

Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

December 10, 2014

Re: Promoting and Protecting an Open Internet, GN Docket No. 14-28

Dear Chairman Wheeler:

On November 10, 2014, President Obama reaffirmed his commitment to a free and open Internet and called on the Federal Communications Commission (FCC) to “implement the strongest possible rules to protect net neutrality.”¹ The President was primarily addressing the No Commercially Unreasonable Practices section of the May 2014 *Proposed Rules for Promoting and Protecting an Open Internet*, which, if adopted, would authorize broadband providers to give differentiated treatment to Internet traffic, thereby undermining net neutrality in the United States. That much is common knowledge.

What is not common knowledge, but just as certain, is that the Proposed Rules, or any others like them, would violate international law obligations of the United States in the areas of international trade and human rights. As a member of the World Trade Organization (WTO) and a party to the International Covenant on Civil and Political Rights, the United States is bound to respect principles of nondiscrimination and free expression when regulating essential communications media like the Internet. Any FCC rule that does not meaningfully protect net neutrality would run afoul of these legal obligations and expose the United States to legal action by other governments and individuals prejudiced by its actions.

We are law professors at George Washington University who specialize in the international law and human rights consequences of ICT policy and practice.² For the reasons set out below, among others, we believe that the FCC should abandon the rules proposed in May and instead adopt strong net neutrality rules prohibiting broadband providers from according differentiated treatment to Internet traffic.

International Trade Obligations Violated By a U.S. Failure to Adopt Strong Net Neutrality Rules

The United States is bound by the WTO’s *General Agreement on Trade in Services* (GATS), and has additionally signed on to the *Basic Agreement on Trade in Telecommunications Services* (BATS),³ committing to regulating its telecommunications services on the basis of several principles that are essential to net neutrality.⁴ In particular, the BATS enshrines the United States’ commitment to ensure that

¹ *Net Neutrality: President Obama’s Plan for a Free and Open Internet*, WHITE HOUSE, <http://www.whitehouse.gov/net-neutrality>

² We are co-directors of the Global Internet Freedom and Human Rights Project at GW Law School. *See* <http://www.law.gwu.edu/gwl/internetfreedom> (last visited Dec. 1, 2014).

³ OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2014 TRADE POLICY AGENDA AND 2013 ANNUAL REPORT, annex III (2014), available at http://www.ustr.gov/sites/default/files/Annex%20III_1.pdf.

⁴ The WTO Reference Paper, which the United States included in its schedule of commitments, sets forth the regulatory framework for telecommunications. United States Schedule of Commitments, *Supplement 2*, GATS/SC/90/Suppl.2 (Apr. 11,

“interconnection” in telecommunications services, including Internet service, be provided to the service suppliers of other WTO Member States on nondiscriminatory terms.⁵ The FCC's failure to meaningfully protect net neutrality would violate the terms of the BATS.⁶

The BATS integrates clear non-discrimination principles into its primary obligations. It covers packet-switched services, including broadband services, which the United States “expressly included [in the Agreement] to protect its growing IP-based services providers.”⁷ The BATS commitments for IP-based services include several key principles that converge with net neutrality, including transparency, anti-competitive practices, and, most importantly, fair interconnection.⁸ Under the BATS, fair interconnection “will be ensured at any technically feasible point in the network” and is to be provided “under nondiscriminatory terms”; “in a timely fashion”; and at “cost-oriented rates that are transparent, reasonable, [economically feasible], and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided.”⁹

If the FCC were to adopt the Proposed Rules, or similar rules allowing broadband providers to accord differentiated treatment to Internet traffic, this would contravene the United States’ legal obligations under the GATS to ensure non-discriminatory access¹⁰ and the BATS to ensure fair interconnection for foreign service suppliers. Standards like those in the FCC’s Proposed Rules would allow broadband providers to engage in individual negotiations with edge providers for paid prioritization to create “fast” and “slow” lanes for Internet service,¹¹ which by definition would violate the requirement in the BATS that

1997). Schedules of commitments are legally binding on WTO member States. *Telecommunications Services*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_e.htm (last visited Nov. 14, 2014).

