



February 19, 2015

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,

After more than nine months of deliberation and more than four million comment submissions, the FCC will soon complete its Open Internet proceeding, referenced above. In addition to the detailed legal and policy comments we filed in July we add the following items:

As Appendix A, we submit a transcript of President Obama’s speech from last November, calling on the FCC to “implement the strongest possible rules to protect net neutrality” and to “reclassify consumer broadband service under Title II of the Telecommunications Act.” We must note that the President’s speech (not just the oral version, but the text provided by the White House) references the *wrong* Title II. As anyone would learn on the very first day of any communications law course, the FCC relies on two primary pieces of legislation for authority: the Telecommunications Act of 1996 and the Communications Act of 1934. At issue in the current proceeding, as anyone who has been paying the slightest attention would know, is Title II of the 1934 Communications Act, as amended by the 1996 Telecommunications Act — *not* the “Telecommunications Act,” as the President’s speech declares. That no one in the White House caught this glaring, embarrassing error speaks volumes about the the level of sophistication inside the Obama Administration concerning the most significant decision undertaken by the FCC in its over eight decades of existence — and suggests that the real objective of the Administration has always been, first and foremost, political.

As Appendix B, we submit a fundraising letter sent by Organizing for America, the grassroots arm of Obama for America, the day after the President’s speech urging recipients to “sign our

petition to tell the FCC you stand with **President Obama's plan** to protect net neutrality” (emphasis added).¹

As Appendix C, we submit a coalition letter we sent to Chairman Wheeler on October 2, explaining the litany of recent process failures at the FCC, the gravity of the issues currently before the Commission, and the overwhelming importance of getting them right. Generally, that would be done by ensuring, to the greatest extent possible, that the Commission’s deliberations would be as open and transparent as reasonably feasible. Instead, by refusing to publish the 332-page draft order the Chairman recently circulated among the Commissioners, the Chairman has only compounded the lack of transparency around this process.

Needless to say, we have never received a response to the questions raised in our October 2 letter about appearance that the FCC actively worked to distort media coverage of the comment proceeding to downplay (if not completely ignore) public opposition to Title II. As our letter noted, as of the end of the comment cycle, at least a quarter of the comments received in this docket clearly opposed new FCC regulations over broadband and/or invocation of Title II.

As Appendix D, we submit a transcript from a recent radio debate between Jeff Eisenach and Gigi Sohn, Special Advisor to Chairman Wheeler. A recording of the debate is available online,² but we have also taken the liberty of providing a transcript. In particular, we call attention to the following claim by Sohn: “Almost universally, Americans said they wanted an open Internet that was protected by the strongest possible rules. And much to even my surprise, many of them, the majority of them, called for Title II reclassification.” Both statements have been repeated routinely by the FCC and advocates of Title II. The first statement is demonstrably false, as at least a quarter of commenters specifically opposed regulation. The second statement unsubstantiated, as a significant percentage of the comments filed in support of regulation broadly speaking did not specifically reference Title II.

As Appendix E, we submit a poll conducted by Hart Research Associates, a highly regarded, Democratic polling company, whose results were published today, and conducted at the behest of the Progressive Policy Institute. The results speak for themselves, but to them, we add our comment, issued today in a press release:

This poll debunks the FCC’s claims that there is a groundswell of support for public utility regulation. 74% of Americans readily admit they’re not “familiar” with the term “Net Neutrality.” Beyond a small base of engaged activists, “net neutrality” is simply one of the trendy platitudes that have come to drive American politics. In attempting to

¹ <https://www.barackobama.com/news/support-net-neutrality-petition/>

² http://thekojonnamdishow.org/shows/2015-02-17/a_decision_approaches_on_net_neutrality

rebrand public utility regulation under Title II as ‘net neutrality’ the FCC has manipulated popular confusion about this issue to pull the greatest bait-and-switch in the history of communications policy. Why the deception? Because a majority of Americans is against imposing public utility regulation on the Internet — by a 21-point margin.

A whopping 73% of respondents demand “greater disclosure” from the FCC before it imposes any new Internet regulations. Publishing the draft FCC order before it’s voted on would be a start, but the real answer is for Congress, not the FCC, to finally resolve the decade-long fight over net neutrality. That means providing the FCC clear but narrow authority to police core concerns about online competition and free expression. Only Congress can do that without opening the door to public utility regulation, broadband taxes, and years of litigation. Bipartisan compromise is possible — just not at the FCC.³

As Appendix F, we submit the letter signed by 32 scholars of economics and communications law and submitted to the Federal Trade Commission, asking the FTC to defend its jurisdiction over broadband services, which the FTC would lose if the FCC deems broadband to be a common carrier service.

As Appendix G, we submit the FTC’s 2007 Broadband Connectivity Competition Policy Staff Report, which offers a detailed legal analysis of the common carrier exception to the FTC’s otherwise comprehensive jurisdiction to punish unfair and deceptive acts and practices, as well as to enforce the antitrust laws.⁴

And finally, as Appendix H, we submit a coalition letter we sent to the House and Senate Commerce Committees on January 20, urging Congress to resolve the net neutrality fight through legislation. Only Congress is directly accountable to the American people; only congress can effectively distill input from millions of engaged citizens into a durable bipartisan compromise.

Pursuant to the Commission’s rules, please include this written *ex parte* and the attached documents in the docket for the above-referenced proceedings.

Sincerely,

Berin Szoka
President

³ <http://techfreedom.org/post/111484672714/new-poll-debunks-public-support-for-making-the>

⁴ Federal Trade Commission, *Broadband Connectivity Competition Policy Staff Report*, (June 2007) at 42-50 <http://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf>