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By First-Class Mail and E-mail

P. Michele Ellison, Chief
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Google Inc., File No. EB-10-IH-4055

Dear Ms. Ellison:

Google Inc. (“Google” or the “Company”), by its attorneys, respectfully responds to the Notice of Apparent Liability for Forfeiture in the above-referenced matter (the “Notice”).¹

I. Introduction

In May 2010, Google learned that its Street View cars had collected payload data publicly broadcast by unencrypted Wi-Fi networks. Upon learning of the unwanted collection, Google promptly grounded its Street View cars, segregated and rendered inaccessible the payload data that had been acquired, and retained an independent party to review what had happened. In addition, Google has cooperated fully with investigations around the globe regarding this matter, acting in good faith at all times. After a 17-month investigation of the matter, the Federal Communications Commission (“FCC” or “Commission”) found on April 13, 2012 that Google did not violate the Communications Act.

The FCC did not begin its investigation of this matter until after the Federal Trade Commission (“FTC”) had opened and closed its own investigation into the matter. Various state Attorneys General have likewise been investigating this same matter. And the Department of Justice (“DOJ”) conducted and long ago completed its own thorough examination of the facts.

¹ *In the Matter of Google Inc., Notice of Apparent Liability for Forfeiture*, File No. EB-10-IH-4055 (Apr. 13, 2012). The FCC’s Enforcement Bureau (“Bureau”) opened its investigation in November 2010. The investigation concerned whether Google violated Section 705 of the Communications Act of 1934, as amended (“Section 705”). Section 705 prohibits the interception and publication of radio communications, except where those acquisitions are permitted by the Wiretap Act, as they were here.

The DOJ had access to Google employees, reviewed the key documents, and concluded that it would not pursue a case for violation of the Wiretap Act.

The FCC was thus the third independent department of the United States government to investigate this same matter. Google's cooperation with the FCC involved dozens of discussions with FCC representatives by phone, by video-conference, and in person. Google reviewed over half a million documents, voluntarily provided those that were responsive to the FCC's requests, and answered dozens of written questions. Google arranged for interviews with everyone the FCC asked to meet. Google had every interest in cooperating and did so fully – at all times on a timetable discussed with and agreed to by the Commission. Moreover, Google voluntarily provided everything that the FCC concluded was necessary to its review.

Google worked diligently to review large volumes of documents and provide an analysis of a technically complex area. Google shares the FCC's concern about the protracted nature of the investigation, but notes that most delays resulted from internal FCC process. Over the course of the 17 months it took the FCC to officially conclude its investigation, the Commission did not contact Google for weeks and months at a time. For example, the FCC did not contact Google following Google's submissions for 83 days between January 6 and March 30, 2011, and for 52 days between June 27 and August 18, 2011. It is difficult to reconcile those lengthy delays with the FCC's criticism of Google's responses as "untimely." In addition, a variety of FCC scheduling and preparation issues further delayed a resolution of the issues.

Despite Google's cooperation, the FCC nearly ran out of time to decide on a course of action early in its investigation. Yet Google agreed to extend the FCC's statutory deadline by seven months. That is hardly the act of a party stonewalling an investigation. Rather, it is a demonstration of Google's interest in cooperating and allowing the FCC time to conduct a thorough investigation.

The FCC concluded in November 2011 that there had been no violation of the law. It nevertheless indicated that it planned to issue a "report" based on its investigation. Five months later, it instead issued the Notice. While Google disagrees with the premise of the Notice and many of its factual recitals, Google has determined to pay the forfeiture proposed in the Notice in order to put this investigation behind it.

II. Google Cooperated with the FCC's Investigation

In the Notice, the Bureau points to three instances in which Google's cooperation was supposedly not timely or otherwise inadequate.² In each case, Google worked diligently to provide the Bureau with the information it requested, in an appropriate format.

² Notice at ¶41.

First, the Notice raises a concern about the initial form of various declarations verified by Google employees. Google fully complied with the FCC's rules, as its representative verified under penalty of perjury that the information Google submitted was true based on his own knowledge, information, and belief. The Bureau took the position that this approach was inadequate, and required that Google's declarant swear to the truth of facts that he personally did not know using precise words specified by the Bureau. But the FCC's own rules do not require such "magic words" in a verification. While there was no basis for the demand, and the absence of those particular words did not affect the Bureau's investigation, as part of its good-faith cooperation, Google acquiesced and provided the Bureau with the desired verification and additional declarations.

Second, the Notice states that Google declined to timely identify specific employees relevant to the investigation. In response to the Bureau's initial request for information, Google promptly called the Bureau and asked not to have to provide the names of employees, which were not necessary to the legal question before the FCC, especially so in light of all of the information Google would be voluntarily providing to the Bureau. The Bureau asked Google to put its position in writing in its formal response and Google did so. After 100 days, the Bureau wrote back and said it would not agree to Google's request to maintain the employees' anonymity. Google then timely provided the names within two weeks. That was a discussion on the merits, not a failure to cooperate.

Finally, the Notice states that Google failed to timely cooperate because it refused to produce e-mails. Apparently, the Bureau takes issue with the fact that Google did not produce e-mails in its initial response to the FCC's inquiry. But the Bureau's inquiry did not call for those documents. The Bureau asked only that Google produce those documents that Google relied upon for its response. Google relied on no e-mails and thus produced none. When, 100 days later, the Bureau made a request that did call for e-mails, Google produced them within two weeks.

We provide a more detailed review of each claim below.

1. Each Declaration that Google Provided Fully Complied with FCC Rules

Each declaration that Google submitted was timely, accurate, and submitted under penalty of perjury. The Bureau has never taken issue with the actual substance of the declarations submitted. Its concerns have been technical, and related to the verification accompanying the declaration. Each declaration that Google submitted complied with the FCC's rules.

A declaration was sought in the first communication from the Bureau. The November 3, 2010 Letter of Inquiry ("LOI") that initiated the Bureau's investigation "direct[ed] Google to support its responses with an affidavit or declaration under penalty of perjury, signed and dated by an officer of the Company with personal knowledge of the representations provided in Google's response, verifying the truth and accuracy of the information therein and that all of the

Lampert, O'Connor & Johnston, P.C.

April 26, 2012

Page 4

information and/or documents requested by this letter which are in Google's possession, custody, control, or knowledge have been produced," and to provide declarations from each Google employee with personal knowledge if such officer relied on that person's personal knowledge.³ The LOI further stated that any declaration "must comply with section 1.16 of the Commission's rules and be substantially in the form set forth therein."⁴

Google's December 10, 2010 responses to the LOI ("LOI Responses")⁵ included a declaration from an officer of the Company (the "Officer") substantially in the form set forth in Section 1.16 of the rules. The declaration was submitted under penalty of perjury and based on the Officer's personal knowledge, information or belief of the representations made in Google's responses. Notably, at no time during its investigation did the Bureau ever ask to speak with the Officer.

On January 6, 2011, the Bureau contacted Google's counsel to schedule a call to discuss the form of the Officer's declaration.⁶ During a telephone conference later that day, the Bureau stated that it had wanted the exact words "personal knowledge of the representations provided in Google's response" to be in the declaration. Google explained that the LOI itself was not clear that the specific language the Bureau now sought was required to be in the declaration; rather, the LOI stated that the declaration must comply with Section 1.16, which it did. Moreover, Google explained that the Officer did not have personal knowledge of all matters covered by the LOI, and Google had not included declarations from anyone other than the Officer because it had requested forbearance with respect to disclosing the names of Google employees, an issue that remained unresolved.⁷ The Bureau asked whether, because Google had disclosed the identity of one person, the engineer who wrote the code ("Engineer Doe"),⁸ it would provide Engineer Doe's declaration. Google explained that Engineer Doe was not available to talk with the FCC because he had invoked his constitutional rights, and that Google was not in a position to produce him or to have him provide a declaration. The Bureau then asked for the name of Engineer Doe's attorney, which Google provided that same day.⁹ As to other employees, Google again requested the Bureau's forbearance from disclosing their names, as their identities

³ Letter of Inquiry, File No. EB-10-IH-4055 (Nov. 3, 2010) ("LOI"), at 4-5.

⁴ *Id.* at 5.

⁵ Responses of Google Inc. to LOI, File No. EB-10-IH-4055 (Dec. 10, 2010).

⁶ E-mail from Enforcement Bureau to Google Counsel (Jan. 6, 2011).

⁷ *See* LOI Responses at 12.

⁸ *See* Second Supplement to Responses of Google Inc. to LOI, File No. EB-10-IH-4055 (Dec. 20, 2010) ("Google Second Supplement"), at 1.

⁹ E-mail from Google Counsel to Enforcement Bureau (Jan. 6, 2011). Thereafter the Bureau never asked Google to make available or provide a declaration from Engineer Doe. Even the DOJ did not seek (or gain) access to Engineer Doe once advised that he had asserted his constitutional rights.

were not necessary to the legal question that the Bureau was seeking to answer. In response, the Bureau expressed no concerns, other than to say that it might want Google to provide more specificity about the basis for and extent of the Officer's knowledge, and that it wanted to consider matters further in light of the discussion.¹⁰ Google reiterated its intention to cooperate fully in giving the Bureau whatever it needed to make its decision and waited to hear from the Bureau.