⁵ World Trade Organization, *Telecommunications Services: Reference Paper, Negotiating Group on Basic Telecommunications*, ¶ 2.1-2(a) (Apr. 24, 1996) [hereinafter Reference Paper].

⁶ Jennifer A. Manner with Alejandro Hernandez, *An Overlooked Basis of Jurisdiction for Net Neutrality: The World Trade Organization Agreement on Basic Telecommunications Services*, 22 *COMMLAW CONSPPECTUS* 57, 73 (2013-2014).

⁷ *Id.* at 68.

⁸ *Id.* at 60, 70.

⁹ Reference Paper, *supra* note 5, at ¶ 2.2(a)-(b).

¹⁰ The GATS Annex on Telecommunications Services’ requires that a WTO Member guarantee that service suppliers of other Members have access to and use of their telecommunications networks and services “on reasonable and non-discriminatory terms and conditions.” GATS: General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, *THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS* 284 (1999), 1869 U.N.T.S. 183, 33 *I.L.M.* 1167 (1994) [hereinafter GATS].

¹¹ “A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not engage in commercially unreasonable practices.” *Promoting and Protecting an Open Internet*, *GN Docket No. 14-28*, FCC, app. A § 8.7 (2014), available at <http://www.fcc.gov/document/protecting-and-promoting-open-internet-nprm> [hereinafter Proposed Rules]. The FCC has indicated that it would determine what constitutes a commercially unreasonable practice on a case-by-case basis, relying on a “totality of the circumstances” test. See Proposed Rules ¶ 116. The D.C. Circuit has indicated that the “commercial reasonableness” standard provides sufficient flexibility for providers to negotiate deals -- including pay-for-priority deals -- on individualized terms. *Cellco Partnership v. FCC*, 700 F.3d 534 (D.C. Cir. 2012) (upholding data roaming order). Thus, the proposed No Commercially Unreasonable Practices Rule governing broadband providers would allow broadband providers to engage in individualized negotiations with edge providers through which broadband providers would be able to prioritize certain content and disfavor other content, creating “fast lanes” for prioritized content and “slow lanes” for all other content.

interconnection be provided on nondiscriminatory terms.¹² While the FCC's Proposed Rules would in principle apply equally to all service providers domestic and foreign, a decision to give priority to services or content provided by one set of suppliers who can pay for this privilege, over others who cannot, discriminates in effect against the latter. Such differentiated treatment of Internet traffic would have a disparate and negative impact on those foreign service providers who are unwilling or unable to pay the "fast lane" premiums, especially those from the developing world. Adopting such a rule would leave the United States open to the risk of a WTO complaint by other WTO member states on behalf of their disadvantaged service suppliers.¹³

Rules in the United States that do not meaningfully protect a robust concept of net neutrality would put the country at odds with key trade partners in Latin America and Europe. Net neutrality is of particular importance in Latin America, where approximately 85% of the region by population and trade lives under a legal regime that strongly protects this principle. Over the last five years Paraguay, Chile, Mexico, Colombia, Ecuador, Peru, Argentina, and Brazil have all adopted legislation or regulation guaranteeing net neutrality. More to the point, at least 90% of all Latin American Internet traffic passes through Miami, and would therefore be subject to U.S. regulation.¹⁴ If the FCC were to adopt rules that did not guarantee strong protection for net neutrality as do most of the countries in Latin America, the impact on trade in the region could be potentially severe.¹⁵

The FCC's Proposed Rules also have the potential to hinder trade with Europe, another continent that is in the process of embracing strong net neutrality protections. In April 2014, the European Parliament passed the European Commission's proposed telecoms reforms that will enable a Digital Single Market,¹⁶ including guarantees safeguarding net neutrality and strict rules for the blocking and slowing of Internet services.¹⁷ The Netherlands, Slovenia, the United Kingdom, and Norway, among others, have enshrined meaningful net neutrality protections through legislation or regulation,¹⁸ and France and Germany are currently considering

