

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re: Open Internet Remand, GN Docket No. 14-28**

Dear Ms. Dortch:

On March 21, 2014, I met with Philip Verveer, Senior Counselor to Chairman Wheeler. We discussed *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) and the February 19, 2014 "Statement by FCC Chairman Tom Wheeler on the FCC's Open Internet Rules." While I advise several companies and nonprofits deeply supportive of network neutrality, my views expressed were purely personal, based on years of advocacy and academic work on the issue.

We covered a range of legal and economic topics.

**Jurisdiction.** We discussed the FCC Chairman's stated preference to move under Section 706 of the Telecommunications Act rather than to reclassify broadband providers as Title II carriers. I argued that the FCC should determine the necessary substantive contours of its network neutrality rule and then determine whether Section 706 authority would even support that rule. Beginning with 706's limitations and then crafting a rule that fits those limitations is putting the cart before the horse. At best, 706-first thinking could result in the appropriate network neutrality rule only by accident. At worst, this thinking could lead to the adoption of a rule devoid of the substance required to ensure an open Internet based on market evidence and theory.

**Interconnection.** We discussed whether the FCC should consider the relationship between interconnection and network neutrality, particularly in light of the recent Comcast-Netflix dispute. We discussed whether traditional net neutrality principles or traditional common carrier rules should govern such disputes and the basis for FCC jurisdiction to intervene.

I explained why the FCC should not look at the dispute between Comcast and Netflix as merely a question of wealth transfer between large companies, or merely rent-seeking from Comcast targeting the very few technology companies with large profits and margins.

The entire Internet ecosystem will be upset.

*First*, when the issue of “wealth transfer” involves an American company and a foreign carrier (e.g., Netflix-France Telecom or Netflix-Deutsche Telecom), the foreign government *will* care about wealth transfer. It will likely put a thumb on the scale to ensure that wealth is transferred from (US) technology companies to (foreign) telecommunications companies. Those countries would expect their own telecommunications firms to have the same rent-seeking powers that our telecommunications firms have, and would not expect their own ISPs to be any more restrained than ours.

*Second*, if the biggest technology companies transfer money to the carriers, it will likely lead to less venture investment across the board in technology companies. Venture investment is predicated on a portfolio theory, with investors expecting many of their investments to be losers, while attempting to find a small number of very big winners. That is, they want the next Facebook, Google, Twitter, or Netflix, and are willing to suffer dozens of failures in that search. With the rewards from big winners being handed over to cable and phone companies, this portfolio model will be upset. The gains from the biggest winners would diminish, decreasing the expected gain from an entire portfolio. That would leave less investment across the board and stifle innovation.

*Third*, transferring money from the biggest technology companies will weaken the acquisition market that fuels technology investment. Venture investors act on the assumption of a liquidation event, which is generally an IPO or an acquisition. Beyond the biggest acquisitions (Whatsapp, Instagram, Waze), large American technology companies make dozens of smaller technology- and talent-acquisitions every year and integrate their teams. This strong acquisition market drives investment and is one reason other nations have failed to build a rival “Silicon Valley” of their own. They lack the strong acquirers. Despite their profits, based on their core competencies, carriers have not played the same role in the application innovation ecosystem as strong acquirers. In short, if Comcast had the power effectively to degrade or block companies like Netflix to extract termination fees, that would affect the entire ecosystem in multiple adverse ways.

*Finally*, carriers would extract rents from much smaller companies too. Because smaller companies might not interconnect directly with carriers, carriers would not seek interconnection fees but access fees from them. Patent trolls seek rents from startups even more than large companies, as Colleen Chien’s research indicates. Similarly, carriers will likely also seek rents from the “long tail.” Early-stage startups may have to consult not only expensive patent lawyers

but also telecommunications contract lawyers rather than focus on building their businesses.

Moreover, all these harms to the ecosystem would result from large access fees no less than from large interconnection fees.

**Two-Sided Markets.** We discussed whether and how Section 706 requires carriers to take part in a “two-sided market,” as carriers aim to extract revenue from both end-users and from edge-providers or backbone-providers. We discussed whether “commercially reasonable terms” should be tied to long-standing industry practices under which it was not commercially reasonable to charge for terminating access, either through direct interconnection or otherwise.

**Disclosure.** We also discussed the disclosure rules and the relationship between disclosure and FTC enforcement on consumer protection grounds.

**Timing.** We discussed whether the FCC should try Section 706 (again) or move towards reclassification. Because Section 706 might lead to a different substantive outcome than possible under Title II, a proceeding under Section 706 that blesses a range of discriminatory and two-sided market practices would move the industry and change the Internet. It would then likely be difficult to undo those discriminatory deals after (and if) a Section-706 based rule is struck down in court.

Sincerely,  
Marvin Ammori