

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

Re: Open Internet Remand, GN Docket No. 14-28
Filed via ECFS

May 6, 2014

Dear Ms. Dortch:

On Friday, May 2, 2014, representatives of the companies Kickstarter, Meetup, and Tumblr, along with representatives of the New York City Tech Meetup and Engine Advocacy, met with FCC staff to express their strong opposition to the FCC Chairman's draft proposal concerning network neutrality.

We explained that if the Chairman's proposal were adopted as a rule, it would stifle innovation and entrepreneurship in the New York City tech sector that is at the center of the city's recent and future economic growth. We explained that the city's entire tech community is paying attention to the Chairman's proposal and is deeply concerned.

While the Chairman's proposal may look good on paper, it provides no certainty or effective remedy for smaller entrepreneurs building real businesses on the internet.

We urged the Commission to consider a different path: to ban rather than bless a world of paid fast lanes and unpaid slow lanes; to abandon pursuit of a "commercially reasonable" standard and to impose a rule against "unreasonable discrimination," that clearly defines which discriminatory conduct is prohibited and bans all application-specific discrimination (i.e. discrimination based on criteria related to the application or class of application); and to extend this strong rule to mobile as well as fixed service.

We also invited the Commission to New York City to hold an official FCC hearing on network neutrality, so that the Commission can hear directly from those in the New York tech sector affected by this proposal.

Organizations and Companies Represented

New York Tech Meetup is a nonprofit organization that convenes the world's largest meetup group. The group includes almost 40,000 people who are involved in technology in New York. While the organization generally focuses on convening the tech community to encourage entrepreneurial and economic activity, it has been involved in policy when there is a grave threat to the community, such as the proposed Stop Online Piracy Act two years ago.

The company Meetup is a social platform that enables people to start a group or join an existing group in order to get offline and meet in person to pursue a common interest or activity. It gained its initial fame during the 2004 elections, because of Meetups for political candidates. Today, there are over 300,000 monthly Meetups for 140,000 groups, with over 15 million members. These Meetup Groups bring together people across a wide range of interests, from stay-at-home mothers to hardware

engineers and soccer teams. Meetup has over 110 employees. As noted, the largest Meetup Group, which is now incorporated as a nonprofit, is the New York Tech Meetup. ([About Meetup](#))

Kickstarter is a funding platform for creative projects. All kinds of new ideas -- from films, games, and music to art, restaurants, and technology -- have been brought to life through the direct support of Kickstarter users. Since launching in 2009, 6.1 million people have pledged \$1 billion to projects on Kickstarter, successfully funding 61,000 creative ideas. Thousands of projects are raising funds on Kickstarter right now. ([About Kickstarter](#))

Tumblr is a network and platform for creators, and hosts over 184 million blogs, ranging from the blog of singer and actress Beyoncé to a blog about the fictional text messages of Hillary Clinton. Tumblr was founded in 2007 in New York City by its CEO David Karp, and now has over 250 employees throughout the United States. ([About Tumblr](#))

Engine Advocacy is based in San Francisco but advocates for startups based all over the nation. With 500 startup members, Engine has been involved in copyright, patent, and immigration policy. A member of Engine's Board lives in New York City and advises several New York startups on how to recruit, vet, and hire engineers to build their technical teams as their businesses expand.

NYC Tech Entrepreneurs Are Concerned and Talking

Because of Chairman Wheeler's draft proposal, many in the NYC tech community are deeply concerned for the future of their businesses and their jobs.

The government of New York City has undertaken a wide range of initiatives to encourage the New York technology sector, which has become the second-largest tech hub in the nation behind the Bay Area. Partly because of the city's technology initiatives, between 2007 and 2012, "the number of private sector jobs in NYC rose by about 4 percent, compared to a 3 percent decline nationally," a surprising 7 percent difference. (See Michael Mandel, [Building a Digital City](#), Bloomberg Technology Summit, Sept. 30, 2013.) Indeed, during the same time period, the city's tech sector added 26,000 jobs, or \$5.8 billion in wages, and has accounted for 2/3 of the growth in the city's private sector wages in that time. (*Id.*)

Jessica Lawrence, the Executive Director of NYT Meetup, explained that the tech community is deeply concerned about the Chairman's proposal and is discussing it with her constantly. These expressions of concern come to her through all of her social media feeds, in direct emails, and in almost every conversation at social events that she has attended recently.