The Bureau did not contact Google again for 83 days, when Google received an e-mail the evening of March 30 stating that a Supplemental LOI had been sent to Google.¹¹ The Supplemental LOI asked Google to provide employee declarations, or, alternatively, "sworn statement[s] from an authorized officer with personal knowledge attesting to the Company's efforts, and inability, to obtain such declarations."¹² The March 30 e-mail also stated that the Bureau would contact Google both to discuss the Supplemental LOI and schedule a time to meet with Google.¹³

Google and the Bureau spoke on April 1 and again on April 6, when Google requested a brief extension of time to respond to the Supplemental LOI¹⁴ and began discussing possible meeting dates. During these discussions, the Bureau asked Google to extend the Bureau's statutory period to investigate the Section 705 question by agreeing to a Tolling Agreement. Given the time that had elapsed before the FCC opened an investigation (seven months) and then again following Google's response to the first LOI (three months), without an extension the Bureau would not have been in a position to continue to investigate the matter. Far from seeking to obstruct matters, Google agreed to a seven-month extension of the statute of limitations so that the FCC could complete a thorough investigation.

The Bureau also agreed that Google could submit its responses to the Supplemental LOI in two parts, with the first part due on April 14, 2011 and the second part due no later than April 28, 2011. The Bureau and Google settled on April 27 for a meeting, although Google had

¹⁰ *Compare Notice* at ¶18 ("In a telephone call on January 6, 2011, the Bureau advised Google that its declaration was deficient and directed the Company to submit a compliant version; Google did not do so."). Although that phone call did take place, as discussed above, the Bureau did not direct Google as it claims in the *Notice*.

¹¹ E-mail from Enforcement Bureau to Google Counsel (Mar. 30, 2011).

¹² Supplemental Letter of Inquiry, File No. EB-10-IH-4055 (Mar. 30, 2011) ("Supplemental LOI"), at 5.

¹³ E-mail from Enforcement Bureau to Google Counsel (Mar. 30, 2011).

¹⁴ The Supplemental LOI (which was dated March 30, 2011 but not received until March 31) had requested responses by April 7. *See* Supplemental LOI at 6.

Lampert, O'Connor & Johnston, P.C.

April 26, 2012

Page 6

offered to meet earlier.¹⁵ When Google and the Bureau met on April 27, 2011, the Bureau stated that it viewed the meeting as the first of several, with this first meeting focused on continued fact-gathering, and a subsequent (yet-to-be scheduled) meeting to discuss applicable law with the Commission's General Counsel present. Google responded fully to the Bureau's questions regarding materials the Company had provided, as well as other matters that had not been the subject of any prior requests (including the status of the DOJ investigation and various foreign and state investigations, and whether any countries had produced written reports of their investigations). Google promised to follow up regarding the status of one foreign report in particular, and told the Bureau that it expected to receive a declination letter from the DOJ shortly. Google also confirmed that it planned to complete its Supplemental LOI Responses on April 28, including a privilege log and declaration. Google timely filed responses to the Supplemental LOI on April 14 and April 28, including a declaration from the Officer substantially in the form set forth in 47 C.F.R. § 1.16.¹⁶

Google and the Bureau met again on May 18, 2011. The Commission's General Counsel and Chief Technologist were present for what was to be a detailed discussion of the technologies at issue and applicable law. However, the Chief Technologist acknowledged that he had just been given the technical report Google had submitted more than six months prior and thus had not been able to review it. Regarding declarations, the Bureau expressed concern about whether the Officer had personal knowledge, but did not assert any violation or object to the format of the Officer's declarations. Rather, Google and the Bureau renewed their discussion about what would constitute a declaration sufficient for the Bureau to rely on for purposes of its investigation. Google explained that its investigation of the underlying events was conducted by counsel; that multiple employees contributed information; and that Google sought to protect the identity of those employees. The Officer had provided declarations as Google's representative regarding the factual conclusions of the investigation, including with respect to the issue of knowledge (or lack thereof) within Google regarding the underlying facts. Google also described a declaration it had provided in connection with a separate investigation, believing it could assist the Bureau. Finally, Google offered to provide additional materials discussed during the course of the meeting.

The day after the meeting, the Bureau thanked Google "for coming in to meet with us," adding, "[i]t was very helpful."¹⁷ The Bureau also requested two additional items.¹⁸

¹⁵ See e-mails from Enforcement Bureau to Google Counsel (Apr. 12, 2011, Apr. 13, 2011, Apr. 14, 2011, Apr. 15, 2011, Apr. 18, 2011); e-mails from Google Counsel to Enforcement Bureau (Apr. 12, 2011, Apr. 13, 2011, Apr. 14, 2011, Apr. 18, 2011).

¹⁶ See Google Inc. Response to Supplemental Letter of Inquiry, File No. EB-10-IH-405 (Apr. 14, 2011) ("Supplemental LOI Responses"); Google Inc. Further Response to Supplemental Letter of Inquiry, File No. EB-10-IH-4055 (Apr. 28, 2011) ("Further Response to Supplemental LOI").

¹⁷ E-mail from Enforcement Bureau to Google Counsel (May 19, 2011).

¹⁸ *Id.*

Lampert, O'Connor & Johnston, P.C.