¹² For a discussion of the overlap between interconnection and network neutrality issues, see Marvin Ammori, *Interconnection Disputes Are Network Neutrality Issues (of Netflix, Comcast, and the FCC)*, CIRCLEID (Apr. 07, 2014, 9:39 AM PST), http://www.circleid.com/posts/20140407_interconnection_disputes_are_network_neutrality_issues.

¹³ The United States is by far the most litigious member of the Dispute Settlement Body and has been the complainant in 107 disputes and respondent in 121. *WTO Disputes By Country/Territory*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited Nov. 20, 2014). See also Veijo Heiskanen, *The Relation of International and Municipal Law*, 1 FINNISH Y.B. INT'L L. 154, 154-57 (1990); John J. Barcelo, *The Status of WTO Rules in U.S. Law*, CORNELL L. FACULTY PUBL'NS, Paper 36, 2006.

¹⁴ Thomas Sparrow, *Behind the Scenes of Latin America's 'Internet Brain'*, BBC (Jan. 30, 2013, 20:43 ET), <http://www.bbc.com/news/technology-21178983>.

¹⁵ Professor Alberto Cerda, Panel Presentation, George Washington University Conference on Net Neutrality and Global Internet Freedom (Oct. 23, 2014), <http://vimeo.com/user9108723/review/113398905/df1b1d2334> (Net Neutrality Around the World Panel, min. 35 – 39).

¹⁶ Foo Yun Chee, *EU Parliament Votes to End Roaming, Protect 'Net Neutrality'*, REUTERS (Apr. 3, 2014 2:59 PM), <http://uk.reuters.com/article/2014/04/03/us-eu-telecommunications-parliament-idUKBREA320S520140403>.

¹⁷ Olivia Solon, *Victory for Net Neutrality in European Parliament*, WIRED (Apr. 3, 2014), <http://www.wired.co.uk/news/archive/2014-04/03/eu-net-neutrality-victory>.

¹⁸ Reagan MacDonald & Giusy Cannella, *Net Neutrality: Ending Network Discrimination in Europe*, in THE VALUE OF NETWORK NEUTRALITY FOR THE INTERNET OF TOMORROW 46, 47 (Luca Belì & Primavera De Filippi eds., 2014).

similar legislation.¹⁹

It is no stretch of the imagination to claim that significant dissonance in net neutrality rules between the United States and major trading partners in Latin America and Europe would set the stage for possible, if not probable, disputes. Under WTO rules, “[a] dispute arises when one country adopts a trade policy measure or takes some action that one or more fellow-WTO members considers to be breaking the WTO agreements, or to be a failure to live up to obligations.”²⁰ Indeed, the United States has engaged the WTO Dispute Settlement Body on behalf of its own interconnection interests. In 2000, the United States made several claims against Mexico based on Mexico’s Schedule of Commitments, which include the BATS Reference Paper.²¹ In 2004, a WTO panel concluded that Mexico had violated its GATS commitments by failing “to ensure interconnection at cost-oriented rates,” failing to “prevent anti-competitive practices by firms that are major telecoms suppliers,” and failing “to ensure reasonable and non-discriminatory access to and use of telecommunications networks.”²² In response to the WTO panel’s findings, Mexico has now complied with the panel report to the satisfaction of both the WTO Dispute Settlement Body and the United States.²³

In sum, several factors weigh against the Proposed Rules and in favor of enforcing strong net neutrality rules in compliance with U.S. obligations under the GATS and the BATS. The United States has not been shy in utilizing the WTO Dispute Settlement Body to further its own telecommunications interests. Accordingly, the United States could hardly claim surprise if and when other member states follow suit, were the United States to adopt rules that were inconsistent with the nondiscrimination obligations for foreign IP-based services required by the aforementioned trade agreements.