We are not aware of the Chairman consulting with any businesses in the New York tech sector before proposing to authorize paid priority and technical discrimination.

The Proposal Will Inflict Massive Unintended Harms

The Chairman's proposal to allow ISPs to charge applications and content providers fees for enhanced treatment or for exemptions from monthly bandwidth caps could inflict grave harm on the New York technology sector, and likely on many others. Innovation and entrepreneurship are hard enough already, without adding online tolls and threats of discrimination.

If ISPs are allowed to charge access fees, it would radically impact companies of Kickstarter's size, for instance. Kickstarter is an independent company that takes a 5% fee from projects that are successfully funded. Beyond this and third-party credit card fees, it's free for creators, entrepreneurs, and artists to use Kickstarter. Kickstarter competes based on the strength of its product and community. If Kickstarter videos were choppy or if its pages loaded more slowly than rival crowdfunding platforms that paid for better treatment—including platforms started by larger companies or companies that raise tens of millions of dollars—that would change, and the playing field would no longer be level. The creators and entrepreneurs that use Kickstarter to fund their ideas and projects could be deprived of what is currently the best and biggest crowdfunding platform online.

Tumblr is a massive, content-rich network. Tumblr's millions of users devote considerable resources to producing sophisticated, dynamic, visually appealing content and blogs, and its community expects the images and videos hosted by Tumblr to load and stream quickly. Like many internet applications and services, Tumblr is available to its users for free. If Tumblr were forced to pay for a fast lane for internet access because, for example, more financially established competitors start paying, it would force Tumblr to divert resources from developing the best products for its users to paying for its users to simply have reasonable access to the content in the network. Even worse, under the Chairman's proposal, competitors may be able to secure exclusive or effectively exclusive deals through ISPs, forcing Tumblr to remain in the slow lane while competing platforms with exclusive fast lane access speed by. While Tumblr strongly embraces competition and innovation in its sector, its products and services should be judged on their merits - such as the diversity of content creation tools it offers its users, the worldwide reach and engagement on the platform, and the ease and elegance of its design - rather than by the amount of money it is forced to pay an ISP in order to simply load or stream its content at a reasonable rate. Requiring such a shift in priorities would harm innovation and, ultimately, millions of content creators, curators, and consumers in the Tumblr network and other competing networks.

While Meetup may be less content-rich, page-load time still matters for Meetup and its users. Research shows users switch sites when a site loads slowly. ([Engine Comments at 5](#)) Meetup might not be able to afford the fees to be in a fast lane, and therefore a web giant could move aggressively into meetup events simply by paying for prioritization rather than building a better product. Alternatively, a company such as Meetup might be forced to sell to an ISP or web giant that *can* negotiate the necessary fast lanes. The consolidation of many web companies in general is a likely outcome from the draft proposal.

The Chairman's Proposed Internet Slow Lanes Will Stifle Innovation

The representatives present at the meetings oppose the Chairman's draft proposal to bless paid prioritization and technical discrimination on the internet. Internet innovation would be crushed if large cable and phone companies can charge websites and applications for "priority" service. These ISPs would have little incentive to upgrade the "slow lane"—they would follow the money to invest in improving only the "fast lanes." Indeed, the ISPs would have every incentive to neglect the slow lane, despite any rule against "blocking" applications, because web companies will only pay for a fast

lane if the slow lane puts them at a competitive disadvantage. As a result, the fast lane may become necessary for real-time gaming, streaming video, and video/voice calling, and even text webpages rely on fast load times to compete. Moreover, any application, content and service would benefit from not being counted against an ISP's bandwidth cap. Therefore, a company would be at a competitive disadvantage if larger, more established rivals started paying to not have their competing offering counted against the cap.

If lucky, startups would be faced with three options: (1) let (larger, more established) competitors with sufficient funds load more reliably and quickly and live with the resulting competitive disadvantage, (2) pay a new tax to multiple ISPs to get treatment equal to competitors, or (3) pay a premium for an exclusive deal unavailable to competitors. Most startups will not even have the second or third option because they would be unable to afford the tax, or ISPs wouldn't offer them the deal because they have made exclusive or semi-exclusive deals with competitors. Moreover, startups would face such choices not only for US ISPs but also abroad--foreign nations will likely empower their ISPs to collect fees from American technology companies if American ISPs have that right.

