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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 April 17, I met by video conference with Ramesh Nagarajan, Chairwoman Rosenworcel's Chief Legal Advisor, and, separately, with the staff copied on this letter regarding the proceeding referenced above. I participated in the meeting in my personal capacity.

The meeting with Ramesh Nagarajan focused on non-BIAS data services and preemption. The meeting with bureau staff focused on the no-throttling rule.

On April 18, I met by video conference with Hayley Steffen, Legal Advisor for Wireline and Space for Commissioner Gomez, and, separately, with Justin Faulb, Chief of Staff and Legal Advisor for Wireline and National Security for Commissioner Starks, regarding the proceeding referenced above. I participated in the meeting in my personal capacity. In both meetings, I discussed the no-throttling rule and, briefly, video throttling.

I noticed that my name is misspelled 'Shewick' in a number of places throughout the draft order; I hope this can be corrected in the final order.

## Non-BIAS data services

We discussed the draft order's section on non-BIAS data services. I expressed my strong support for reinstating the language from the 2015 Order that "If we determine that a particular service is providing the functional equivalent of BIAS or is being used to evade the protections set forth in these rules, we will take appropriate action." (para. 196). I noted that the 2015 Order stated that the Commission would "vigilantly watch for such abuse"[1] and "act

[1] 2015 Open Internet Order, para. 35.

decisively"[2] and "take appropriate enforcement action,"[3] if a particular non-BIAS data service violated these requirements. I suggested reinstating this language.

In line with prior filings in this proceeding, I strongly support the decision to clarify when providing Quality of Service to applications, content, and services as part of a non-BIAS data service evades the Open Internet protections. In recent filings, CTIA suggests that language that suggests that alleged non-BIAS data services that offer quality of service to applications, content, and services whose quality of service requirements can be met over BIAS consistent with open internet protections would likely be found to evade the Open Internet protections is "a dramatic shift from the 2015 framework." I disagree with that characterization. As the draft order recognizes, the 2015 Order clearly stated multiple times that it would "take appropriate enforcement action" if an alleged non-BIAS data service was found to evade the Open Internet protections. In 2015, it was not necessary to clarify further when providing quality of service to content, applications, or services as a non-BIAS data service would be found to evade the Open Internet protections. However, as explained in more detail in prior filings, the emergence of 5G network slicing has created a need for clarification of this question.

As described in earlier filings, the framework for evaluating evasion flows directly from the need to prevent ISPs from circumventing the Open Internet rules. The Open Internet protections establish a nuanced framework for the provision of quality of service. As explained elsewhere, it is possible to offer quality of service as part of BIAS in a way that is consistent with Open Internet principles, and we have asked the FCC to clarify this. In particular, if the ISP does not limit which applications or categories of applications can use the different type of service (e.g., a low-latency service) and the end user selects whether, when, and for which applications to use this type of service, such offerings do not violate the no-throttling rule. If the ISP does not charge the application provider for the provision of the different type of service, they don't violate the no-paid prioritization rule, either.

By contrast, offerings where the ISP selects which apps or categories of apps receive a better quality of service would violate core net neutrality principles and should be prohibited by the no-throttling rule.

If an ISP could offer quality of service to applications whose objective quality of service requirements can be met over BIAS consistent with the Open Internet rules without being subject to these protections by offering the quality of service as part of a non-BIAS data service, this nuanced framework would be meaningless.

By contrast, non-BIAS data services that provide quality of service to applications whose objective quality of service requirements cannot be met over BIAS consistent with the Open Internet protections, including via the application-agnostic, user-controlled, and user-

[2] 2015 Open Internet Order, para. 207.

[3] 2015 Open Internet Order, para. 210.

paid quality of service, do not raise the same problem, since the meets of these applications cannot be met over BIAS.

Thus, the clarification of evasion provided in the draft order strikes the right balance. It prevents ISPs from evading the Open Internet protections by offering quality of service to applications whose objective quality of service requirements can be met over BIAS, consistent with Open Internet principles, while allowing applications to emerge whose quality of service requirements cannot be met over BIAS.

CTIA is thus wrong that the Commission's framework reduces consumer choice or reduces their ability to chose tailored offerings. Instead, allowing users to decide which applications should receive quality of service better meets user needs than letting ISPs make that choice. Needs may vary across different users, and even for the same user over time. For example, if I'm chatting with a friend on a video call, I don't mind an occasional glitch, but when I'm doing a job interview by video conference, I need excellent quality. ISPs have no way of knowing what is most important to a specific user at a specific moment in time.

