the networks of potentially many other intermediaries, and finally arrives at a destination ISP, there would be some remote delivery service to the destination IP address offered to and used by that "remote host." The remote host would then send data back to our original end-user. And this whole remote "service" – or, at least, that sending and receiving pathway within the last mile of the end-user ISP's network – is said to be somehow "logically and legally distinguishable – but not physically separable"[16] from the end-user's broadband service.

This entire construct is unworkable and absurd in practice, as described in greater detail below. But solely from a legal and statutory construction standpoint, to the extent that there is any "offer" of a delivery to the remote host, this is not an offering *directly* to the public. Mozilla admits as much, saying its remote host concept "need not include any direct connection to that endpoint."[17] But without that direct connection, it simply cannot be a telecom service subject to Title II. At most, such a service would be a direct offering to the final interconnecting carrier.[18] As we explain below, that would be a private cable service, and therefore also not a telecommunications service available effectively to the public.

> [W]hether a service is effectively available directly to the public depends on the type, nature, and scope of users for whom the service is intended and whether it is available to a 'significant restricted class of users.' . . . We disagree with TLD that if AT&T-SSI's customers use the capacity obtained from AT&T-SSI to provide a service to the public, then AT&T-SSI is making a telecommunications service effectively available directly to the public. Such an interpretation is contrary to the plain language of the statute by focusing on the service offerings AT&T-SSI's customers may make rather than what AT&T-SSI will offer.

[15] Mozilla Petition at 11.

[16] *Id.* at 7.

[17] Mozilla Petition at 6. Mozilla contradicts itself in its petition, at times recognizing that this hypothetical service is indeed remote – and not a direct offering – by characterizing remote hosts as "arms-length" away from the end-user's ISP. *Id*. Further, Mozilla's petition requires an interpretation of "direct interconnection" that is plainly wrong and contrary to the express language of the Communications Act: "This potential relationship [between a remote host and an ISP] exists on one level because of the possibility of direct interconnection between a once-remote endpoint and an Internet service provider." *See id.* Congress and the Commission have long recognized that direct interconnection involves a physical connection between two parties' networks, while those involving intermediaries is a form of indirect interconnection. While some few "remote hosts" may directly interconnect with a particular ISP, the majority of the traffic requested by an Internet access subscriber arrives from the sender via one or more intermediaries. And even in the case of a direct connection with "remote hosts" or senders, that connection alone does not make the service a "telecommunications service" offered to the public. *See infra* Section II(B).

[18] In its subsequent comments in this proceeding, Mozilla attempted to conjure a direct connection between a remote sender and an ISP by saying "[t]his characterization holds despite the statute's use of the term 'directly,' as that term does not require technical attachment for a service to be offered. Where a network operator has the capacity of disconnecting traffic for only a single edge provider, or charging only a single provider for differential treatment, there is certainly a 'direct' connection in play." Comments of Mozilla, GN Docket Nos. 14-28, 10-127, at 11 (filed July 15, 2014) ("Mozilla Comments"). For one, what Mozilla describes here is the well-established existence of an *indirect* connection between a remote party and a destination carrier, via intermediaries. For a direct relationship to exist, by law and Commission precedent, there does indeed need to be a technical, or more precisely, physical connection between the two *carriers* or between the end-user and the destination carrier. For two, terminating carriers have always had the technical capability "of disconnecting traffic for only a single edge provider," *id.* at 11, such as by refusing to terminate calls from a single phone number. This is not the least bit novel.

In sum, it is not possible under the Act for the Commission to adopt any regulatory framework that recognizes a remote host delivery service as a telecommunications service. This hypothetical service almost never involves an offering directly to the public for the vast majority of "remote hosts," but at best an indirect offering that is not made available on indiscriminate terms to the public.[19]

B. In Instances Where The Purported Sender-Side Offering Is Made to An Entity With a Direct Connection to the ISP, It Is Private Carriage Not Common Carriage

Even if the Commission limits its conception of sender-side services to those "directly" offered to senders or "remote hosts," meaning those with a direct physical connection to the terminating ISP, it would not follow that these are telecom services offered to the public, *i.e.*, common carrier services. To transform it into one, the Commission would need to distinguish or overturn the decisions in *AT&T-SSI*, as well as the D.C. Circuit's rulings in *VITELCO*[20] and *NARUC I*,[21] and compel such an offering where none exists today.