April 26, 2012

Page 7

On June 3, 2011, Google provided the additional items requested by the Bureau, as well as two other items that had been discussed during the May 18, 2011 meeting.¹⁹ Also on June 3, 2011, the Bureau followed up the May 18 discussion regarding declarations with the following request:

[I]n the investigations by the various state attorneys general, [Google's Counsel] indicated that a "proffer" or sworn statement of some kind had been submitted to the state AGs by Google that substantiated certain aspects of the data collection and subsequent treatment of the payload data. As we discussed at the May 18 meeting, we would like to obtain a copy of this statement and any others that the company has provided to other investigating entities. As you know, we have concerns regarding the sufficiency of the declaration that has been provided with the company's responses to our LOI, and obtaining additional sworn statements may help address these concerns.²⁰

Google promptly sent a copy of the declaration the Officer had provided to the state Attorneys General, and confirmed that it had provided no other statements to other investigating entities.²¹ Google had no reason at the time to believe that the issue was not resolved or, if not resolved, that the Bureau would not continue to discuss with Google the question of the identity of potentially relevant employees and their declarations.

Seventy days later, Google received a letter from the Bureau asserting that the sufficiency of the declarations was an "item[] pending Company cooperation or response."²² Google could not have known, and did not know until it received this letter, that the Bureau had reached any decision regarding the declarations provided prior to that date. Although the August 18 Letter mentioned the May 18, 2011 meeting, it made no reference to the Bureau's subsequent request and Google's response.²³ The August 18 Letter also described the Officer as "an individual who, contrary to the plain language of the [LOI] ... did not have personal knowledge of the representations provided in the Company's response."²⁴ This is inaccurate, for the reasons described above. In addition, the August 18 Letter contained no reference to the January 6, 2011 phone call or any of the subsequent discussions regarding declarations.

¹⁹ Letter from E. Ashton Johnston, Esq. to T. Cavanaugh, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, File No. EB-10-IH-4055 (Jun. 3, 2011) ("Google June 3 Letter").

²⁰ E-mail from Enforcement Bureau to Google Counsel (Jun. 3, 2011).

²¹ E-mail from Google Counsel to Enforcement Bureau (Jun. 9, 2011).

²² Letter from P. Michele Ellison, Chief, Enforcement Bureau, to Google Inc., File No. EB-10-IH-4055 (Aug. 18, 2011) ("August 18 Letter"), at 2.

²³ *See id.*

²⁴ *Id.* at 3.

On September 7, 2011, in response to the August 18 Letter and in a good-faith effort to resolve the Bureau's concerns, Google timely provided nine additional declarations in further support of the Officer's previously submitted declarations, and a further declaration from the Officer.²⁵ According to the Notice, "[t]hose declarations served, for the first time, to identify the nature of relevant employees' involvement with the Street View Wi-Fi data collection project—including their knowledge, or lack thereof, of Google's payload data collection."²⁶ Google believes that each of the declarations it submitted previously was consistent with the Bureau's request to provide a declaration or affidavit substantially in the form set forth in Section 1.16.

As the foregoing makes clear, Google did not fail to "timely provide" compliant declarations "for a period of almost nine months."²⁷ In fact, more than half of that period was expended by the FCC's own internal process. Although Google timely provided a declaration with each submission it made during this period, the Bureau did not tell Google until August 18, 2011 that the Bureau could not or would not conclude its investigation without additional declarations from Company employees. Throughout the period of alleged noncompliance, Google was waiting for a definitive Bureau response to its request not to provide the identities of individuals not relevant to the legal questions at issue. Indeed, the Notice concedes that "the Company could not supply" the declarations the Bureau had initially requested without identifying those employees.²⁸ And it was the Bureau itself that advised Google to raise that issue in its first written response, after which the Bureau did not respond to Google for 100 days.

2. Google Responded Promptly to Bureau Requests for Identification of Employees with Knowledge of Relevant Facts

The Notice's assertions that Google "refused to identify any employees" in response to the LOI²⁹ are not correct, and the Bureau cites nothing in the record that constitutes a "refusal."

²⁵ Google Inc. Responses to August 18 Letter, File No. EB-10-IH-4055 (Sept. 7, 2011) ("Responses to August 18 Letter").

²⁶ Notice at ¶33.

²⁷ *See id.* at ¶50 (asserting a "continuing violation" beginning December 10, 2010).

²⁸ *Id.* at ¶48.

²⁹ *Id.* *See also id.* at ¶17 (the LOI Responses "failed to identify any of the individuals responsible for authorizing its collection of Wi-Fi data or any employees who had reviewed or analyzed Wi-Fi communications collected by Google. Indeed, Google redacted the names of its engineers from the few documents that were produced. Google asserted that identifying its employees 'at this stage serves no useful purpose with respect to whether the facts and circumstances give rise to a violation' of the Act."); ¶43 ("Similarly, in response to the Bureau's directives to identify the individuals responsible for authorizing the Company's collection of Wi-Fi data, as well as any employees who had reviewed or analyzed Wi-Fi communications collected by Google, it unilaterally determined that to do so would 'serve[] no useful purpose.'"); ¶47 ("as described above ... Google violated Commission orders by ... (footnote continued on next page)

Lampert, O'Connor & Johnston, P.C.