CTIA provides the example of a medical app that "could function over BIAS, but a patient may reasonably prefer that app be delivered over a low latency non-BIAS network slice." Under the framework established by the draft order, the ISP is free to offer a low latency service as part of BIAS that is open to all applications and categories of applications. The patient above might use it for its medical app, a web designer might use it to collaborate on a design job with a colleague in real time using Figma, and an avid gamer might use it for a first-person shooter game. But by offering the low-latency service over BIAS consistent with Open Internet protections, all apps and categories of apps can benefit from the low-latency service – not just the apps or categories of apps selected by the ISP.

We discussed the example of "a network slice used for video-conferencing" as an example of evasion of the open internet protections for BIAS. I noted that the phrase "if the video conferencing provider is paying the BIAS provider for prioritized delivery" could potentially be interpreted as establishing an additional requirement for evasion and suggested ways of clarifying that this is not the intention such as, e.g., including the word "including if … the video conferencing provider is paying …."

We discussed the sentence "We will be watchful of services that do not require isolated capacity to enable or ensure a specific functionality or level of service quality that cannot be met over the open Internet." (para. 196) I noted that it is difficult to parse how the different components of the sentence (isolated capacity on the one hand and quality of service requirements on the other hand) relate to each other. I suggested replacing this sentence with a sentence that matches more clearly the content of the filings quoted in the footnote accompanying this sentence:

> "To ensure non-BIAS data services are not used to evade our Open Internet rules, we will closely monitor non-BIAS data services supporting applications, content, or services that require a specific level of quality of service to ensure that the quality of

> service is objectively necessary for the specific type of application, content, or service and cannot be met over a well-provisioned BIAS."

This language captures the concepts that are already embedded in the draft order's discussion of what constitutes evasion in a way that is clear and administrable.

We discussed the order's guidance related to the impact of non-BIAS data services on the performance and capacity of BIAS. CTIA's filings claims that "the 2015 Order did not set forth any of these rigid warnings." However, both the 2010 and 2015 Order addressed the potential negative impact of non-BIAS data services on BIAS in various ways.

First, according to the 2015 Order, "permissible non-BIAS data services generally "use some form of network management to **isolate the capacity used by these services from that used by broadband internet access,**" which prevents non-BIAS data services from negatively affecting the capacity available for and the performance of BIAS. As the joint OTI, PK, van Schewick, and Jordan filing explained, it is more efficient to forego the requirement of capacity isolation and directly focus on the impact of non-BIAS services on the performance of BIAS in the moment and on the capacity available for BIAS over time. But this doesn't change the fact that this 2015 characteristic directly protected both the capacity and performance of BIAS from degradation by any permissible non-BIAS data services.

Second, the 2015 Order noted clearly that "[W]e will closely monitor the development and use of non-BIAS data services and **have authority to intervene** if these services are utilized in a manner that **harms the open Internet**," (para. 213) and explained that the transparency obligations would aid it in doing so. The Commission has expressed concerns that non-BIAS data services might negatively affect the performance of and capacity for BIAS since 2010, and has explicitly connected such concerns to harms to the Open Internet.[4] Similarly, as the NPRM recognized, ensuring "that consumers be able to use their BIAS connections without degradation" is a key goal of the 2024 Open Internet Order:[5]

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[4] See, e.g., 2010 Open Internet Order, para. 112 ("broadband providers may constrict or fail to continue expanding network capacity allocated to broadband Internet access service to provide more capacity for specialized services. If this occurs, and particularly to the extent specialized services grow as substitutes for the delivery of content, applications, and services over broadband Internet access service, the Internet may wither as an open platform for competition, innovation, and free expression. These concerns may be exacerbated by consumers' limited choices for broadband providers, which may leave some end users unable to effectively exercise their preferences for broadband Internet access service (or content, applications, or services available through broadband Internet access service) over specialized services." Footnotes omitted), para. 114 ("We will closely monitor the robustness and affordability of broadband Internet access services, with a particular focus on any signs that specialized services are in any way retarding the growth of or constricting capacity available for broadband Internet access service. We fully expect that broadband providers will increase capacity offered for broadband Internet access service if they expand network capacity to accommodate specialized services. We would be concerned if capacity for broadband Internet access service did not keep pace.").

[5] See, e.g., 2023 Open Internet NPRM, para.117 ("Above, we express our belief that consumers perceive and use BIAS as an essential service, critical to accessing healthcare, education, work, commerce, and civic engagement. Because of its importance, we further believe *it is paramount that consumers be able to use their BIAS connections without degradation due to* blocking, throttling, paid prioritization, *or other harmful conduct*." Emphasis added); ibid., para. 148 ("The last several years have demonstrated not only broadband's

ISPs might interfere with consumers' ability to use their BIAS without degradation "through blocking, throttling, paid prioritization, or *other harmful conduct*."

