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December 4, 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 Tuesday, December 2, 2014, I met with Priscilla Delgado Argeris, Legal Advisor to Commissioner Jessica Rosenworcel, regarding matters in the above-captioned dockets.

My presentation consisted primarily of discussions regarding our previously filed submissions in this proceeding.

For instance, I referred to and described the Free Press *ex parte* notification submitted in these dockets on November 21, 2014.[1] That filing reiterated our position on forbearance from certain provisions of Title II if and when the Commission classifies broadband Internet access as a telecommunications service once again. As we articulated in the 2010 Broadband Framework proceeding[2] and the current Open Internet proceeding,[3] the Commission should not forbear from and instead should retain all or part of Sections 201, 202, 208, 222, 251, 255 and 256. We noted in the 2010 filing that the Commission also should consider retaining Section 214 discontinuance provisions,[4] and suggested there would be "significant difficulty in transforming the Universal Service Fund to support broadband for rural and low-income communities"[5] absent Section 254.

In the meeting, however, and as described in greater detail below, I explained that Sections 201, 202 and 208 form the core of Title II[6] – with that trio of statutes providing sufficient authority for strong Open Internet rules.

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[1] *See* Free Press *Ex Parte* Notification, GN Docket Nos. 14-28, 10-127 (filed Nov. 21, 2014).

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

[3] *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").

[4] *See, e.g.*, Broadband Framework Comments at 3, 69-72.

[5] *Id.* at 24.

[6] *See* Free Press Comments at 29-31.

Meanwhile, as our November 21st filing suggested, the Commission might now explore whether intervening court decisions and statutes (such as the Tenth Circuit's affirmance of the USF/ICC Transformation Order, or the 21st Century Communications and Video Accessibility Act) had lessened the need for continued enforcement of Section 254's universal service provisions and Section 255's disabilities access provisions, respectively.

Finally with respect to forbearance, and specifically the procedural mechanisms at the Commission's disposal to make forbearance decisions, I discussed the possibility of deferring decisions on some of the aforementioned statutes while staying their application during the pendency of such consideration. Yet I noted 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 also noted the robust record, in GN Docket No. 10-127, on which statutes may provide necessary authority to promote important policy goals (such as broadband competition, universal service, and consumer protection) in other proceedings.

I also referred in the instant meeting to Free Press's analysis of the Commission's authority under Sections 201, 202, and 208, reiterating the logic of focusing any Open Internet rules on the end-user of the Title II broadband Internet access service rather than the "sender" of any content. A mass market broadband Internet Service Provider's customer is the individual to whom such a carrier actually 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"[7] on terms that are "just and reasonable"[8] and not unreasonably discriminatory.[9]

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 the 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. When a broadband provider impedes its users' ability to access content at the speeds those users purchase, that constitutes unjust interference and patently unreasonable discrimination <u>against those users</u>. So when Comcast charges a content provider or transit provider a terminating access charge, and 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.

I then briefly summarized the *ex parte* letter submitted on November 5th in which Free Press identified the myriad problems (from a legal, practical, logical, and policy perspective) of attempting to create a "sender-side" telecommunications service nonetheless.[10]

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[7] 47 U.S.C. § 153(50).

[8] *Id.* § 201(b).

[9] *See id.* § 202(a).

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

The D.C. Circuit's decision overturning the 2010 Open Internet rules does not command the Commission to recognize delivery of content as a telecom service offered to senders of that content. No matter what economic value such "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. It is also essential to understanding why the Commission may prevent practices that harm end-users because those practices violate the ISPs' duty to provide a telecom service on just, reasonable and nondiscriminatory terms.

Lastly, I referred to a second Free Press filing also made on November 21st in the above-captioned dockets, which discussed and debunked a USTA study purporting to show declines in broadband investment that reclassification would occasion.[11] As shown in our letter, the study speculated about the risk of reductions in investment that no publicly traded carrier has disclosed to its investors, and the study failed utterly in its attempt separate investments in Title II services from those made in other services – in large part because the authors failed to acknowledge that CMRS offerings are regulated with a "light-touch" application of Title II. USTA's submission also ignored contemporary evidence of massive network investments by LECs and cable operators alike in carrier Ethernet facilities and similar enterprise broadband telecom services.[12]

I made brief reference as well to a post Free Press published on our blog on the day of this meeting, addressing claims that reclassification would allow for taxation of broadband by federal, state, and local governments.[13] We noted in our piece what we believe to be significant overstatement of the potential revenues in question, based on various parties' failure to distinguish between assessable interstate and intrastate services. We also described in the post the steps Congress and the Commission could take to eliminate all such fees, by amending and renewing the Internet Tax Freedom Act on Congress's part; and by defining broadband as an interstate service while considering forbearance from federal USF contribution requirements on the FCC's part.

Respectfully submitted,

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[11] *See* Letter from Free Press to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 14-28, 10-127 (filed Nov. 21, 2014).

[12] *See id.* at 2, 10-11.

[13] *See* Matt Wood, "Claims That Real Net Neutrality Would Result in New Internet Tax Skew the Math and Confuse the Law," Free Press Blog, Dec. 2, 2014, .