April 26, 2012

Page 9

On November 29, 2010, Google contacted the Bureau to discuss the LOI, and to seek the narrowing of its requested identification of Google employees. The Bureau acknowledged that request, but specifically asked Google to state it in its written response to the LOI. On December 10, 2010, Google did just that, explaining:

Google is providing redacted versions of design plans and code, removing the identity information of the engineers. Google requests that it not be required to disclose the identities of its employees at this time. The identity of these individuals has not been publicly disclosed, and Google has not provided the information to foreign regulators who seek to interview these employees, nor has it provided the information to the Federal Trade Commission or State Attorneys General. **We believe the identity of the employees at this stage serves no useful purpose with respect to whether the facts and circumstances give rise to a violation of [47 U.S.C. § 605]. Google requests the Bureau's forbearance at this time, recognizing it may renew its request if it deems it necessary in the future.**³⁰

The Notice presents only a portion of this quotation, and does not mention that Google included it in the letter at the Bureau's express request. A party that receives an administrative request, even an LOI, is entitled to protections requiring that government requests be "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."³¹

The Notice therefore is not correct when it states that Google's subsequent identification of employees was not timely.³² As explained above, Google's LOI Responses were on file for 100 days before the Bureau's March 30, 2011 Supplemental LOI acknowledged that the LOI Responses "provided redacted versions of certain documents, from which the identities of certain employees" were redacted, and directed, "[t]o the extent that it has not already done so in

(footnote continued from previous page)

failing to identify employees"); n.62 (in its LOI Responses, "Google redacted information in documents 11-1 through 11-3").

³⁰ LOI Responses at 12 (emphasis added).

³¹ *See v. Seattle*, 387 U.S. 541, 544-45 (1967). *See also In the Matter of SBC Commc'ns, Inc., Forfeiture Order*, 17 F.C.C.R. 7589, 7597 (2002) (affirming proposed forfeiture where party did not "raise a genuine good faith challenge," because it failed to alert "the Bureau of its concerns prior to, or simultaneous with" its LOI response). Here, Google did raise a genuine good-faith challenge by alerting the Bureau of its concern both prior to and along with its LOI Responses.

³² Notice at ¶48.

Lampert, O'Connor & Johnston, P.C.

April 26, 2012

Page 10

subsequent filings ... that the Company provide unredacted versions of these documents.”³³ Google timely did so on April 14, 2011, within two weeks of the Bureau’s request.

The Bureau next mentioned access to a Google employee at a May 18, 2011 meeting at the Agency. That meeting was scheduled to address technical matters, and the Bureau sought another meeting to cover additional technical issues. Google agreed, and three weeks later, on June 3, 2011, the Bureau notified Google that

[the Bureau] would like to schedule a time for the Commission’s technical team to talk with the appropriate person(s) with technical expertise from Google, Inc. To assist Google with identifying the appropriate people to attend the meeting (either in person or via teleconference), we are compiling questions from our technical staff that we will forward to you by early next week. We anticipate that the meeting would include the Commission’s [Chief Technologist] and others from our engineering staff. We would like to schedule that meeting within the next two weeks, and we are targeting June 15 from 2:00 to 3:00 pm EDT, if that will work on your end.³⁴

Google did not refuse to make anyone available, but rather responded that

[w]ith respect to the technical follow up, although Google is unable to address the gstumbler code (the engineer who developed it being unavailable, as we have discussed), we believe the Stroz Report fully explains the functionality of the code. Otherwise, your proposal to send questions in advance is a good one and will greatly help us determine whether we can answer them and if so, who would be best suited to do so.³⁵

The same day, the Bureau forwarded nine questions it anticipated its technical staff would discuss with Google’s technical representative, acknowledging that some of the topics already had been discussed.³⁶ After receiving the questions, Google determined that they were within the expertise of in-house and outside counsel, and promptly advised the Bureau who would be made available to address them.

On June 14, 2011, the Bureau stated that it would like to proceed by conference call the following day.³⁷ However, on the morning of June 15, the Bureau cancelled the call, stating it

³³ Supplemental LOI at 4.

³⁴ E-mail from Enforcement Bureau to Google Counsel (Jun. 3, 2011).

³⁵ E-mail from Google Counsel to Enforcement Bureau (Jun. 9, 2011).

³⁶ E-mail from Enforcement Bureau to Google Counsel (Jun. 9, 2011).

³⁷ E-mail from Enforcement Bureau to Google Counsel (Jun. 14, 2011).

Lampert, O'Connor & Johnston, P.C.

April 26, 2012

Page 11

would “like to reschedule the meeting for a time when Google can provide someone with technical expertise who can talk with our technical staff.”³⁸ The Bureau informed Google that it was “trying to work around the schedules of up to four FCC technical staff, some of whom have very challenging schedules,”³⁹ and ultimately proposed to reschedule the call for June 27.⁴⁰ Google promptly agreed.⁴¹

On June 17, 2011, the Bureau asked whether Google intended to make available for the June 27 call both a representative from Stroz Friedberg and a person with technical expertise from the Company who “would know about WiFi although he may not know all the details of the collection...”⁴² The Bureau also informed counsel that the Bureau would provide notice should the Bureau have questions in addition to those forwarded on June 9.⁴³ Google never received any additional questions.