Degrading the performance of BIAS via non-BIAS data services thus harms the Open Internet. I suggest making this connection explicit in the non-BIAS data service section by including something like "We recognize that properly categorized non-BIAS data services might harm the open internet by interfering with consumers' ability to use BIAS without degradation (Fn)" before discussing the monitoring of non-BIAS data service.

Finally, in the 2015 Order, the FCC repeatedly noted that it would intervene if non-BIAS data services were used in a manner that harms the Open Internet. I recommended reinstating this important language in the non-BIAS data services section.

We also discussed the section on network slicing.

First, as I noted in a recent ex parte filing, para. 201 mischaracterizes my and other commenters' positions on how to evaluate network slicing under the Open Internet framework.[6] I urged the Commission to correct this mischaracterization and suggested the following potential changes:

"201. Commenters raising concerns about implications of network slicing, however, ask us to clarify that network slicing or the services delivered through network slicing may or may not be non-BIAS data services, and that such services and practices must be analyzed under our conduct rules, if they are not non-BIAS data services."

Finally, I noted that the current language in the section on network slicing does not match the language in the section on non-BIAS data services and suggested the following changes to paragraph 202 for consistency:

"And to the extent uses of network slicing fall outside of BIAS, we will closely monitor these uses to ensure that they are not providing the functional equivalent of BIAS, are not being used to evade our open Internet rules, and are not otherwise undermining investment, innovation, competition, or end-user benefits in the Internet ecosystem or harming the open internet in other ways."

"We will also monitor to ensure that non-BIAS data services enabled by network slicing do not negatively affect the performance of BIAS in any given moment or the capacity available for BIAS over time."

## No-throttling rule

We discussed the draft order's approach to the no-throttling rule with respect to speeding up apps and classes of apps. Net neutrality proponents generally use the term "speeding up" or "fast lanes" as a catch all for various forms of preferential treatment that

essential value, but also the consequences to consumers of its absence or degradation, and we therefore believe it important to establish clear, bright-line rules.")

[6] van Schewick, Notice of Ex parte meeting with Ramesh Nagarajan dated April 19, 2024, pp. 2-4.

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.

The 2015 no-throttling rule, was a brightline rule. It explicitly prohibited ISPs from "impair[ing] or degrad[ing]" apps or kinds of apps.

Before the publication of the draft order, commenters asked the FCC to clarify, in the Order, that the no-throttling rule also prohibits ISPs from speeding up or providing other preferential treatment to select apps or classes of apps. The draft order characterized these requests as a "request to *modify the rule* to explicitly include positive and negative discrimination of content" (para. 492), which it explicitly declined. However, commenters did not ask the Commission to modify the rule. They asked for a clarification *in the order*.[7]

Commenters requesting the clarification argue that the 2015 no-throttling rule *implicitly* prohibited ISPs from speeding up apps or classes of apps. That's because preferential treatment of some apps necessarily "impairs or degrades" other content, applications, or services not given the same treatment, either technically or economically. Thus, commenters ask the Commission to make this implicit understanding explicit.

Commissioner statements at the time suggest that Commissioners understood the no-throttling rule in this way, too. Similarly, the no-throttling rules in President Obama's 2014 NN proposal and Republican NN bills at the time prohibited both speeding up and slowing down of apps, suggesting that the term "throttling" at the time was understood to encompass both positive and negative forms of differential treatment.

Instead, the 2024 draft order changes the brightline rule, which clearly prohibits conduct, to a new, vague, and undefined case-by-case standard for speeding up apps and classes of apps. As I explained in the meeting, that fundamentally changes the character of the no-throttling rule as a brightline rule. The no-throttling rule is violated if an ISP impairs or degrades apps or classes of apps (subject to reasonable network management). If the practice impairs or degrades apps or classes of apps, that establishes the violation; there is no inquiry whether the impairment or degradation is reasonable. That's the nature of the brightline rule. In 2015, the Commission decided that impairing or degrading apps or classes of apps is always unreasonable (subject to reasonable network management); that's why it adopted a brightline rule.[8] Asking whether a BIAS provider's decision to speed up certain apps is "unreasonably discriminatory", as para. 492 suggests, changes the brightline no-throttling rule into a case-by-case standard for speeding up. That kind of inquiry is incompatible with a brightline rule.

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[7] van Schewick, 2024, Clarifying the No-Throttling Rule, p. 1 ("However, the 2015 Open Internet Order implicitly prohibited ISPs from favoring apps or classes of apps over others, and the FCC should clarify that its proposed no-throttling rule prohibits ISPs from speeding up and slowing down applications and classes of applications. Clarifying this *in the Order* is critically important.") (emphasis added); Group letter, p. 2 ("Thus, *the new Order* needs to clarify that the no-throttling rule prohibits ISPs from either speeding up *OR* slowing down particular applications and classes of applications.") (emphasis added).

