

February 20, 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 Wednesday, February 18, 2015, Sarah Morris of New America's Open Technology Institute, along with Lauren Wilson and Matt Wood of Free Press, met with Stephanie Weiner, Associate General Counsel; Matthew DelNero, Deputy Chief of the Wireline Competition Bureau; and Claude Aiken, Acting Deputy Division Chief of the Wireline Competition Bureau's Competition Policy Division, to discuss matters in the above-captioned dockets.

We began by expressing our sincere appreciation for the Commission's work in this proceeding – in particular the Commission's decision to return to Title II and reportedly ground strong Open Internet rules in that authority. However, we focused primarily in our presentations on our organizations' shared concerns with what the Commission's Open Internet Fact Sheet described as a decision “to classify the service that broadband providers make available to ‘edge providers’” as “a Title II telecommunications service.”¹

There are legal obstacles to recognizing this construct as a “telecommunications service” as defined in 47 U.S.C. § 153(50) and (53). And there are policy consequences that would be undesirable, to say the least, that could emanate from the creation of such a service purportedly offered to edge providers by end-users' broadband Internet access providers. By recognizing a novel, edge-facing service and classifying it as a common carriage service, the Commission risks creating an unintended legal relationship between senders of content and last-mile broadband Internet access providers that are not such senders' actual carriers. Historically, speakers on the Internet have not needed to care about the mechanism by which their traffic reaches the last-mile ISP's 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.

Free Press first reiterated the concerns it articulated on this subject in its letter submitted November 5, 2014.² While we acknowledge the distinctions between now and November, as illustrated by the Fact Sheet's explanation that Commission recognition of such a service for the first time is not a so-called “hybrid” approach, several of our doubts remain.

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

² See Letter from Free Press to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 14-28, 10-127 (filed Nov. 5, 2014) (“Free Press Letter”).

On the statutory definition question, services purportedly offered to a “remote” edge provider – when there is no physical connection between that edge provider and the carrier in question – are not services offered “directly” to said edge provider.³ If there is no physical connection and no obvious “direct” relationship between the carrier and the remote edge provider, it is hard to imagine how the service can be a telecom service under Section 153(53) of the Act, which stipulates that a telecom service must be offered “directly” to the recipient.

Likewise, as Free Press also noted in its November letter, even in the rare case where there is a direct interconnection with an edge provider, this is likely private carriage. Such arrangements are negotiated on an individual basis with the broadband provider, not offered indiscriminately on a common carrier basis “to the public” as required by the same definition in subsection (53).⁴

Even if the Commission could surmount these statutory barriers, the policy question remains: why would it want to? Free Press’s November letter described the seemingly absurd results that could flow from recognizing such a relationship between edge providers and end-users’ broadband providers. Would such an approach suggest or even mandate that every single end point on the Internet is a customer of each and every ISP that provides service to any other single end point on the Internet?⁵ Put more colloquially, would every website in the world become a customer of any broadband Internet access service provider whose end-users visit that website?

OTI expressed its serious concerns about the policy implications of any such legal theory, noting again that neither a service relationship nor any type of privity between the edge and the end-user’s ISP has heretofore existed. Creating any such legal relationship in the pending order could disrupt the functional separation of the network’s layers and undermine the way the Internet has always worked. It also could unnecessarily increase the litigation risks and political ramifications the Commission faces for otherwise laudable actions.

Given the potential for a reviewing court to accept or reject any legal theory, or any combination of theories offered as authority for the rules, OTI’s concerns exist regardless of whether an 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 use legal authority for these rules that recognizes 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.

³ *See id.* at 3-5.

⁴ *See id.* at 5-6. Interconnection obligations between two carriers certainly could arise in this context, but that is very different from describing the relationship between such carriers as a telecommunications service offered by one to the other carrier – or indeed, from mandating that this interconnection be offered as a common carrier service. *See id.* (discussing the D.C. Circuit’s *VITELCO* and *NARUC I* decisions); *see also id.* at 8-9.

⁵ *See id.* at 2.

Recognition of this edge-facing service as a telecom service is decidedly not commanded by the D.C. Circuit's decision in the *Verizon* case that rejected the authority theory underpinning the Commission's 2010 Open Internet rules.⁶ Nor is the edge-facing service necessary to establish Commission jurisdiction over any practices, including interconnection practices, that unreasonably discriminate against and harm end-users.⁷

Prior to the conclusion of the meeting, OTI and Free Press briefly noted their position that access fees charged at the point of interconnection with the last-mile network do indeed harm broadband end-users and consumers. Free Press also suggested that the Commission's "general conduct" rule described in the Fact Sheet must not extend to the practices of non-telecommunications carriers, nor apply solely according to the dictates of any illustrative factors set out in the order. One of the many benefits of Title II is that it restores the Commission's flexible and yet bounded authority to prevent unreasonable discrimination by telecom carriers as their practices may mutate over time. Fulfilling that statutory mandate should be the aim and purpose of any such "general conduct" rule.

Respectfully submitted,

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cc: Stephanie Weiner
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⁶ *See id.* at 6-7.

⁷ *See id.* 11-12.