That would be an extraordinary step, but not for the reasons that Verizon claims in its recent "white paper."[22] Reclassifying user-side broadband Internet access service as a telecom service would reverse the Commission's wrong determination of the legal definition for such offerings as they exist today. Verizon and other broadband ISPs already offer, directly to the public and for a fee, the ability to send and receive information of the user's choosing, without change in the form or content of that information.[23] That is precisely what Verizon and others provide to their end-user broadband subscribers. These ISPs (1) hold themselves out to serve all customers in their service territory; (2) do not individually negotiate terms with individual end-users, but offer certain service tiers; and (3) transmit the information those end-user customers choose, without change in its form or content, between points of such customers' choosing.

Typically, the Commission's test for common carriage under *NARUC I* has focused on the carrier's intent and conduct of this sort. So for any sender-side approach, the first question would be whether the terminating ISP (terminating from the "sender's" perspective, that is) in fact holds itself out to offer last-mile routing to all potential senders. It is clear from their responses in this proceeding that ISPs do not even recognize this service. But assuming the Commission does determine that ISPs offer such a service, do all ISPs hold themselves out to serve indifferently all "senders" who might take that service? It is clear from the ISPs' forceful opposition to the rules adopted in this proceeding that they do not.

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[19] The Internet Service Providers that commented on the Mozilla proposal contend that there is no such offering of any service to remote users in the first place, claiming that they are offer their direct end-users an integrated information service that retrieves information from the Internet. *See, e.g.*, Reply Comments of Verizon and Verizon Wireless, GN Docket Nos. 14-28, 10-127, at 53 (filed Sept. 15, 2014) ("Mozilla's attempts to segregate broadband service into neat 'calls' and 'responses' only belie the current reality of broadband service….").

[20] *Virgin Islands Telephone Corp. v. Federal Communications Commission*, 198 F.3d 921 (D.C. Cir. 1999).

[21] *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 525 F.2d 630 (D.C. Cir. 1976) (*NARUC I*).

[22] Verizon, "Title II Reclassification And Variations On That Theme: A Legal Analysis," GN Docket Nos. 14-28, 10-127, at 1-2 (filed Oct. 29).

[23] *See, e.g.*, Comments of Free Press, GN Docket Nos. 14-28, 10-127, 09-191, at 63-68 (filed July 18, 2014) ("Free Press Comments").

A party that wishes to interconnect with Comcast, for example, can read its interconnection policies;[24] but if this party wishes to interconnect, it must then sign a confidential, highly individualized contract with Comcast. This is the opposite of serving "the public" on an indiscriminate basis. This fails the second prong of the *NARUC I* test, and thus would be a private cable service, not common carriage[25] – and still available only to those entities who establish a direct, physical connection with the terminating ISP. Such a regime could not support the adoption of nondiscrimination rules and requirements applicable to common carriers under Title II.

In sum, even if the Commission were to reverse the rationale underlying bedrock decisions like *NARUC I* and *VITELCO*, then compel the offering of transmission to "senders" as a common carrier service, it could only compel and then recognize as a telecom service a direct offering to interconnected carriers, not the indirect offerings described in Section II.A.

C. Nothing in the D.C. Circuit's Decision in Verizon v. FCC Dictates Such a Result, nor Does That Case Make the Transmission of Senders' Data a Telecom Service

Some suggest that the D.C. Circuit's decision overturning the 2010 Open Internet rules commands the Commission to recognize such sender-side services.[26] That argument fails on administrative law grounds and fails to account for the statutory hurdles discussed above.

With regard to the administrative law point, those who read *Verizon v. FCC*[27] as requiring such a construction forget the central tenet of *Brand X*[28] on this precise point. The D.C. Circuit's recent decision found that the Commission cannot impose common carrier obligations on non-common carriers, and that court indeed suggested that "transmission of edge-provider traffic to [ ] end-user subscribers represents a valuable service."[29] Yet as *Brand X* explains, "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[30]

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[24] *See, e.g.*, "Comcast Settlement-Free Interconnection (SFI) Policy," http://www.comcast.com/peering.

[25] "[A] carrier will not be a common carrier where its practice is to make individualized decisions in particular cases whether and on what terms to serve." *See Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶ 785 (1997); *see also NARUC I* at 641 ("This does not mean a given carrier's services must practically be available to the entire public. One may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population. And business may be turned away either because it is not of the type normally accepted or because the carrier's capacity has been exhausted. But a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal. It is not necessary that a carrier be required to serve all indiscriminately; <u>it is enough that its practice is, in fact, to do so</u>.") (emphasis added).

[26] *See, e.g.*, CDT Comments at 20; Wu/Narechania Proposal at 1 (postulating an "asymmetric framework suggested by the D.C. Circuit"); Mozilla Petition at 6 (characterizing the "potential commercial relationships" between ISPs and remote hosts as the basis for a "telecommunications" service under 47 U.S.C. § 153(53).

[27] *Verizon v. Federal Communications Commission*, 740 F.3d 623 (D.C. Cir. 2014).

[28] *National Cable and Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) (*Brand X*).

[29] *Verizon v. FCC*, 740 F.3d at 653 (D.C. Cir. 2014).

[30] *Brand X*, 545 U.S. at 982.

In other words, "*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative," which means that "the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong."[31] So the D.C. Circuit cannot bind the Commission to declare the "sender-side" service a "telecommunications service" under Section 153 of the Act unless the statute unambiguously does so.

Verizon v. FCC does not dictate this result – nor could it. No matter what economic value senders may derive from the fact that their traffic (typically) reaches the party requesting it, that assurance is based on an ISP's duty not to block or interfere with its own end-users' data. The end-user is the party who initiates the communication. And for the reasons outlined above, no matter what economic value senders may derive from this operation, the delivery of their traffic is not a "telecommunications service" under the Act. It fails to satisfy every (or any) element of the definition in Section 153(53). It is not offered "directly" to senders, on a "public" or indiscriminate basis, "for a fee" that is actually paid by the putative recipient of the offering. However one conceives of the benefits derived by edge-providers from the fact that the Internet works, they are not under the law the recipients of a telecom service from the end-users' ISPs.

Incidentally, none of the court cases and Commission decisions cited by Verizon in its D.C. Circuit brief suggest otherwise. Each of the handful of cases Verizon cited there deal with relationships between carriers – those with the type of direct, physical connections described in Section II(A) above. At pages 18 and 19 of its Joint Brief filed with MetroPCS on July 2, 2012, Verizon cited *VITELCO* and *Iowa Telecommunications Services*,[32] along with one Commission order finding common carrier services can include those "offered primarily to other carriers."

Such other carriers establish a direct connection with a common carrier, and may indeed be customers of that common carrier, even if we do not typically describe these entities as "end-users." And as the *VITELCO* and *Iowa* cases instruct, these entities may themselves operate as common carriers or private carriers.[33] Yet that is a far cry from suggesting, let alone requiring, that the Commission find the existence of a telecom service on offer to every sender or "remote host" in the world – including the millions or billions of senders who are not carriers and who have no direct connection or relationship with the end-user's terminating ISP. The statute cannot support such a twisted reading, and so the Commission cannot support it either.

D. The Same Factors the Commission Used to Classify Retail ISP Services As Information Services Would Apply to the Remote Host or Sender-Side Service.

For the Commission to find such a "remote host telecommunications service," the agency would have to willfully ignore the analysis it made in the 2002 *Cable Modem Declaratory Ruling*, the 2005 *Wireline Broadband Framework Order*, and the 2007 *Wireless Broadband Order*. Without delving into those findings once again here, each of those classification decisions found that the broadband services in question contained inextricably intertwined information service components.

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[31] *Id.* at 983.
[32] *See, e.g., Iowa Telecommunications Services v. Iowa Utilities Board*, 563 F.3d 743 (8th Cir. 2009).
[33] *See, e.g., id.* at 749.

