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CENTER FOR DEMOCRACY
& TECHNOLOGY

1634 Eye Street, NW
Suite 1100
Washington, DC 20006

January 6, 2014

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554
VIA ELECTRONIC FILING

Re: Notice of *Ex Parte* Presentation in WC Docket 07-52, GN Docket 09-191, GN Docket 12-353, and GN Docket 13-5

Dear Ms. Dortch:

On January 3, 2014, David Sohn and Andrew McDiarmid of the Center for Democracy & Technology (CDT) met with Jonathan Sallet, the FCC's Acting General Counsel. We discussed CDT's support for the FCC's Open Internet Rules and, in particular, CDT's view that experimentation with "two-sided markets" should be limited to the provision of specialized services, and not allowed in connection with the provision of broadband Internet access services. CDT provided two brief documents, attached to this letter, expressing these views.

In addition, we discussed the FCC's upcoming work on the transition to all-IP networks. The discussion focused in particular on the future of interconnection obligations once networks have transitioned to all-IP. CDT suggested that certain factual information would be useful to gather as the FCC assesses this question. Key questions CDT suggested were (i) the extent to which direct interconnection between two carriers is necessary to optimize performance, versus the extent to which indirect interconnection (i.e., interconnecting via one or more intermediary carriers) provides sufficient performance; and (ii) the extent to which interconnection points between carriers are locus or source of network congestion.

This letter is being filed electronically, and a copy is being sent to Mr. Sallet.

Sincerely,

David M. Sohn
General Counsel, Center for Democracy & Technology

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FCC Chairman Sparks Debate On Internet Neutrality and Two-Sided Markets

by David Sohn [1]
December 4, 2013

The new FCC Chairman, Tom Wheeler, raised some eyebrows [2] this week when, at a public event [3], he simultaneously expressed strong support for the FCC's Open Internet rules and for the development of "two-sided markets" – in other words, paid prioritization. Paid prioritization on the Internet – ISPs picking winners and losers among online services – is a big part of what the Open Internet rules aim to prevent. So it's no surprise that CDT and other [4] neutrality advocates [5] are wondering, what gives?

The Chairman's statement came in a Q&A discussion, so it's hard to know how much to read into it. This was an extemporaneous remark in a high-level conversation, not any kind of official policy announcement. But if the remark reflects a view that the Open Internet rules only bar ISPs from blocking Internet traffic, while leaving them free to discriminate for commercial purposes, that would be a serious problem. Creating two-sided markets for Internet access and discriminating accordingly among Internet traffic would fundamentally undermine the Internet's capacity for innovation and free expression. It would be bad for Internet users and online innovators alike. (CDT has explained why in detail before; see page 7 of these comments [6] from January 2010).

On the other hand, the Open Internet rules don't necessarily bar two-sided market arrangements in all contexts. The rules allow for experimentation in the form of specialized services: services that are not Internet access, and to which the Open Internet rules therefore don't apply. So if a content provider and an ISP want to work out a special arrangement for the delivery of certain content with specified attributes such as quality guarantees, they have a path to do so under the rules - they just need to do it as a separate service that does not impair the delivery of Internet access or require favoritism among Internet traffic. Thus, to the extent the FCC Chairman just meant that he expects some development of two-sided arrangements in the marketplace at large – which presumably includes the marketplace for specialized services – his remark could be consistent with the Open Internet rules.

The bottom line is that Internet access service should carry a basic expectation of nondiscrimination among traffic. You can't square that with two-sided markets. But Internet access services aren't the only services a provider may offer. In a well-functioning marketplace,

there may be room both for an open and nondiscriminatory Internet access service, and for other types of services that involve special deals, so long as the one doesn't swallow the other. Let's hope that's what Chairman Wheeler meant.

Email

specialized services net neutrality FCC

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[6] https://www.cdt.org/files/pdfs/2010_CDT_openness_comments.pdf

2. Two-sided markets

The NPRM notes that some opponents of Commission action in this area point to economic arguments regarding "two-sided markets."[8] Embracing the concept of a two-sided market in the Internet access service context would be inconsistent with preserving the Internet's openness, and would be contrary to the historical structure of financial relationships on the Internet – a structure that has directly contributed to the extraordinary innovation we have seen over the Internet's short life.

The Internet is a user-driven medium. For providers of broadband Internet access, the end user subscriber is the customer, and end users control how and for what purposes they will use the service. This user-centric focus would change if broadband Internet access providers start thinking of themselves as providing transmission services not just to end user subscribers, but also to non-subscribers such as large online content providers to whom they do not directly provide bandwidth. Creating a two-sided market means dividing the broadband providers' loyalties and creating a new set of incentives beyond just empowering subscribers.

Selling priority treatment to online content providers could mean that, in exchange for a fee, the broadband provider effectively would be steering its subscribers towards particular content, applications, or services (by making them faster or more reliable) and away from others. This would be very different from the way a two-sided market works in the newspaper context, to take a commonly cited example. The inclusion of paid advertisements in newspapers presumably has minimal impact on how non-advertisement portions of the newspaper are perceived by or presented to readers. Paid priority on the Internet would be akin to a newspaper market in which advertisers pay fees not just to run ads, but to influence the placement of substantive articles – determining which articles appear on the front page and which on the interior pages, for example.

In the Internet context, this kind of two-sided market would create major problems for independent innovators. Broadband Internet access providers have a termination monopoly with respect to their subscribers. An innovator seeking to offer some new content, application, or service to a consumer has no choice but to reach that consumer through the consumer's broadband Internet access provider. The Internet is open today because that Internet access provider, by carrying any traffic the subscriber requests on essentially nondiscriminatory terms, is not exercising bottleneck control. By contrast, in a two-sided market, the treatment the innovator's traffic gets would depend at least in part on whether it had struck a deal with the broadband access provider.

Indeed, the central concept of a two-sided market involves *negotiating to reach an audience.* The Internet is an open platform precisely because it requires no such negotiation. Turning the Internet into a two-sided market would make it dramatically less open, less innovative, and ultimately less empowering of users.

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[8] *Id.* ¶ 66.