Such slow lanes will also radically transform fundraising. Today, entrepreneurs can start tech businesses without anyone's permission and extremely inexpensively. They can raise money after they have some success or traction. With slow lanes, entrepreneurs would have to raise money and make deals with large ISPs even before testing their ideas and getting traction. These increased costs increase risk for both investors and entrepreneurs, and will decrease investment and the creation of new businesses. Moreover, these fees will affect investors' potential rewards, as successful companies will have to pay a recurring tax to ISPs in order to compete.

The Commercially Reasonable Standard Will Provide No Relief

We understand that the Chairman's proposal would allow ISPs to offer online companies different terms to get better service than some minimum baseline, which people figuratively call a slow lane. Under the rules, ISPs would generally be allowed to charge similarly situated companies different prices for the same enhanced service, or to make an enhanced service available exclusively to one of several competing firms. We understand that the Chairman hopes to make sure those terms are fair by allowing us to bring a complaint against ISPs at the FCC claiming that the ISPs behavior is "commercially unreasonable" --a vague standard with vague factors. According to the Chairman's blog, this standard might ask whether an ISP's actions harm free expression, consumers, or competition, and might forbid ISPs from offering the better service exclusively to a company they own, but would not ban exclusive deals for better service in general.

While perhaps appealing on paper, this process provides us no remedy whatsoever in practice. Kickstarter has one lawyer total; Tumblr has two; Meetup has one. They don't have lobbyists in DC. Their lawyers cover a wide range of legal issues, including compliance with corporate law, employment law, contracts, copyright compliance, patents, law enforcement information access, litigation, and everything in between. The large ISPs, by contrast, have hundreds of lawyers on staff, as well as hundreds of lobbyists in DC.

In light of these resource differences, the Chairman’s proposed after-the-fact “commercial reasonableness” inquiry would provide far too much uncertainty and risk. The inquiry requires hiring outside counsel, expert witnesses, economic studies, and surveys to rebut the ISPs’ lawyers on issues of harm to competition, consumers, and free expression. Such cases would burn smaller companies’ entire legal budgets for years—and Meetup, Tumblr, and Kickstarter are fortunate enough to have legal budgets. Moreover, under such a vague legal standard, any technology company would fear retaliation by the ISPs. To compound matters: we doubt that the FCC (or any agency) can adjudicate these complaints under such a vague standard nearly as quickly as necessary for a startup in a highly dynamic industry. If company executives have to devote scarce time and resources to FCC litigation, they cannot devote that time to building a better product and defeating competitors. Moreover, if an internet company is in the “slow” lane for just a few months, competitors with inferior products but better ISP deals can steal consumers, particularly because the costs for consumers of switching applications are so low.

Rather than pursue this path, the FCC should adopt a rule against “unreasonable discrimination” and clearly define which behavior violates that standard, e.g., by specifying that some practices are *per se* unreasonable. With a rule against unreasonable discrimination, the FCC could do at least three things that the FCC cannot do under Section 706: ban ISPs from treating similarly situated companies differently, outlawing exclusive deals generally, and forbidding paid prioritization. The non-discrimination rule should explicitly ban application-specific discrimination – i.e., discrimination that is based on criteria related to the application or class of application. This would enable smaller companies merely to prove that they are being treated *differently* than other applications or classes of applications, generally through engineering analysis. This more specific rule would lower the costs of litigation and provide more certainty that startups can effectively vindicate their rights. The rules should also ban access fees.

We have a final concern: the 2010 Open Internet Order rightly rejected the harm-to-consumers or -competition standard proposed by the Chairman today. In 2010, the FCC noted that cable companies proposed that standard, but the Commission rejected it as too narrow because it would not sufficiently protect user choice, free speech, innovation and entrepreneurship. (See [paragraph 78](#)). We are alarmed that the FCC has now embraced this harmful (and vague) standard.

Mobile and Interconnection Should Be Included

The Chairman’s proposal wrongly tentatively excludes mobile and last-mile interconnection. We understand mobile was treated differently under the 2010 order. Whether or not that was a mistaken decision, mobile usage has increased dramatically in the past four years and continues to increase. Mobile is core to our future growth. Exempting mobile will harm innovation and entrepreneurship. It does not reflect sound policy.

