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May 5, 2014

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

Via Electronic Filing

Re: GN Docket No. 14-28, *Promoting and Protecting the Open Internet*

Dear Ms. Dortch,

On Thursday, May 1, 2014, I met with Rebekah Goodheart, Commissioner Clyburn's Legal Advisor for Wireline issues; Louis Peraertz, the Commissioner's Legal Advisor for Wireless, International and Public Safety issues; and Stefanie Frank, legal fellow. During the meeting, we discussed reported provisions in the Notice of Proposed Rulemaking in this docket, which Chairman Wheeler has circulated to the other commissioners and placed on the tentative agenda for the upcoming open meeting.

In defending his widely criticized proposal, the Chairman suggested it will prohibit broadband Internet access service providers from blocking legal content¹ – supposedly in the same way that the struck-down 2010 Open Internet rules banned fixed and mobile broadband providers from blocking certain types content.² Chairman Wheeler subsequently argued his proposal would “shut down” harmful behavior such as broadband providers (i) degrading service to create a fast lane, (ii) degrading basic service to force consumers and content companies to a higher tier, (iii) providing exclusive or prioritized service to an affiliate, or (iv) requiring creators of new Internet content to “seek permission” or “pay special fees to be seen online.”³

The rhetoric about preserving the Open Internet is welcome. The problem is that the Chairman cannot back it up if he continues clinging to Section 706 as the authority for his proposal. As Free Press has explained in several prior filings and articles,⁴ and as I articulated during the meeting with Commissioner Clyburn's staff, the decision in *Verizon v. FCC* precludes reliance on Section 706 for anything resembling effective Open Internet protections.

¹ See Tom Wheeler, FCC Chairman, “Setting the Record Straight on the FCC's Open Internet Rules,” Official FCC Blog (Apr. 24, 2014) (“April 24 Blog Post”).

² See 47 C.F.R. § 8.5 (2013).

³ See Tom Wheeler, FCC Chairman, “Finding the Best Path Forward to Protect the Open Internet,” Official FCC Blog (Apr. 29, 2014) (“April 29 Blog Post”).

⁴ See, e.g., Comments of Free Press, GN Docket Nos. 14-28, 10-127, 09-191 (filed Mar. 21, 2014); S. Derek Turner & Matt Wood, “Wonkblog Gets It Wrong: The FCC's Shrinking Authority Isn't Enough to Save Net Neutrality,” (Jan. 16, 2014), available at <http://bit.ly/Q7Rrlp>.

The FCC Can't Prevent Discrimination, Fast Lanes and Internet Tolls with Section 706.

Innovation on the Internet should be possible without the permission of a broadband provider.⁵ To make such innovation without permission a reality, the Commission must adopt effective and enforceable non-discrimination rules.⁶ Yet Chairman Wheeler's claim that the Commission can craft "tough, enforceable Open Internet rules"⁷ with Section 706 as a legal foundation just doesn't stand up to scrutiny or, more importantly, to the D.C. Circuit's opinion in *Verizon v. FCC*.⁸ Even a cursory reading of that decision makes it abundantly clear that the Commission *must* allow substantial discrimination if it resorts to Section 706.

Any standard that the Commission could adopt using this authority would be either wildly ineffective or immediately struck down. There is no middle ground. The majority opinion in *Verizon* held that any standard the Commission designs under Section 706 would have to permit "substantial room for individualized bargaining and discrimination in terms."⁹ Resolving any doubt about how weak it would need to be to survive judicial review – and how completely the use of such a standard would change the fundamental character of the Open Internet – the majority opinion laid out the *best* that the Commission could do under Section 706. Broadband providers could "charge an edge provider . . . for high-speed, priority access while limiting all other edge providers to a more standard service," and could "negotiate separate agreements with each individual edge provider regarding the level of service provided" or "charge similarly-situated edge providers completely different prices for the same service."¹⁰

The Commission simply can't allow this sort of targeting and discrimination to occur and slap the label "Net Neutrality" on it. That's a contradiction that no number of blog posts from the Chairman could resolve. And creating an Internet on which broadband providers charge for priority access to their customers, and discriminate freely against any content, service or application they see fit to slow down, is not a result the Commission should entertain in this docket. (Note too that the FCC can't ban broadband providers from "degrading service" to create a "fast lane." Indeed, degrading everyone else's service is the only way to create a priority service on a packet-switched network – and the only way to make it worthwhile for people to buy it. So the Chairman's proposal to prohibit such practices fails at the start.)

The Chairman and a handful of people defending his proposal have suggested that "Title II regulation . . . *only* bans 'unjust and unreasonable' discrimination"¹¹ as if that's nothing. But their formulation is incorrect, as is the notion that somehow the Commission's proposed "commercially reasonable" standard is no different than a "no unreasonable discrimination" rule.

⁵ See S. Derek Turner, "How AT&T Is Planning to Rob Americans of an Open Public Telco Network," *Wired*, Feb. 28, 2013, <http://www.wired.com/opinion/2013/02/the-latest-sneaky-plan-to-rob-americans-of-a-public-telco-network/>.

⁶ See Marvin Ammori, "We're About to Lose Net Neutrality – And the Internet as We Know It," *Wired*, Nov. 4, 2013, <http://www.wired.com/opinion/2013/11/so-the-internets-about-to-lose-its-net-neutrality/>.

⁷ April 29 Blog Post.