On June 21, 2011, Google notified the Bureau that a representative from Stroz Friedberg, who had been a member of the team that reviewed and analyzed the gstumbler code and related files, and of the team that prepared the June 3, 2010 “Source Code Analysis of gstumbler” report, would participate, as would the Company’s counsel.⁴⁴

On the morning of June 27, 2011, the day the meeting was scheduled, the Bureau notified Google’s counsel that the Chief Technologist “has a speaking engagement that will conflict with the meeting time, and our front office is deciding what to do. There’s a chance we may cancel.”⁴⁵ Shortly thereafter, the Bureau stated “we’re having problems getting our technical people available for this call so we will have to reschedule.”⁴⁶ Counsel for Google asked the Bureau to provide possible dates for rescheduling.⁴⁷ The Bureau never responded.

Google heard nothing further from the Bureau for 52 days, when it received the August 18 Letter. That letter asked Google to provide “access to an engineer, employed by the Company, with personal knowledge of the Company’s Street View project, for the purpose of an

³⁸ E-mail from Enforcement Bureau to Google Counsel (Jun. 15, 2011).

³⁹ E-mail from Enforcement Bureau to Google Counsel (Jun. 15, 2011)

⁴⁰ E-mail from Enforcement Bureau to Google Counsel (Jun. 16, 2011)

⁴¹ E-mail from Google Counsel to Enforcement Bureau (Jun. 17, 2011).

⁴² E-mail from Enforcement Bureau to Google Counsel (Jun. 17, 2011).

⁴³ E-mail from Enforcement Bureau to Google Counsel (Jun. 17, 2011).

⁴⁴ E-mail from Google Counsel to Enforcement Bureau (Jun. 21, 2011).

⁴⁵ E-mail from Enforcement Bureau to Google Counsel (Jun. 27, 2011).

⁴⁶ E-mail from Enforcement Bureau to Google Counsel (Jun. 27, 2011).

⁴⁷ E-mail from Google Counsel to Enforcement Bureau (Jun. 27, 2011).

in-person informational meeting to discuss technical issues” no later than September 9, 2011. The August 18 Letter incorrectly stated that “the Company originally agreed to make a Company engineer available on June 27, 2011 for the requested technical discussions,” and that “the Company has failed to provide the Commission with access to any such [sic] engineer, or anyone on the Company’s technical staff.” The call was not cancelled because of anything Google did. Rather, as the Bureau’s June 27 e-mails show, the Bureau cancelled the call because it was having a problem getting its “technical people” available for the call. Moreover, prior to August 18, the Bureau had never sought “an engineer, employed by the Company, with personal knowledge of the Company’s Street View project, for the purpose of an in-person informational meeting to discuss technical issues.” Its prior requests had been for “the appropriate person(s) with technical expertise from Google, Inc.” It thus was not possible that this item could have been “pending Company cooperation or response” on August 18, the day it was first requested. Yet, Google made no objection and did not refuse the request.

On September 1, 2011, the Bureau altered its August 18 request, and stated that it wished to speak to three Google engineers and to a representative from Stroz Friedberg. Again, Google made no objection and did not refuse the request. The Bureau identified the three engineers, and stated it would follow up with confirmation, which it did on the afternoon of September 2, 2011 (a Friday before a holiday weekend). During the September 1 call, Google’s counsel informed the Bureau that one of the engineers mentioned was not available until late September; the Bureau did not express any concern about delay. In subsequent discussions regarding scheduling the four informational interviews, the Bureau and Google agreed, in the spirit of efficiently managing their resources, to try to schedule interviews on the same day to the extent possible, and the Bureau stated that conducting some interviews by video-conference would be acceptable. The Bureau provided two possible dates for the interviews, September 16 and 20, and Google informed the Bureau that September 20 likely would be the first date available to conduct multiple interviews. Through this process, Google made available a total of six individuals that the Bureau sought to interview. Notwithstanding Google’s complete cooperation regarding these interviews, the Bureau subsequently incorrectly said that the Company had changed their timing and location.⁴⁸

Finally, the Bureau contends that the Engineer’s assertion of his Fifth Amendment rights impeded its investigation and left significant factual questions unanswered.⁴⁹ The fact that the Engineer was legally unavailable did not leave any significant factual questions unanswered and, in any event, Google had no ability to provide access to him. However, Google did explain to the Bureau that the Engineer had cooperated fully with Google’s investigation, stating that he

⁴⁸ See e-mail from Enforcement Bureau to Google Counsel (Sept. 16, 2011); e-mail from Google Counsel to Enforcement Bureau (Sept. 19, 2011).

