



February 20, 2015

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Via Electronic Filing

Re: Notice of Ex Parte Communications, GN Docket Nos. 10-127, 14-28

Dear Ms. Dortch:

On February 19, 2015, Alan Davidson, Director, and Sarah Morris, Senior Policy Counsel, both of New America's Open Technology Institute (OTI), spoke via phone with Priscilla Delgado Argeris, Senior Legal Advisor for Federal Communications Commissioner Jessica Rosenworcel. During that meeting, OTI made the following presentation regarding the Commission's Open Internet Proceeding.

Alan Davidson began by expressing OTI's strong appreciation of the Commission's continued good work in this proceeding, and in particular of the Commission's strong proposed rules and inclusion of interconnection within the scope of the final Order. However, Davidson also noted one area of significant concern for OTI.

Specifically, Davidson noted OTI's serious concerns on the merits of any proposed theory for legal authority that would recognize a relationship between any person or entity sending packets over the Internet—as a speaker, content creator or sender, or “edge service”—and distant, last-mile Internet Service Providers (ISPs), and the creation of rules based on that relationship. Historically, speakers on the Internet have not needed to care about the mechanism by which their traffic reaches the ISP subscriber who has requested that traffic. Indeed, the level of

abstraction that kept those two parties at arm's-length is one of the key characteristics of the Internet.¹

By recognizing a novel, edge-facing service and classifying it as a common carriage service, the Commission risks creating an unintended legal relationship between packet-senders on the content layer and last-mile carriers on the infrastructure layer. This privity has never existed in that context. OTI believes very strongly that disrupting the functional separation of the network's layers would undermine the conceptual model that is essential to the way the Internet has always worked.

Davidson also expressed concerns about the potential political ramifications of this component of the proposal. First, the legal theory could unnecessarily increase litigation risk. Second, because it recognizes a new service, the legal theory's inclusion in the final Order could leave the Commission vulnerable to arguments about potential overreach.

Given the potential for a reviewing court to accept or reject any legal theory, or combination thereof, offered for the rules, OTI's concerns exist regardless of whether a sender-side or edge-facing legal theory is offered as a primary justification for the rules or a secondary justification in the alternative. OTI urged the Commission to adopt a theory of legal authority that recognizes that broadband carriers' delivery of edge provider traffic is part and parcel of the unitary service that carriers promise and deliver to consumers—not a distinct and independent service to edge providers.²

Pursuant to the Commission's rules, this notice is being filed in the above-referenced dockets for inclusion in the public record.

Respectfully submitted,

/s/ Sarah Morris

Sarah J. Morris
Senior Policy Counsel
Open Technology Institute

¹ See, e.g., Sarah Morris, "Rumored network neutrality approach might break the Internet instead of saving it," The Hill (Nov. 6, 2014) available at <http://thehill.com/blogs/pundits-blog/technology/223184-rumored-network-neutrality-approach-might-break-the-internet>

² See, e.g., Notice of Ex Parte Communications, Free Press, GN Docket Nos. 10-127, 14-28 (November 5, 2014): "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. The end-user is the party who initiates the communication."

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Cc: Priscilla Argeris