TESTIMONY

Of

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CENTER FOR DEMOCRACY & TECHNOLOGY

BEFORE

THE JUDICIARY COMMITTEE

of the

UNITED STATES SENATE

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Chairman Leahy, Senator Grassley, distinguished members of the Committee, esteemed colleagues on the panel, thank you. I am honored to appear before you representing the Center for Democracy & Technology, one of the country's oldest Internet advocacy organizations. For over 20 years, CDT has worked to promote and sustain public policies that protect a free and open Internet. Above all, we are dedicated to the individual's interest in a digital world that allows free expression, free association, privacy, and growth. Both the Internet technology and policy architectures must support the individual's rights, while also fostering innovation and the free flow of information—not only within the United States, but globally.

We are also an organization that has long supported a light hand in the regulatory structures governing the Internet, both domestically and internationally. We believe that ensuring global access to the Internet requires deference to the decentralized technology

architecture, to the unprecedented pace of technology innovation, and to the truly global, dynamic, and organic growth of the Internet community.

As we enter into the era of Internet 3.0, where the Internet is no longer something you sit down at a computer terminal to access, or even access via your phone or other mobile device, but rather, becomes embedded in every aspect of your daily life—your home, your car, your school or workplace, your very relationships, there has never been a more important time to work to protect, defend, and promote the rights of the individual in the digital world. As connected technologies become the interface between ourselves and our world, we must continue to be vigilant about the fundamental principles of free expression, personal privacy, and freedom of movement and association, among so many others. It is an important time to re-dedicate ourselves to these values and for the FCC and Congress to articulate clear guidance about the rights of the individual online.

However, the Internet, at just over two decades, is still in its infancy. And thus, while it is an appropriate time to evaluate our norms and strengthen our rules regarding the interaction between the individual and the digital world, we must be thoughtful about the consequences, while zealous in our creation of these new norms and rules. We must seek to protect an individual's profound need to fully engage in the digital world at reasonable costs and effective speeds, and must remain dedicated to growth and innovation—both in the commercial space and in the policy space.

Action is necessary at this time to clarify norms and reinstate prior rules

Thus, the Center for Democracy & Technology strongly supports the concept of net neutrality, as we believe that Internet access is an enabler of knowledge, of community, of

economic advancement, and of democracy throughout the world. We applaud the FCC in taking decisive action to establish clear rules that create a level playing field for consumers. We seek rules undergirded by strong principles of fairness and Internet openness. We believe that all options should be on the table for the FCC to consider. We support the FCC's efforts to find a solution that advances the needs of individual consumers to have low-cost options to engage in digital life, while respecting the role that companies have played and will continue to play in fostering innovation and growth in the digital world.

Any action must be based in principles of openness and nondiscrimination

In our comments to the FCC, the Center for Democracy & Technology articulated several principles on which this regulatory decision should be based, and which should be reinforced through the agency's actions and enforcement choices. Any regulatory solution:

1. Must include an anti-blocking rule.
2. Must be based on a general expectation of nondiscrimination for Internet service.
3. Must allow for reasonable network management.
4. May include flexibility for different/additional data delivery models that don't degrade ordinary Internet access.
5. Must demonstrate clarity of scope.

All available options should be considered

We believe that all available regulatory options should be considered, including Title II reclassification, Section 706 authority, and a range of hybrid proposals. In our prior comments to the Federal Communications Commission, we examined the pros and cons of both Title II and Section 706. While both of these remain real options, we remain

concerned about limitations inherent in the structure of either solution and in the likelihood of speedy implementation.

I. Support for Title II.

We believe that public policy must support principles that promote access, free expression, and enable more individuals to fully engage in the digital world. Many in the advocacy community believe that Title II reclassification is the only option that satisfies these principles. The support for Title II has been well documented in the majority of comments submitted, and demonstrates the public's overwhelming interest in Internet life. Title II also provides a clear path forward for FCC action. Title II does, however, present significant hurdles, both procedurally and substantively, in adoption, implementation, forbearance, and, yes, potential litigation.

Reclassifying broadband Internet access as a telecommunications service subject to Title II of the Communications Act would be the most direct and simplest course to eliminate the specific legal obstacle that caused the court to strike down the Commission's 2010 Open Internet rules. A reclassification action would create the durable legal basis for the Commission to craft rules in support of an open Internet. There is a strong argument that Internet access is a "telecommunications service" within the definitions of the act. However, significant portions of Title II would require forbearance, as they are a poor fit for the current Internet access marketplace. Price regulation and construction approval are just two of the myriad of provisions that even many in the advocacy community recognize might require forbearance. Still, Title II remains a significant option for the FCC to consider as it creates an environment of Internet openness.

As I have worked now for almost 20 years in the legal and policy space related to the Internet and emerging technologies, I am most curious about the proposals that represent real policy innovation. Thus, I would like to discuss several proposals that draw upon, or are hybrids of, Title II and Section 706, and several implementation issues applicable to any approach.

