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ELECTRONIC FILING

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

Re: Notice of *Ex Parte* Meeting, GN Docket No. 09-191, GN Docket No. 14-28

Dear Ms. Dortch:

On August 7, I, Barbara van Schewick, met with Commissioner Rosenworcel and Priscilla Delgado Argeris, Legal Advisor to Commissioner Rosenworcel.

We discussed the Mozilla petition. I highlighted two problems with the proposal: *First*, the definition of "telecommunications service" requires that telecommunications is offered "for a fee." As a result, a classification of the service offered to edge providers in line with the Mozilla petition would leave edge providers that do not pay a fee unprotected against blocking or discrimination by ISPs. For example, it would not capture Comcast's blocking of BitTorrent, since Comcast was not providing a service to BitTorrent for a fee. *Second*, if the classification requires the charging of a fee, it seems arbitrary and capricious to classify the service provided to edge provider as a telecommunications service based on the fee, only to then use the newly gained authority under Title II to ban these fees. Thus, while Mozilla petition would give the FCC authority to ensure that the rates charged to edge providers are just and reasonable, it is not clear that granting the Mozilla petition would allow the FCC to actually ban access fees.

We also discussed the proposal to use Title II as a backstop in case a Court strikes down network neutrality rules based on Section 706. I expressed the concern that such an approach might be arbitrary and capricious for two reasons: *First*, as the Commission has noted repeatedly, the definitions of telecommunications service and information service are mutually exclusive. The backstop theory, however, would require the FCC to argue in the same order that broadband Internet access service is an information service and to engage in a

conditional reclassification, which requires arguing that it is a telecommunications service. However, Internet access service is either a telecommunications service or an information service; it cannot meet both definitions at the same time. *Second*, as the Supreme Court has pointed out in *Brand X*, the classification decision depends on the factual particulars of how the service is offered to end users. This suggests that a service must meet the definition of at the time of classification. When the FCC adopts the order based on Section 706, it does not know what Internet service will look like in the future when a court strikes down the network neutrality rules based on Section 706, triggering the reclassification. A classification decision at that time in the future needs to be based on the facts at that time, not on the facts today.

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

Sincerely,

/s/ Barbara van Schewick

Barbara van Schewick
Professor of Law and (by courtesy) Electrical Engineering
Helen Crocker Faculty Scholar
Faculty Director, Center for Internet and Society, Stanford Law School

cc:
Commissioner Jessica Rosenworcel
Priscilla Delgado Argeris