[8] Similarly, Jordan/Peha April 19, 2024 ex parte, p. 3.

The requested clarification has ample support in the record and is consistent with the logic of the 2015 Order.[9] In particular, as Professors Jordan and Peha explain, "[a]s a technical matter, any practice that discriminates on the basis of content, application, service, or device (or classes thereof) almost certainly affects not only one such class but other such classes. Quality-of-Service (QoS) is commonly measured in terms of throughput (speed), delay (latency), and packet loss. Improving any of these QoS measures for one class of applications almost certainly degrades the same QoS measure for at least one other class of applications."[10] The 2015 Open Internet Order recognized this, too: "As several commenters observe, allowing for the purchase of priority treatment can lead to degraded performance—in the form of higher latency, increased risk of packet loss, or, in aggregate, lower bandwidth—for traffic that is not covered by such an arrangement.," citing Mozilla and Sandvine.[11] Nothing in this argument relates to the fact that the prioritization is in exchange for payment.

ISPs argue that the requested clarification would make the ban on paid prioritization meaningless. But that ignores the differences between the no-throttling rule and the paid prioritization rule:[12] The no-throttling rule prohibits ISPs from impairing or degrading apps, subject to reasonable network management. It does not prohibit ISPs from engaging in degradation and impairment that is application-agnostic – such as providing a different type of quality of service that is open to all apps and classes of apps and where users, through their apps, signal each data packets desired quality of service to the network.

By contrast, the ban on paid prioritization is not limited to preferential treatment that is limited to specific apps or classes of apps. An ISP may not charge application providers for a fast lane to the ISP's customers. This ban applies whether the ISP offers the fast lane only to Netflix, only to online video services, or to all apps and kinds of apps that are willing to pay. Contrary to the no-throttling rule, the ban on paid prioritization does not have an exception for reasonable network management. These differences are driving by the different policy concerns underlying the prohibition: The no-throttling rule is driven by the concern that an ISP may pick winners and losers by treating some apps or kinds of apps differently from others. By contrast, the ban on paid prioritization is based on the rationale that allowing some apps to pay for preferential treatment makes it harder for companies and speakers that cannot afford to pay to compete to and be heard. These are very different concerns, resulting in very different brightline rules.

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[9] For a more extended discussion, see also van Schewick, 2024, Clarifying the no-throttling rule, April 2, 2024 submitted as an attachment to an ex parte letter April 2.

[10] Jordan/Peha April 19, 2024 ex parte, p. 4.

[11] See 2015 Open Internet Order, para. 125, citing comments by Mozilla and Sandvine ("Fn. 287 See Mozilla Comments at 20 ("Prioritization is inherently a zero-sum practice, and inherently creates fast and slow lanes and prevents a level playing field."); Mozilla Reply at 15; Sandvine Comments at 9 ("At a moment in time, there is a fixed amount of bandwidth available to all applications, content, etc. on a given network. If one application has paid for more of that bandwidth (and this is how the priority is achieved) then there is less 'best efforts' bandwidth remaining for all other applications and content.").").

[12] See also Jordan/Peha, April 29 ex parte, p. 3.

We discussed the harms associated with plans that allow ISPs to determine which apps or classes of apps get to be in a fast lane as laid out in the attached slide deck.

As startups Outpost and Quiet explained in a recent ex parte, for affected applications, slowing down some apps has the same effect as speeding up other apps. Some apps work better than others, making it harder for the other applications to compete.[13]

Finally, we discussed that many applications benefit from improvements in latency, and the reduced latency for apps excluded from the low-latency lane degrades the performance of many apps, including websites or cloud-based AI services.[14]

## Preemption

Factual correction to paragraph 271: The California law **has been enforceable** since early **2021**, so the Commission should change the words "in effect" (the law was in effect since 2019, but by agreement of the parties not enforced until early 2021) to "enforceable," and change the year from "2022" to "2021."

Consistency of language: The Commission generally carefully refers to state laws subject to potential preemption as those that "interfere" or are "incompatible" with the federal framework. *See*, e.*g.* paragraphs 3, 264, 265, 269, 271, 272, 638. This language should be used consistently throughout the document (*e.g.* in paragraphs 270 and 638) instead of other terms that are vaguer and hence susceptible to misinterpretation, and so that it doesn't inadvertently give the impression that there are different standards in different paragraphs.