II. Section 706 and A New Alternative to "Commercially Reasonable."

There are certainly valid concerns about Section 706 and its implementation and enforcement. None more salient, however, than whether a commercially reasonable standard is the appropriate one for determining whether business practices support the concept of Internet openness. As we discussed at length in our comments to the FCC on this issue, a "commercially reasonable" standard is simply inappropriate for open Internet rules, and the Commission should consider alternative formulations. Modifying the Commission's proposed legal standard could strengthen protections for the Internet user and clarify the intent and norms the Commission seeks to reinforce. CDT agrees with the Commission's observation that "[s]ound public policy requires that Internet openness be the touchstone of a new legal standard."[1]

An alternative policy approach would be to articulate a new standard that is tailored to the particular aims of this proceeding and that is based upon the compelling public policy and societal need underpinning an open Internet. Choosing the appropriate shorthand for such a standard is less important than articulating its content, but CDT would suggest that a

[1] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, FCC 14-61 (rel. May 15, 2014) (hereinafter "NPRM"), ¶ 116.

standard might require practices to be "consistent with Internet openness" or prohibit practices that would tend to "undermine Internet openness."

A standard could further be articulated that would determine whether a practice is in violation of this standard if substantial adoption of the practice would tend to undermine:

> (i) the ability of broadband Internet access subscribers to access and use the lawful Internet content, applications, services, and devices of their choice without interference from their provider of broadband services; or
>
> (ii) the ability of developers of independent online content, applications, services, or devices to make those offerings available to interested Internet users everywhere without having to negotiate for or obtain any kind of permission or agreement from those users' providers of Internet service.

Alternative formulations are possible, but the legal standard should reflect the public's interest in an Internet that fosters free expression, accumulation of knowledge, freedom of association and movement, and a policy architecture that maximizes public engagement in digital life and online communities, discourse, and commerce.

III. A Title II/Section 706 Hybrid Approach.

The Commission might also consider a hybrid approach that builds upon the recent D.C. Circuit decision and some of the strengths of Title II and Section 706. Section 706 authority could be utilized to adopt rules regarding broadband Internet access service, augmented with new policies focused on the second side of broadband providers service, following the D.C. Circuit's finding that network operators effectively provide a service to all the websites and Internet content providers the operators' subscribers choose to access.

The D.C. Circuit's holding that broadband providers "furnish a service to edge providers"[2] presents an opportunity to consider open Internet policy from a new angle. A new policy expressly addressing this edge-facing service that carriers provide could augment the Commission's proposed rules.

The Commission's proposed rules, like the 2010 rules, apply to "broadband Internet access service," defined in relevant part as the "capability to transmit data to and receive data from all or substantially all Internet endpoints." This is a reasonable description of the functionality broadband providers provide to subscribers: Subscribers get the ability to send and receive traffic to and from the entire Internet. That includes not only the carriage of traffic over the broadband provider's own network, but also the onward forwarding of traffic over other networks with which that broadband provider has arranged to interconnect.

The definition is not, however, an accurate description of the functionality broadband providers provide to edge providers (i.e., the websites and other providers of online content or services that Internet subscribers choose to access). What edge providers get from each broadband provider is more limited: not the ability to reach the entire Internet, but rather the ability to reach the subscribers of that particular broadband provider. Additionally, the service is limited to carriage across the broadband provider's own network. Edge providers make their own arrangements (via their own Internet access, transit providers, or content delivery networks) for the delivery of traffic to and from the edge of the broadband provider's network. The edge-facing service of the broadband

[2] *Verizon v. FCC* at 51.

provider is to carry that traffic between the interconnection point and the relevant subscribers across its own local network.

In short, what Internet carriers provide to edge services is different from what they provide to subscribers, and it does not meet the definition of broadband Internet access service. This disparity did not concern the Commission prior to *Verizon v. FCC*, because the Commission's position was that broadband providers only provided service to their subscribers. Edge providers were not considered to be customers or recipients of a service from broadband providers.

Now that the D.C. Circuit has rejected that position, it is appropriate for the Commission to consider this edge-facing service as a distinct offering warranting distinct analysis. The Commission has an opportunity to craft an appropriate definition of these services and develop an appropriate policy framework for them – a framework which may augment whatever open Internet rules the Commission adopts for "subscriber-side" services. There are at least two ways that a focus on edge-facing service, thus defined, could contribute to a policy framework to promote the open Internet.

1. Possible Applicability of Title II to the Edge.

One option is discussed in Mozilla's May 5 petition to the FCC.[3] As set forth in that petition, there is a strong argument that the edge-facing functionality that broadband carriers provide could qualify as a telecommunications service subject to Title II. The service that edge providers receive consists exclusively of the transmission of traffic across the

[3] Mozilla Petition to Recognize Remote Delivery Services in Terminating Access Networks and Classify Such Services as Telecommunications Services Under Title II of the Communications Act, May 5, 2014, https://blog.mozilla.org/netpolicy/files/2014/05/Mozilla-Petition.pdf.

