



November 18, 2014

Ex Parte

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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

Dear Ms. Dortch,

On Thursday, November 13, 2014, Rev. Jesse Jackson and Steve Smith (Rainbow PUSH Coalition), Dr. Nicol Turner-Lee (Minority Media and Telecommunications Council), Rosa Mendoza (HTTP), Hilary Shelton (NAACP), Sean Mickens (National Urban League) (collectively, the “Civil Rights Advocates”), joined Berin Szoka (TechFreedom), Jeff Eisenach (American Enterprise Institute), Hal Singer, (Progressive Policy Institute), Randy May (Free State Foundation), and Fred Campbell (CBIT) (collectively, the “Telecom Scholars”), and Cheryl Leanza (United Church of Christ) for a meeting with FCC Chairman Tom Wheeler, Daniel Alvarez (Office of the Chairman), Jonathan Sallet and Stephanie Weiner (Office of the General Counsel), Matthew DelNero (Wireline Competition Bureau), and Eric Feigenbaum (Office of Media Relations) to discuss the Open Internet proceeding, and various factors the Commission should consider in weighing its available regulatory options.

Effects of Title II on Deployment. Rev. Jackson expressed concerns of some of the Civil Rights Advocates, shared by the Telecom Scholars, that Title II would harm investment in broadband infrastructure, which would reduce broadband deployment and speeds in minority communities. Dr. Nicol Turner-Lee noted the tension in President Obama’s comments about net neutrality between the consequences of Title II and the goal of universal service, and asked how the FCC planned to address concerns of communities of color. Rosa Mendoza explained that Title II would harm, rather than help, hispanic Americans. Chairman Wheeler responded that the FCC would address such concerns in other proceedings, such as Universal Service Fund and E-Rate subsidies, and asked for more data on the negative effects of Title II.

Why Not Section 706? Rev. Jackson and Randy May asked the Chairman: Why not use Section 706 as the basis for new net neutrality rules instead of Title II? May said that while it is his position that, given the lack of market failure, the Commission does not need to take any further action at this time, if the Commission is going to do so, then it is far preferable for the agency to adopt a properly

implemented “commercial reasonableness” approach under Section 706 than to invoke Title II authority. Szoka noted that the D.C. Circuit granted the FCC sweeping power under Section 706 and upheld the FCC’s 2010 transparency rule.¹ The Chairman declared that the FCC had “only one chance to get this right” and that it needed to craft the strongest regulations necessary to protect consumers from both blocking and “paid prioritization.” He noted that Section 706 and Title II were both still on the table as sources of legal authority for new rules, and could be used alone or in tandem, but that he would use whatever regulatory means necessary to ensure that the Internet remains open and free from blocking, throttling, and so-called “fast lanes” that exclude small voices on the Web.

Efficacy of Section 706. Cheryl Leanza argued that Section 706 was an inadequate basis for new rules because it depends on a factual finding about the adequacy of deployment. While Section 706(b) does require that the FCC find that broadband is not “being deployed to all Americans in a reasonable and timely fashion,” Section 706(a) requires no such finding.² Instead, according to the FCC and the D.C. Circuit’s *Verizon* decision, Section 706(a) authorizes the FCC to regulate anything “within the Commission’s subject matter jurisdiction over [‘interstate and foreign communication by wire and radio,’]” so long as the regulations are “designed to achieve a particular purpose: to ‘encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.’”³ The Chairman noted that one of Section 706’s strengths was that anything that interferes with promotion of the Internet could arguably be covered by Section 706.

No-Blocking Rule. The Chairman noted that other civil rights advocates had expressed concern that, without a no-blocking rule, news about controversies like that unfolding in Ferguson, Missouri, could be censored. Berin Szoka noted that D.C. Circuit did not actually rule that a no-blocking rule lay outside the boundaries of the Commission’s authority under Section 706, but rather that the Commission had failed, in its briefs, to adequately explain why the no-blocking rule did not constitute *per se* common carriage. Indeed, the court summarized the FCC’s oral arguments making this distinction in such a way as to suggest that the court might have upheld the no-blocking rule had the FCC either made such arguments in its briefs or asked the court to re-brief the case after the court decided *Cellco* in December 2012.⁴ The Chairman responded by saying that he wasn’t going to second-guess his predecessor’s decisions.

The Chairman also expressed his desire for a no-blocking rule that would bar throttling or slowing down an edge provider’s service “so that it becomes unusable.” Hal Singer, TechFreedom, and other commenters have supported the FCC’s proposed “best-efforts” standard for assuring that broadband providers deliver all edge providers’ traffic.⁵

¹ See *FCC v. Verizon*, 740 F.3d 623 (D.C. Cir. 2014).

² See Telecommunications Act of 1996, Pub. L. No. 104-104, § 706(a–b), 110 Stat. 56, 153 (1996), as amended in relevant part by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008) (codified as amended at 47 U.S.C. § 1302(a–b)).

³ *Verizon*, at 640.

⁴ *Id.* at 658–59.

