

**Before the  
Federal Communications Commission**

**In the Matter of  
Open Internet Remand**

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**GN Docket 14-28**

**Framework for Broadband  
Internet Service**

**GN Docket 10-127**

**Comments of Contextly**

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## **Executive Summary**

Contextly is a San Francisco-based startup founded two years ago aiming to help media organizations retain readers online and to help those readers find news they care about and that enriches their lives.

We support an open Internet and rely on it for the success of our business. Our company would not be what it is today without an open Internet. In fact, we might not have been able to even found it.

New and young businesses like ours are the primary source of new net job growth in the United States. In fact, outside of new businesses, job creation in the United States has been negative over the last three decades. We understand that startups are the future of the economy, and we take that responsibility seriously. This is one of the many reasons we care so much about an open Internet.

If we had been subject to the technical discrimination and pay-to-play deals that would be permitted under the FCC's proposal, our company would probably not exist today. If our incumbent competitors could pay for premium access rather than competing on a level playing field, their advertisements and promotions would have an advantage by loading faster on client's websites. As a result, our clients would have an incentive to leave our service and become clients of our competitors.

When we were founded, we did not have the funds to pay for priority or preferences and therefore could not have competed on the merits. Moreover, even if we could have paid, we would have been diverting money from hiring employees and building our business. We have no lawyers on staff and limited resources, so we cannot rely on a vague standard of "commercial reasonableness" or even an FCC ombudsman to protect our interests, as the FCC has proposed.

Moreover, figuring out how to even start to negotiate with many different ISPs and then having the time for those negotiations is something startups would not be able to do. They are focussing on products and customers, and building a business. We need a bright-line rule against technical discrimination and pay-to-play-better deals.

The Commission's proposal to authorize "commercially reasonable" discrimination would hurt our business and stifle investment and employment. We oppose it. We urge the FCC to adopt a rule that mandates transparency and bans blocking, unreasonable discrimination, paid prioritization, and discriminatory exemptions to bandwidth caps, and we believe these rules should apply both to fixed and mobile access, and to last-mile interconnection disputes.

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## **I. What We Do: Our Business, Our Innovation, and Our Impact**

Contextly helps online publishers of all sizes build a loyal audience in the age of drive-by readers. Our vision is to help media organizations more effectively transition to the digital and online environment and help readers find the most relevant news and commentary to inform their lives. We provide content recommendations and other engagement tools to online publishers. We help readers dive deeply into stories and also get recommendations of other interesting content from a publisher's site that may not be relevant to the story they are reading. The idea is to treat every story as the new homepage, by giving readers ways to learn more about a given story or to explore more broadly.

To be more concrete, let me tell you about our competitors' products. You have probably read an article and scrolled to the bottom and seen advertisements for articles on other sites with outrageous headlines. Here are a few at random from a well-known business magazine I would rather not name, but you are familiar with such links: "Photos: 20 Hottest Democratic Politicians," or "25 Celebrities Who Showed a Little Too Much on the Red Carpet," or "15 Good-Looking Celebrities Who Destroyed Themselves With ...," or "Hot Photos of Fitness Enthusiast Jen Selter."

That is opposite of what we do at Contextly. Instead of sending people away from publishers' websites, and sending them to tacky sites that may reflect poorly on their brands, we recommend articles from their own sites that readers should find interesting if they are interested in the article they just read. If a reader scrolls to the bottom of an article they love on *Make* magazine, they will see recommendations for other articles on *Make*, thanks to Contextly. There is a reason people love our product—and we believe it can lead to a stronger, more independent press in a digital age and a more informed, engaged citizenry.

## II. We Could Have Never Founded this Company Under the FCC's Proposal

Contextly was incorporated two years ago, while I was a writer and editor at *Wired*. After being on the frontlines of the digital publishing revolution for ten years, I was frustrated at the tools publications had to guide readers to previous coverage of a topic. I founded Contextly relying on my own savings and built out a barebones version of the product. After getting some early customers, I left my job as an editor at *Wired* in November 2012 to pursue the vision - without any funding.

Over the next year after leaving *Wired*, Contextly grew in customers, revenue, and employees. I found an amazing co-founder and we were accepted into an accelerator called Matter.VC, which is dedicated to helping companies trying to change media for good. We've since gotten funding from Turner/Warner Brothers and created awesome technology that's superior to that of our two largest competitors who have raised over \$100 million collectively. We give free service to help high-school and college newspapers, non-profits, and public broadcasting news organizations like PBS and KQED. We're in talks with some of the nation's biggest news brands and we will be hiring and growing rapidly in the next 12 months.