⁴⁹ Notice at ¶5 (“Moreover, because Engineer Doe permissibly asserted his constitutional right not to testify, significant factual questions bearing on the application of Section 705(a) to the Street View project cannot be answered on the record of this investigation.”).

believed the collection of publicly broadcast information sent over unencrypted Wi-Fi networks to be lawful.

The record thus is clear that Google did not “refuse” to make any person available, nor did it “fail[]to cooperate with the Bureau” with respect to making any person available. Consequently, Google’s purported “failure to identify employees” could not have been a “continuing violation” that began on December 10, 2010.⁵⁰ Google raised a reasonable concern about the scope of the Bureau’s initial LOI request on that date at the Bureau’s suggestion. Once the Bureau indicated that it would not proceed in the same manner as the DOJ and the FTC, Google timely identified each employee as requested by the Bureau. The Bureau’s claim of noncooperation in this regard is not supported by the record.

3. Google Timely Produced Responsive E-mails When Requested

Google disagrees with the claims in the Notice that Google “refused to ... produce any e-mails in response to the Bureau’s LOI” and failed to “timely ... search for and produce any e-mails.”⁵¹ Google did not refuse to provide e-mails; in fact, Google produced e-mail in response to the Supplemental LOI, when they were specifically sought. Any delay in this production is attributable not to Google, but to the Bureau’s months-long wait to respond to Google’s December 2010 LOI Responses. Moreover, the focus on e-mails alone is incomplete. Google produced key documents alongside its response to the LOI. The Bureau itself recognizes this, as those documents comprise the majority of the Google materials that the Bureau cites in the Notice.

The LOI did not request that Google produce any specific documents or email. It instead requested that Google “[p]rovide copies of all Documents that provide the basis for or otherwise support the responses to” all of the inquiries in the LOI.⁵² The Company’s response addressed the Street View Wi-Fi project’s role in Google’s development of location-based services, the collection of data transmitted from unencrypted Wi-Fi networks, the hardware and software involved, Google’s treatment of the payload data collected, and the remediation measures that the Company had taken. None of these topics implicated or called for e-mail; instead, they called for the production of two Design Documents, 25 code files, the Stroz Friedberg Report, and the Stroz Friedberg Remediation Report. Those are the materials that Google’s response relied upon and are what Google provided:

⁵⁰ *Id.* at ¶50.

⁵¹ *Id.* at ¶¶ 48, 41. *See also id.* at ¶17 (“Google’s document production included no e-mails, and the Company admitted that it had ‘not undertaken a comprehensive review of email or other communications’ because doing so ‘would be a time-consuming and burdensome task.’” (footnote omitted)).

⁵² LOI at 4.

Google has not undertaken a comprehensive review of email of potential record custodians. As stated above, no one in senior management or the product teams requested that payload be collected, and it was not used in any product or service. A comprehensive email review to prove the absence of documents related to the collection would be a time-consuming and burdensome task. Google is providing a comprehensive response that shows a lack of knowledge and accordingly requests that it not be required to conduct a further email search at this time to in essence prove a negative. Other agencies have agreed with this approach, reserving the right to renew the request if not otherwise satisfied with the information provided.⁵³

This response shows that Google was working in good faith to identify and produce the documents most responsive to the Bureau's inquiry. Google did not "elect[.]... without the Bureau's consent"⁵⁴ to not produce documents. Google provided the documents called for in the LOI, and also made a request relevant to the scope of the investigation. The Bureau did not respond to that request for three months. Rather than informing Google that the Bureau chose not to follow the approach taken by other agencies, the Supplemental LOI responded to Google's request indirectly by referring to Google's LOI Responses as "[i]ncomplete" and directing Google "to provide a full response to the LOI that reflects a comprehensive search of all materials within the Company's possession, as instructed in the original LOI," as well as to "provide complete responses, certifying that a complete search was conducted."⁵⁵ In response, Google produced e-mails.

Given the delayed response to Google's request regarding the production of employee names and Google's timely response to the Supplemental LOI, there was no "continuing violation[]" that lasted from December 10, 2010⁵⁶ with respect to production of e-mails. Moreover, because the Bureau did not respond to Google's December 10, 2010 request until March 30, 2011, the statement that Google "delayed the Bureau's investigation and required considerable effort on the part of Commission staff that should not have been necessary"⁵⁷ is not accurate.

⁵³ LOI Responses at 12.

⁵⁴ Notice at ¶43. *See also id.* at ¶27 (referring to "Google's failure to produce any e-mails in response to the initial LOI and the Company's admission that it had not attempted a comprehensive review of its employees' e-mails"); ¶44 (referring to "e-mails the Company withheld for several months"); ¶47 ("Google violated Commission orders by delaying its search for and production of responsive e-mails and other communications").

⁵⁵ Supplemental LOI at 5. As noted above, Google timely provided responsive e-mails and other materials on April 14, 2011 and April 28, 2011.

⁵⁶ Notice at ¶50.

⁵⁷ *Id.* at ¶45.

