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May 12, 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 8, 2014, Michael Scurato of the National Hispanic Media Coalition, Sarah Morris of the New America Foundation's Open Technology Institute, Harold Feld of Public Knowledge, and I met with Commissioner Jessica Rosenworcel; David Goldman, her Senior Legal Advisor; and Priscilla Argeris, Legal Advisor. During the meeting, we discussed the reported contours of the Notice of Proposed Rulemaking in this docket, which Chairman Wheeler has circulated and placed on the tentative agenda for the upcoming open meeting.

We began by thanking Commissioner Rosenworcel for voicing her concerns about the Chairman's proposal in a speech she had delivered the day before our meeting with her. We conveyed our appreciation for her continued consideration of the item, both in terms of its substance and timing.

We also explained that our organizations have concerns about the item on circulation too. While Chairman Wheeler's oft-stated belief in the Open Internet is welcome, he cannot deliver on his promise to preserve that openness by relying on Section 706 authority. The D.C. Circuit's decision in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), precludes reliance on that provision for truly effective protections. The majority opinion held that any standard the Commission designs under Section 706 would have to permit "substantial room for individualized bargaining and discrimination in terms." *Id.* at 652. Any resulting standard using this authority, therefore, would be either ineffective to prevent harmful discrimination or immediately struck down if it were too "restrictive" of ISP behavior. The Commission simply can't allow such discrimination to occur and label the result "Net Neutrality," creating an Internet on which broadband providers can charge for priority access to their customers and on which those providers can discriminate freely against any content, service or application they see fit to slow down.

The Chairman has suggested that Title II could not prohibit such harmful behavior either, but that's simply not the case. 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. In other words, while Title II might permit some forms of discrimination, it does not require 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.

Making such arrangements unlawful, and presumptively prohibiting them, is just what the Commission should do. Chairman Wheeler's proposal to allow such arrangements, and scrutinize them only after-the-fact, would shift the burden to prove such practices commercially unreasonable onto Internet users and edge providers who can least afford to bear that burden.

Respectfully submitted,

/s/ Matthew F. Wood

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