The Commission should reject the case citation USTelecom suggests adding to paragraph 267 and footnote 1111. *Ting* is not the appropriate case to cite here because at issue in *Ting* were state laws of general applicability (i.e. laws that generally apply to all businesses, like contract law and false advertising law), whereas the state net neutrality laws at issue here, like the Commission's proposed net neutrality rules, are not laws of general applicability, but are instead specific to BIAS provider misconduct. Such misconduct is not limited to just addressing deceptive advertising, billing, etc. ancillary to the provision of broadband, but also includes the type of discriminatory, anti-competitive broadband provider misconduct addressed by state net neutrality laws.

Therefore, including this citation is not only inapt, but could create unnecessary confusion. If the Commission wishes to clarify something here, it could simply delete the word "intrastate" in the phrase immediately before footnote 1111, and delete footnote 1111. This would clarify that the Commission is referring to BIAS provider conduct with respect to customers in a given state (and not just to laws of general applicability, or to "intrastate" communications, i.e. those where both end points are in a single state, neither of which are at issue here).

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[13] Outpost/Quiet, 2024 April 18 ex parte filing.

[14] See Outpost/Quiet filing.

The Commission should reject comments that imply its jurisdiction over interstate communications is exclusive, or that states are in any way limited to intrastate communications, as both of these are contrary to the Communications Act and the case law. These representations are contrary to the express terms of the Communications Act as well as to the case law. States regulate the misconduct of providers of services to customers in their state, and that includes BIAS providers. Whether the conduct involves communications that are interstate or intrastate is irrelevant. The ISPs and their trade associations throughout their filings consistently confuse the Commission's general jurisdiction over interstate communications (and lack of jurisdiction over intrastate communications) with the fact that the Commission's jurisdiction over interstate communications is not exclusive, and that nothing in the Communications Act limits the states to intrastate communications. The only limitations on states in the Act are set forth explicitly, given that the purpose of the Communications Act is to delineate the *Commission*'s jurisdiction, whereas state police powers are *independent* of the Communications Act. Congress thought very carefully about preemption in the Communications Act, and expressed its intent often in granular detail about what should be preempted, and even what should be the scope and manner of any preemption,[15] leaving the states' historic police powers otherwise intact. Moreover, Congress was explicit when it intended the Commission's jurisdiction to be exclusive.[16]

The ISP trade associations sidestep these axiomatic principles and solid record by (a) making the exact same arguments that were rejected by both the D.C. Circuit in *Mozilla v FCC*,[17] and the 9th Circuit in *ACA v Bonta*,[18],[19] and (b) relying on a district court case (*New York State Telecommunications Association v James, "NYSTA"*) that is an outlier and on appeal to the Second Circuit.[20] Due to an inordinately expedited timeline, the district court opinion in *NYSTA* was filed only three weeks after the briefing concluded .[21]

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[15] See, e.g., 47 U.S.C. §§ 223(f)(2), 230(e)(3), 253(a), 253(d), 276(c), 543(a)(1), 544(e), 556(c). "Congress's enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Cipollone v. Liggett Grp., Inc*., 505 U.S. 504, 518 (1992). Legislative history suggests that these provisions were extensively negotiated. *See, e.g.*, H.R. Rep. No. 104-458, at 201, 210 (1996). In some instances, Congress even expressed limits on how agency preemption, even when authorized, was to be exercised. *E.g*. 47 U.S.C. 253(d) (case by case after notice and comment).

[16] E.g. 47 U.S.C. § 303(v).

[17] *Mozilla Corporation v. Federal Communications Commission*, 940 F.3d 1, 74-86 (D.C. Cir. 2019).

[18] *ACA Connects et al. v. Bonta*, 24 F.4th 1233 (9th Cir. 2022).

[19] E.g. CTIA comments at 103-104 (arguments rejected in both *Mozilla* and *ACA v Bonta),* 109-110 (arguments rejected in *ACA v Bonta*).

[20] E.g. CTIA comments at 105-106, 110. Apparently, the associations are concerned that the Second Circuit will reverse, because a few days before filing their comments they wrote to the court in a veiled attempt to get it to delay its decision until after the Commission issues its Order in this proceeding. Corrected FRAP 28(j) Letter, *New York State Telecommunications Assoc., Inc. et al v. James*, No. 21-1975 (2d Cir. Dec. 8, 2023).

[21] As the law was to go into effect on June 15, 2021, the court scheduled the briefing and hearing as follows: ISP associations' opening brief on May 6, 2021, state's brief on May 17, 2021 (giving state counsel 11 days to brief the multiple complex issues), ISP associations' reply brief on May 21, 2021, hearing on June 4 by telephone, decision filed on June 11, 2021.

