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FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

Process Reform for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership, IB Docket 16-155

Comments and Erratum of William J. Kirsch

The FCC proposal, based on a delegation of authority from the Congress and the Executive Branch, reaches new lows in irresponsibility.

The extent of the FCC hubris, the enabling of foreign protectionism and mercantilism and the promotion of a little America isolationism is breathtaking.

The candidates for President of both major parties have rejected a Trans-Pacific Partnership proposal negotiated in secret that purports to promote an open internet.

The FCC Open Internet Order places inordinate and unspecified burdens on U.S. legacy providers of telephone and cable television services while ignoring the rest of world both in the context of the Japanese/People's Republic of China's SoftBank Sprint and the German government's T-Mobile participation in the U.S. market and the absence of the *same footing as regards privileges* abroad for the 95% of U.S. international telecommunications traffic that travels over submarine cable facilities, see 47 U.S.C. 34-39, or the remaining 5% that travels over radio facilities largely covered by the incorporation of the same footing standard in the Communications Act of 1934. See 47 U.S.C. 310.

Despite the fact that Sprint warehouses up to one sixth of the available U.S. broadband spectrum, and the German government complains that a Transatlantic Trade and Investment Partnership is not possible without additional U.S. concessions, the FCC proceeds with unilateral trade concessions, such as the transfer of the administration of all U.S. telephone and internet numbers to a Swedish corporation and a Swedish President that make the approval of additional future Information Age trade

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agreements almost impossible.

One major candidate for President has already noted the $800 billion annual U.S. trade deficit that includes a $500 billion annual trade deficit with the PRC. Combined with an estimated $300 annual PRC cybertheft of U.S. intellectual property a continuation of this approach would likely transfer up to $8 trillion in U.S. wealth to the PRC over the next decade. This would be well in excess of planned U.S. military spending over the same period despite the promise of a former U.S. Secretary of Defense that he would not preside over the hollowing out of the U.S. military. It nows appears that what he meant is that it would take place after he left office.

If the FCC were to proceed with its proposal to expedite the Executive Branch review of foreign applications in light of the $3.5 trillion in PRC foreign currency reserves and associated sovereign wealth funds and the anticipated $2 trillion in Saudi Aramco-related Saudi sovereign wealth funds, the President will have no choice but to revoke the delegation of authority to an FCC that insists that he or she hurry things up.

In paragraph 27 the FCC makes it clear that its proposal is not based on a competent professional review of U.S. and international law by asking the question whether distinguishing between applicants with reportable foreign ownership and those without foreign ownership raise concerns with any U.S. treaty obligations, such as the non-discrimination/national treatment obligations common to U.S. free trade agreements? Generally, U.S. free trade agreements are not treaty instruments, but executive agreements. See Congressional Research Service, Why Certain Trade Agreements Are Approved As Congressional-Executive Agreements Rather Than Treaties, April 15, 2013.

The FCC in its poorly conceived proposal, like its poorly conceived broadband privacy proposal, its failure to meet its legal obligation to apply the same footing standard, and its failure to meet its legal obligation to ensure an adequate nation-wide and world-wide network that includes secure communications and promotes the trust of U.S. consumers, is acting contrary to law.

But by its actions the FCC is forcing an anxious electorate to conclude that the supporters of Donald Trump and Bernie Sanders are correct that the inside the Beltway establishment represents the worst corruption in federal government history and represents the Boss Tweed all politics is local approach at the national level.

Looking the other way while ICANN is given away to the continental European desire to ensure Franco-phone civil law inquistorial control of the Internet along the

lines of the liberty, equality, fraternity approach at the ITU, WIPO and WTO in Geneva, UNESCO and the OECD in Paris and the EU in Brussels, the FCC is making it clear that the so-called multi-stakeholder model is a sham designed to fool the American public while the "neutral" Swedes steer the Internet more towards the liking of the Europeans and the illiberal BRICS and developing countries. See, e.g. Michael Moynihan, Stockholm Syndrome: Spotify Threatened To Abandon Sweden if the Goverment Didn't Address Over-regulation and Sky-high taxes, The Wall Street Journal, July 8, 2016. See also "strategy isn't something that 9,000 people work on" Tatyana Shumsky, Juniper Networks CFO: The First 100 Days, The Wall Street Journal, May 19, 2016.

Perhaps I should be flattered that Tommy "The Dingo" Wheeler is sufficiently upset with my Freedom of Information Act requests to place notice of the FCC denial of one of my requests in the Federal Register despite the absence of a NTIA Federal Register Notice concerning the March 2016 ICANN proposal to proceed with an IANA transition in violation of a Congressional budget rider and in light of the abuse of discretion by NTIA associated with the funding of NTIA staff trips to ICANN meetings, but not spending a few dollars on a Federal Register Notice that would demonstrate the superiority of the Administrative Procedure Act and judicial review by the United States courts to any so-called multi-stakeholder model.

The FCC can and should now recognize that the dingo reference was by a court jester sympathetic to the Chairman's political cronies. There is no reference to so-called "edge providers" in U.S. law and the invention of a new term cannot hide the fact that Section 230 cannot and should not be used to favor certain providers over others or to promote a marketing slogan of "net neutrality" over the legal requirement of no unjust or unreasonable discrimination. If "edge providers" wish to take advantage of the benefits of 47 U.S.C. 230 then they should be subject to the same burdens as the legacy providers of common carrier services. And the FCC should not promote Most Favored Nation and National Treatment free riding by foreign governments and service providers by favoring foreign providers over U.S. legacy providers. The problem is not U.S. non-compliance with international treaties. The problem is lack of FCC compliance with U.S. law.

Liberty and an open internet can and should be on the march rather than in retreat. The vote for Leave in Britain made clear that the English middle and working class in the heart of England have not forgotten the English commitment to liberty from the time of Edgar the Peaceful's Right to Petition to King John's Magna Carta. The FCC cannot abdicate its legal responsibility under the Submarine Cable Landing

License Act and the Communications Act of 1934 to provide for the same footing as regards privileges ensuring non-discriminatory access to an adequate network at just and reasonable rates. The "outsiders" in the electorate from the left and the right are beginning to march with pitchforks (symbolically) on Washington to bring a wave election that makes it clear that they will not permit any agreement with a foreign nation that will confer powers on the executive branch or the FCC that is free from the restraints of the Constitution including the Bill of Rights. See, e.g. Reid v. Covert, 354 U.S. 1 (1957). We recognize that Silicon Valley obtains much if not most of its revenues and profits overseas and is concerned about the popping of a possible dotcom bubble 2.0. But as the late Elie Wiesel so eloquently stated we cannot be neutral in the face of a threat to liberty. Neutrality favors the oppressor over the oppressed. The failure to correct past FCC mistakes and the additional mistakes associated with the lame duck FCC's proposed and/or adopted unilateral trade concessions means that the only solution is not only a landslide election in favor of liberty, but a tsunami that takes all the rickety shacks of K Street corruption away to sea to rest in peace.

William J. Kirsch

July 26, 2016