The Chairman’s proposal also wrongly excludes interconnection between backbone providers and last-mile access providers. We believe this is merely a loophole, and that such last-mile interconnection concerns the same technical and economic issues underlying the FCC’s open internet actions. While the 2010 Order did

not directly speak to this issue, a lot has changed in the past four years, demonstrating the need for the FCC to act. Indeed, the filings by Level 3 and Cogent, and Comcast and Verizon's recent ability to extract fees from Netflix, all point to a problem requiring redress. (See [Level 3](#), [Cogent](#), and [Netflix](#))

Title II is Preferable to Section 706

Title II, with appropriate forbearance, strikes us as the obvious legal path for ensuring a free and open internet. We agree with Senator Bill Nelson that the FCC should “carefully consider whether Section 706 provides the best pathway for these rules or whether Title II, with appropriate forbearance, provides a more sound approach.” ([Letter to Chairman Wheeler](#)) Because Title II reclassification would empower the Commission to prohibit all unreasonable discrimination and to clearly define that standard in its implementing regulations, and all other paths would not, we encourage this path. We agree with the White House that a rule upheld under Title II “would give the FCC a distinct set of regulatory tools to promote net neutrality.” (White House [Response](#)) We also predict that there will be facial and as applied legal challenges whichever way the FCC proceeds--Section 706 or Title II--and that Title II at least empowers the FCC both to adopt the more appropriate substantive rule and to do so on more sound legal footing.

In its NPRM, the FCC should at least ask substantive questions about Title II. Specifically, the FCC should ask: (1) whether the FCC should classify internet access service as a telecommunications service under Title II and, for mobile, as a commercial mobile service under Title III; (2) whether the FCC should immediately forbear from certain provisions of Title II, and should ask which provisions those may be; (3) how exactly to define “unreasonable discrimination” in the context of internet access.

Yes, This Proposal is Far Worse than the 2010 Order

During our meetings, we responded to questions by FCC staff comparing this proposal with the previous order.

We believe that the FCC's goal should be to adopt a network neutrality rule that preserves the openness and equality of access to the internet. In this way, we agree with President Obama's campaign promises. ([Video clips](#).)

Nonetheless, the Chairman and FCC staff seem to be misreading the 2010 Order to suggest the Chairman's proposal is not much worse. While we disagree with the notion that the FCC should attempt no more than the 2010 order, particularly on wireless and interconnection, we believe some people are misinterpreting the 2010 Order.

First, staff suggested that the 2010 Order permitted paid prioritization (and slow lanes). The order said that “it is unlikely that pay for priority would satisfy the ‘no unreasonable discrimination’ standard.” Until recently, everyone interpreted the FCC's language as effectively banning paid prioritization and setting a high bar for any exceptions: The order arrived at its conclusion that paid prioritization is unlikely to be reasonable based on a detailed discussion of the arguments in favor of and against paid prioritization that rejected the usual arguments in favor of paid prioritization and endorsed the arguments against it. That discussion made clear that the usual arguments in favor of paid prioritization would not be sufficient to overcome the FCC's

conclusion that paid prioritization is unreasonable. In line with this analysis, the D.C. Circuit in *Verizon v FCC* interpreted this language to leave “no room at all for ‘individualized bargaining.’” No room at all sounds like an effective ban. ([Page 60-61](#)). The industry agreed. Verizon’s brief in that case presented Verizon’s interpretation of the order:

The Order *effectively banned* certain potential commercial services—including any “commercial arrangement between a broadband provider and a third party to directly or indirectly favor some traffic over other traffic”—by stating that “it is unlikely” that such services “would satisfy the ‘no unreasonable discrimination’ standard. ([Page 9 of the brief.](#))

Thus, the FCC’s recent claims that the Open Internet Order allowed paid prioritization misrepresent the real meaning of the rules as clarified by the text of the order—a meaning shared by network neutrality advocates, Verizon, and the appellate court. ([See Barbara van Schewick ex parte.](#))

The FCC is also making a logical error here by equating the possibility of an exception for some paid prioritization in the 2010 Open Internet Order, with blessing paid prioritization in advance under the current proposal. To see the logical error, consider other areas of the law. Violence is generally legal when done in self-defense; nonetheless, if a state legalized all assault and battery, it could not defend itself by saying “violence was already legal.” Under the 2010 Open Internet Order, paid prioritization was at best a distinct exception, not the standard, as in the Chairman’s proposal.

