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ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Re: Notice of *Ex Parte* Meeting, Safeguarding and Securing the Open Internet, Docket No. 23-320

Dear Ms. Dortch:

On Tuesday, April 23, 2024, I received a telephone call from Ramesh Nagarajan, Chief Legal Advisor to Chairwoman Jessica Rosenworcel. The ex parte presentation summarized in this notification is exempt and thus permitted under Section 1.1204(a)(10) of the Commission's rules, which permits presentations to be made when "requested by . . . the Commission or staff for the clarification or adduction of evidence, or for resolution of issues." See 47 C.F.R. § 1.1204(a)(10); see also id. § 1.1203(a)(1) (citing Section 1.1204(a) exemptions to the Sunshine period prohibition). The notification is filed today in accordance with Section 1.1206(b)(2)(v) of the rules, which stipulates same-day filing for notifications of permitted ex parte presentations made during this period. See id. §§ 1.1204(a)(10)(iii); 1.1206(b)(2)(v).

We discussed the importance of maintaining the nature of the no-throttling rule as a brightline rule. My presentation was in line with my prior filings in this proceeding, including recent ex parte filings filed on April 19 and April 22.

I urged the Commission to maintain the no-throttling rule as a bright-line rule and clarify in the final Order that speeding up or providing other preferential treatment to some apps or categories of apps necessarily degrades or impairs other apps.

I reiterated that net neutrality proponents generally use the term "speeding up" or "fast lanes" as a catch all for various forms of preferential treatment that improve the performance of the traffic to which it is applied, including the provision of quality of service that improves throughput (speed), delay (latency), and/or packet loss.[1]

[1] van Schewick April 19 ex parte filing, pp. 5-6.

The 2015 no-throttling rule, is a brightline rule. It explicitly prohibited ISPs from "impair[ing] or degrad[ing]" apps or kinds of apps. I reiterated that preferential treatment of some apps or categories of apps necessarily "impairs or degrades" other content, applications, or services not given the same treatment and referenced the April 19 filing by Professors Scott Jordan and Jon Peha's ex parte letter on this topic.

Finally, I noted that the no-throttling rule rightly prohibits ISPs from impairing or degrading apps or classes of apps. As I explained in my April 22 ex parte filing, allowing ISPs to discriminate among classes of apps is just as harmful from a net neutrality perspective as allowing them to discriminate among applications in a class. By contrast, application-agnostic discrimination does not raise similar concerns.

That's why strong net neutrality regimes, including the 2015 no-throttling rule, prohibit ISPs from discriminating, positively or negatively, among applications or classes of applications, but allow ISPs to engage in application-agnostic discrimination. I stressed the importance of maintaining this distinction in the 2024 no-throttling rule.

I summarized the more extended discussion of the rationale for also prohibiting discrimination among classes of applications, while allowing application-agnostic discrimination in my Stanford Law Review article, which I submitted as an attachment to my ex parte filing on April 23.[2]

Pursuant to Section 1.1206 of the Commission's rules, this reply letter is being filed in ECFS. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Barbara van Schewick

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[2] van Schewick, 2015, Net Neutrality and Quality of Service, Stanford Law Review, submitted as an attachment to April 22 ex parte, pp. 102-124 (discussing the problems with allowing class-based discrimination) and pp. 123-143 (discussing the rationale for prohibiting ISPs to discriminating among applications and classes of applications, but allowing them to engage in application-agnostic discrimination – just as the no-throttling rule does).