



February 19, 2015

VIA ELECTRONIC DELIVERY

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

**Re: *Notice of Ex Parte Communication*
Protecting and Promoting the Open Internet, GN Docket No. 14-28
*Framework for Broadband Internet Service, GN Docket No. 10-127***

Dear Ms. Dortch:

On February 4, 2015, Federal Communications Commission (“FCC” or “Commission”) Chairman Tom Wheeler released a Fact Sheet with an overview of the proposed open Internet rules on which the Commission is scheduled to vote on February 26, 2015.¹ The Fact Sheet’s proposal to advance an alternative argument that a broadband provider makes a service available to “edge providers”² is problematic and unnecessary.

The Commission has no obligation to establish a distinct service offered by broadband providers to edge providers, and doing so is unsupported in the docket and will likely have unforeseen consequences. Therefore, the Commission should not concoct such a service in its forthcoming open Internet order.

Numerous filings in the docket have made clear that there is no service offered by broadband providers to edge providers, nor do edge providers pay a fee to last-mile Internet service providers (“ISPs”) for delivery of content to the ISPs subscribers.³ Because there is no direct relationship between ISPs and edge providers and, in the rare cases where such a relationship may exist the arrangement is negotiated on an individual basis rather than offered

¹ Federal Communications Commission, “Fact Sheet: Chairman Wheeler Proposes New Rules for Protecting the Open Internet,” (rel. Feb. 4, 2015).

² *Id.* at 1.

³ See e.g., Notice of *Ex Parte* of Free Press, GN Docket Nos. 14-28 & 10-127, at 1-2 (filed Feb. 11, 2015); Letter by Public Knowledge to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 10-127 & 14-28, at 4-5 (filed Dec. 19, 2014); Notice of *Ex Parte* of Free Press, GN Docket Nos. 14-28 & 10-127, at 3 (filed Nov. 21, 2014); Notice of *Ex Parte* of Free Press, GN Docket Nos. 14-28 & 10-127, at 1, 4-6 (filed Nov. 5, 2014); Comments on Mozilla’s Proposal by Barbara van Schewick and Alec Schierenbeck, GN Docket No. 14-28, at 6-13 (filed Oct. 30, 2014).

indiscriminately “to the public,” the service would not comply with the definition of “telecommunications service” in 47 U.S.C. §153(53). As a result, inventing and then recognizing the existence of such a service is unhelpful to the Commission’s efforts to use Title II of the Communications Act to adopt open Internet rules that will prohibit blocking, discrimination, and paid prioritization of legal web content by ISPs.

Additionally, acknowledging the legal fiction that ISPs offer a service to edge providers will have unforeseen consequences. For example, establishing that there is a relationship between any edge provider and the ISP delivering the edge provider’s traffic to the end user would essentially create privity between any website in the world that is accessed by a U.S.-based user and that user’s residential ISP. Under such a regime, every website in the world could be deemed a customer of every U.S. ISP. Creating such a scheme out of whole cloth would be unprecedented, have unknown consequences, and is completely unnecessary.

Finally, the D.C. Circuit’s decision in *Verizon v. FCC*⁴ does not require the Commission to contrive, even as an alternative legal basis for its rules, a service that broadband providers make available to “edge providers.”

Pursuant to Section 1.1206(b) of the Commission’s rules, I am filing this notice electronically in the above-referenced dockets. Please contact me with any questions.

Respectfully submitted,

/s/ Phillip Berenbroick

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⁴ *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).