These decisions were wrong, and they should be revisited and reversed now.[34] But contrary to the assertions in the Mozilla Petition and the Wu/Narechania Proposal, many of the same facts the Commission used to make this determination with respect to retail broadband offerings apply with equal force to the transmission of a "remote" sender's data.[35] It would be a plainly arbitrary outcome to find one "side" of this transmission to be an information service and the other half a telecom service when, for example, the remote host's content sent downstream to the broadband end-user is far more likely to be cached and stored than is any upstream request for that data. The flaws in the design of such proposals make even a casual observer wonder why the Commission would consider them from a dry legal standpoint – but it's especially puzzling when that would entail positing an offer of a service from each and every ISP in the U.S. to the literally billions of endpoints connected to the public Internet.

III. Treating Transmission of Senders' Data As Telecom Services Would Wreak Havoc on Telecom Markets and the Very Concept of Telecom Services, But Not Undo the Harms of the Original Classification Decisions or Providing for Sound Rules

A. Sender-Side and Remote Host Theories Require Interconnection Frameworks Inconsistent with the Act, and With How the Internet Functions Too

Section 251(a)(1) of the Communications Act states that "[e]ach telecommunications carrier has the duty . . . to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[36] As noted above, the Act defines a "telecommunications carrier" as any provider of "telecommunications services." Those are defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used. And "telecommunications" is defined as "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."

Thus, if a party offers a telecommunications service, it is a telecommunications carrier and has the legal duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. Interconnection is something that occurs between two telecom carriers, in physical space, either indirectly or directly. In implementing this section of the Act, the Commission stated that the term interconnection "refers only to the physical linking of two networks for the mutual exchange of traffic."[37] The Commission also found that "indirect" interconnection involved a telecom carrier in the middle of the two parties.[38]

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[34] *See, e.g.*, Free Press Comments at 71-88.

[35] Once again the Mozilla Petition appears to argue with and contradict itself, suggesting at page 7 that the end-user facing broadband service includes "possibly other services" as well, including information services sold in the same bundle to the subscriber; but then at page 8 acknowledging that the so-called "local" and "remote" services in fact "share infrastructure (including routing, caching, and congestion control mechanisms)."

[36] 47 U.S.C. § 251(a)(1).

[37] *Local Competition Order*, ¶ 176.

[38] *Id.* ¶ 997 ("Regarding the issue of interconnecting 'directly or indirectly' with the facilities of other telecommunications carriers, we conclude that telecommunications carriers should be permitted to provide interconnection pursuant to section 251(a) either directly or indirectly, based upon their most efficient technical and economic choices. . . . [W]e find that indirect connection (*e.g.*, two non-incumbent LECs interconnecting with an incumbent LEC's network) satisfies a telecommunications carrier's duty to interconnect pursuant to section 251(a).").

Under this framework, telecommunications carriers offer telecommunications services for a fee to their end users; they in turn have an obligation to interconnect with other telecom carriers, and the right to request interconnection from them. These other telecom carriers in turn serve their own customers (which may be other carriers or public subscribers). By definition, there is no direct interconnection between a common carrier and a distant customer. Section 251(a) interconnection does not necessarily mean every direct connection is the provision of a "telecommunications service" to that directly connected carrier – and it cannot mean that the common carrier in question provides a telecom service to another carrier's end-user customers.

This system produces an interconnected public network, where one end-user is able to reach other end-users without undue discrimination, even when these two end-users are customers of two different carriers.

For example, a subscriber to Verizon's local exchange carrier ("LEC") service in New York City can place a long distance call to subscriber of AT&T's LEC service in Dallas, choose XO as the long distance carrier, and have that call completed. The subscriber to Verizon in New York city is a customer of Verizon and of XO long distance, but not a customer of AT&T. In this scenario, Verizon has a carrier-to-carrier business relationship with XO, which in turn has a business relationship with AT&T, but there is no relationship between the customers of one LEC and the distant LEC on the other side of the call. The only relationship between the distant carriers is based on their duty to directly or indirectly interconnect.

