



February 20, 2015

**Via Electronic Filing**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth 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 Services*, GN Docket No. 10-127**

Dear Ms. Dortch:

On February 19, 2015, Johanna Shelton, Staci Pies, and I, all of Google, spoke by telephone separately with Rebekah Goodheart, Wireline Legal Advisor to Commissioner Clyburn, and Priscilla Delgado Argeris, Senior Legal Advisor to Commissioner Rosenworcel. I also spoke by telephone separately with Ruth Milkman, Chief of Staff to Chairman Wheeler; Jonathan Sallett, General Counsel; and Julie Veach, Chief of the Wireline Competition Bureau. In each of these calls we expressed the view that—regardless of what the Commission decides with respect to the service Internet access providers offer their end-user customers—the Commission should not attempt to classify a “service that broadband providers make available to ‘edge providers.’”<sup>1</sup>

We explained that this supposed additional service does not exist. To reach their users, edge providers rely on the users’ arrangements with Internet service providers (ISPs). For the most part, edge providers have no relationship with their users’ ISPs: Edge providers are themselves customers of a local ISP, on which they rely to deliver the provider’s traffic to the Internet and on to users via the users’ ISPs.

To be sure, some content providers and network operators have interconnection relationships with ISPs. Nearly all such peering arrangements worldwide are informal. According to the Organisation for Economic Co-operation and Development, 99.5% of all peering arrangements are completed on a literal or figurative handshake, with no

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<sup>1</sup> FCC, *Fact Sheet: Chairman Wheeler Proposes New Rules for Protecting the Open Internet*, at 1 (rel. Feb. 4, 2015), available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2015/db0204/DOC-331869A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0204/DOC-331869A1.pdf).

money changing hands.<sup>2</sup> Informal, settlement-free peering is the norm because it minimizes transaction costs and reflects the mutual benefit both parties receive from interconnection. Google has entered into peering arrangements with some of the largest U.S. broadband providers insofar as we are unable to use transit to reach users on those networks with reasonable quality. These arrangements are individually negotiated, however, so they could not support classification of a common carriage service provided to Google or any other edge provider. All these arrangements, moreover, are for *interconnection*. An ISP's agreements with end users control the speed and other terms on which user-generated and user-selected traffic is carried to and from the ISP's points of interconnection.

For similar reasons, it would be effectively impossible to apply provisions such as Sections 201 and 202 to the imagined edge provider access service. For instance, to determine whether the "charges, practices, classifications, and regulations for and in connection with such communication service [are] just and reasonable,"<sup>3</sup> the Commission first would need to establish the terms on which the service is being provided. But terms for the hypothesized service cannot be found in standard agreements, for (quite unlike ISPs' end-user access services) written agreements rarely exist. Investigation of the ISPs' day-to-day practices might or might not reveal uniform conduct, but this process would be so time-consuming and burdensome that no complainant could expect timely relief.

The impetus for seeking to classify a non-existent edge provider service appears to be language in the D.C. Circuit's *Verizon* decision.<sup>4</sup> There, the Court of Appeals opined, without reference to any evidence, that "broadband providers furnish a service to edge providers, thus undoubtedly functioning as edge providers' 'carriers.'"<sup>5</sup> The Commission and the Department of Justice had argued to the contrary, correctly advising the Court that this view "misstates . . . the nature of Internet access service."<sup>6</sup> As they cogently explained, "the relevant customers are the end users who subscribe to broadband Internet access services—the entities that request service—and not edge providers."<sup>7</sup> The Government continued, "an edge provider has no direct relationship with the end user's access provider (Verizon, in this case) and typically does not know

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<sup>2</sup> Internet Traffic Exchange: 2 Billion Users and It's Done on a Handshake, OECD Insights (Oct. 22, 2012), <http://oecdinsights.org/2012/10/22/internet-traffic-exchange-2-billion-users-and-its-done-on-a-handshake/>.

<sup>3</sup> 47 U.S.C. § 201(b).

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

<sup>5</sup> *Id.* at 653.

<sup>6</sup> Brief for Appellee/Respondents FCC and United States at 60, *Verizon v. FCC*, No. 11-1355 (D.C. Cir. Sept. 10, 2012).

<sup>7</sup> *Id.* at 62 (citations and quotation marks omitted)

the access provider's identity."<sup>8</sup> Rather, "end users and edge providers have independent subscriber relationships with their own access providers, with typically at least one (and sometimes many) third-party backbone networks between them."<sup>9</sup> In sum, "[a]n edge provider does not 'request' service from or seek to 'hire' Verizon."<sup>10</sup>

The Commission should not assume that the D.C. Circuit's prior view will be the last word in future litigation. In the U.S. Supreme Court or any other court, adherence to the D.C. Circuit's factually unsupported assertion would require the Commission to abdicate its role as the expert federal agency on communications networks and services, and ignore the administrative record in this proceeding. This would weaken rather than strengthen the Commission's ability to defend net neutrality rules in court.

Nor is it necessary to imagine a non-existent service in order to reach ISPs' interconnection practices. Should the Commission classify end-user broadband Internet access as a telecommunications service subject to Title II, that classification alone would enable the Commission to ensure that ISPs' interconnection practices are just and reasonable. As noted, for instance, Section 201(b) requires just and reasonable practices "for *and in connection with* such communication service." If an ISP's intentional port congestion or other interconnection practices denied end-user customers the full benefit of the two-way service they have purchased, then the Commission could take enforcement action.

Finally, this issue must be viewed in light of the efforts by some ISPs, particularly abroad, to claim that they provide a service to content providers for which they should be able to charge under a "sender pays" model—while still charging their retail customers for the same traffic. To the extent the Commission encourages the falsehood that ISPs offer two overlapping access services instead of just one, or the fiction that edge providers are customers of terminating ISPs when they deliver content to the Internet, it may encourage such attempts at double-recovery. That could do serious, long-term harm to the virtuous circle of Internet innovation, thus greatly undermining the benefit of adopting net neutrality rules.

For all these reasons, the Commission should not classify ISPs' delivery of edge providers' content, applications, and services as a service distinct from end user Internet access. If the Commission nevertheless does so, at minimum it should make clear that it is doing no more than restating a disputed finding of the D.C. Circuit, and take this step in a contingent fashion that will expire of its own force if that classification ultimately is not essential to sustain net neutrality rules.

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<sup>8</sup> *Id.* at 62-63.

<sup>9</sup> *Id.* at 63.

<sup>10</sup> *Id.*

Google Inc. Ex Parte  
Dkts. 14-48 and 10-127  
February 20, 2015

Pursuant to the Commission's rules, this notice is being filed in the above-referenced dockets for inclusion in the public record. Please contact me should you have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Austin C. Schlick".

Austin C. Schlick  
*Director, Communications Law*

cc: *Via electronic mail*  
Ruth Milkman  
Jonathan Sallett  
Julie Veach  
Priscilla Delgado Argeris  
Rebekah Goodheart