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September 15, 2014

VIA ELECTRONIC SUBMISSION
Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

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

Dear Ms. Dortch:

On September 11, 2014, I made a number of comments on a paper and presentation by Daniel Lyons titled "The Perils of Internet Interconnection Disclosure" at the AEI event "Regulating the Broadband Ecosystem." At this event, held at the FCC, staffers Amanda Burkette, Antonio Sweet, Daniel Shiman, Ena Decanic, Gigi Sohn, Irene Wu, Jon Chambers, Jon Sallet, Jonathan Levy, Judith Dempsey, Kate Matraves, Kristine Forgotstein, Martin Doczkat, Matthe Collins, Matthew Del Nero, Nick Degani, Pramesh Jobanputra, Sarah Weeks, Scott Jordan, Tim Brennan, and Walt Strack were or may have been present for my remarks.

I argued that there are potential problems from a transparency requirement that the FCC should consider in the proceedings on the Open Internet rules.

First, I noted, following on a point made by Mr. Lyons, that the costs of transparency may not be as low as assumed. Thus, the question needs to be whether the benefits exceed the cost.

For instance, I offered the example of post and hold laws for alcohol distribution to illustrate the possible ill effects of pricing transparency. I noted that much like net neutrality and Internet regulation, these laws were animated by an article of faith imbued with a moral fervor: alcohol is evil — if it isn't going to be prohibited, it must be regulated, and that means carefully controlled distributors, and only a few of them and prices must be kept high. The predictable effect: You have companies saying "here's our price and we can't lower it for 6 months no matter if you meet the same price, wink wink." The irony is that this was really the *intended* effect — make sure prices stay high to reduce output and thus drinking. Here the impetus seems to be the opposite, but the predictable effect may well be the same, and in this case *not* what it is intended.

Further, I argued that the antitrust risk of tacit collusion isn't the only risk here. If the FCC requires, in the name of transparency, publication of sensitive information like prices (not merely filing them with the FCC under seal), this would amount to a *de facto* tariff, which is nothing but a list of prices. In practical effect, this could amount to an effective requirement of uniform pricing. Regardless, tariffing is a core element of common carriage. To the extent the Commission were relying on Section 706 as the legal basis for its rules, this would amount to an illegal imposition of common carriage in violation of both *Cellco* and *Verizon*.

Next, I pointed out that what is involved here is commercial disputes between major players. Whether we are speaking about interconnection, CDNs, or dispute between Comcast and Netflix, both sides have the ability to take care of themselves without the FCC giving one stronger bargaining strength. Insofar as Comcast is a "terminating monopoly," Netflix is an "*originating* monopoly." It is unclear why the bargaining power derived from one is a special case meriting regulation, while the other is not. The flip side of this is the reality that Netflix's private decisions affect everyone else, and Netflix's interest isn't aligned with "the Internet's." Putting a thumb on the scale in Netflix's favor may mean saddling everyone else with an otherwise avoidable cost.

Finally, I questioned the purported benefits of transparency, as well. What are end users going to do with the information? We need an explanation of how it's going to work in practice for consumers to "know more" about interconnection agreements. For some agreements, the end user won't even have any ability to do anything — for instance, a Comcast customer can do nothing about a deal Netflix makes with Charter, nor can she do anything about transit agreements that occur deeper in the Network than her ISP. Other times - most of the time - customers won't know anything about what is being disclosed even if they could do something about it.

If the audience is other content companies or other ISPs — well, Mr. Lyons' arguments are extremely important, because it's not clear why disclosure would do more good than harm in this environment. As Mr. Lyons writes:

> If AT&T offers a low interconnection rate to Netflix, for example, it is unlikely that Netflix will shift some of its volume away from Verizon as a result. But transparency could affect Netflix's likelihood of securing non-price features that affect the quality of the product as delivered to end-user consumers, such as the capacity and location of interconnection ports. AT&T could bid aggressively by taking technical measures to assure that Netflix traffic is delivered with fewer interruptions over its network, which allows it to tout superior network quality to both content providers and end-user consumers. But those incentives would be retarded if public disclosure allowed rivals to move quickly to counter, because AT&T would secure no demonstrable long-term advantage as a result of these efforts.[1]

This is like the hydraulic effect of disclosure regulation I have described elsewhere.[2] If you make something less appealing because it must be disclosed, it is less likely to happen. That's a feature when the thing being done is bad, but it's an unintended cost when the thing is good. But it isn't always possible to know what disclosures correlate with which, or what conduct is actually good or bad.

Where the logic of disclosure is that making available information about misdeeds deters them, shedding light on information (*e.g.*, certain pricing, services or contract terms) that is concealed for procompetitive reasons deters these, as well. Similarly, if every change in network management practices requires disclosure with positive costs, some changes will be deterred even if they would have benefitted consumers. While the benefits of "good" disclosure might outweigh the costs of "bad" disclosure, this certainly won't always be the case and there is no indication that the FCC has undertaken the analysis necessary to determine which effect prevails.

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[1] Daniel A. Lyons, *The Perils of Mandatory Disclosure of Private Interconnection Agreements Between Internet Networks* (Working Paper, Sept. 2, 2014) (on file with author).

[2] *See* Geoffrey A. Manne, *The Hydraulic Theory of Disclosure Regulation and Other Costs of Disclosure*, 58 ALA. L. REV. 473 (2007), *available at* http://www.law.ua.edu/resources/pubs/lrarticles/Volume%2058/Issue%203/manne.pdf.

And this is magnified with the risk of antitrust liability — the risk isn't merely from collusion facilitated by disclosures, but from scrutiny of underlying conduct. Most likely the real cost of disclosure is the risk of erroneous regulatory or antitrust scrutiny. As is well known, of course, antitrust has a hard time distinguishing procompetitive from anticompetitive conduct without looking at effects. If disclosure deters conduct regardless because it increases liability risk, even for good behavior (error costs), it operates like a quasi-per se rule, to the detriment of competition.

I noted that I think we all know what's behind efforts to demand transparency here: A belief, without evidence, that Netflix shouldn't have to pay for interconnection (and more broadly for this proceeding: A belief that IS conduct can be presumed to be bad and should be deterred). The thinking is that disclosure of these agreements will deter paid peering because they'll make enforcement easier. In other words, the real motivation for many supporters of such a rule is not mere disclosure but *enforcement* — the intended effect is to create a quasi per se rule.

So such efforts need to be treated for what they are, and they need to be justified by evidence that there is a problem in the first place and that "correcting" it would do more good than harm.

Those burdens haven't been met.

Respectfully submitted,

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