⁵ See Protecting & Promoting the Open Internet, *TechFreedom & ICLE Policy Comments*, GN Docket No. 14-28, at 46–48 (July 17, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521706121>.

Paid Prioritization. Szoka noted that, as the Chairman has acknowledged in Congressional testimony,⁶ even under Title II, the FCC could not bar all paid prioritization.⁷ The Chairman agreed that Title II would not authorize an absolute ban on paid prioritization but could allow the FCC to ban some forms of paid prioritization if the FCC concluded they were not just and reasonable. Szoka noted that the *Verizon* court struck down the FCC’s non-discrimination rule because the Open Internet Order declared that “it is unlikely that pay for priority would satisfy the ‘no unreasonable discrimination’ standard[,]”⁸ and failed to explain how such a standard could be overcome.⁹

Dr. Turner-Lee reminded the Chairman of MMTC’s proposal to model case-by-case enforcement of net neutrality rules on the complaint procedures created for race-based discrimination under Title VII of the Civil Rights Act of 1964.¹⁰

Hal Singer proposed a burden-shifting regime, wherein (a) the burden of proof sits initially on edge providers to demonstrate a harm from paid prioritization, but (b) as soon as the edge provider meets a bright-line test, the burden of proof would shift back to the ISP. Examples of bright-line tests for a private harm would include evidence that (i) the edge provider suffered a degradation in quality as a result of declining priority, or (ii) the edge provider was denied access to the same terms for priority extended to rival edge provider. (The transparency rule would, and should, ensure that edge providers would be aware of priority deals that might affect them.) Dr. Singer cited the Supreme Court’s creation of a bright-line test (the “avoided litigation benchmark”) to facilitate a rule-of-reason inquiry in *Actavis* (2013)¹¹ and the Ninth Circuit’s similar test in *PeaceHealth* (2007) to assess bundled rebates (employing the “discount attribution test” as a filter to begin the rule of reason inquiry).¹² By clarifying how burdens could be shifted, the FCC could satisfy the D.C. Circuit’s requirement that parties be allowed to bargain individually, and thus justify regulation of paid prioritization under Section 706, while affording edge providers ample protection from harmful discrimination without undue burdens.¹³

Jonathan Sallet noted that the FCC was considering the approach taken in these cases, but needed to set a starting point through rulemaking, not just through case-by-case enforcement. If, he

⁶ See FCC Oversight: Hearing Before House Energy & Commerce Subcommittee on Communications & Technology, at 2:30:28 (May 20, 2014), *video and transcript available at* <http://www.c-span.org/video/?319457-1/fcc-chair-testifies-net-neutrality> (Tom Wheeler: “As you know, Title II, there is nothing in Title II that prohibits paid prioritization.”).

⁷ See Protecting & Promoting the Open Internet, *TechFreedom & ICLE Legal Comments*, GN Docket No. 14-28, at 19–24 (July 17, 2014) [*TechFreedom & ICLE Legal Comments*], *available at* <http://apps.fcc.gov/ecfs/document/view?id=7521706235>.

⁸ Preserving the Open Internet Broadband Industry Practices, *Report and Order*, GN Docket No. 09-191, ¶ 76 (Dec. 23, 2010), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf.

⁹ *Verizon*, at 657.

¹⁰ See Minority Media & Telecom Council, *Memorandum to FCC, GN Docket Nos. 14–28 & 10–27, Re: Application of the EEOC Complaint Process to 1996 Telecommunications Act Section 706 Complaints Regarding the Open Internet* (Sept. 18, 2014), *available at* <http://mmtconline.org/wp-content/uploads/2014/09/MMTC-Title-VII-Internet-091814.pdf>.

¹¹ See *FTC v. Actavis, Inc.*, 133 S.Ct. 2223 (2013).

¹² See *Cascade Health Solutions v. PeaceHealth*, 502 F.3d 895 (9th Cir. 2007).

¹³ See Kevin Caves & Hal Singer, *On the Utility of Bright-Line Tests for Rule of Reason Cases*, CPI ANTITRUST CHRON. (publication forthcoming, Nov. 2014 (2)).

explained, the record showed either a sufficiently grave or sufficiently likely harm, the FCC might create a bright-line rule, much as the antitrust agencies have created presumptions against certain mergers when they would result in a level of market concentration (measured on the Herfindahl-Hirschman Index) above a given threshold.

Title II. Jeff Eisenach warned that Title II is, at base, a rate-regulation regime with a century of jurisprudence constraining FCC’s ability to set prices — which is sure to be invoked by any party who doesn’t like the price set by the FCC in a particular case. The Chairman insisted that banning paid prioritization would not constitute setting a price of zero and pointed to the FCC’s experience with the wireless industry as proof that forbearance could work.