The plain language of the statute and the Commission's implementation thereof clearly indicates that the telecommunications service is offered to a carrier's direct physical subscribers, for the origination and termination of telecommunications. In addition, a carrier is obliged to interconnect with other telecommunications carriers, and this may be a telecommunications service offered to other telecom carriers with whom they interconnect (pursuant to Commission and state Utility Commission rules, and/or terms agreed upon in private negotiations or arbitration.)[39] The Act, and the Commission's implementation indicate that there is no telecommunications service offered to distant end-users; only the duty to indirectly interconnect via the carriers with whom those distant parties directly connect. A distant end-user is indirectly connected with all other carriers, but each end-user is only a customer of its own carrier. Distant carriers who indirectly interconnect are customers of the tandem carrier in the middle, and these carriers may have reciprocal obligations to each other; but there is no obligation or relationship between carriers and distant customers.

[39] While the 1996 Amendments to the Act imposes additional and specific interconnection obligations, the duty to interconnect also is a function of Sections 201 and 202. Section 201(a) states that "every common carrier engaged in interstate or foreign communication by wire or radio" shall: (i) "furnish such communication service upon reasonable request therefor"; and (ii) "in accordance with the orders of the Commission . . . to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes." Section 202(a) makes it unlawful for "any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service." (emphasis added).

What the proponents of the Remote Host and sender-side frameworks are asking the Commission to find would obliterate these careful distinctions between direct and indirect interconnection. Their framework suggests that the customers even of two indirectly interconnected telecommunications carriers are in fact customers of each other's carrier, and receive a direct offer of service. Then each and every subscriber to a telecommunications service would become a customer of every telecommunications carrier. If this were indeed the case, it would obliterate the function of tandem carriers, for a terminating carrier would have the legal right to demand payment from the customer that originated the telecommunications.

In the familiar telephony context, this would sounds bizarre, because it is. This plainly is not an outcome contemplated or dictated by the Act; it is in fact in direct conflict with the Act's definitions. Indeed, consider the language of Section 203, which requires (absent forbearance) telecommunications carriers to file tariffs "showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established . . . and such common carrier shall furnish such schedules to each of its connecting carriers."[40]

This is a clear indication of the Act's contemplation of the carrier-customer relationship as one between a carrier and its own end-user subscribers, or between two interconnected telecom carriers, but not between a terminating carrier and a distant customer who seeks to terminate traffic onto that access network.[41] The Remote Host and sender-side frameworks would transform this clear customer-carrier or carrier-carrier relationship into something unrecognizable, as they would contemplate (in the telephony context) a direct customer relationship between the calling party and the called party's carrier, not the statutorily-recognized relationship between the calling party's carrier and the called party's carrier.

In the end, these sender-side frameworks are a plainly nonsensical approach that would requires the Commission to cleave the legal concept, and functional design, of telecommunications into two pieces: a sender-side and a user-side that are somehow fancied to be distinct parts of what is a single two-way transmission. This would have far reaching consequences for the entire telecommunications ecosystem, likely disrupting the recently adopted changes to the intercarrier compensation rules. If every sender is a customer of every receiver, then every calling party is a customer of the carrier for every called party.

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[40] 47 U.S.C. § 203(a).

[41] The Commission's own website notes that it is *carriers* who pay the tariffs filed by LECs, not distant end users paying these tariffs: "Tariffs contain the rates, terms and conditions of certain services provided by telecommunications carriers. The most common tariff filed at the FCC is for interstate local access service. These tariffs are filed by local exchange carriers, or LECs. Long-distance companies and others pay the rates set out in these tariffs to LECs for access to local networks at the originating and/or terminating ends of a long-distance call. Access services include: Switched access, used primarily for long-distance calls originating and/or terminating over a standard phone line. Special access, a dedicated line provided by a local phone company to a customer, which could be a long-distance company, for the customer's exclusive use. Access tariffs may also include rates and conditions for services that include DSL from certain carriers, packet-switched services, long-distance directory assistance access and other services." (emphasis added) *See* http://www.fcc.gov/encyclopedia/tariffs.

B. The Sender-Side Proposals, Even if Legally Sustainable Classifications, Could Not Be Used To Support Network Neutrality Rules. The Only Legally Sustainable Way to Protect End Users from Unjust Discrimination is By Ensuring That They Are Directly Offered Telecommunications Services.

Above we have shown that under the law, if the Commission finds that an ISP offers a termination service, it is a service that is provided directly only to the transit carrier that physically connects with that ISP. This by definition cannot be a telecommunications service offered to remote senders, since there is no direct connection. Also, the nature of the offering of this direct service renders it a private cable service under the Commission's interpretation of the Act as upheld in *VITELCO*.

