Markham C. Erickson
202 429 8032
merickson@steptoe.com

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
202 429 3000 main
www.steptoe.com

July 30, 2014

Filed in ECFS

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

Re: Notice of Ex Parte Presentation, GN Docket No. 14-28, *Protecting and Promoting the Open Internet.*

Dear Ms. Dortch:

On Monday, July 28, Corie Wright, Director, Global Public Policy, Netflix, Inc.; and the undersigned met separately with: (1) Commissioner Mike O'Rielly; Amy Bender, Legal Advisor, Office of Commissioner Mike O'Rielly; and Rachel Cook, Law Clerk, Office of Commissioner Mike O'Rielly; and (2) Rebekah Goodheart, Legal Advisor, Office of Commissioner Mignon Clyburn; and Wayne P. Connor and Laura Arcadipane, Law Clerks, Office of Commissioner Mignon Clyburn. On Tuesday, July 29, Corie Wright and the undersigned also met with Nicholas Degani, Legal Advisor, Office of Commissioner Ajit Pai.

At each meeting, Netflix discussed the comments it filed in the above-referenced docket. Specifically, it discussed the part of the filing that states that the Open Internet rules should prohibit ISPs from charging access fees to terminate traffic. In addition to what Netflix included in its comments, Netflix made several further points in our meetings, which are included in the attached document.

In accordance with the Commission's rules, this *ex parte* notice is being filed electronically in the above-referenced docket.

Respectfully submitted,

/s/
Markham C. Erickson
Counsel to Netflix, Inc.

cc: Meeting participants

ATTACHMENT

Open Internet Rules Should Prohibit ISPs from Charging Access Fees to Terminate Traffic

ISP Demands for Access Fees Implicate the Policy behind the Open Internet Rules

- Open Internet protections that guard only against pay-for-play and pay-for-priority on the last mile can be easily circumvented by moving the discrimination upstream.

- Some ISPs have confused the issue by conflating upstream degradation at the ISP's terminating access point with larger interconnection or peering issues.

- When a consumer asks Netflix to send traffic to terminate onto an ISP's broadband Internet access network and Netflix responds by sending content to the ISP's last mile network, the point of interconnection should be considered a point of "termination" not "peering."

- When a terminating access monopoly requires an access charge from a company seeking to terminate its traffic requested by the terminating access monopoly's customer, this is a clear violation of the principles of network neutrality.

- The Commission already has determined that effective rules must "ensure that a broadband service provider would not be able to evade our Internet rules by engaging in traffic exchange practices that would be outside the scope of the rules." Open Internet NPRM, 29 FCC Rcd. at 5582 ¶ 59.

- In the traditional telephony ecosystem, the person initiating a phone call with another would be considered the "caller" and was responsible for paying for the call—no matter which party did the most "talking" on the call.

- The Internet ecosystem is no different. A broadband ISP's customer "calls" Netflix and Netflix "answers the call." No matter that Netflix's response causes more data to flow to the originating "caller."

- Indeed, in the case of a terminating access monopoly, the traffic between parties to a "call" almost always will be asymmetrical—with the edge company doing the most "talking," despite the fact that the "caller" is the customer who initiated the conversation.

- When the terminating access monopoly demands an access fee from the edge company, which is delivering traffic in response to a "call," this demand implicates the policy behind the network neutrality rules.

- The Open Internet rules must ban such demands for payment. To analogize to the telephony ecosystem, the FCC should consider the appropriate framework as "bill-and-keep."

- Some large ISPs continue to attempt to justify access charges based on a ratio "imbalance" between downstream and upstream traffic. But these ratios are arbitrarily set and enforced and are not reflective of how ISPs sell broadband connections and how consumers use them. Traffic volumes are consistently and significantly greater downstream than upstream and ISPs who deliver traffic over the last mile can never be in balance with the networks that deliver video. ISPs typically do not sell symmetrical Internet connections to consumers. Even though ratio-based peering does not make much sense, edge providers and ISPs still have a mutual interest in interconnecting in a way that saves costs, maximizes efficient delivery of content to end users, and makes sure that the Internet continues to scale to meet consumer needs. Indeed, globally Netflix is interconnected with hundreds of ISPs, 99% without ratio-based access charges.

Myth about Netflix Purposely Choosing Congested Routes

- Some ISPs are alleging that Netflix caused congestion by deliberately choosing to deliver traffic over congested routes. This allegation is false.

- When a Netflix subscriber requests traffic from Netflix, there is only one means of reaching the subscriber – via the subscriber's last mile broadband Internet access provider.

- In the case of Comcast, Netflix purchased all available transit to reach Comcast's network. Every single one of those transit links to Comcast was congested (even though the transit providers requested extra capacity). The only other available routes into Comcast's network were those where Comcast required an access fee.

Myth about Costs

- Comcast also has attempted to confuse the matter by suggesting that Netflix's payments to Comcast have allowed Netflix to cut out the "transit middleman" and save costs. But for edge providers such as Netflix, paying a terminating ISP like Comcast for interconnection is not the same as paying for Internet transit. Transit networks like Level 3, XO, Cogent, and Tata perform two important services: (1) they carry traffic over long distances; and (2) they provide access to every network on the global Internet. Comcast does not connect Netflix to other networks. Nor does Comcast carry Netflix traffic over long distances. Netflix is itself bearing the costs and performing the transport.

- It is Netflix that incurs the cost of moving Netflix content long distances, closer to the consumer, not the broadband Internet access provider.