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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| In the Matter of | ) | |
| | ) | GN Docket No. 14-28 |
| Protecting and Promoting | ) | |
| the Open Internet | ) | |

# COMMENTS OF THE CENTER FOR DEMOCRACY & TECHNOLOGY

The Center for Democracy & Technology (CDT) commends the Commission for its continued focus on the important issue of Internet openness. These brief comments stress four basic points:

- the Commission's approach to its authority over broadband Internet access is closely related to other priorities;
- action to protect the open Internet is needed now;
- nondiscrimination is an essential element of such protection; and
- the Commission should expressly disclaim authority over Internet content and over-the-top services.

## 1. The Commission's approach to its authority over broadband Internet access is crucial not just for this proceeding, but also for the IP transition and the future relevance of the agency.

The proper scope and source of the Commission's authority over broadband Internet access service is important not just for the specific subject matter addressed in the Open Internet Order, but also more broadly for the IP transition and the ongoing role of the Commission in the modern communications environment. The Commission should consider the legal authority issue from this broad perspective.

With that in mind, it is perfectly appropriate for the Commission to explore the relatively narrow question of whether and to what extent it might be able to rely on Section 706 to establish some constraints on online blocking or discrimination in local Internet access networks. But the Commission should also recognize that this issue is best analyzed with an eye to the bigger challenge the agency faces: establishing a clear and stable conception of the agency's authority over what is rapidly becoming the core communications network for the 21st century.

The Commission's National Broadband Plan recognized that we are in the midst of a "transition from a circuit-switched network to a world in which the broadband Internet serves as "a platform over which multiple IP-based services – including voice, data, and video – converge."[1] Promoting the transition to an all-IP network is now a significant Commission priority.[2] In this environment, a stable understanding of the Commission's legal jurisdiction over broadband Internet access services is essential. It is hard to see how the Commission can pursue its mission of encouraging "rapid, efficient, Nation-wide, and world-wide wire and radio communication service"[3] amidst general uncertainty regarding its authority over the principal element of the emerging communications landscape.

It is far from clear that section 706 can provide an appropriate general legal foundation for Commission authority in an Internet-based world. As the court in *FCC v. Verizon* observed, section 706 authorizes only those actions aimed at spurring broadband deployment (and in the case of 706(b), only actions preceded by a finding that advanced telecommunications are not being deployed to all Americans on a timely basis). It would be an odd result indeed if these parameters were to become the new legal touchstones for the bulk of the Commission's work (other than spectrum allocation). It would also make Commission decisions vulnerable to legal challenges second-guessing the sufficiency of the link between Commission actions and promoting broadband deployment.

To be clear, CDT believes the Commission's authority over Internet matters should be subject to significant limits, as we have described in prior comments.[4] Maximally expansive authority should not be the goal. But appropriately scoped Commission authority is a prerequisite for the Commission pursue any kind of coherent policy agenda, including the "Network Compact" vision outlined in recent months by Chairman Wheeler.[5]

In short, the legal authority questions in this docket cannot reasonably be considered in isolation. At a minimum, while an NPRM may well pose some specific and limited questions about the reach of the agency's authority under section 706, it should be framed in a manner to encourage input on the full range of considerations and options – including the possibility of revisiting the regulatory classification of broadband Internet access services. Given the foundational importance of the legal basis for Commission authority over broadband Internet access services, the Commission also needs to think seriously about the interrelations between this docket, the IP transition, and the docket

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[1] Federal Communications Commission, Connecting America: The National Broadband Plan at 59 (Mar. 16, 2010), http://www.broadband.gov/plan/.

[2] FCC, *Technology Transitions* and *AT&T Petition Order* (GN Docket Nos. 13-5 and 12-353), FCC 14-5, January 30, 2014, http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0131/FCC-14-5A1.pdf.

[3] 47 U.S.C. 151.

[4] *See* Comments of CDT in the matter of Framework for Broadband Internet Service (GN Docket No. 10-127), July 15, 2010, https://cdt.org/files/pdfs/CDT_Comments-Framework_for_Broadband.pdf, at 2-5; *see also* Comments of CDT in the matter of Preserving the Open Internet (GN Docket No. 09-191), Jan. 14, 2010, https://www.cdt.org/files/pdfs/2010_CDT_openness_comments.pdf, at 11-22; Reply Comments of CDT in the matter of Preserving the Open Internet (GN Docket No. 09-191), Apr. 26, 2010, https://www.cdt.org/files/pdfs/CDT_Reply_Comments-Open_Internet.pdf, at 9-14.

[5] FCC Chairman Tom Wheeler, Remarks at the Computer History Museum, January 9, 2014, http://www.fcc.gov/document/fcc-chairman-tom-wheeler-remarks-computer-history-museum.

on Framework for Broadband Internet Service (GN Docket No. 10-127). Whether the Commission formally links these dockets or not, they raise a cross-cutting issue that requires a consistent approach.

## 2. The Commission should act to protect Internet openness now – not wait until non-open practices have become widespread and entrenched.

The Commission is right to pursue open Internet protections now.

Opponents of regulatory action in this area often assert that there have been relatively few examples of broadband providers interfering with Internet traffic. But setting aside the question of how many examples would be enough to warrant action, it is important to recognize that for virtually the entire history of this policy debate, regulatory policies and ongoing regulatory proceedings have served as significant constraints on any potential discriminatory behavior by carriers. Consider the following timeline:

- Prior to the 2005 *Brand X* decision and the FCC decision regarding the legal treatment of DSL services later that same year, broadband services were potentially subject to common carriage obligations.

- In 2005, the Commission's broadband Policy Statement put broadband providers on notice that interfering with the transmission of lawful online content or services could draw substantial regulatory scrutiny.

