

The Free State Foundation
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April 11, 2024

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

NOTICE OF EX PARTE MEETING

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Ms. Dortch:

On April 11, 2024, I met with Commissioner Brendan Carr and his Chief of Staff Greg Watson to discuss the above-referenced proceeding.

We discussed legal and policy contentions contained in the Free State Foundation's [initial](#) and [reply](#) comments and a written ex parte submission, dated April 3, 2024, to which a paper titled "[The 'Network Slicing' Debate Exposes How Title II Will Kill Innovation.](#)" all of which have been filed in the public record.

I discussed the extent to which, considering the substantial technological and competitive developments since 2015, the proposal to classify Internet service providers as "telecommunications carriers" subject to Title II public utility regulation is even more irrational now than it was then. I discussed how extraordinary it is for an agency to propose burdensome restrictive major regulatory mandates without any meaningful evidence of any present harm to consumers or competition.

I discussed why the Supreme Court's Major Questions Doctrine renders the Commission's proposal so legally vulnerable. As but one indication that the Commission's proposal would be considered a major question of vast economic and political significance, I pointed to Chairwoman Rosenworcel's public statement, in announcing the proposed rulemaking, inviting proponents of the proposal "to make some noise" and "raise a ruckus." See my [commentary](#) in The Regulatory Review, October 30, 2023. I stated that I have over 45 years of experience in communications law and administrative law generally, and I have served as Chair of the ABA's Section of Administrative Law, a Public Member of the Administrative Conference of the United States, and a Fellow of the National Academy of Public Administration. I stated that I am unaware of any other agency head or commissioner inviting advocates to "raise a ruckus" and "make some noise" in connection with a rulemaking proceeding. I stated that Chairwoman Rosenworcel's appeal was an indication she considered the proposal to be of major political significance.

I discussed the draft order’s tentative decision declining to decide whether so-called “network slicing” is or is not a BIAS service to be regulated as common carriage. In doing so, the draft order says, to the extent uses of network slicing fall outside of BIAS, “we will closely monitor these uses to evaluate if they are providing the *functional* equivalent of BIAS, being used to *evade* our open Internet rules, or *otherwise undermining* investment, innovation, competition, or end-user benefits in the Internet ecosystem.” [Para. 202]. I said it is difficult to imagine a statement in which, in one sentence, an agency arrogates to itself so much unbridled discretion to exercise regulatory authority by invoking such open-ended criteria that necessarily will lead to arbitrary and capricious decisionmaking. I said that while ‘network slicing’ is just one technological advancement that happens to be highlighted, the way the draft addresses it, inviting arbitrary and capricious decisionmaking, is emblematic of why and how the Commission’s proposal is likely to suppress or delay other technological advancements, both wireless and wireline, to the detriment of consumers, the nation’s economy, and our national security which depends heavily on continued technological innovation and a robust economy.

Thank you for including this ex parte submission in the record.

Sincerely,

/s/ Randolph J. May

Randolph J. May

President, The Free State Foundation
The Free State Foundation

cc: Commissioner Brendan Carr, Greg Watson