This rushed decision conflicts with the reasoning of every other court that has considered these issues, from the D.C. Circuit's considered opinion in *Mozilla*, to the Ninth Circuit's considered opinion in *ACA v Bonta*, to Maine District Court Judge Lance E. Walker's considered opinion in *ACA Connects et al v. Frey.*[22] While the ISP associations describe the 9th circuit's decision in *ACA v Bonta* as "erroneous,"[23] not a single judge there voted to hear their petition for rehearing,[24] and the associations apparently assessed that the Supreme Court wouldn't agree with them either, because they elected not to file a petition for certiorari. Similarly, they criticize *Mozilla*'s preemption decision and refer to it as both "unpersuasive"[25] and "wrongly" rejecting their preemption arguments,[26] but here again, they elected not to file a petition for certiorari on their preemption loss in *Mozilla*.

The Commission should reject comments that imply there is a patchwork because there is no patchwork. Current state net neutrality laws are consistent with the Commission's 2015 Order and the draft 2024 Order, and they have existed since 2018 with no evidence that they have been a burdensome "patchwork".[27] The NPRM lists state net neutrality laws (some were Executive Orders), from only ten states.[28] Most of these are simply subsets of the Commission's 2015 rules.[29] California's law is more detailed, but the additional detail

[22] 471 F.Supp. 3d 318, 323-326 (D. Maine 2020).

[23] E.g. CTIA comments at 110, n. 463.

[24] Order Den. Pet. for Reh'g en banc, *ACA Connects, et al v Rob Bonta*, No. 21-15430 (9th Cir. April 20, 2022), ECF No. 82.

[25] E.g. CTIA at 106.

[26] E.g. CTIA comments at 108, n. 454.

[27] Thus, ISP speculation that there will be a 50-state race to the bottom to regulate in the future if states aren't preempted is unfounded.

[28] NPRM n. 91.

[29] E.g. N.J. Exec. Order No. 9 (2018), https://nj.gov/infobank/eo/056murphy/pdf/EO-9.pdf (contains the five rules in the 2015 Order (no blocking, no throttling, no paid prioritization, a general conduct rule, and a transparency rule); N.Y. Exec. Order No. 175 (2018)( contains three of the five rules in the 2015 Order (no blocking, no throttling, no paid prioritization; also includes a ban on application-specific differential pricing which would have been subject to the general conduct rule in the 2015 Order – as the New York Executive Order does not have a general conduct rule, it needed to include this protection explicitly); R.I. Exec. Order No. 18-02 (2018), https://governor.ri.gov/executive-orders/executive-order-18-02 (contains four of the five rules in the 2015 order (no blocking, no throttling, no paid prioritization, and a general conduct rule); Mont. Exec. Order No. 3-2018 (2018), https://spb.mt.gov/_docs/Laws-Rules- EOs/EOs/EO-03-2018-Net-Freedom.pdf (amended by Mont. Exec. Order No. 6-2018 (2018), https://spb.mt.gov/_docs/Laws-Rules-EOs/EOs/EO-06-2018-Amended-Net-Freedom.pdf (contains four of the five rules in the 2015 Order (no blocking, no throttling, no paid prioritization, and a general conduct rule); H.B. 4155, 79th Leg. Assemb., Reg. Sess. (Or. 2018) (contains the five rules in the 2015 order (no blocking, no throttling, no paid prioritization, a general conduct rule, and a transparency rule); LD 1364, 129th Leg., Reg. Sess. (Me. 2019)( contains three of the five rules in the 2015 Order (no blocking, no throttling, and no paid prioritization); S.289, No. 169, 2018 Sess. (Vt. 2018)( contains the five rules in the 2015 order (no blocking, no throttling, no paid prioritization, a general conduct rule and a transparency rule); Colorado S.B. 19-078, 71st Leg., Reg. Sess. (Colo. 2019)( contains four of the five rules in the 2015 Order (no blocking, no throttling, no paid prioritization, and a transparency rule); H.B. 2282, 65th Leg., 2018 Reg. Sess. (Wash. 2018)( contains four of the five rules in the 2015 order (no blocking, no throttling, no paid prioritization, and a transparency rule).

was drawn from the text of the 2015 Order and the Commission's related work.[30] There is no patchwork here.

Dual enforcement is both helpful and the essence of our federalist system. The ISPs repeatedly suggest there is something wrong with both states and the FCC enforcing net neutrality. But as the Supreme Court recently said in *National Pork Producers Council v. Ross*, 598 U.S. 356, 364 (2023), "Companies that choose to sell products in various States must normally comply with the laws of those various States."