None of this would have happened under the rules proposed by the FCC. I would have never left my job or tried to start a company when everyone around me thought I was just a journalist with a crazy idea that high quality recommendations can help good journalism and storytelling thrive.

Like many other startups, if there were a fast lane, we would have needed to be in it on day one. We provide content recommendations at the bottom of news stories. That means that every time a news story on one of our publishers is read, a request is made to our servers to get the right recommendations and we return them along with thumbnail images—anywhere from 4 to 16 images per page. While these are individually not large, the bandwidth quickly adds up when you are serving hundreds of millions of images a month, and need to do so quickly to

readers around the country and the world. It would not matter if the “slow lane” was “pretty fast.” What would matter was whether we could serve our clients as effectively as our competitors. Being unequal alone would put us at a disadvantage.

We are able to manage these costs because the cost of technology and bandwidth has dropped massively, due to technology and competition. This has made it possible for a bootstrapped Contextly—founded with the modest savings of a former journalist—to compete with companies that have tens of millions of dollars in capital.

Startups face many challenges - finding great employees; seeking out clients willing to take a risk; dealing with legal issues; finding funding; scaling technology; figuring out payroll systems; paying federal, state and local taxes; getting insurance; finding office space; etc.

But those are manageable, and technology startups are flourishing for one simple reason: It's cheap to start a startup now. Paul Graham, the co-founder of the country's pre-eminent startup accelerator (Y Combinator, which was the first investor in Dropbox, AirBnB, Reddit, among many others), wrote this in 2005, when this wave of startups began: "You need three things to create a successful startup: to start with good people, to make something customers actually want, and to spend as little money as possible." He followed that up in 2007, writing, "It's so cheap to start web startups that orders of magnitudes more will be started."

Graham was right and orders of magnitude more web startups have since been built. Servers got cheap; software got cheap; millions more people joined the internet; and the networks were open. No one needed permission or had to pay tolls to network operators to create an innovative service.

The FCC should not make it even harder to create a company by adopting its proposal to authorize “commercially reasonable” discrimination rather than to forbid “unreasonable discrimination.” AT&T and Verizon have made it very clear they would like to extract tolls from online services such as Contextly. That's despite the fact that it's their customers who are requesting news stories from our publisher clients. Both Contextly and our publisher clients pay

for our outgoing and incoming bandwidth to our hosting providers - but now the FCC proposes to let consumer Internet Service Providers extract fees on both sides of their networks.

If this were the case before I started Contextly using my savings (which were not substantial), I would have never started the company. There's no way I could have afforded to pay Verizon and AT&T and Comcast and Cox and Sprint and Time Warner Cable and AOL and T-Mobile to get Contextly images showing up quickly. Our competitors—the ones who post ads to diet pills and “hot” photos of fitness enthusiasts—could have buried us just by paying for the fast lane—without even needed exclusivity, which they could have negotiated under the Commission’s proposal.

Hiring lawyers and negotiating complicated contracts is expensive. I incorporated Contextly myself to avoid significant legal fees and operated on handshake agreements with early customers. Negotiating performance agreements with ISPs would have required resources and skills I didn't possess (and still likely don't have).<sup>1</sup> ISPs could have also asked for equity at a time where I'd have had no choice but to accept their terms—since they control the pipes that get my clients' news and information to American citizens. My equity would not have been worth much at the time, so I would have had to give up much of my company, if not a majority, to get it off the ground.

Additionally, online publishing is, for many, a low margin business. If our publishing clients themselves have to pay tolls, they would have less money to try services such as Contextly.

Finally, adding fast and slow lanes to the last/first mile networks adds technical burdens to startups. Companies will not only have to make sure their servers are working well, but will also have to figure out how well they perform on dozens, if not hundreds, of individual networks that they have no access to in order to measure.

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<sup>1</sup> Indeed, I had to ask Marvin Ammori, an experienced lawyer who has practiced before the FCC, for help in formatting this document and filing it correctly.



Today, we help National Magazine Award-winning sites build their audience and business; we help individuals have their voices heard and we help companies grow their business by blogging, including everything from biotech firms to pet-sitters. We were able to do this under the FCC's policies going back to 2004 "to ensure that providers of telecommunications for Internet access or Internet Protocol-enabled (IP-enabled) services are *operated in a neutral manner.*"<sup>2</sup>

If the Chairman's proposal--permitting "commercially reasonable" discrimination-- had been in effect two years ago, we never would have started.