International Human Rights Norms Violated by a U.S. Failure to Adopt Strong Net Neutrality Rules

The FCC’s Proposed Rules, or any others like them, would violate the United States’ legal duties under its international human rights obligations to promote and protect freedom of expression in a non-discriminatory manner. Allowing broadband providers to accord differentiated or discriminatory treatment to Internet traffic would impermissibly impinge on the rights of all persons to equally seek, receive, and impart information, ideas, and opinions in the media of their choice.²⁴ If enacted, the Proposed Rules, or others like

¹⁹ *Id.*; Christopher T. Marsden, *Net Neutrality: Past Policy, Present Proposals, Future Regulation?*, in THE VALUE OF NETWORK NEUTRALITY FOR THE INTERNET OF TOMORROW 76, 83-84 (Luca Belì & Primavera De Filippi eds., 2014).

²⁰ Understanding the WTO: Settling Disputes, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm (last visited Dec. 6, 2014).

²¹ *Mexico – Measures Affecting Telecommunications Services*, WORLD TRADE ORGANIZATION http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds204_e.htm (last visited Nov. 14, 2014).

²² *Id.*

²³ *Id.*

²⁴ *See, e.g.*, Universal Declaration of Human Rights, art 19, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), available at <http://www.un.org/en/documents/udhr/> [hereinafter UDHR]; International Covenant on Civil and Political Rights, art. 19, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [hereinafter ICCPR]; American Declaration of the Rights and Duties of Man, art. 4, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), available at <https://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm> [hereinafter ADHR].

them, would leave the United States vulnerable in the human rights arena to legal actions not just by other nations, but also by affected individuals and non-governmental organizations (NGOs).

The United States is bound to respect and protect freedom of expression in a non-discriminatory manner, *inter alia*, under the United Nations' International Covenant on Civil and Political Rights (ICCPR) and the American Declaration of the Rights and Duties of Man (ADHR).²⁵ Both the ICCPR and ADHR enshrine freedom of expression and non-discrimination as fundamental rights that States must promote and protect.²⁶ Freedom of expression is the right to seek, receive, and impart information, ideas, and opinions "through any media and regardless of frontiers."²⁷ It is well settled that this right is protected equally online as it is offline.²⁸ Accordingly, "the treatment of Internet data and traffic [cannot be] based on the device, content, author, origin and/or destination of the content, service or application."²⁹ States "should take all necessary steps to foster the independence of [the Internet] and to ensure access of individuals thereto."³⁰

The FCC's Proposed Rules would operate as an impermissible restriction on freedom of expression by making access to certain kinds of content more difficult for some users, based on a prioritization of services due to the privileged socio-economic status of the content provider. Only those companies and organizations with deep enough pockets will be able to afford to pay for "fast lanes," making their information, ideas, and opinions more readily accessible to Internet users, while less well-funded information, ideas, and opinions will be relegated to "slow lanes."³¹ Similarly, the ability to access information, also an important component of freedom of expression, may be curtailed for those users who cannot or choose not to pay the premiums likely to be associated with access to those "fast lanes."

²⁵ Having ratified the ICCPR, the United States is a party to that treaty. The ADHR is binding on all Member States of the Organization of American States by virtue of their membership in that Organization and the OAS Charter. See Human Rights Council, *Compilation Prepared by the Office of the High Commissioner for Human Rights: United States of America*, Aug. 12, 2010, A/HRC/WG.6/9/USA/2, available at http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/A_HRC_WG.6_9_USA_2_United%20States%20of%20America_eng.pdf. Charter Signatories and Ratifications, ORGANIZATION OF AMERICAN STATES, http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States_sign.htm (last visited Dec. 6, 2014). See also Dawn Carla Nunziato, *The U.S. Federal Communications Commission's Proposed Rulemaking in the Matter of Protecting and Promoting the Open Internet*, 3-4, May 15, 2014, available at <http://www.osce.org/fom/119819?download=true> (describing "commitment by OSCE Participating States to freedom of expression ... as protected by international instruments").

