

March 29, 2024

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

Re: WC Docket No. 23-320, *Safeguarding and Securing the Open Internet*

Dear Ms. Dortch:

This notice of *ex parte* communications covers two contacts with and presentations made to Ramesh Nagarajan, Chief Legal Advisor to Chairwoman Jessica Rosenworcel. The first was a telephone conversation that I had with Mr. Nagarajan on Wednesday, March 27, 2024; and the second was a meeting with him on March 28 attended by myself and by Yanni Chen, Policy Counsel for Free Press.

The subject of both of these conversations was the same: they centered on requests made in a joint filing (the “Joint Filing”) submitted this week in the above-captioned docket by six other public interest organizations,¹ seeking certain clarifications of the Commission’s rules and in the final order in this proceeding. In each meeting, Free Press expressed its general support for the requests made in that Joint Filing, focused explicitly on the following points of agreement.

First, we discussed the fact that the text of the “no-throttling” rule proposed in the 2023 NPRM is identical to the final rule adopted in 2015. It specifies that a broadband internet access service (“BIAS”) provider “shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device.”² Free Press suggested that the final order in this docket should clarify that such impairment and degradation would encompass a BIAS provider’s decision to pick out and speed up particular applications, content, websites, services, or categories of any of these. Choosing to speed up certain apps or sites in an unreasonably discriminatory manner effectively would slow down in relative terms, and thus “impair or degrade,” any other apps or sites not given this preferential treatment.

¹ See Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from the American Civil Liberties Union, Electronic Frontier Foundation, Open Technology Institute at New America, Public Knowledge, Fight for the Future, and United Church of Christ Media Justice Ministry, WC Docket No. 23-320 (Mar. 27, 2024).

² *Safeguarding and Securing the Open Internet*, WC Docket No. 23-320, Notice of Proposed Rulemaking, FCC 23-83, ¶ 155 & App. A, proposed rule § 8.2(c) (rel. Oct. 20, 2023) (“2023 NPRM”).

Second, we explained that “reasonable network management” must mean practices tailored to alleviate actual network congestion when and where it occurs, in a manner that does not unreasonably discriminate against any application, content, website, service, or categories of these. The 2015 Open Internet Order affirmed that a network management practice would more likely be reasonable if it “allows the end user to control it or is application-agnostic.”³ Likewise, it explained that “network management practices that alleviate congestion without regard to the source, destination, content, application, or service are also more likely to be considered reasonable,” and that the Commission would “consider whether the practice is triggered only during times of congestion and whether it is based on a user’s demand during the period of congestion.”⁴ The 2023 NPRM references these same application-agnostic considerations in its proposal for evaluating BIAS providers’ practices under the general conduct standard.⁵ Any order in this docket should incorporate these same considerations into the guidance for “reasonable network management” proposed in the 2023 NPRM.⁶

Third, we expressed strong support for the 2023 NPRM’s proposal to retain the 2015 Open Internet Order’s definition of reasonable network management, which requires network management to have a “primarily technical” justification in order to be found reasonable.⁷

Fourth, we explained that BIAS providers may not evade Net Neutrality protections by abusing any “non-BIAS data services” exemption in the final rules. The 2015 Open Internet Order made clear that any such claimed exemption cannot be used to evade open internet protections.⁸ The 2023 NPRM prohibits evasion by retaining the broad definition of BIAS to include “any service that the Commission finds to be providing a functional equivalent” of BIAS “or that is used to evade the protections” of the open internet rules.⁹ The 2023 NPRM also says that the Commission is “concerned about activities that may undermine . . . consumers’ use of broadband Internet access service, and the ability of consumers to access broadband Internet access service.”¹⁰ The forthcoming order would benefit by stating explicitly that supposed non-BIAS data services may not be used to evade the rules and the order’s conduct standards.

The Commission therefore should reject any requests for blanket or over-broad treatment of 5G offerings as non-BIAS data services, making it clear that mobile carriers cannot evade these rules and standards merely by suggesting that the use of 5G network slicing or other network management practices automatically exempts these offerings from Commission oversight. As the Joint Filing noted, wireline BIAS providers also support this clarification.¹¹

³ *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, ¶ 221 (2015) (“2015 Open Internet Order”).

⁴ *Id.* ¶ 220.

⁵ *See* 2023 NPRM ¶ 166.

⁶ *See id.* ¶ 188.

⁷ *See id.* & App. A, proposed rule § 8.2(a)(4).

⁸ *See* 2015 Open Internet Order ¶¶ 210, 212-13.

⁹ 2023 NPRM ¶ 59 & App. A, proposed rule § 8.2(a)(1).

¹⁰ *Id.* ¶ 65.

¹¹ *See* Joint Filing at 4 n.13 (citing NCTA reply comments and *ex parte* submissions in this docket).

Fifth, we noted that the Commission also must prevent BIAS providers from using or abusing interconnection agreements and practices to evade the open internet rules and conduct standards. The 2015 Open Internet Order made it clear that the Commission would not tolerate such circumvention.¹² The 2023 NPRM proposes the same general framework, explaining that the Commission would review commercial disputes impacting internet users on a case-by-case basis under Sections 201 and 202 of the Communications Act.¹³ The forthcoming order should specify, as the 2015 order did, that “[w]hen Internet traffic exchange breaks down – regardless of the cause – it risks preventing consumers from reaching the services and applications of their choosing.”¹⁴ The Commission should clarify with respect to internet traffic exchange that its case-by-case adjudication of disputes will prevent “circumvention of the open Internet regulations” – with the Commission prepared to “intervene to ensure that” traffic exchange arrangements and disputes “are not harming or threatening to harm the open nature of the Internet.”¹⁵ According to the record in this docket,¹⁶ BIAS providers are already engaging in such abuse in the absence of the Commission oversight this proceeding rightly proposes to restore.

Lastly, Free Press expressed to Mr. Nagarajan our general agreement with the Joint Filing’s recommendations on transparency, preemption, and zero-rating. Namely, we agreed with the suggestion that the Commission should restore the 2015 Open Internet Order’s transparency rules and guidance in full. We also support the Commission’s proposal to proceed incrementally on any preemption questions,¹⁷ which the 2023 NPRM proposed as a potential approach.¹⁸ Under such a careful incremental approach, the Commission should not conclude categorically that state laws would conflict with the proposed federal protections. Compliance with both federal and state laws would be possible; and harmonious state laws and regulatory regimes would not serve as an obstacle to fulfillment of the Commission’s objectives and the protection of internet users. For these reasons, the Commission should not conclude that federal protections must form a “ceiling” for Net Neutrality protections.¹⁹ Finally, we suggested that the Commission adopt California’s framework and analysis for zero-rating plans, recognizing that unreasonably discriminatory forms of zero-rating may unjustly advantage certain applications or let BIAS providers give their own apps an advantage.

Respectfully submitted,

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¹² See 2015 Open Internet Order ¶ 206.

¹³ See 2023 NPRM ¶ 87.

¹⁴ 2015 Open Internet Order ¶ 205.

¹⁵ *Id.*

¹⁶ See, e.g., Comments of Lumen, WC Docket No. 23-320, at 2 (filed Dec. 14, 2023).

¹⁷ See Comments of Free Press, WC Docket No. 23-320, at 70 (filed Dec. 14, 2023).

¹⁸ See 2023 NPRM ¶ 96.

¹⁹ *Id.* ¶ 97.