- In 2008, the Commission issued an order reprimanding Comcast for interfering with some of its subscribers' BitTorrent uploads, thus confirming the Commission's intent to police broadband provider interference with lawful Internet traffic.

- The Commission's action against Comcast was eventually vacated by the D.C. Circuit in *Comcast Corp. v. FCC.* But by that time, the Commission had already launched in 2009 a rulemaking proceeding to adopt open Internet protections. Broadband providers would have been well aware that any blocking or discrimination during the pendency of this proceeding would have risked a serious policy backlash and undermined their arguments against adopting rules.

- The Commission adopted the Open Internet Rules in December 2010. They were not invalidated until January of 2014.

If the Commission were to let this matter drop in the wake of *Verizon v. FCC,* we would be in uncharted territory. For the first time, there would be neither an existing policy constraining blocking and discrimination by broadband providers nor a live proceeding aimed at developing such a policy. Broadband providers would have unprecedented leeway, with little fear of legal or regulatory repercussions, to try to exercise new measures of influence or control over the content, applications, and services employed by their subscribers.

The Commission is right to preempt such a dangerous experiment. If practices to favor or disfavor particular Internet traffic were to become widespread, the damage to Internet openness could prove difficult or impossible to reverse. Unraveling a web of discriminatory deals after significant investments have been made, business plans have

been built, and technologies have been deployed would be a difficult and complicated undertaking both logistically and politically. Documenting the harms could prove impracticable; nobody knows about small businesses and innovative applications that are lost before they make it off the ground. Moreover, it is a safe bet that any future Commission action to roll back perceived harms after they have occurred would meet loud complaints about the unjust nature of *ex post facto* regulatory action. Broadband providers would surely say that it is unfair and perhaps illegal for the Commission to interfere with their investment-backed expectations premised on the current legal environment.

In short, if we want broadband Internet access services to operate in a manner that preserves the Internet's open character, the most efficient, effective, and fair approach is to establish that expectation in advance. The Commission should address Internet openness in a proactive manner now, rather than kicking the can down the road.

## 3. Nondiscrimination is an essential part of a robust open Internet rule.

A nondiscrimination principle is an essential component of a framework to protect the Internet's open nature. The Commission could not credibly claim to be fulfilling the goals of the Open Internet Order if it adopted an approach that addressed blocking alone.

An unconstrained right to discriminate would enable broadband providers to exercise almost as much gatekeeping power as an unconstrained right to block. By degrading some traffic or prioritizing other traffic, broadband providers could effectively play favorites in the online marketplace, distorting competition among online content and applications. Innovators and upstarts would need to start worrying about what treatment their traffic will receive from the broadband providers serving their potential end users. The more favoritism became widespread, the more innovators would need to consider striking deals with broadband providers to avoid being placed at a significant performance disadvantage relative to their competitors. This dynamic is possible even if outright blocking is prohibited; it would be cold comfort to know that broadband providers cannot entirely refuse to deliver one's traffic, if the rules permit them to deliver it at a small fraction of the speed of key rivals.

In short, discrimination enables scenarios in which the approval and cooperation of large broadband providers becomes a practical necessity for successful participation in the marketplace for online services. That is the opposite of "innovation without permission," and it would mean substantially higher entry barriers for online innovation – in other words, a less open Internet.

As the Commission assesses its potential legal and policy options in this proceeding, it should reject any approach that would fail to include a nondiscrimination principle. Nondiscrimination is the core of a meaningful open Internet safeguard.

## 4. The Commission should indicate clearly, from the beginning of this proceeding, that it will not seek to exert jurisdiction over over-the-top online services.

As CDT argued in earlier proceedings concerning the Open Internet Rules, the Commission should narrowly focus its regulatory activity on broadband Internet access service – the physical provision of the transmission links that connect subscribers to the

Internet. The Commission should expressly disclaim authority over the content, applications, and services that run over the Internet.[6]

From a political and public messaging perspective, a clear statement from the Commission that it cannot and will not pursue higher-layer content regulation would offer the best defense against the all-too-common rhetorical charge that the Commission aims to "regulate the Internet." In the absence of language expressly establishing limits, opponents of Commission action will continue to argue that the effort to preserve the open Internet may be just the first step in an FCC effort to extend its reach over more and more Internet activity. The Commission can best demonstrate that it harbors no such intent by specifically disclaiming any authority over the myriad applications and content provided over the Internet.

Fencing off online content, applications, and services from FCC oversight is also the best approach from a policy perspective. Without clear limits, open-ended theories and applications of jurisdiction could open the door for future Commissions, pursuing any number of potential policy concerns, to attempt to regulate virtually any of the wide range of conduct and communications traversing the Internet. Such a result would undermine Internet openness and thus contravene the policy goals of this proceeding. It also would raise significant legal questions; communication between Internet endpoints is protected speech and cannot generally be regulated, and courts have repeatedly struck down efforts to regulate Internet content.[7]

In short, the Commission should assert clear limits to its own reach. To safeguard an open and vibrant Internet, the Commission should seek to ensure that its approach to this proceeding, far from laying the groundwork for broader Internet regulation in the future, actually serves as a bulwark against it. With that in mind, the Commission should state clearly, from the beginning of this proceeding, that whatever authority it asserts does not extend to the myriad over-the-top services that the Internet enables.

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CDT appreciates the Commission's continued attention to the crucial issue of Internet openness.

Respectfully submitted,

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[6] *See supra* note 4.

[7] *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844; *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004); *Am. Booksellers Found. v. Dean*, 342 F.3d 86 (2d Cir. 2003); *Cyberspace Commc'ns, Inc. v. Engler*, No. 99-2064, slip op. (6th Cir. Nov. 15, 2000), *aff'g*, 55 F. Supp. 2d 737 (E.D. Mich. 1999); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999).