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November 21, 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 Wednesday, November 19, 2014, Lauren Wilson and I met with Jonathan Sallet, General Counsel, and Stephanie Weiner, Associate General Counsel, regarding matters in the above-captioned dockets.

Our discussion focused chiefly on two topics: forbearance from provisions of Title II, if and when the Commission should proceed to classify broadband Internet access service as a telecommunications service once again; and the proper interpretation of the protections afforded users of telecom services by Sections 201 and 202 of the Act, 47 U.S.C. §§ 201, 202.

Free Press briefly addressed both the substance and the process of forbearance after reclassification. We noted our position, articulated in the 2010 Broadband Framework proceeding¹ and reiterated in the current Open Internet docket,² that the Commission should not forbear from and thus retain all or part of Sections 201, 202, 208, 222, 251, 255 and 256. We likewise noted in the earlier filing that the Commission should consider retaining Section 214's discontinuance provisions.³ And we suggested there that the Commission could face "significant difficulty in transforming the Universal Service Fund to support broadband for rural and low-income communities"⁴ absent Section 254 and a rationalization of its broadband classification.

In the meeting, however, and as described in greater detail below, we explained that Sections 201, 202 and 208 form the core of the Title II, and the heart of the entire Act in many respects,⁵ with that trio of statutes providing sufficient authority for strong Open Internet rules.

¹ See Comments of Free Press, GN Docket No. 10-127, at 3 (filed July 15, 2010) ("Broadband Framework Comments"); *id.* at 64-75.

² See Comments of Free Press, GN Docket Nos. 14-28, 10-127, 09-191, at 83 n.180 (filed July 18, 2014) ("Free Press Comments").

³ See, e.g., Broadband Framework Comments at 3, 69-72.

⁴ *Id.* at 24.

⁵ See Free Press Comments at 29-31.

We also suggested during the meeting, without offering any final opinion as to the ultimate merits on this particular issue, that the Commission might explore whether intervening statutes and court decisions (such as the 21st Century Communications and Video Accessibility Act, or the Tenth Circuit’s affirmance of the USF/ICC Transformation Order) had lessened the necessity for continued enforcement of Section 254’s universal service provisions and Section 255’s disabilities access provisions.

Finally with respect to forbearance, and specifically the procedural mechanisms at the Commission’s disposal to make forbearance decisions, we discussed the possibility of deferring decisions on forbearance from some of the aforementioned statutes until a later date while staying their application during the pendency of such determination. Free Press acknowledged the need for further research of that procedural question, and pledged to provide such analysis as soon as practicable. Yet we also stressed that the record in this docket is complete on the topic of which statutes the Commission must retain in order to adopt Open Internet rules – namely, Sections 201, 202, and 208. And the record is complete too when it comes to which statutes may be necessary (as a basis of authority in other proceedings) to promote important policy goals such as broadband competition, universal service, and consumer protection, even if some few questions remain as to how and when to make those determinations in other proceedings.

Returning to the substance of the Commission’s authority under Sections 201, 202, and 208, we reiterated the Commission’s need when fashioning strong Open Internet rules to focus on the actual end-user of the Title II broadband Internet access service. A mass market Internet Service Provider’s customer is the individual to whom such a carrier provides a telecom service, and it is to this customer that such a carrier owes a duty to “transmi[t], between or among points specified by the user, [] information of the user’s choosing”⁶ on terms that are “just and reasonable”⁷ and not unreasonably discriminatory.⁸

In this light, the oft-repeated objection that Title II “can’t even ban all discrimination” simply melts away; while the harms to end-users, from so-called interconnection charges imposed by terminating access monopolies, become clear.

Chairman Wheeler and others have suggested quite correctly on numerous occasions that users deserve access to the Internet – the whole Internet – to obtain “the content they desire at the speeds they pay for” (in the words of the Internet Association).⁹ When a broadband provider impedes its users’ ability to access content at the speed they pay for, that constitutes unjust interference and patently unreasonable discrimination against those users. So when Comcast charges a content provider or transit provider a terminating access charge, and when absent payment of such charge by the so-called “sender” the end-user’s experience is degraded, this is an unreasonable practice which the Commission can preclude with bright-line prohibitions.

⁶ 47 U.S.C. § 153(50).

⁷ *Id.* § 201(b).

⁸ *See id.* § 202(a).

⁹ Ted Johnson, “President Obama Says He’s ‘Unequivocally Committed to Net Neutrality’ in Santa Monica Visit,” *Variety*, Oct. 9, 2014 (quoting Internet Association response to President Obama’s remarks).

Furthermore, as we explained in our initial comments in GN Docket No. 14-28, even labeling a content provider or the transit provider as the “sender” of such traffic is likely a misnomer, because it is the last-mile ISP’s customer that initiates the transmission. “[T]he end-user, and not the content company, ‘caused’ the cost. Netflix isn’t sending [the user] a streaming video unless [she] first requests the stream.” In that case, “for a last-mile ISP to ask for, or demand, payment from Netflix or its intermediary carriers to access the last-mile network is an unreasonable abuse of the ISP’s terminating access monopoly.”¹⁰

In an *ex parte* letter submitted earlier this month, Free Press identified the myriad problems, from a legal, practical, logical, and policy perspective, of attempting to create a “sender-side” telecommunications service and “hybrid” Title II approach to cover such service.¹¹ In that submission, we illustrated that the Commission cannot and must not suggest that there is made to senders any direct offer, to the public, for a fee, of a telecom service recognizable under the Act’s definitions. Carriers do not provide a statutorily recognized service to “remote” parties with whom they have no direct interaction, and to whom they owe no obligations beyond those explicitly spelled out in the Act. Rather, broadband Internet service providers when properly classified as telecommunications carriers are common carriers with respect to their actual end-user customers, who must be permitted to send and receive the information of their choosing.

At the meeting with Mr. Sallet and Ms. Weiner, we emphasized once more that the D.C. Circuit’s decision overturning the 2010 Open Internet rules does not command the Commission to recognize sender-side services. As *Brand X* make clear, “*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.”¹²

Moreover, 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. None of the court cases and Commission decisions cited by Verizon in its D.C. Circuit brief suggest otherwise, as each of the handful of cases Verizon cited in its brief deal with relationships between carriers.

This understanding of the Act is essential not only to the analysis of the flaws in sender-side models, which would suggest implausibly 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.

This focus on the service offered to the ISPs’ end-users also is essential to understanding how and why the Commission may prevent Net Neutrality violations and other practices that harm end-users, because such practices obviously violate the ISPs’ duty to provide a telecom service on just, reasonable and nondiscriminatory terms.

¹⁰ Free Press Comments at 146-47.

¹¹ See Letter from Free Press to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 14-28, 10-127 (filed Nov. 5, 2014).

¹² *National Cable and Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 983 (2005).

Respectfully submitted,

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cc: Jonathan Sallet
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