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February 19, 2015

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, February 17, 2015, I spoke by telephone with Rebekah Goodheart, Commissioner Clyburn's Legal Advisor for Wireline Issues, to discuss matters in the above-captioned dockets.

I first reiterated Free Press's position on the subject of terminating access fees commonly labeled (or, to be more precise, commonly mischaracterized) as interconnection fees charged by broadband Internet access service providers. I discussed Free Press's *ex parte* filing of February 11, 2015,¹ explaining that such access fees should be banned when they are used to evade Open Internet rules by blocking or throttling traffic at the interconnection point with the last-mile network. The Commission can and must address these harms in some fashion, despite carriers' vapid claims that degradation just outside the last-mile should not be subject to these rules.

Furthermore, the Commission can indeed protect against such unreasonable and unreasonably discriminatory conduct with rules grounded in Title II classification of the end-user-facing broadband Internet access service rather than some sort of newfound edge-provider facing service. When a broadband provider impedes its own end-users' ability to access content at the speed for which those end-users pay, that constitutes unjust interference and patently unreasonable discrimination against those very same end-users. So if Comcast charges either a content provider or a 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 and should prohibit. Broadband Internet access service providers, properly classified as telecommunications carriers, are common carriers with respect to their actual end-users who must be permitted to send and receive the information of their choosing.

¹ See Letter from Free Press to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 14-28, 10-127 (filed Feb. 11, 2015) (attached hereto as Attachment 1).

As we explained in our initial comments in this proceeding, even labeling a content provider or transit provider as the “sender” of such traffic is 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.”²

For this reason, concerns about traffic asymmetry and imbalances are in many respects nonsensical. The cost-causer in this scenario is almost always the broadband Internet access service provider’s end-user who requested the data from the edge provider in the first place, not the edge provider itself.

Concerns that Open Internet rules are somehow legally asymmetrical, and thus inequitable to broadband Internet access providers, fare no better than the technical asymmetry claims. Classifying broadband Internet access service as a Title II telecom service offering decidedly does not render content providers or the providers of other information services delivered via the Internet into telecommunications carriers themselves. Yet neither does the adoption of rules applicable to broadband Internet access providers automatically suggest or require that other types of actual carriers remain outside of Title II.

The Open Internet rules that the Commission is poised to adopt – including the “general conduct” rule that has been the topic of some discussion since the release of the Open Internet Fact Sheet³ – properly should apply only to the practices of broadband Internet access service providers, to prevent unreasonable practices and unreasonably discriminatory conduct by these carriers and not by other entities on the Internet. No matter how strenuously some cable companies, their trade associations or their consultants may assert that other sectors have more leverage than terminating access monopoly broadband providers do – ironically suggesting that the Commission should indeed “regulate the Internet” while they simultaneously attack the restoration of nondiscrimination safeguards for broadband access users as undue regulation – none of these false arguments change the Commission’s jurisdiction. Returning to the proper legal foundation of Title II does not give the Commission Title II jurisdiction over the practices of non-telecommunications carriers. But it also does not mean that the practices of other carriers or classes of carriers providing other telecom services would be immune from the protections outlined in Section 201 or the complaint processes of Section 208.

Lastly, I touched briefly on the unfounded arguments that Title II reclassification would lead automatically to the imposition of new federal, state, or local taxes and fees on broadband access. As explained in greater detail in Free Press’s letter filed in the above-captioned dockets on December 14, 2014,⁴ there is no basis in reality for these fear-mongering claims.

² Comments of Free Press, GN Docket Nos. 14-28, 10-127, 09-191, at 146-47 (filed July 18, 2014).

³ “Fact Sheet: Chairman Wheeler Proposes New Rules for Protecting the Open Internet,” at 2 (rel. Feb. 4, 2015).

⁴ See Letter from Free Press to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 14-28, 10-127 (filed Dec. 14, 2014) (attached hereto as Attachment 2).

Congress's reauthorization of the Internet Tax Freedom Act (ITFA) precludes any new state or local taxes for broadband Internet access service, no matter how the Commission defines and classifies that service, just as the ITFA precluded such taxes before reauthorization.

And while the ITFA makes some allowance for fees as opposed to taxes, this allowance does not magically equate to the imposition of every telecom fee on any telecom service. The architects of these crumbling tax scare claims are fond of reciting numbers, listing out the fees in different states and localities that do indeed apply to some telecom services. But word-searching a state tax code for the word "telecommunications" does not a sound legal argument make, unless and until the proponents of these claims actually read the laws they reference and demonstrate that these fees would indeed apply to broadband Internet access telecom services.⁵

For example, the tax scare authors suggest informally (in conversations on Twitter in other such fora) that California state and municipal "fees" such as the state's LifeLine program surcharge, its 911 surcharge, or its municipal Utility User Tax would apply to broadband Internet access service after reclassification. But these taxes and fees are assessed, respectively, on intrastate charges of California telephone corporations; intrastate telephone communication services; and telephone usage or cell phone usage. At risk of stating the obvious, not every "telecommunications service" is a telephone service, let alone an intrastate one.

The federal and state universal fund contribution impacts casually tossed into the equation by the tax scare proponents are, likewise, readily precluded by Commission action such as forbearance from Section 254(d) for broadband Internet access service providers. What's more, contribution requirements are neither an automatic outcome of, nor dependent on, reclassification. Just as the Commission had begun using USF monies to support broadband deployment through its Connect America Fund initiative long before reclassification was put back on the table by the current Chairman, the Commission had also considered expanding the federal USF revenue base by requiring contributions from broadband providers long before reclassification was made a possibility again.⁶

⁵ See *id.* at 6-9 (demonstrating that various state property taxes and fees would not apply to broadband Internet access services either because the specific state statutes in question expressly exempt Internet access from liability for the fee or because these statutes apply said fees only to intrastate or toll telephony).

⁶ See S. Derek Turner, "Taxing broadband – an idea whose time has not come," *Ars Technica*, Aug. 30, 2012, <http://arstechnica.com/tech-policy/2012/08/op-ed-taxing-broadband-an-idea-whose-time-has-not-come/> (noting that then-Commissioner McDowell, former Congressman Boucher, and AT&T all had discussed expanding the contribution base potentially to include Internet content providers or broadband providers as early as 2012 and before); see also Comments of AT&T, WC Docket No. 06-122, GN Docket No. 09-51, at 13 (filed July 9, 2012) (suggesting that "retail mass market broadband Internet access should be included, at least within any revenues- or connections-based regime" because "broadband Internet access is widespread and commercially successful, and – unlike conventional telecommunications services – it is not facing rapid competitive erosion in the face of market substitutes").

Likewise, even in the rare state that may assess some interstate telecommunications service revenues for its state universal service fund, the state law's definition of a telecom service is not necessarily dependent on the federal regulatory classification of the service.⁷

Respectfully submitted,

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cc: Rebekah Goodheart

⁷ See, e.g., Vt. Stat. title 30, § 7501(b)(8) (defining “telecommunications service” – without reference to the federal Communications Act definition – as “the transmission of any interactive electromagnetic communications that passes through the public switched network”).