Furthermore, the Notice's focus on e-mails alone presents an incomplete picture of Google's cooperation. From the beginning, Google produced the documents that "support [its] responses," as required by the first LOI.⁵⁸ Google's LOI Responses were not informed by e-mail because, as stated therein, the collection of payload data was never requested by senior management or any product group, nor was it ever included in any product or service.⁵⁹ Only a small number of e-mails were ultimately relevant to the Bureau's investigation, and Google produced them in response to the March 30, 2011 Supplemental LOI.⁶⁰ Google also produced other unrelated e-mails later in response to requests that specifically called for them.⁶¹ None of those e-mails was cited in the Notice.

To produce documents and e-mail, Google undertook a comprehensive document search to determine the extent of Google employees' knowledge, if any, of the collection of payload data in connection with the Street View Wi-Fi program. Google reviewed more than 500,000 individual documents over a period of months.

The responsive e-mails found during that intensive search constitute a tiny fraction of the half-million documents reviewed, and likewise comprise a minor portion of the nearly 800 pages in total that Google submitted to the Bureau. The absence of responsive e-mails demonstrates the absence of knowledge or intent within Google with respect to the collection of payload data. The DOJ reached the same conclusion in its declination letter to Google.⁶²

Although the Bureau frames Google's e-mail production timeline as having "delayed the Bureau's investigation,"⁶³ the Notice itself illustrates the e-mails' relative unimportance to the investigation. While the Notice's fact findings rely heavily on Google's December 2010 LOI Responses and document production,⁶⁴ they cite only four e-mails.⁶⁵ Rather than delaying the investigation, these e-mails confirmed what Google had informed the Bureau from the start.⁶⁶

⁵⁸ LOI at 4.

⁵⁹ See LOI Responses at 12.

⁶⁰ See Supplemental LOI at 4.

⁶¹ See August 18 Letter at 3.

⁶² See Google June 3 Letter (attaching May 27, 2011 Department of Justice letter notifying Google of closure of Department's investigation).

⁶³ Notice at ¶45.

⁶⁴ See, e.g., *id.* at ¶¶ 9-12, 23-24, 26.

⁶⁵ The Notice cites the contents of one e-mail (Document 11-14) four times, another (Document 11-9) twice, and two other e-mails (Documents 11-7 and 11-13) once each. See Notice at ¶¶ 21, 30, 31, 44.

⁶⁶ See LOI Responses at 4-5.

4. Google's Document Search Was Comprehensive and Google Certified It Accordingly

The Notice alleges that Google failed to provide a compliant certification verifying the completeness and accuracy of its search efforts until its Responses to the August 18 Letter.⁶⁷ The Notice's representation that Google willfully and deliberately failed to conduct a comprehensive search for responsive documents⁶⁸ does not accurately reflect the Company's communications with the Bureau.

The August 18 Letter directed Google "to produce a declaration certifying that it has conducted a comprehensive search of all materials within the Company's possession, including emails."⁶⁹ Google provided a declaration from an Officer, confirming that Google conducted a comprehensive search of all materials within its possession, including e-mails, to identify responsive documents that provide the basis for or otherwise support its responses to the LOI.⁷⁰

Google's Responses to the August 18 Letter further objected to the Letter's characterization of Google's communications with the Bureau regarding the production of responsive documents.⁷¹ In its December 10, 2010 LOI Responses, Google objected to the overbroad, burdensome, and non-specific production request in the LOI, which sought production of all documents that supported Google's responses to the LOI. Google and the Bureau thereafter engaged in discussions regarding the scope of production, during which Google explained its methodology for searching for documents relevant to the response. Google assured the Bureau that it would produce responsive documents, including e-mails from pertinent custodians. Google identified appropriate record custodians for possible production of relevant documents, including e-mail. All documents that Google relied upon in its response were produced – as the Bureau requested. The review was comprehensive and Google's prior correspondence with the Bureau was not an admission or suggestion to the contrary. The paucity of responsive documents underscores the point Google made repeatedly to the Bureau in regard to the collection of payload information: there was a general lack of knowledge of the activity throughout the company. The Bureau had no basis to lack confidence in the thoroughness of the production. Accordingly, Google confirmed that it conducted a comprehensive search for documents that "provide the basis for or otherwise support the Company's responses" to the LOI.⁷²

⁶⁷ Notice at ¶¶ 4, 18, 27, 29, 32, 33, 41, 45.

⁶⁸ *Id.* at ¶¶ 43, 45.

⁶⁹ August 18 Letter at 3.

⁷⁰ Responses to August 18 Letter, Officer Declaration (Sept. 6, 2011).

⁷¹ Responses to August 18 Letter at 3.

⁷² *Id.*

III. Conclusion

In sum, Google cooperated with the Commission's investigation in good faith and in a timely matter, and agrees with its finding that there was no underlying legal violation. While it disagrees with the Notice, it is pleased that the matter is closed.

Respectfully submitted,



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Commissioner Robert McDowell
Commissioner Mignon Clyburn
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