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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 15, I met by video conference with Ramesh Nagarajan, Chairwoman Rosenworcel's Chief Legal Advisor, regarding the proceeding referenced above. I participated in the meeting in my personal capacity.

In the meeting, we discussed the draft order's approach to evaluating speeding up apps or classes of apps under the no-throttling rule.

My presentation covered the content of my recent blog post "Harmful 5G fast lanes are coming. The FCC needs to stop them."[1] The blog post is attached to this filing.

As I explained in the meeting, for speeding up and other forms of preferential treatment, the draft order turns the brightline no-throttling rule into a new, vague case-by-case standard.

This opens the door to ISPs' creating fast lanes for select apps or kinds of apps, as long as the application provider does not charge for it. There is no way to predict which kinds of fast lanes the FCC might ultimately find to violate the no-throttling rule. This gives ISPs cover to flood the market with various fast-lane offerings, arguing that their version does not violate the no-throttling rule and daring the FCC to enforce its rule.

This is a real problem. Mobile ISPs have been testing 5G fast lanes for specific apps or kinds of apps. These kinds of ISP-controlled fast lanes violate core net neutrality

[1] van Schewick, 2024, Harmful 5G fast lanes are coming. The FCC has to stop them, Stanford Law School Center for Internet and Society Blog, https://cyberlaw.stanford.edu/blog/2024/04/harmful-5g-fast-lanes-are-coming-fcc-needs-stop-them.

principles and would limit user choice, distort competition, hamper startups, and help cement platform dominance.

I urged the Commission to clarify, in the text of the final Open Internet Order, that the no-throttling rule also prohibits ISPs from speeding up apps or classes of apps.

I also noted that paragraph 201 of the draft order seems to mischaracterize the positions that other commenters and I have taken on how the framework established by the Open Internet Order should treat 5G network slicing.

According to paragraph 201 of the draft order, "[c]ommenters raising concerns about implications of network slicing, however, ask us to clarify that network slicing or the services delivered through network slicing are not non-BIAS data services, and that such services and practices must be analyzed under our conduct rules," citing, in footnote 827, filings by Open Technology Institute at New America, INCOMPAS, and me.

This statement does not accurately reflect our positions. Our positions are much more nuanced.

In line with earlier filings in this proceeding, I repeated my position that network slicing as a technology is neither harmful nor beneficial. It's simply another way to treat some applications differently than others and should be evaluated under the same rules as other forms of differential treatment.[2]

5G network slicing is nothing new.[3]

Network slicing lets ISPs differentiate between apps and wall off different parts of the network from others. Thus, a 5G network slice is just another way to treat some internet traffic differently than others – it's a 5G fast lane.

But ISPs have long been able to treat internet traffic differently. 5G simply makes it easier for mobile ISPs to differentiate traffic, even as the explosion in capacity reduces the need to do so.

How to deal with technology that lets ISPs treat traffic differently is not a new question, either. Distinguishing between socially harmful and socially beneficial discrimination ISPs is the essence of net neutrality.[4]

Meaningful net neutrality protections ban socially harmful discrimination and encourage socially beneficial ones. Which technology an ISP uses to implement that discrimination is irrelevant.

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[2] See, e.g., van Schewick, 2024, Ex parte notice filed February 8, 2024 ("van Schewick February 8 Ex Parte"), https://www fcc.gov/ecfs/search/search-filings/filing/10208477623816.

[3] See van Schewick February 8 Ex Parte, p. 2.

[4] See van Schewick February 8 Ex Parte, p. 2.

As other commenters and I have explained in prior filings and meetings in this proceeding, there are ways to offer network-slicing enabled services as part of BIAS, non-BIAS data services, and enterprise service offerings in ways that do not harm the open internet, and we have asked the Commission to clarify that they are consistent with the Commission's Open Internet framework.[5] At the same time, our proposals also ensure that ISPs cannot use technologies such as network slicing in ways that evade the Open Internet protections or otherwise harm the open internet.

Finally, I addressed some ways in which mobile ISPs and their trade associations have mischaracterized my position and that of other commenters.

Under our proposal, ISPs do not need prior FCC approval to offer non-BIAS data services. Instead, the FCC monitors the market and enforces the Order when it finds that a certain non-BIAS data service is evading the Open Internet protections.

Our proposal provides ample opportunity for innovation.

(1) **ISPs may offer net innovative neutrality-friendly fast lanes that benefit consumers as part of their broadband internet plans.**[6] Under the 2015 Open Internet Order, these kinds of net neutrality-friendly fast lanes were evaluated case-by-case under the general conduct rule, leaving them in a grey area. We are asking the FCC to clarify that these offerings are consistent with the general conduct rule, opening up space for innovation.

(2) **ISPs are free to use technologies such as 5G network slicing to offer enterprise services.**[7] Services for enterprise-service customers are not subject to the Open Internet Order. They do not have to meet the test for evasion. As a result, ISPs may use technologies such as network slicing to support apps and services for enterprise-service customers regardless of whether the app functions on the regular internet. That means they are free to use technologies such as network slicing for, e.g., factory automation or first-responder services.

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[5] See, e.g., van Schewick February 8 Ex Parte, pp. 3-4; 5-6; Written Ex Parte of Open Technology Institute at New America, Public Knowledge, Professor Barbara van Schewick and Professor Scott Jordan, filed March 11, 2024 ("Joint Written Ex Parte"), pp. 4-5, 8-9, available at https://www.fcc.gov/ecfs/document/103120890811342/1. See also CCIA & INCOMPAS, 2024, Written Ex Parte Letter dated March 14, 2024 ("CCIA & INCOMPAS Written Ex Parte") (supporting the same framework and proposals), p.2, https://www.fcc.gov/ecfs/search/search-filings/filing/10314012196846.

[6] See, e.g., van Schewick February 8 Ex Parte, pp. 3-4; "Joint Written Ex Parte," pp. 4-5; CCIA & INCOMPAS Written Ex Parte, p. 2.

[7] For a more detailed discussion, see van Schewick February 8 Ex Parte, pp. 5-6.

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

Sincerely,

Barbara van Schewick

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

Attachment:
van Schewick, 2024, Harmful 5G fast lanes are coming. The FCC has to stop them (Blog Post)

cc:
Ramesh Nagarajan