In its latest *ex partes*, NCTA suggests that any state enforcement would inevitably be "inconsistent." But the suggestion that there is any problem with dual enforcement is contrary to the approach the FCC has thoughtfully and carefully laid out to working with state laws and enforcement that neither interfere nor are incompatible with the FCC's open internet rules and goals. It is also contrary to U.S. Supreme Court teaching. As the Supreme Court also recently said in *Kansas v Garcia*, 140 S. Ct. 791, 806 (2020), "in the vast majority of cases where federal and state laws overlap, allowing the States to prosecute is entirely consistent with federal interests." As the Commission observes in paragraph 270, state enforcement can dedicate additional resources to monitoring and enforcement, especially at the local level, and thereby ensure greater compliance.

It is important that current state net neutrality laws remain undisturbed in order to provide the Commission with valuable data going forward. In our federalist system, state and federal laws are meant to co-exist. Preemption is the exception, not the rule. There are many good reasons for this. Aside from the benefits of a federalist system in general, one that is particularly salient here is that state laws often provide valuable experience and a roadmap for the development of federal law in an area. Here, for example, California's codification of protections embodied in the Commission's prior work will yield beneficial data regarding the value of the Commission also codifying these protections. Testing out a regulatory approach that might serve as a model for the Commission is a classic example of a state serving as a laboratory of democracy. As the Supreme Court observed, "We have long recognized the role of states as laboratories for devising solutions to difficult legal problems." [31]

These important benefits of state laws that are consistent with the Commission's open internet goals are especially critical here where we have a dynamic industry that rapidly innovates. Congress was well aware of this in the 1996 Telecommunications Act when it left state police powers largely intact except for a few carefully considered preemption provisions that do not apply here. A federal legal framework for net neutrality protections must allow

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[30] E.g. Cal. Civ. Code §§ 3101, 3102 (in addition to the five rules in the 2015 Order, i.e. no blocking, no throttling, no paid prioritization, a general conduct rule, and a transparency rule, contains four provisions drawn from the text of the 2015 Order - a provision on access fees drawn from ¶¶113, 120, a provision on specialized services drawn from ¶¶112, 207, 210, 212, an anti-circumvention provision drawn from ¶¶195, 206, and a provision on harmful forms of zero-rating drawn from ¶¶151-152 and from the Commission's follow up report, https://www.fcc.gov/document/release-report-policy-review-mobile-zero-rating-practices and ongoing investigations before they were aborted by the previous administration).

[31] *Oregon v. Ice*, 555 U.S. 160, 171 (2009).

flexibility to keep pace with technology. States play a critical role in nimbly adapting to real-world circumstances. The reality is that States are better equipped to quickly adjust to the challenges presented by technological innovation that may elude immediate federal oversight, especially states like California that are on the front lines at the heart of technological innovation. The Commission is aware of how long it can take for the Commission or Congress to act to address ISP practices that threaten an open Internet. In such a technologically dynamic and evolving space, states are in the best position to address new practices that develop to threaten the open Internet as soon as they arise.

Even when the Commission can act, opponents use vast resources to employ every tool to get Congress and/or the courts to undo the Commission's work. In the meantime, states that need and value an open Internet must have a stable regime in place in state law to police ISP misconduct to protect their economies, including their businesses both small and large, their governmental entities, encompassing both public discourse and public safety, and their consumers who need an open internet to conduct their affairs every day, from health to education to employment.

In sum, state enforcement is entirely consistent with both having a national framework and promoting the Commission's open internet rules and goals. Moreover, this is entirely consistent with the approach taken in the 2015 Order. There were no state net neutrality laws in 2015. All the Commission did in 2015 was indicate it would review future state laws on a case-by-case basis for compatibility. It's therefore likely the Commission at that time was more concerned about potential state laws that would afford fewer protection to consumers. It was undoubtedly thinking of state rules that would interfere or be incompatible with its open internet rules and goals. That's the same approach the FCC takes here. State laws can be consistent whether or not they are identical, and if they are stronger. The Commission is therefore wise to review them on a case-by case basis when it not only has experience with them, but a record to review.

<u>The Commission might wish to clarify its discussion of the impossibility exception in paragraph 265 and footnote 1102.</u>

The ISPs and their trade associations repeatedly misrepresent the impossibility exception. The fact that broadband may be "interstate for jurisdictional purposes" has nothing to do with the impossibility exception. It just means that broadband is within the Commission's general jurisdiction because it includes an interstate communication by wire or radio. But the Commission still needs regulatory authority over it, which restoring its classification as a telecommunications service under Title II would provide. However, even *with* regulatory authority over the service, the Commission is *still* barred by section 152(b) from regulating, and hence preempting, its intrastate aspects, unless the impossibility exception applies.