It could be possible for the Commission to reverse the findings in *AT&T-SSI* that led to *VITELCO*, and to compel the offering of a common carrier service by an ISP to a directly interconnecting transit provider, or any other carrier. However, telecom services are between or among points of the user's choosing for the information sent and received; and in this scenario the destination for the direct telecommunications transmission to the ISP's network would not be the ISP's subscribers, but the ISP itself. As recognized in *Brand X*, a service cannot be a "HalfTel" service: if it is an information service on one side, it cannot be an telecommunications service on the other.[42]

So the very best the Commission could do with this sender-side framework is identify and/or compel a service that is offered by an ISP to the parties with which it directly interconnects. The Commission somehow would have to identify or compel this as a common carrier service, and not private carrier service. If it did so, the service would then be governed by (at minimum) Sections 201, 202, and 208. The statutory duties contained therein would apply to the ISP and the carrier with which it interconnects. But once the information was delivered to the ISP, the telecommunications transmission would have reached its destination. From that point on, the ISP would be free to do whatever it wants with this information, since it now would be traveling over a (purported) information service to the end-user.

No amount of strenuous objection or argument by the sender-side and remote host proponents can avoid the practical and legal folly of attempting to split this service into two halves or parts, which are putatively the same and different all at once. The telecom traffic must flow in both directions on a unified telecom service, not a bifurcated telecom service somehow held to completely overlap with the left-over broadband information service offered to end-users.

This framework would, at best, permit the ISP to charge a terminating access fee for traffic delivery. The Commission could attempt to regulate and set the default rate for this service at a rate of zero dollars, but as in the case of intercarrier compensation and interconnection generally, the two parties could make any private arrangements they deem mutually beneficial. There also is no way that the Commission could use this framework to prohibit paid-prioritization, blocking, degradation or any other subsequent deviation from best-efforts delivery once the information had been delivered to the ISP, as the Commission would be maintaining the classification of the ISP's service to its own end-users as an information service.

[42] *See Brand X*, 545 U.S. at 999-1000.

However, if end-user broadband Internet access service were properly classified as a telecommunications service, or if the Commission were to identify an underlying transmission or service on offer already, that is a framework that could provide end-users with legal protections against unreasonably discriminatory practices such as paid-prioritization. It would be plainly inconsistent with Commission precedent for the ISP to favor the communications requested by the user without that user's consent. For example, the ISP itself choosing to degrade or prioritize certain traffic requested by its subscribers would be unreasonably discriminatory and unlawful. But actual end-user directed prioritization (using tools such as DIFFSERV), or a Service Level Agreement between the end-user and her ISP for a higher-up time or faster speeds for the entire connection, would not be unreasonably discriminatory.

Conclusion

Chairman Wheeler has said on multiple occasions that network users' rights do not change simply because technologies change. He is one hundred percent correct. The proper way to preserve the network compact, and protect users against unreasonable discrimination as they always have been, is to put the focus back on those users. We cannot and must not concoct a wholly new, wholly untested, and wholly unworkable conception of a sender-side service, only to devise and apply some comparatively weaker protections for that fanciful new service.

The law is something that not even the knowledgeable appointees at the Commission can amend by fiat, to serve whatever purposes they deem worthy. The Act is of course subject to Commission interpretation and deference is due to that reasoned judgment, which the Commission constantly finds itself in court defending. But this deference does not allow the Commission to conjure up new services and markets in contradiction to the plain language of the law, and irreconcilable with its own precedent that pre-dates the 1996 amendments to the Act.

It is deeply troubling and problematic for those concerned about the rule of law that the Commission would seriously consider finding a telecom service where there is none, and ignoring the existence of the one currently offered to consumers, all in a vain effort to avoid a political confrontation. The Commission needs to proceed with both humility and wisdom here instead. If it is unwilling to conduct the analysis and conclude that retail ISP services offered to consumers are telecommunications services, or refuses to correct the market failure betrayed by the absence of such broadband telecom services by compelling their offering, it must not create further uncertainty and unintended consequences with yet another doomed-to-fail legal theory.

Respectfully submitted,

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