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November 10, 2014

VIA ELECTRONIC FILING

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

Re: Notice of Ex Parte Communication, *In the Matter of Protecting and Promoting the Open Internet,* GN Docket No. 14-28; *Framework for Broadband Internet Service,* GN Docket No. 10-127

Dear Ms. Dortch:

On November 6, 2014, David Cohen, Lynn Charytan, and the undersigned from Comcast met with Jonathan Sallet and Stephanie Weiner of the Office of General Counsel and Philip Verveer, Senior Counselor to the Chairman, regarding the above-captioned proceeding.

Consistent with Comcast's previous submissions in this docket, we explained that, in adopting new rules to protect and promote the open Internet, the Commission should follow the guidance of the D.C. Circuit in *Verizon v. FCC* by relying on Section 706 of the Telecommunications Act of 1996 as legal authority.[1] We emphasized that, although Comcast and other leading broadband providers have made clear that they have no plans to enter into commercial arrangements to prioritize any edge provider content within their broadband Internet access services, Section 706, as construed by the court, provides ample authority for the Commission to adopt a strong presumption against paid prioritization arrangements. Similarly, the most that the Commission could accomplish under Title II would be to use a comparable presumption since it is not possible to prohibit all paid prioritization under Title II either.

We also discussed the variety of so-called "hybrid" approaches to open Internet regulation, including approaches pursuant to which a "remote delivery service" could be separately identified and classified under Title II, as well how any such telecommunications service might be defined and how it would be regulated. We noted our continued support for maintaining the distinction between open

[1] *See Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

Internet issues and traffic-exchange issues, consistent with Chairman Wheeler's repeated recognition that they present different considerations. We stressed that, notwithstanding the conflation by some commenters and by some members of the media of peering and transit arrangements, whether paid or settlement-free, with "prioritization" of traffic, payments and other exchanges of value for peering and transit arrangements do not as a matter of law or engineering practice or theory represent paid prioritization or the creation of a "fast lane." We also noted that in all events Title II could not support a rule precluding payment for a telecommunications service. Finally, we noted that focusing on ISPs to the exclusion of other providers that transmit edge-provider traffic would be a nonsensical way to protect the ecosystem, as underscored by recent reports and an admission by Cogent's CEO that Cogent has been prioritizing its paying customers' traffic over other traffic on its transit network.[2] This is the only evidence of paid prioritization to have emerged in this proceeding , and yet would remain outside the scope of the Commission's framework if it remained focused on only one side of the traffic-exchange relationship.

We separately address herein Netflix's recent claims regarding its peering agreement with Comcast.[3] Those claims are misleading and meritless. For example, in support of its assertion that broadband Internet access providers have a "terminating access monopoly" that harms competition and consumers, Netflix stated that the cost of its paid-peering arrangement with Comcast exceeds its transit costs and internal CDN costs, "comprising over 60% of Netflix's total cost of delivering traffic to Comcast's customer."[4] But that is a red herring. The relevant comparison is not the cost of direct connectivity to Comcast's network versus the costs of backbone transit and other distinct functions, but rather the cost of direct connectivity to Comcast's network versus what Netflix historically paid third parties (like Cogent) for *indirect* connectivity to Comcast's network.[5] Certainly Netflix would not have entered into direct agreements with Comcast, Verizon, Time Warner Cable, and AT&T unless doing so provided economic advantages over paying middlemen to reach these same companies—and of course, these arrangements have in turn reduced Netflix's need for Cogent's and other transit providers' services, not only reducing Netflix's costs but freeing up transit capacity for other entities.

In stark contrast to Netflix's opportunistic posturing in this proceeding, its CEO, Reed Hastings, gushed to Comcast executives upon entering into the direct connection agreement with Comcast that the arrangement had "made peering affordable for us," while also predicting that Comcast's "great performance will be the major story over the coming months.[6] Netflix's CFO

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2 *See* Dan Rayburn, StreamingMediaBlog.com, *Cogent Now Admits They Slowed Down Netflix's Traffic, Creating a Fast Lane & Slow Lane* (Nov. 5, 2014), available at http://blog.streamingmedia.com/2014/11/cogent-now-admits-slowed-netflixs-traffic-creating-fast-lane-slow-lane.html; Cogent Communications Group, Inc. Earnings Call Transcript, Statement of Dave Schaeffer, Chairman, President & CEO (Nov. 7, 2014), available at http://www.cogentco.com/en/news/events/681-cogent-communications-third-quarter-2014-earnings-call (acknowledging Cogent's prioritization of traffic for customers).

3 *See* Letter of Christopher D. Libertelli, Vice President, Netflix, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 *et al.* (filed Nov. 5, 2014) ("Netflix November 5 Ex Parte").

4 *Id.* at 4-5.

5 *See* Opposition to Petitions to Deny and Response to Comments, MB Docket No. 14-57, at 231 (filed Sept. 23, 2014) ("Joint Response") (noting that "edge providers have *always* paid *some* entity to reach Comcast's (and *all* ISPs' networks), whether such entity is a transit provider, a CDN, or some other entity").

6 Joint Response at 209 & n.47.

likewise boasted to investors that the company had secured a "long-term" arrangement with Comcast that would not in any way alter Netflix's expectation of "400 basis point year-on-year margin improvement for the U.S. streaming business."[7] He added that "we're not going to be interested in doing something that's going to meaningfully change the economics for us … but, we are interested in doing things that, for the right set of economics improve that subscriber experience long-term."[8] Consistent with such comments, Netflix has not filed any SEC disclosure suggesting that its peering agreement with Comcast (or any similar arrangement with any other ISP) is expected to cause any financial harm. Nor has Netflix made any SEC filing correcting the record with respect to the material positive statements it has made to the market regarding the fair and positive economics of the direct peering arrangement it has secured from Comcast, calling into question the credibility of Netflix's subsequently adopted alternative story line, which it now pursues with continuing vigilance.