### **III. The FCC's Proposal Upsets Investment-Backed Expectations and Could Disrupt Our Company's Future**

The Chairman's proposal, if adopted, could still severely damage Contextly and even put us out of business. At the very least, it will decrease investment, increase our costs, slow down development by adding complexity, put us at a competitive disadvantage, and reduce our hiring. It's that bad.

Chairman Wheeler's proposal would require us to choose one of two bad options: either pay for priority or suffer at the hands of our competitors that have the capital to pay the tolls. If we don't pay, our publishers may drop us for poor load times. Today, our two largest competitors are fighting incredibly hard for market share, and either or both could strike exclusive deals with ISPs under the Chairman's proposal as a way to get an advantage over each other and smaller competitors like Contextly. Even if that exclusive deal was open to competitive bidding, we could not bid. If the deal were not formally "exclusive," it could still be out of our reach, as our competitors could bid the "market" price up far beyond our means.

We would face this Hobson's Choice in the U.S., under the FCC's rule, and likely also around the world with countless ISPs. Foreign ISPs will want the same right to tax us that the

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<sup>2</sup> See FCC, Internet Policy Statement, August 5, 2005, [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-05-151A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf). See also NPRM, Protecting and Promoting the Open Internet, GN Docket No. 14-28, at paragraphs 12-23.

FCC is proposing to grant to American ISPs. Moreover, our Hobson's choice would affect both foreign readers of U.S. publications (publications we would be less able to serve) and our publication-clients based in Central America, South America, Europe, Asia and Africa (who might not be able to choose us to serve promotional content in the US and elsewhere).

We're a scrappy, small company. But we punch above our weight. Our customers love us and new customers find us every day after seeing our recommendations on other sites. Unlike our competitors, Contextly doesn't include any disguised ads for ersatz weight loss pills or celebrity cleavage shots. We build products that are good for readers, writers and publishers. Building for the long-term isn't the easy road, but we believe that we are helping build better publications that can survive in the long-term without discarding real reporting for clickbait slideshows. And, crucially, to us, that means we are helping build a more informed citizenry using the most powerful communication platform ever invented.

#### **IV. We Have Real, Not Imagined, Concerns that Would Impact Our Business**

We have every reason to believe that the cable and phone companies will implement pay-to-play arrangements. This has been obvious since at least late 2005 and early 2006, when executives at AT&T and Verizon declared an intention to charge web companies for using "their pipes" and eating a "free lunch."<sup>3</sup> It was reinforced when Comcast was discovered to be secretly interfering with web traffic,<sup>4</sup> and confirmed in a court of law when Verizon's lawyer repeatedly told the D.C. Circuit at the *Verizon v. FCC* oral argument, "I'm authorized to state from my client today that but for these [Open Internet] rules we would be exploring those types of

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<sup>3</sup> "Online Extra: At SBC, It's All About Scale and Scope," BusinessWeek Magazine, November 6, 2005, <http://www.businessweek.com/stories/2005-11-06/online-extra-at-sbc-its-all-about-scale-and-scope> (quoting SBC CEO before the AT&T acquisition); Arshad Mohammed, "Verizon Executive Calls for End to Google's 'Free Lunch'," Washington Post, February 7, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/06/AR2006020601624.html>.

<sup>4</sup> Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd 13028 (2008).

arrangements.”<sup>5</sup> Plus, there is a long list of open Internet violations around the world, especially where open Internet rules have not been adopted.<sup>6</sup> And it makes no sense for the cable and phone companies to spend at least tens of millions of dollars lobbying and litigating for the right to engage in online discrimination and to impose tolls if they never plan to profit from their hoped-for victory.

We have also seen examples that cut close to home for Contextly. First, cable and phone companies in the United States and abroad made largely secret deals with companies like NebuAd and Phorm to monitor all their users’ traffic to improve micro-targeted advertising. At one point, these deals covered 10% of American Internet access users. Congressional pressure and public backlash forced the largest customers eventually to cease use of NebuAd.<sup>7</sup> If cable and phone companies enabled their affiliated, exclusive, or preferred advertising partners to have access to user data or simply to load their targeted advertising more quickly as web pages load, those partners would have an advantage over our content-promotion. Therefore, even if readers and publications preferred our promotions of relevant articles from the same publication, we might lose out to ISP-connected advertisers diverting traffic to other sites for red carpet bloopers. Second, in France, during a dispute between the second largest French ISP and Google over YouTube traffic, the French ISP changed its default to block ads.<sup>8</sup> We believe that ISPs could discriminate against ads and content-promotions in ways that would affect our business and that of our media customers. Indeed, the French dispute ended because the French government opened an inquiry and French media organizations opposed

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<sup>5</sup> Timothy Karr, “Verizon’s Plan to Break the Internet,” Huffington Post, September 18, 2013, [http://www.huffingtonpost.com/timothy-karr/verizons-plan-to-break-th\\_b\\_3946907.html](http://www.huffingtonpost.com/timothy-karr/verizons-plan-to-break-th_b_3946907.html).

