



ELECTRONIC FRONTIER FOUNDATION

Protecting Rights and Promoting Freedom on the Electronic Frontier

February 19, 2015

ELECTRONIC FILING

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

Re: *Ex Parte Letter*, GN Docket No. 09-191, GN Docket No. 14-28

Dear Ms. Dortch:

As the latest comment period in the Open Internet docket comes to a close, the Electronic Frontier Foundation (“EFF”) wishes to express its appreciation that the Commission is poised to reclassify broadband providers as telecommunications services, putting its efforts to promulgate Open Internet rules on firmer legal footing.

However, we also wish to express our deep concern that the Commission is poised to adopt a “general conduct rule” that may lead to confusion and litigation, and perhaps even regulatory overreach. As we understand it, the Commission intends to apply this standard on a case-by-case basis, assessing whether given practices not included within the “bright-line” rules might nonetheless undermine the open Internet.

We appreciate that the Commission wishes to retain the flexibility to address new unfair practices as they emerge. However, we strongly believe that the Commission should use its Title II authority to engage in light-touch regulation, taking great care to adhere to clear, targeted, and transparent rules. A “general conduct rule,” applied on a case-by-case basis with the only touchstone being whether a given practice “harms” consumers or edge providers, may lead to years of expensive litigation to determine the meaning of “harm” (for those who can afford to engage in it). What is worse, it could be abused by a future Commission to target legitimate practices that offer significant benefits to the public but could also be construed to cause some harm to a specific provider or consumer.

The Commission has an important role to play in promulgating “rules of the road” for broadband, but that role should be narrow and firmly bounded. We fear the proposed “general conduct rule” may meet neither criteria. Accordingly, if the Commission intends to adopt a “general conduct rule” it should spell out, in advance, the contours and limits of that rule, and clarify that the rule shall be applied only in specific circumstances. For example, the Commission’s rules should make clear that it will evaluate a challenged practice based primarily on whether it impedes innovation and free speech. Thus, the

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Commission should consider (1) whether the practice preserves user choice; (2) whether the practice is application agnostic; and (3) whether and how the practice impacts the cost of free speech and innovation.¹

In addition, we note that the Commission's description of the proposed "bright-line" rules against blocking, throttling, and paid prioritization suggests those rules will be limited to "legal" or "lawful" content or traffic. Unfortunately, such a limit implicitly blesses the use of such practices where the provider believes (or claims to believe) that it is targeting unlawful content or traffic. Service providers should not be encouraged to monitor or make judgments about the legality of their users' activities. We urge the Commission to clarify that its "bright-lines rules" apply to all content.

Finally, we are disappointed that the Commission appears to have taken the notion of unbundling off the table completely. Unbundling rules helped foster service competition in the early days of the Internet. Those 20th century rules probably could not be adopted wholesale for broadband, but we urge the Commission to seek further comment on what rules might be appropriate for the 21st century, in a separate proceeding.

On February 13, 2015, EFF published a related blog post entitled "*The FCC's Latest Net Neutrality Proposal: Pros, Cons, and Question Marks.*" A copy of that post is attached to this letter and available online here: <https://www.eff.org/deeplinks/2015/02/fccs-latest-net-neutrality-proposal-pros-cons-and-question-marks>

If you have any questions, please do not hesitate to contact me.

Very truly yours,

s/ Corynne McSherry

Corynne McSherry
Intellectual Property Director

cc:
Chairman Wheeler
Commissioner Jessica Rosenworcel
Commissioner Mignon Clyburn
Philip Verveer
Gigi B. Sohn
Daniel Alvarez

¹ See generally Barbara van Schewick, Analysis of Proposed Network Neutrality Rules (February 18, 2015), pp. 10-19, Attachment to Barbara van Schewick *Ex Parte* Letter to Marlene Dortch, Secretary, Federal Communications Commission, Protecting and Promoting the Open Internet, GN Docket No. 14-28, February 18, 2015.