More broadly, as Comcast has previously shown in great detail,[9] the assertion that it has a "terminating access monopoly" and is not constrained by the competitive market for transit services is a fiction. Broadband providers such as Comcast not only have a powerful business incentive to ensure that their subscribers have unfettered access to popular online services like Netflix, but they also do not even have the practical ability to foreclose such access. To the contrary, a fundamental prerequisite to providing broadband Internet access is entering into interconnection arrangements with a diversity of network operators to ensure connectivity to the entirety of the World Wide Web. Indeed, Comcast has frequently noted that it has dozens of settlement-free routes into its network, along with many other CDN and paid transit arrangements. Any and all of those routes offer edge providers ample opportunities to deliver their traffic to Comcast without any need to enter into a direct-connection agreement.[10] While Netflix is fond of claiming that "only Comcast can send content *across its last mile* to its subscribers,"[11] such assertions entirely miss the point that the "multiple available pathways *into* Comcast's network guarantee edge providers … access," in many cases via settlement-free links.[12] Because of the availability of such interconnection pathways—which, again, all ISPs *must* maintain in order to offer access to the Internet—"the direct routes into Comcast's network for which Comcast does charge—CDNs, for example—are subject to market based rates." In particular, "these rates are constrained by the marketplace's rapidly decreasing transit rates," because "any CDN or other entity that finds Comcast's direct interconnection rate too high has the option of using one of the many indirect transit routes just described."[13] Therefore, contrary to Netflix's false and unsupported

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7 Remarks of David Wells, CFO, Netflix, Inc., Morgan Stanley Technology, Media & Telecom Conference (Mar. 3, 2014), available at http://seekingalpha.com/article/2064743-netflix-management-presents-at-morgan-stanley-technoloy-media-and-telecom-conference-transacript.

8 *Id. See also* Joint Response at 232 (explaining testimony of Dr. Mark Israel, which explains that a direct connection agreement between a large edge provider like Netflix and a large broadband provider like Comcast is "mutually beneficial," as "cutting out the middleman 'may not be a good financial result for the intermediary (*e.g.*, Cogent), but it is not a bad outcome for the edge provider (*e.g.*, Netflix) or the ISP (*e.g.*, Comcast), or for competition or consumers.'" (quoting Israel Declaration ¶ 173)).

9 *See* Joint Response at 196-240.

10 *See id.* at 219-23.

11 Netflix November 5 Ex Parte at 4 (emphasis in original).

12 Joint Response at 221.

13 *Id.* at 219.

assertion that ISPs are "not constrained by competition in the transit market,"[14] the reality is that the availability of indirect transit at low prices *does* "constrain Comcast's (and other parties') pricing for direct interconnection."[15]

Finally, even if the Commission were, for the first time ever, to assert that backbone interconnection arrangements are subject to Title II regulation, the notion that doing so would support a rule precluding charges—and mandate the settlement-free peering that Netflix demands—is insupportable. Not only must a "telecommunications service" by definition be offered *for a fee*,[16] but the core Title II provisions that provide for oversight of carrier charges are premised on the understanding that some service rate will be imposed; such charges need only be "just and reasonable" and not unreasonably discriminatory.[17] Indeed, it would be absurd to posit that the largest sender of traffic on the Internet should have a regulatory right to obtain a direct connection and terminate unlimited amounts of traffic *at no charge*, notwithstanding its lack of any facilities enabling the transmission of traffic to other Internet end points. To the extent that Netflix seeks to rely on analogies to PSTN interconnection, such arrangements are inapposite because they necessarily involve the exchange of telecommunications traffic *between two carriers* (as opposed to the provision of service *to a customer*).[18] Thus, unless Netflix is prepared to argue that it is a telecommunications carrier subject to Title II, its call for the imposition of a "bill and keep" regime is entirely misplaced.[19]

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14 Netflix November 5 Ex Parte at 4.

15 Joint Response at 219. *See also id.* at 219-222 (rebutting Netflix's assertions that Comcast has allowed indirect transit links to congest and showing that, to the contrary, Netflix engaged in gamesmanship by manipulating traffic flows (among other tactics) to increase its leverage over ISPs).

16 47 U.S.C. § 153(53).

17 *Id.* §§ 201(b), 202(a). Notably, even where the Commission has found that a "terminating access monopoly" exists—in circumstances readily distinguishable from Internet traffic-exchange, given the many different transit routes into ISPs' networks and the ultra-competitive market for transit rates—it has made clear that telecommunications carriers providing terminating access services are entitled to impose reasonable rates for such services. *See, e.g.*, *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 ¶ 40 (2001) (adopting conclusive presumption that tariffed CLEC access charges at benchmark level (based on incumbents' rates) were just and reasonable, while also permitting detariffed charges *above* the benchmark level, subject to complaints).

18 *See, e.g.*, *id.* §§ 251(a), 251(b)(5).

19 If Netflix *were* subject to Title II, it bears emphasis that its own conduct (including the manipulation of traffic-routing to induce congestion and increase leverage in negotiations over direct-connection arrangements) would be subject to scrutiny and enforcement penalties under Sections 201 and 202.

In short, Netflix's efforts to upend the well-functioning traffic-exchange marketplace accordingly are without merit, and those issues in any event should not be shoehorned into the open Internet proceeding. Please direct any questions regarding this matter to the undersigned.

Respectfully submitted,

/s/ Kathryn A. Zachem
Senior Vice President,
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cc: Jonathan Sallet
Stephanie Weiner
Philip Verveer