

April 15, 2024

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

Re: Safeguarding and Securing the Open Internet  
WC Docket Nos. 23-320 and 17-108  
Notice of Ex Parte Presentation

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission’s rules,<sup>1</sup> TechFreedom hereby files this ex parte notice in the above-referenced proceedings. On April 11, I participated in a virtual ex parte meeting with Commissioner Anna Gomez featuring multiple parties invited by her to participate remotely. After briefly highlighting why, as TechFreedom’s comments explained,<sup>2</sup> we doubt the draft Open Internet Order will ultimately be upheld by the Supreme Court, I reiterated what TechFreedom has said since 2017: only Congress can resolve the debate over net neutrality—by writing legislation that provides clear authority to the FCC and that avoids the need for the FCC to invoke Title II.<sup>3</sup> I advised that, even as litigation over the next Open Internet Order begins, the FCC should do whatever might be required to allow the Commissioners to join together in a unanimous recommendation to Congress for a

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<sup>1</sup> 47 C.F.R. § 1.206.

<sup>2</sup> See generally TechFreedom Comment on Safeguarding and Securing the Open Internet RIF Remand Order at ii-iii, WC Docket No. 23-320, at ii-iii (Jan. 17, 2023), <https://www.fcc.gov/ecfs/document/101180336006533/1> (“Because the proposed rule is doomed to fail under the major questions doctrine, and because the Court may also soon roll back the deference it has previously granted on nonmajor questions under Chevron, we recommend that the Commission desist from any action in the present proceeding.”).

<sup>3</sup> See TechFreedom Reply Comments of TechFreedom on Notice of Proposed Rulemaking—Restoring Internet Freedom at 7-8, WC Docket No. 17-108 (Aug. 30, 2017), [http://docs.techfreedom.org/TechFreedom\\_Reply\\_Comments\\_on\\_Open\\_Internet\\_Order.pdf](http://docs.techfreedom.org/TechFreedom_Reply_Comments_on_Open_Internet_Order.pdf) (“After expending so much time, effort, and taxpayer money on this issue, it is perplexing that the one thing the FCC has never done is to specifically ask Congress to squarely address this issue. Such a request would not be so unusual. The Federal Trade Commission, for example, did just that in 2000, asking Congress to pass comprehensive baseline privacy legislation. That the FTC did so two years after initially advising Congress that ‘a private sector response to consumer concerns . . . could afford consumers adequate privacy protections’ simply bolsters the point.”).

legislative framework for net neutrality legislation. Recommending legislation will in no way undermine the Commission’s legal position: even if, as the draft Order argues, the Commission is correct that Congress has already given the FCC sufficient authority to reclassify broadband Internet access service as a Title II service and to issue net neutrality rules based on that authority, there remain things the Commission cannot do without new statutory authority—such as addressing concerns about enterprise services, which do not meet the definition of BIAS because they are not sold to a “mass market.”<sup>4</sup> If Chair Jessica Rosenworcel will not make such an effort a priority, I encouraged Commissioner Gomez to join with one of her Republican colleagues in convening public discussions with interested stakeholders who could help the Commission develop clear and specific recommendations for potential legislation.

Just such a framework was issued by the Internet Society in 2019<sup>5</sup> after an extensive discussion among a diverse array of stakeholders, including Public Knowledge, the Center for Democracy & Technology, TechFreedom, and leading broadband providers. That document provides the Commission with one potential model for the kind of recommendation it could make to Congress—though, ideally, the Commission would be much more specific. TechFreedom stands ready to participate in such a process.

I reiterated that, without legislation, the FCC will never resolve the issue of net neutrality on its own. Even if Democrats retain control of the White House this year, and thus of the FCC for the next four years, the D.C. Circuit will likely not decide on the constitutionality of the new Open Internet Order until well into 2025. That means, in turn, that the Supreme Court will likely not decide the matter until 2026, if it decides to take the case. But even then, Title II will remain in place only until the next time Republicans retake control of the FCC—so legislation remains necessary to put net neutrality principles on a stable footing. If, on the other hand, the courts block reclassification or the FCC’s rules, legislation will become suddenly urgent. If Republicans retake the White House this year, legislation will also be necessary: litigation will be short-circuited by the repeal of the new Open Internet Order, perhaps before that order has even taken effect.

In short, whatever happens, legislation remains essential. Now, in the months before the election, the FCC has a unique opportunity to help guide lawmakers towards a potential legislative compromise that could finally resolve this debate—twenty years after Chairman

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<sup>4</sup> TechFreedom Comments on Restoring Internet Freedom at 21-27, Docket WC No. 17-108 (Apr. 20, 2020), <https://techfreedom.org/wp-content/uploads/2020/04/TechFreedom-Net-Neutrality-RIFO-Comments.pdf>.

<sup>5</sup> *Net Neutrality Legislation: A Framework for Consensus*, INTERNET SOCIETY, <https://www.internetsociety.org/wp-content/uploads/2019/05/Net-Neutrality-Principles.pdf>.

Powell first articulated the “Four Freedoms” that became the basis for what we know today as net neutrality.<sup>6</sup> The Commission should act *before* either side concludes that they may be better off delaying legislative action. Of course, the Commission cannot force lawmakers to act, but the potential for congressional inaction is no excuse for the Commission not to do what it can to help lawmakers reach consensus.

Respectfully submitted,

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Berin Szóka

President

TechFreedom

bszoka@techfreedom.org

1500 K St NW

Floor 2

Washington, DC 20005

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<sup>6</sup> Remarks of Michael K. Powell, Chairman, Federal Communications Commission, *Preserving Internet Freedom: Guiding Principles for the Industry*, at 5 (Feb. 8, 2004), <https://docs.fcc.gov/public/attachments/DOC-243556A1.pdf>.