

C A M P A I G N F O R ACCOUNTABILITY

October 25, 2016

Howard Symons
General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Mr. Symons:

Pursuant to Federal Communications Commission (FCC) rules, Campaign for Accountability (CfA) respectfully requests that you investigate a recent ex parte communication made during the pendency of an FCC rulemaking proceeding by Google Vice President Vint Cerf that appears to violate the Commission's rules.

Factual Background

On April 1, 2016, the Commission issued a notice of proposed rulemaking, "In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services," WC Docket No. 16-106 (NPRM). The notice provided a comment date of May 27, 2016, and a reply comment date of June 27, 2016. The notice specified the proceeding was "permit-but-disclose" under the Commission's ex parte rules.¹

According to internal emails obtained by the Electronic Privacy Information Center, soon after the notice was issued, Google Vice President Vint Cerf contacted FCC Chairman Tom Wheeler regarding the rulemaking.² Specifically, on April 8, 2016, Mr. Cerf sent an email to Chairman Wheeler "reacting to" the NPRM.³ With a link to the FCC docket page, Mr. Cerf stated:

[O]n the surface this makes no sense to me. IP addresses are not like telephone numbers and domain names are even farther afield – unless they are personal identifiers like joeblow@info and even then they are public information – how can they possibly be CPNI?

This email was sent at a time when the issue of whether the FCC can and should go further in safeguarding consumer data was a hot-button issue, and groups like EPIC had argued that the FCC's NPRM, which would extend privacy protections to customer IP addresses, was

¹ See ¶ 311 of NPRM, available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-39A1.pdf.

² EPIC's FOIA request is available at <https://epic.org/privacy/cpni/EPIC-16-06-14-FCC-FOIA-20160614-Request.pdf>.

³ The referenced email exchange is enclosed as Exhibit A.

insufficient.⁴ EPIC has alleged that the email exchange constituted a secret attempt by Google to influence the FCC's privacy plan and that the communications represented an improper attempt to lobby on the plan.⁵

When confronted with this evidence of an apparent *ex parte* communication, the FCC reportedly characterized the email as "of a clarifying nature."⁶ Further, someone described as "close to Cerf" claimed "he was acting in a private capacity and using a personal email address."⁷ The FCC redacted Mr. Cerf's email address in the documents released under the FOIA, making it impossible to verify the accuracy of this characterization.⁸

FCC Ex Parte Rules

Commission rules are clear: *ex parte* communications to decision makers during non-restricted Commission proceedings are permitted, but are subject to certain disclosure requirements. 47 C.F.R. § 1.1206. Commission rules define those communications subject to disclosure requirements as "[a] communication directed to the merits or outcome of a proceeding." *Id.* at § 1.1202(a). When such communications are made in writing they must be labeled as *ex parte* and filed with the Commission, with a copy sent to the Commission employee who participated in the communication. *Id.* at § 1.1206(b)(2).

FCC *ex parte* rules also impose disclosure requirements on the recipients of *ex parte* communications. Those receiving written *ex parte* communications must forward them to the Office of General Counsel with a statement describing the circumstances, unless the circumstances are apparent from the communication itself. 47 C.F.R. § 1.1212(c).

Apparent Violation of Ex Parte Rule

Even accepting at face value the FCC's claim that the email communications between Chairman Wheeler and Mr. Cerf were "of a clarifying nature," they still were well within the universe of communications that must be treated as *ex parte*. FCC rules exclude from the definition of communications "directed to the merits or outcome of a proceeding" those that are:

communications which are inadvertently or casually made, inquiries concerning compliance with procedural requirements if the procedural matter is not an area of controversy in the proceeding, statements made by decisionmakers that are limited to providing publicly available information about

⁴ See <https://epic.org/2016/10/epic-foia-google-secretly-atte.html>

⁵ Liz Zhou, [EPIC Alleges Google Tried to Secretly Influence FCC Privacy Plan](http://www.politico.com/tipsheets/morning-tech/2016/10/trump-transition-team-huddles-with-tech-groups-today-216739), *Politico*, October 7, 2016, available at <http://www.politico.com/tipsheets/morning-tech/2016/10/trump-transition-team-huddles-with-tech-groups-today-216739>.

⁶ *Id.*

⁷ *Id.*

⁸ See Exhibit A.

pending proceedings, and inquiries related solely to the status of a proceeding, including inquiries as to the approximate time that action in a proceeding may be taken.

47 C.F.R. § 1.1202(a). Mr. Cerf's email discussing concerns he had with the NPRM's treatment of IP addresses is none of these things – it raises no issues concerning the status of or procedural issues related to the NPRM. Moreover, even if the email exchange were clarifying a key point in the proposed rules, that clarification – coming from the FCC chairman himself -- is something to which all parties should have access, not just Google.

Nor is the email exchange transformed into one excluded from the definition of communications subject to the ex parte rules by Chairman Wheeler's response. Replying to the substantive concerns with IP addresses raised by Mr. Cerf, Chairman Wheeler wrote:

The issue about which we are asking in the NPRM is what information should be considered CPNI . . . The issue is not about whether an IP address or a domain name is public . . . What the NPRM proposes to do is to treat the list of IP addresses and domain names that a customer visits as CPNI if a broadband ISP collects them from a customer's network traffic.⁹

Even though couched in language suggesting a clarification, Chairman Wheeler's response, which concerns a substantive aspect of the NPRM, still does not fall within the type of communications excluded from the ex parte disclosure requirements. Moreover, it is a response to an inquiry from Mr. Cerf that goes to the merits of the NPRM.

Equally unpersuasive is the claim that Mr. Cerf was acting in his personal capacity and not as a representative of Google. This distinction is completely irrelevant for purposes of the ex parte rules, which make no exception for so-called "personal" communications.

Moreover, Mr. Cerf's email communication is part of a larger pattern of using his access to top administration officials to advance Google's corporate interests. Visitor logs reveal Mr. Cerf visited the White house on at least 30 occasions since 2009.¹⁰ Other emails obtained from open records requests show he emailed several top administration officials on a wide range of subjects, often pushing policy priorities for Google such as using taxpayer funds to upgrade Internet equipment in people's homes,¹¹ and complaining about funding cuts to a NASA project he'd been working to create.¹²

⁹ See Exhibit A.

¹⁰ <https://www.whitehouse.gov/briefing-room/disclosures/visitor-records>.

¹¹ <https://www.google.com/intl/en/ipv6/index.html>

¹² Email from Vint Cerf to Thomas Kalil, copied to Adrian Hook, Vivek Kundra, Aneesh Chopra, Andrew McLaughlin and Christopher J. Scolese. Feb 1, 2010. <https://www.documentcloud.org/documents/2837395-9-30-10-OMB-9-30-10-OMB-1-OF-2.html#document/p1>

Conclusion

The Commission adopted its ex parte rules “[t]o ensure the fairness and integrity of its decision-making[.]” 47 C.F.R. § 1.1200(a). The failure by both Mr. Cerf and Chairman Wheeler to disclose their private email correspondence during the pendency of the NPRM comment period threatens these interests and undermines public confidence in the ultimate outcome of the Commission rulemaking. CfA therefore requests that you investigate this matter fully and consider the appropriateness of the sanctions set forth at 47 C.F.R. § 1.1216.

Sincerely,



Anne L. Weismann
Executive Director

Encl.