<sup>6</sup> See also NPRM, Protecting and Promoting the Open Internet, GN Docket No. 14-28, at paragraphs 40-41 & note 89.

<sup>7</sup> NebuAd, Wikipedia, <http://en.wikipedia.org/wiki/NebuAd>.

<sup>8</sup> An Ad-Block Shock: France v. Google, Economist, January 12, 2013, <http://www.economist.com/news/business/21569414-xavier-niel-playing-rough-internet-giant-france-v-google>.

the block; under the Chairman's proposal, discrimination short of blocking could arguably be commercially reasonable and would harm us.

As a result of the near-certainty that we will be impacted, our investors and my partners will have to ask hard questions about how to survive these threats.

## **V. The “Commercial Reasonableness” Standard Will Harm, Not Help, Us**

Running a startup is hard enough already; the Chairman's proposal would make it harder and less likely to happen.

The Chairman's proposal envisions a basic level of service and a fee-based discriminatory tier of priority or preferred service. His proposal is perhaps the best the FCC can do for network neutrality under Section 706 of the Telecommunications Act, but it is not enough. Startups need the certainty that can be offered by a rule against unreasonable discrimination and access fees--against application-specific discrimination in terms of bitrate, latency, or jitter, against discriminatory exemptions to bandwidth caps, and an effective ban against paid priority or other preferences, all of which should apply to fixed and mobile, to deep packet inspection routers and last-mile interconnection.

The Chairman's proposed “commercial reasonableness” standard under Section 706 of the Telecommunications Act provides us no comfort.

First, it is simply the wrong standard. My company does not seek the right to be the customer of broadband providers and to make deals those providers consider commercially reasonable. We need a standard of nondiscrimination and no paid priority or preferences to ensure that we do not face the choice of either paying private taxes to telecom giants or being at a competitive disadvantage.

Second, the factors of the commercial reasonableness test are too vague to provide certainty—except for the certainty of expensive and time-consuming litigation if we choose to pursue it. These standards include “harm to consumers” or “to competition” and evaluation of a

totality-of-the-circumstances. These standards are an invitation to hire dozens of expert witnesses and white shoe lawyers well versed in telecommunications, competition, and consumer law without sufficient guideposts. This standard has already failed to provide any guidance in the one other place it has been used--data roaming.<sup>9</sup>

Third, the Ombudsman provides no comfort either. That person would have the same vague standards and would need our input, which also requires time, money, and other resources we do not have.

Indeed, a “commercial reasonableness” standard is a gift to the cable and phone companies who have armies of lawyers and can crush us in legal disputes at the FCC. This standard is as bad as inviting us to bring an antitrust-like case against Microsoft in the 1990s.

Rather the FCC should adopt a rule banning unreasonable discrimination including paid prioritization and preferences. Such a rule would ensure an open Internet for our business to innovate without permission and compete on the merits. We prefer the test it would establish, which asks simply whether our bits are treated differently from other bits based on application-specific reasons or whether carriers are trying to impose fees on us. Cases under this principle would be completely different from those under Section 706, far more predictable and following the appropriate standard to ensure consumer choice, innovation, and competition. We are aware that such a rule would require Title II of the Communications Act, following the decision in *Verizon v. FCC*.

## **VI. Conclusion**

I was able to start Contextly only because of an open Internet. The open Internet lets us pay our employees. The open Internet lets us serve our paying publishers and those who don't

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<sup>9</sup> See Petition of T-Mobile for Expedited Declaratory Ruling, Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, WT Docket No. 05-265, May 27, 2004, <https://www.dropbox.com/s/6bwcjcxg9zr3kim/T-Mobile%20Petition%20with%20Exhibits%20May%2027%202014.pdf>.

pay—including non-profits, public media and citizen bloggers. The open Internet lets us help make news and journalism better.

The FCC's proposal would undermine that openness, and we therefore oppose it and urge the FCC instead to adopt a rule banning unreasonable discrimination including paid prioritization and preferences, and apply the rule to mobile and last-mile interconnection disputes.

Respectfully submitted,

/s/ Ryan Singel

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