²⁶ ICCPR, *supra* note 24, arts. 2, 19, 26; ADHR, *supra* note 24, arts. 2, 4.

²⁷ UDHR, *supra* note 24, art. 19; ICCPR, *supra* note 24, art. 19; ADHR, *supra* note 24, art. 4.

²⁸ Human Rights Council Res. 20/8, *The Promotion, Protection and Enjoyment of Human Rights on the Internet*, 20th Sess., June 29, 2013, A/HRC/20/L.13, ¶ 1 (stating that "the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice"), available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session20/Pages/ResDecStat.aspx>.

²⁹ *Joint Declaration on Freedom of Expression and the Internet*, ¶ 5(a), June 1, 2011, available at <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=848>.

³⁰ Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression*, ¶ 15, CCPR/C/GC/34 (Sept. 12, 2011), available at <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

³¹ See Yancy Strickler, *FCC's 'Fast Lane' Internet Plan Threatens Free Exchange of Ideas*, THE WASHINGTON POST, July 4, 2014, http://www.washingtonpost.com/opinions/kickstarter-ceo-fccs-fast-lane-internet-plan-threatens-free-exchange-of-ideas/2014/07/04/a52ffd2a-fcbc-11e3-932c-0a55b81f48ce_story.html.

Although a State may under certain circumstances place some restrictions on freedom of expression, it may do so only if it meets certain criteria. Any proposed restrictions must (a) be “provided by law;”³² (b) for a legitimate aim such as national security, public order, or public health and morals;³³ and (c) must be proportional and necessary as well as “directly related to the specific need on which they are predicated.”³⁴ Imposing economic disadvantages on unpopular or poorly funded content providers -- which is a likely outcome under the FCC's Proposed Rules -- is not a legitimate rationale recognized by international law (or by First Amendment law) for restricting users’ freedom of expression.

Furthermore, the FCC’s Proposed Rules, or other rules substantially like them, would discriminate against content providers based on their socio-economic status, which is not permitted under international law (or under First Amendment law). Legal restrictions on fundamental rights, even if adopted in law for a legitimate reason, may not discriminate on the basis of “any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*.”³⁵ The Proposed Rules would allow for the creation of a two-tiered system favoring content providers who can afford to pay to use the “fast” lanes offered by ISPs. All others would be excluded from the privileged treatment as a result of their socio-economic status.

As in the trade arena, failure to live up to its human rights obligations under international law would expose the United States to legal action by States, as well as by affected individuals and NGOs. These actions can take the form of complaints or hearings at the Inter-American Commission of Human Rights, the body that monitors compliance with the ADHR by OAS member States, or hearings before the United Nations Human Rights Committee, the U.N. body that monitors State compliance with the ICCPR. For these reasons, the FCC should weigh the international consequences of its actions, along with the domestic ones, before enacting rules that would authorize the differential treatment of Internet content based on the economic status of the content creator or the end-user.

Please contact us should you have any questions regarding this letter. Thank you in advance for your consideration.

Sincerely,

/S/

Professor Arturo J. Carrillo

/S/

Professor Dawn C. Nunziato

The George Washington University Law School

³² ICCPR, *supra* note 24, art 19(3).

³³ *Id.*, art. 19(3)(a)-(b).

³⁴ Human Rights Committee, *supra* note 30, at ¶ 22; *see also* ICCPR, *supra* note 24, art. 19(3).

³⁵ ICCPR, *supra* note 24, arts. 2, 26 (emphasis added).

CC:

Commissioners

Mignon Clyburn

Jessica Rosenworcel

Ajit Pai

Michael O’Rielly

Jonathan Sallet

Gigi Sohn

Stephanie Weiner

David Goldman

Rebekah Goodheart