The impossibility exception is discussed in *Pub. Serv. Comm'n of Maryland v. FCC*.[32] There are a number of requirements, but the bottom line is that the state rule has to effectively negate the federal rule. (The court specifically noted, for example, that an economic burden on carriers would be insufficient.)[33] While the Commission could likely make such a showing in the case of state rules that are less protective of consumers, it would have a hard time making such a showing in the case of state rules that are as or more protective.

Moreover, even when all the requirements of the impossibility exception are met (where state and federal rules can't "feasibly coexist" because the state rules would "effectively trump the FCC regulations", rendering the federal rules "nugatory", and "negat[ing]" the FCC's exercise of its own lawful authority), so the Commission can preempt something, its preemption cannot be broader than necessary (only what would "necessarily" thwart the federal regulation, and that would be "inconsistent" with the federal requirements, and that hence would "negate" them).[34] The court specifically questioned whether more stringent state requirements would qualify.[35]

The Commission's discussion in paragraph 265 and footnote 1102 of the Draft Order also appears to confuse this issue, and it may wish to adjust its analysis in light of the discussion above. The "impossibility exception"[36] is inapposite here because current state net neutrality rules do not impede federal net neutrality rules the way that, for example, the state VoIP rules in *Minn. PUC* impeded the federal VoIP rules. With respect to *California III*, it was just a follow on to *California I*, discussed above. The court in *California III* merely found that the Commission, on remand, had sufficiently narrowed the preemption that *California I* had held was too broad.

## Video Throttling

I briefly discussed video throttling in the meeting with Justin Faulb and Hayley Steffen. I urged the Commission to reject requests by CTIA and wireless ISPs to make determinations about how to evaluate video throttling under the framework established by the order. The Commission has not built a record in this proceeding to evaluate specific plans.

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[32] *Pub. Serv. Comm'n of Maryland v. FCC,* 909 F.2d 1510, 1515 (D.C. Cir. 1990), discussed in footnote 330 of the NPRM.

[33] *Id.* at 1516. The Court noted specifically that any burden on ISPs from complying with state law is not one of the factors supporting application of the impossibility exception: "We doubt … that the FCC may preempt state regulation on the grounds that … it imposes too great a burden on carriers," observing that in *Louisiana* the fact that the dual state and federal regulatory approach "was burdensome to the carriers …was not sufficient justification for preemption."

[34] *People of the State of Cal. v FCC* (*California I*), 905 F.2d 1217, 1243-1245 (9th Cir. 1990).

[35] *Id*. at 1245.

[36] The" impossibility exception" should not be confused with the impossibility branch of *conflict* preemption, which is when it is impossible to comply with both state and federal law and hence state law automatically gives way.

As a result, it is impossible to evaluate the ISPs' claims that their behavior does not constitute throttling, or that is constitutes reasonable network management.

I did note, however, that the websites of the three largest ISPs clearly and transparently establish that these ISPs provide different speeds to online video than to other kinds of apps, with the exact treatment depending on the plan.

For example, Verizon, according to its website, limits the speed of online video to a fraction of the speed that other traffic gets; the online video provider then detects the low speed and adjusts the resolution of the video accordingly. Thus, Verizon limits the speeds of traffic they identify as video compared to other traffic.

From Verizon's network management disclosure page: https://www.verizon.com/about/our-company/network-management:

"In addition, in order to optimize customers' video viewing experiences on their devices over our 5G, 4G LTE, and All Access Home Internet networks while ensuring a high quality experience for other users of the network, Verizon seeks to transmit video downloads or streams to smartphones at 480p or 720p, depending on the plan, to devices with larger screens at 1080p, on the 5G Home, LTE Home, LTE Home Plus, and All Access Home Internet plans to 1080p, and on the 5G Home Plus plans to 4K, unless a different video resolution is disclosed in the description of a particular plan. This practice does not make any distinction based on the content of the video or the source website. To achieve this optimization, Verizon limits the throughput speeds of such video downloads or streams over our 5G and 4G LTE networks (which may be below the 9-56 Mbps 5G and 4G LTE download speeds typically provided). This practice results in the video provider's content server sending the appropriate resolution video file for that speed, if available. over our 5G and 4G LTE networks (which may be below the 9-56 Mbps 5G and 4G LTE download speeds typically provided), and All Access Home Internet. This practice results in the video provider's content server sending the appropriate resolution video file for that speed, if available."

I attach the slides I used in my presentation with bureau staff, Justin Faulb, and Hayley Steffen.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

Barbara van Schewick

Barbara van Schewick
M. Elizabeth Magill Professor of Law and Professor, by Courtesy, of Electrical Engineering
Director, Stanford Law School Center for Internet and Society

**cc:**
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