In addition, staff suggested that because the 2010 Order prohibited “unreasonable” discrimination, so it permitted reasonable “discrimination,” and therefore is just like the Chairman’s proposal. While both rules permitted some discrimination, they permitted very different kinds of discrimination. While the Open Internet Rules banned “unreasonable” discrimination and effectively banned paid prioritization, the text of the 2010 Open Internet Order specified four technical factors that the FCC would use to determine whether discriminatory conduct would be viewed as “unreasonable” under its non-discrimination rule and its exception for reasonable network management. These factors were end-user control, use-agnosticism, transparency, and compliance with standards. According to the order, use-agnostic discrimination (or “[application-agnostic](#)” discrimination) is discrimination that does not discriminate among specific uses of the network or among classes of uses. Two of the factors – user control and use-agnosticism – reinforced key principles that have made the Internet the platform for innovation it is today. The order explicitly rejected attempts to equate “unreasonable” discrimination with “anticompetitive” discrimination. Thus, the text of the order provided explicit guidance on the interpretation of the non-discrimination rule, using factors that are specific and well-defined.

By contrast, the Chairman’s proposal would ban discrimination that is “commercially unreasonable” based on a set of much more vague factors (e.g., whether the practice harms free speech, consumers or competition plus a factor considering the totality of the circumstances) that are open to interpretation and, ultimately, lead to unpredictable outcomes. In addition, Section 706 requires the FCC to interpret the standard so that it provides sufficient room for individualized discrimination and negotiation. The 2010 Open Internet Order and the Chairman’s proposed rule are based

on very different factors, and will therefore often lead to very different outcomes regarding discrimination.

More generally, the question is not whether a non-discrimination rule allows some discrimination. Most network neutrality proponents agree that certain kinds of discrimination will be socially beneficial and should therefore be allowed under a network neutrality regime. The real question is whether the non-discrimination rule allows the right kind of discrimination – discrimination that is socially beneficial – and bans the right kind of discrimination – discrimination that is socially harmful.

Staff also asked what could be banned under a standard of “unreasonable discrimination” that could not be banned under a standard that bans “commercially reasonable” discrimination. The 2010 order’s nondiscrimination rule is illustrative here: as *Verizon v. FCC* show, it is something that the Commission cannot adopt under Section 706. That is the key holding of that case. Section 706 cannot support a rule against discriminations that are unreasonable. Non-discrimination rules based on Section 706 cannot ban application-specific discrimination – i.e. discrimination based on criteria related to the application or class of application. That is because it would not leave sufficient room for individualized discrimination and negotiation—even though it would accurately distinguish socially beneficial from socially harmful discrimination. By contrast, whether discrimination is use-specific and therefore unlikely to be reasonable, or use-agnostic and therefore likely to be reasonable, was a key factor under the 2010 Open Internet Rules. Finally, as the court held explicitly in *Verizon v. FCC*, rules based on Section 706 cannot ban paid prioritization. They cannot prohibit ISPs from making paid prioritization available exclusively to one of several competing firms, and cannot require ISPs to make them available on non-discriminatory terms. Those are the exact harms that concern us and that Section 706’s commercial reasonableness standard cannot address. ([See also Harold Feld ex parte.](#))

Participants

At the meetings were David Pashman of Meetup; Michal Rosenn and Julie Wood of Kickstarter; Liba Rubenstein and Ali Kazemi of Tumblr; Jessica Lawrence (Executive Director) of NY Tech Meetup; and Marvin Ammori (Board Member) of Engine Advocacy. We met with Priscilla Argeris of Commissioner Rosenworcel’s office; separately with Rebekah Goodheart of Commissioner Clyburn’s office; and had a meeting Gigi Sohn, Sagar Doshi, and Daniel Alvarez of the Chairman’s office, Matthew DelNero of the Wireline Competition Bureau, and Stephanie Weiner of the Office of General Counsel.

Sincerely,
Marvin Ammori