broadband provider's network. On the Internet side, the transmission function does not come bundled with any of the other services (email, newsgroups, website hosting, etc.) that were key to the Commission's decision to classify subscriber side services as information services. The main question would be whether edge-facing service can be considered to be provided "for a fee," possibly on a theory that carriers receive valuable consideration for the exchange and carriage of edge provider traffic via interconnection agreements or subscriber revenues, or possibly if carriers start charging edge providers directly, as Verizon told the D.C. Circuit it intended to start doing.[4]

Classifying edge-facing services under Title II would not require the Commission to reverse prior classification decisions for the simple reason that the Commission has not previously recognized the existence of such a service and hence has had no occasion to consider its regulatory treatment. Now that the D.C. Circuit has ruled that broadband carriers do provide a service to edge providers, it would be perfectly reasonable for the Commission to consider how those services might be treated under the statute. And the fact that the Commission has judged the subscriber side of broadband (the only side it previously recognized) as information services is no bar to different treatment of the Internet side. The D.C. Circuit has observed that "one may be a common carrier with regard to some activities but not others."[5]

Applying Title II would not automatically create a complete policy framework. Rather, it would provide the Commission with a stable base of authority to craft appropriate

[4] See *Verizon v. FCC* at 37 (quoting Verizon's counsel from the oral argument transcript at 31: "but for [the Open Internet Order] rules we would be exploring those commercial arrangements.").

[5] *NARUC v. FCC,* 533 F.2d 601, 608 (D.C. Cir. 1976).

nondiscrimination rules for edge-facing service. Such rules could be based on provisions of Title II, on section 706, or both. Importantly, however, they would not be subject to the common-carrier prohibition that doomed the Commission's 2010 rules. They would also need to be coupled with extensive forbearance, as many provisions of Title II would not be sensible to apply to edge-facing services.

2. Linking the Concepts of Individualized Negotiations and Specialized Services

Alternatively, focusing on edge-facing service may provide a new avenue for an open Internet policy framework to avoid the common carrier prohibition, even without classifying edge-facing service under Title II. The idea would be to link the concepts of individualized negotiations on the Internet side with the offering of specialized services to subscribers, so that specialized services become the vehicle for creating the flexibility in terms that the D.C. Circuit has held the common carrier prohibition to require.

The 2010 rules allowed broadband providers to offer specialized services in addition to broadband Internet access service. Thus, there was always some potential for edge providers and broadband providers to negotiate special delivery arrangements. In litigating *Verizon v. FCC*, however, the Commission never pointed to the allowance for specialized services as a possible source of the "substantial room for individualized bargaining and discrimination in terms"[6] necessary to distinguish the Commission's rules from common carriage.

The challenge facing such an argument would have been that the Commission's approach treated broadband Internet access service and specialized services as distinct, and the case

[6] *Cellco Partnership v. FCC*, 700 F.3d at 548.

concerned the permissible regulatory treatment of the former standing alone. But even if the two services are treated as distinct on the subscriber side, they need not be treated that way on the Internet side. If the relevant edge-facing service is defined consistently with our proposal above and with the D.C. Circuit's suggestion in Verizon v. FCC[7] – in effect, as the provision of a capability to reach a broadband provider's subscribers, without regard to the precise manner or quality of transmission – then the edge-facing service could include the transmission of traffic to subscribers via both regular Internet service (standard transmission) and specialized service (e.g. including quality-of-service guarantees). The overall edge-facing service would be transmission, with different options constituting tiers of service that "permit broadband providers to distinguish somewhat among edge providers."[8]

In other words, the Commission could consider a regime under which, as per the D.C. Circuit's suggestion, a broadband provider would be required to provide a baseline level of service to all edge providers, while still retaining some flexibility to negotiate for special treatment in individual cases. The Commission could require such special arrangements, however, to be provided in a manner consistent with specialized services treatment on the subscriber side. Under such a regime, there would be flexibility for special deals, but not unlimited flexibility. The constraint would depend on the definition of specialized services.

The end result of this kind of approach could be a policy framework that in principle could be similar to the 2010 rules. Edge providers would be entitled to a standard level of access to broadband subscribers. They could also try to negotiate special arrangements with

[7] See *Verizon v. FCC* at 61 (suggesting that "the relevant 'carriage' broadband providers furnish [to edge providers] might be access to end users more generally," rather than access at any particular level of speed or service).

[8] *Verizon v. FCC* at 61.

broadband providers. To avoid violating the rules, though, such special arrangements would need to be carried as specialized services to and from subscribers, rather than being commingled with ordinary broadband Internet access traffic.

As the Commission noted in 2010, permitting special treatment via specialized services carries some policy risks. The Commission would need to carefully monitor the marketplace for signs that specialized services are "retarding the growth of or constricting capacity available for broadband Internet access service." But integrating specialized services into the analysis of how much leeway open Internet rules leave for individualized negotiations, and considering the issue through an edge-facing lens, may create a new opening to argue that rules quite similar to the 2010 rules could nonetheless be consistent with the approach the D.C. Circuit suggested might pass muster.

It is in the public's interest to adopt clear rules, now.

We believe that public policy must support principles that promote access, free expression, and enable more individuals to fully engage in the digital world. Whichever path the FCC chooses to take, it must act swiftly to create policy certainty that protects the individual and promotes future growth and innovation.

Thank you.