The meeting’s end did not permit us to distinguish between the extent to which the wireless industry’s growth depended on the statutory status of mobile data service as a *private* mobile service (Title I) rather than the status of mobile voice service as a common carrier service (subject, through Title III, to many of the requirements of Title II), which the FCC chose to deregulate through forbearance.¹⁴ Nor did we have time to discuss the process by which the FCC would be able to forbear from some or all of the requirements of Title II, how to reconcile the factual basis for doing so with the arguments made for increased regulation and for imposing Title II status on broadband, or from which specific provisions the FCC might forbear.¹⁵

Szoka did note, however, that it was unclear why Title II would not authorize ISPs to charge all edge providers for terminating their traffic to ISP customers¹⁶ — the polar opposite of what Title II advocates claim to want — or how the FCC could forbear from what would amount to a sender-pays regime.¹⁷

Singer urged the FCC to refresh the record on the need for Title II, the problems raised by any attempt at reclassification, and the difficulties involved in forbearance. The Chairman claimed that the FCC’s existing record was adequate to justify invoking Title II and had led the Commission to consider using a “hybrid” approach.

Wireless & Zero-Rating. Randy May expressed concern that an excessively rigid rule against prioritization or other non-“neutral” conduct could be used to ban zero-rating programs, by which data used for a particular app is not counted against a subscriber’s wireless data plan. Dr. Turner-Lee noted that such programs could help to bridge the digital divide, both by making broadband more affordable and by helping non-adopters understand why broadband might be relevant to them — thus overcoming the largest obstacle for non-adoption: a lack of perceived relevance.

¹⁴ *TechFreedom & ICLE Legal Comments*, at 57–62

¹⁵ *Id.* at 32–48.

¹⁶ See George S. Ford & Lawrence J. Spiwak, *Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service*, PHOENIX CENTER POL’Y BULL. No. 36 (Sept. 2014), available at <http://www.phoenix-center.org/PolicyBulletin/PCPB36Final.pdf>.

¹⁷ *Id.*

Conclusion. The Telecom Scholars and Civil Rights Advocates urged the Chairman not to invoke Title II, and instead to ground new rules in the authority claimed by the Commission under Section 706. Avoiding Title II and crafting a flexible rule to govern paid prioritization and zero-rating plans would allow the Commission to balance the dual objectives of promoting edge innovation and core investment,¹⁸ and to maintain the bipartisan consensus that has prevailed since the late 1990s against heavy-handed public-utility-style regulation of the Internet.

But, at a minimum, before the FCC pursues any use of Title II, we, the Telecom Scholars and Civil Rights Advocates, urge the FCC to issue a Further Notice of Proposed Rulemaking clarifying its proposed approach to Title II, setting forth its basis for forbearance from Title II, and seeking further comment on, among other things: (i) the impact of Title II on broadband deployment, especially in under-served communities; (ii) how the FCC’s authority over paid prioritization would differ as between Title II and Section 706; (iii) whether Title II would actually create a sender-pays regime for Internet traffic and, if so, whether the FCC can forbear from this requirement, given that the FCC claims broadband providers have a “terminating access monopoly” over edge providers; (iv) how forbearance would work generally, which requirements of Title II the FCC would forbear from, on what basis it would do so, how it would reconcile its basis for forbearance with its legal basis for reclassification and its policy basis for Open Internet rules, the standard will be for forbearance in the future, and whether the FCC legally can unforbear and how that would work;¹⁹ and (v) flexible approaches to policing paid prioritization, such as those proposed by Singer and MMTc.

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Pursuant to Section 1.1206 of the Commission’s rules, 47 C.F.R. § 1.1206, please include this letter in the above-referenced proceedings. Please direct any questions to the undersigned.

Sincerely,
/s/ Berin Szoka
President
TechFreedom

¹⁸ Robert Litan & Hal Singer, *The Best Path Forward on Net Neutrality*, PROGRESSIVE POL’Y INT. (Sept. 2014), available at <http://www.progressivepolicy.org/issues/economy/best-path-forward-net-neutrality-2/>.

¹⁹ The D.C. Circuit recently stated that “it should be obvious that a section 10 forbearance petition is a request for a rulemaking, since it seeks a modification of a rule which has *only* future effect.” *Verizon v. FCC*, No. 13–1220, slip op. at (D.C. Cir. 2014) (emphasis in original), available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/E1B3BB43327E789E85257D82004DD09E/\\$file/13-1220-1519978.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/E1B3BB43327E789E85257D82004DD09E/$file/13-1220-1519978.pdf). This language, while arguably dicta, strongly implies that a proposed grant of forbearance must be properly issued for public comment under the Administrative Procedure Act. The FCC’s May 2014 NPRM solicited comment on forbearance only in the most general terms, in a single paragraph, but does not explain the FCC’s proposal or, critically, the FCC’s proposed basis for forbearance. Legally, this is unlikely to constitute adequate notice of forbearance and, as a policy matter, it would be unwise to jump from this vague query to the complicated task of attempting to issue the kind of forbearance that Title II advocated insist could cure the problems created by Title II. Either way, if the FCC plans to grant forbearance under Title II *sua sponte* as part of a reclassification order, it should first issue a Further Notice of Proposed Rulemaking in this proceeding describing its proposed approach to forbearance, its basis for granting that forbearance and addressing the questions above forbearance listed above.