⁸ *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

⁹ *Id.* at 652 (quoting *Cellco Partnership v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012)).

¹⁰ *Id.* at 658.

¹¹ April 24 Blog Post (emphasis added).

Treating broadband Internet access service as a Title II service would not automatically ban (or allow) any type of behavior – discriminatory or otherwise. It would restore the Commission’s authority to prohibit “any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services.” 47 U.S.C. § 202. The Commission could then move in a rulemaking to define access charges, paid prioritization or other types of discrimination as *per se* unreasonable.¹²

Making such arrangements unlawful and presumptively prohibiting them is just what the Commission should do, and what it had in mind in the original 2010 Open Internet Order. That’s one of the reasons that the D.C. Circuit ruled as it did. “The *Open Internet Order* makes no attempt to ensure that its reasonableness standard remains flexible. Instead, . . . the *Order* [] declares: it is unlikely that pay for priority would satisfy the no unreasonable discrimination standard.”¹³

To paper over this distinction – between behaviors that Title II would allow the Commission to prohibit in advance, and the pay-for-play arrangements that Section 706 commands it to condone – is to read all meaning out of the D.C. Circuit’s opinion. The court clearly understood the difference between the two standards,¹⁴ and it is impossible to pretend that the Commission could use them interchangeably to address the same kinds of behaviors. *Verizon v. FCC* confirms that the Commission cannot apply its “commercially reasonable” standard in a “restrictive manner, essentially elevating it to the traditional common carrier ‘just and reasonable’ standard” without facing an “as applied” challenge.¹⁵ In other words, the stronger such rules were meant to be for preventing harms, the weaker they’d be in court.

So when Chairman Wheeler claims his proposal would ban or “shut down” practices that harm consumers, competition, online content, and free expression, those claims must be met with the understanding that the agency really can’t ban *anything* under Section 706. The very best the Commission could do is analyze broadband provider discrimination after the fact, allowing substantial flexibility for individual deals with different edge providers. This regime would shift the burden to prove such practices commercially unreasonable onto Internet users and edge providers who can least afford to bear that burden. Broadband gatekeepers could discriminate at will against the commerce and discourse they disfavor – with an army of lawyers at the ready to fight any “commercially unreasonable” case first at the Commission and then in appellate court. That’s not a prescription for regulatory certainty, or for innovation without permission. It’s innovation only by permission of the ISPs and their legal teams.

¹² See, e.g., Public Knowledge *Ex Parte* Notification, GN Docket No. 14-28, at 1 (filed May 1, 2014) (“[W]hile . . . Title II would *permit* reasonable discrimination, it does not, as some seem to insist, *require* reasonable discrimination To the contrary, where the Commission has found conduct *inherently* unjust, unreasonable, or subject to abuse, it has affirmatively prohibited this conduct with no allowance for exception.”).

¹³ *Verizon v. FCC*, 740 F.3d at 657 (internal quotation marks omitted).

¹⁴ See *id.* (“The Commission has provided no basis for concluding that in permitting ‘reasonable’ network management, and in prohibiting merely ‘unreasonable’ discrimination, the *Order’s* standard of ‘reasonableness’ might be more permissive than the quintessential common carrier standard.”).

¹⁵ *Id.* at 652.

The FCC Can't Even Reliably Prevent Blocking with Section 706 Authority.

The majority opinion in *Verizon v. FCC* suggests the Commission *might* at least be able to justify a “no blocking” rule, but to do so that opinion speculates about an argument the Commission failed to make properly in court. The majority asserts nonetheless that the Commission might guarantee edge providers an “effectively usable” or “minimum” carriage service that could survive Section 706, so long as broadband providers had license to “charge an edge provider . . . for high-speed, priority access” or “negotiate separate agreements with each individual edge provider.”¹⁶ The opinion does not really suggest how the Commission could determine what the basic level of service should be, only tossing out the notion of a 4 Mbps download speed slower than the basic speed many broadband customers already purchase today.

In his partial dissent, Judge Silberman viewed this argument with great skepticism. He reasoned that even with room for discrimination on top of it, the basic service “that most users receive[d] under this rule would still have to be offered as common carriage, at a regulated price of zero.”¹⁷ Whether Judge Silberman’s view of such a no-blocking rule would be the majority view the next time Section 706 winds up in the D.C. Circuit is anyone’s guess. But there’s no reason for the Commission to take such chances in the first place when it has a clearer legal path.

What’s more, the majority opinion acknowledges that while the Commission may order a non-common carrier to carry specific content, the agency cannot readily require such a provider to refrain from blocking all traffic. The Commission seems bent on relying on *Southwestern Cable* and *Midwest Video II* to support its conception of a Section 706 blocking prohibition. As the *Verizon* decision makes clear though, those Supreme Court precedents suggest only that the Commission can compel carriage of a specific content channel – not compel facilities to be held out “indifferently for public use.”¹⁸ Of course the very nature of an Open Internet requires that it be open to all members of the public, not just a chosen few that the Commission decides to protect. Thus, even the no-blocking rule the Commission might fashion from scraps of Section 706 authority could be unworkable at best, and unlawful at worst.

Respectfully submitted,

/s/ Matthew F. Wood

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¹⁶ *Id.* at 658.

¹⁷ *Id.* at 668 (Silberman, J., concurring in part and dissenting in part).

¹⁸ *Id.* at 656 (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 n.16 (1979)).