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February 13, 2015 | By CORYNNE MCSHERRY

The FCC's Latest Net Neutrality Proposal: Pros, Cons, and Question Marks

Last week, we received some welcome news: the Federal Communications Commission (FCC) [publicly confirmed](#) that it is finally going to put its open internet rules on the right legal footing by [reclassifying](#) broadband providers as common carriers. That said, the goal was never just reclassification; that's just an essential step for open internet rules to survive the inevitable court challenge. The real goal, though, has always been for the FCC to adopt targeted rules of the road for broadband. Will it?

That's still hard to know, because the FCC has been pretty quiet, at least publicly, on the details of the final rules that will be put to a vote on February 26. Here are some thoughts on what we know so far – and what we'd like to know.

The [FCC's statements](#) have stressed three bright-line rules:

- No Blocking: broadband providers may not block access to legal content, applications, services, or non-harmful devices.
- No Throttling: broadband providers may not impair or degrade lawful Internet traffic on the basis of content, applications, services, or non-harmful devices.
- No Paid Prioritization: broadband providers may not favor some lawful Internet traffic over other lawful traffic in exchange for consideration – in other words, no “fast lanes” – including fast lanes for affiliates.

These are all good ideas. If net neutrality means anything, it means no unfair discrimination based on application or service, and these rules seem aimed at just that. But there's at least one worrisome bit: the repeated reference to “lawful content.” Does the FCC intend to suggest that throttling unlawful content is OK? How are ISPs to determine what is and is not lawful without snooping on their users? Can an ISP block access to the Pirate Bay without fear of violating open internet rules?

Another good idea is requiring providers to be more transparent. We can't hold broadband providers accountable if we don't know what they're up to. The FCC can make that requirement more meaningful, though, if it makes sure that “transparency” includes an obligation to make the information public and fully accessible, online, so watchdog groups can parse it and make it understandable for the general public.

Also good: the FCC has promised to forbear from rate regulation and imposing new taxes and fees. It also promises that there won't be "burdensome" filing requirements or accounting. Let's hope it fulfills those promises.

Less good: the FCC appears to have taken the notion of unbundling off the table completely. That's too bad, because unbundling rules (meaning, rules requiring service providers to lease out their lines on fair and nondiscriminatory terms) were essential to the existence of real service competition in the early days of the Internet. Those 20th century rules probably could not be adopted wholesale for broadband, but we urged the FCC to seek further comment on what rules might be appropriate for the 21st century. It should still do so, perhaps in a separate proceeding.

Back in May, the FCC asked for comment on whether and how it should address interconnection and it has now promised to address ISP interconnection practices that are unjust and unreasonable. Based on what we know, the FCC plans to address such complaints on a case-by-case basis. That, unfortunately, could be a recipe for litigation and confusion, as the FCC, providers, and customers fight over what qualifies as "unjust and unreasonable."

The same concern applies to the FCC's promise to adopt a "general conduct" rule. The FCC says its proposal will "create a general Open Internet conduct standard that ISPs cannot harm consumers or edge providers." Understandably, the FCC wants to have the flexibility to address future unfair practices that we can't yet anticipate, without having another decade-long fight. But it's also very easy to see it as a recipe for FCC overreach.

The FCC could help put these concerns to rest (or at least alleviate them) by sharing more details about its proposal with the public, before the February 26th vote. So why haven't they done so?

One reason is standard legal procedure doesn't require it. The [law that ultimately governs FCC rulemaking procedures](#) doesn't require the FCC to publish every iteration of the rules it votes on—it just needs to base the rules on the public record. Having taken in more than 4 million comments about net neutrality in the past year, the FCC likely feels it has an adequate public record that reflects input from all sides of this debate. And it may be concerned that releasing the full rules in advance of the meeting could lead to calls for another full comment period, which would delay what has already been a pretty exhausting process for everyone.

So we get it -- but we won't pretend it's not an issue. We hope we are close to sustainable and sensible open Internet rules, and there are things to like about what we're heard so far. But we are also worried about some of what the FCC seems to be contemplating, and we certainly can't fully support rules we haven't read. Instead of trusting the FCC to do the right thing, we need to verify, and that means we need more details—but not more delay.