

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

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

Filed via ECFS

July 31, 2014

Dear Ms. Dortch:

On July 29, Kathy Leo Chief Legal Officer of Gilt Groupe, David Pashman General Counsel of Meetup, Michal Rosenn Deputy General Counsel of Kickstarter, Brian Chase General Counsel of Foursquare, Ari Shahdadi General Counsel of Tumblr, Anjali Kumar General Counsel of Warby Parker, Mark Silverstein Legal Counsel of Spotify, Allison Lucas General Counsel of BuzzFeed, Althea Erickson Policy Director of Etsy, Nick Grossman General Manager for Policy of Union Square Ventures, Stanford Law School professor Barbara van Schewick, and I met with Jonathan Sallet and Stephanie Weiner, both of the General Counsel's office, by teleconference, to discuss the Open Internet Remand.

To begin, David Pashman expressed many participants' support for bright-line rules that prohibit ISPs from blocking content or applications, from engaging in content- or application-specific discrimination (i.e. discrimination against applications or classes of applications), and from imposing access fees for termination or preferential treatment. He also expressed their support for applying such rules to mobile as well as fixed connections. Finally, he noted that reclassification and the application of Title II are required to adopt such rules, after the Verizon v. FCC decision. He explained that the FCC should reclassify broadband Internet access service as a "telecommunications service" under Title II of the Telecommunications Act, adopt the bright-line rules against blocking, discrimination, and access fees described above, and forebear from the specific provisions in Title II that are not needed to adopt and enforce network neutrality rules.

We discussed the record evidence in favor of bright-line rules.

First, more than a dozen companies have filed comments explaining that they likely would not exist if the Chairman's current proposal had been law when they were founded. Many of these companies were founded with little capital. Their comments explain that the Chairman's proposal would have injected too much uncertainty and added costs concerning facing discrimination or negotiating and paying access fees to ISPs with terminating-access monopolies across the country. They also highlight that most smaller companies—even international brand names—have no lawyers or a very small number of lawyers, usually none of whom are telecommunications law experts. Finally, they have discussed evidence that differences in load time of fractions of seconds affect a web companies' bottom line, in terms of sales and audience. These comments in the record include those of: [Reddit](#), [Dwolla](#), [Meetup](#),

[Kickstarter](#), [Etsy](#), [General Assembly](#), [Vimeo](#), [Opera Software](#), [Codecademy](#), [CodeCombat](#), [Contextly](#), [OpenCurriculum](#), [Touchcast](#), [Heyzap](#), and [Floor64/Techdirt.com](#). [Engine](#) comments provide additional evidence.

Second, we noted that investors in businesses that rely on the Internet (from consumer applications to enterprise logistics) have said that the lack of bright-line rules would negatively impact their investment in Internet applications, content and services and inject new, harmful uncertainty. The record includes a statement from more than [100 investors](#), as well as comments and filings by two of the top investors in startups now used by hundreds of millions of users—[Y Combinator](#) (the first investor in Dropbox, Airbnb, and others) and [Union Square Ventures](#).

Third, we pointed to the considerable theoretical literature on the importance of nondiscrimination and low costs to innovation in the face of uncertainty, where the number and heterogeneity of innovators is particularly important to ensuring innovation. The FCC can begin with Barbara van Schewick's book, *Internet Architecture and Innovation*.¹

We discussed three substantive legal issues: alternative "classification" proposals, the legal mechanism of reclassification, and the legal standard for forbearance.

First, we discussed whether the transmission component of broadband Internet access is a telecommunications service. We explained that, to reverse the classification orders from 2002-2005, the FCC is held merely to the standard set out in *Fox v. FCC*.² Second, participants discussed how facts have changed since 2002, warranting reclassification. The transmission component (access to the Internet) is not inextricably linked with the information services offered by ISPs, such as an email address and domain name service. The record evidence for the 2002 cable modem order's classification decisions was submitted to the FCC in 2000. The 2005 order and subsequent classification decisions also relied largely on that factual record. Whether or not the information services of ISPs were inextricably linked to access to the Internet back in 2000 (when AOL reigned supreme), these services are not inextricably linked now. Users tend to get their Internet access from one company (generally the legacy cable or phone monopoly in a town) and get their information services from others—email from Yahoo, DNS from Google or OpenDNS, and browser from Microsoft or Opera. Participants pointed to evidence in the record primarily from public interest groups filling out this case.

Second, participants explained that the FCC does not necessarily have to engage in market-by-market analysis to forebear from provisions in Title II on a nationwide basis (see, e.g., [Earthlink v. FCC](#), 462 F.3d 1 (D.C. Cir. 2006)). As *Ad Hoc Telecom. Users Committee v. FCC*, 572 F.3d 903 (DC Cir. 2009) shows, the FCC can engage in nationwide forbearance even if market power still exists. The FCC has discretion and should receive deference in its choice of

¹ On the low cost of application innovation in the original Internet, see van Schewick, *Internet Architecture and Innovation*, MIT Press 2010, at 138–48, 204–05, 289–90. On the impact of low cost innovation on who can innovate, see *id.* at 204–13, 292–93. On the impact of changes in innovator diversity on the amount and quality of application innovation if there is uncertainty, see *id.* at 298–349.

² 556 U.S. 502, 551 (2009) (An agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.").

forbearing market-by-market or nationally, as well as regarding the level of proof it requires to do so; just because the FCC has been upheld when engaging in market-by-market forbearance and requiring a higher level of proof does not mean that the FCC *must* engage in that kind of analysis. Rather, the FCC can and has engaged in nationwide-forbearance without market-by-market analysis and been upheld.

Third, participants explained that they are not persuaded by the approach proposed by the *Mozilla Petition*. The term telecommunications service means “the offering of telecommunications *for a fee* directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” They noted that edge providers do not generally pay a fee for the “service” offered by ISPs whose customers access the edge providers. In addition, it is difficult to see how consumers paying a fee for *another* service (access to the Internet) would transform the supposedly distinct service offered to edge providers into a service offered for a fee. Moreover, traditional principles of grammar and punctuation do not allow for reading “for a fee” as language applying only to services offered directly to the public rather than also to services offered to such classes of users to be effectively available directly to the public. It is questionable whether the *Petition* approach would make it possible to ban access fees, since the charging of access fees to application providers is what brings the service under Title II in the first place. Thus, under the approach proposed by the *Mozilla Petition*, only companies who pay access fees would be receiving a telecommunications service, leaving companies who don’t pay without protection available under Title II. Finally, participants noted that the *Petition* does not have much support in the record: several commenters on both sides of the debate (including NTCA, Cogent, and Verizon) reject the *Petition* and very few parties express any support for it.

Participants also noted their concerns with “sender-side” classification proposals to the extent uploads would be Title I services while downloads would be Title II services; if an ISP could discriminate against particular uploads, it could effectively discriminate against particular applications, as applications tend to include requests for data and sending data.

Sincerely,
Marvin Ammori
Ammori Group & Board Member of Engine Advocacy