

5/1/2014

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street  
Washington, DC 20554

Tom Wheeler  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street  
Washington, DC 20554

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**Subject: Preserving the Open Internet, GN Docket No. 09-191; Comment opposing proposed rules**

Dear Ms. Dortch and Mr. Wheeler:

This comment is submitted on the Commission's proposed rules in Preserving the Open Internet, GN Docket No. 09-191. I hereby register my strong opposition to the Commission's proposed rules in Preserving the Open Internet, GN Docket No. 09-191.

The issues of concern are described well in the April 24, 2014 letter from Joseph C. Cavender, Vice President of Federal Affairs, Level 3 Communications, LLC to Secretary Dortch that was filed in the docket of Docket 09-101. As Mr. Cavender stated:

*Level 3's interconnection points with some, though not all, large consumer ISPs are congested, causing Internet packets to be dropped at the point of interconnection. The result is a poor user experience for millions of American consumers, particularly for streaming video and over the top VoIP applications. Congestion between providers like Level 3 and ISPs affects such services provided by large, commercially successful enterprises as well as startups, non-profits, and even government entities. Yet those large consumer ISPs are refusing to augment their interconnection capacity to improve performance unless Level 3 pays arbitrary access tolls. In other words, they are breaking the Internet, and harming their own customers, in an attempt to extract access tolls for the privilege of reaching those users.*

*Level 3's experience in this regard is consistent with the Commission's own analysis in the Open Internet Order (Report and Order, FCC 10-201, 25 FCC Rcd 17905 (2010) ). There, the Commission observed that large, bottleneck ISPs have the incentive to discriminate in favor of their own video and voice services and against over-the-top competitors, as well as the incentive to extract monopoly rents from all who wish to exchange traffic with their users. And to extract these rents and to effectuate this discrimination, ISPs have the incentive to allow their settlement-free links (that is, their links not subject to tolls) to congest so as to force providers to into a paid arrangement.*

(Footnotes omitted.)



To allow ISPs to control consumers' access to internet traffic through throttling, discriminatory fees (or “rents”, as Mr. Cavender characterizes them) charged to content providers, or any other artificial means other than open, unimpeded and neutral access to all internet traffic, will be tremendously harmful to American consumers. In the environment that would result under the proposed Open Internet Order, consumers will only see content flowing quickly and freely from the largest, wealthiest providers and from the ISPs themselves. ISP's own content will be the fastest, most unrestricted content, whether the consumer wants that or not. The ISPs will choose for the consumer the conditions and flow of internet content; the consumer will be at the ISPs mercy with respect to the shape, speed, and (through pricing schemes intended to benefit the ISP over its consumer customers) the content itself that an internet consumer receives. The ISPs' interests, rather than those of the consumers, will control broadband access.

As the Electronic Frontier Foundation stated in its April 24, 2014 statement:

*This kind of ‘pay to play’ model would be profoundly dangerous for competition. . . .*

*New innovators often cannot afford to pay to reach consumers at the same speeds as well-established web companies. That means ISPs could effectively become gatekeepers to their subscribers.*

The editorial board of The New York Times stated on April 24, 2014:

*Officials at the F.C.C. said on Thursday that the proposed rule is the fastest way for the commission to respond to a January ruling by the United States Court of Appeals for the District of Columbia Circuit that struck down previous rules barring broadband companies from blocking content or engaging in “unjust and unreasonable discrimination.”*

*They argue that under the “commercially reasonable” standard, the agency will be able to review deals to make sure phone and cable companies do not abuse their market power (in most markets, there are only one or two service providers). But the proposal does not meaningfully prevent discrimination; it is largely a capitulation to the broadband industry.*

*The commission should move in a wholly different direction. It should decide to classify broadband as a telecommunications service, which would allow it to prohibit companies like Verizon and Comcast from engaging in unjust or unreasonable discrimination. (The F.C.C. classified broadband as a lightly regulated information service during the George W. Bush administration.)*

[http://www.nytimes.com/2014/04/25/opinion/creating-a-two-speed-internet.html?hp&rref=opinion&\\_r=2](http://www.nytimes.com/2014/04/25/opinion/creating-a-two-speed-internet.html?hp&rref=opinion&_r=2) (Hereinafter “The New York Times editorial”).

I submit that the situation in which the Commission finds itself dates back to the FCC's earliest consideration of the nature of the internet. Long before any FCC involvement, the earliest non-military use of the internet occurred when academic institutions (or more precisely, the academics in those institutions) connected to share information for their mutual benefit in scientific and other academic research. The internet developed for the purpose of sharing



information. The public's rapid adoption of the internet was because of that very attribute – its delivery of information in an unedited, open and neutral manner. Just like water and electricity, the product the public desires from the internet – information – should be available directly from to content provider to the consumer free of self-serving commercial influences (such as throttling or discriminatory fees imposed on the content providers).

The direction of the internet's growth, at least in the short term, is clear – greater and greater connectivity for consumers through broadband connections. Each year more public services go onto the internet – tax filing; court access; local, state and federal services; bill payments; VOIP communications; and likely even voting. These types of activities move the provision of broadband services well beyond those of just commercial interests, into the public domains of equal opportunity, free speech and participation in the political process. Consequently, freedom of neutral access to information through broadband should be unrestricted as a basic American right, one on which our ultimate democracy depends.

The approach taken by the Commission of “commercial reasonableness” results from the Commission's early mischaracterization of internet access itself. The raging debate concerning internet access has been held in terms of “cable service” and/or “telecommunications service.” Both approaches lead to arcane, technical and confused analysis. I propose that internet access should be viewed, and regulated, from the viewpoint of the consumer's best interest. When that viewpoint is adopted, it is irrelevant whether the product – information – is delivered over cable, “telecommunications services,” satellite, wireless or wire phone lines. Each of those are fairly interchangeable “pipes” through which the desired product (the information) flows.

Consequently, the delivery method becomes nothing more than a utility – just as pipes deliver water and power lines deliver electricity, broadband connections deliver information. The FCC should abandon its fumbling attempts to divine the technological mysteries of the broadband industry and simply characterize the delivery of information over broadband connections as a utility. With that characterization, the vagaries of endless interpretation and argument over “commercial reasonableness” disappear. All consumers are entitled to equal access to the same public good – information. Any other approach fails to account for the incredibly democratic and essential nature of information, and its importance to the American consumer.

Unfortunately, it is highly unlikely that business interests will allow the FCC to make such a classification. The sad truth is that business interest dominate governmental law-making and regulations, to the detriment of the American public. Quoting from The New York Times editorial:

*Even though the appeals court has said the F.C.C. has authority to reclassify broadband, the agency has not done so because phone and cable companies, along with their mostly Republican supporters in Congress, strongly oppose it.*

164 Robin Hood Way



Should the FCC choose not to follow my proposal of characterizing broadband access as a public utility, then I would strongly urge it to accept the recommendation of The New York Times editorial board:

*The commission should move in a wholly different direction. It should decide to classify broadband as a telecommunications service, which would allow it to prohibit companies like Verizon and Comcast from engaging in unjust or unreasonable discrimination.*

Sincerely,

James P. Browning, Jr.

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