

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

**In the Matter of
Preserving the Open Internet,
Broadband Industry Practices
Notice of Proposed Rulemaking**

**GN Docket No. 09-191
WC Docket No. 07-52; FCC 09-93**

Comments of the Internet Freedom Coalition

Introduction

The Internet Freedom Coalition is an ad hoc coalition of organizations and individuals committed to the continued growth and improvement of the Internet, who believe regulations and taxes are harmful to those ends. The Internet Freedom Coalition believes that a free and open Internet is desirable, and argues that regulatory intervention in the well-functioning marketplace that has thus far produced a vast, free and open network would unnecessarily limit the current and future supply of bandwidth, and would harm both producers and consumers. These comments are attributable only to the individual signatories.

The current unregulated environment has fostered enormous growth in bandwidth, competition, adoption, and the free use of rapidly emerging applications.

Despite over seven years of dire predictions by a few shrill Network Neutrality advocates that the Internet as we know it would perish without aggressive regulatory intervention by the Commission, the Internet market has been growing at a staggering pace in a regulation-free environment, even during a severe recession. Consider the decade of advancement and growth [documented](#) by Oliver J. Chiang in the December 28 issue of *Forbes**:

- Number of e-mails sent per day in 2000: 12 billion
- Number of e-mails sent per day in 2009: 247 billion

- Revenues from mobile data services in the first half of 2000: \$105 million
- Revenues from mobile data services in the first half of 2009: \$19.5 billion

- Number of text messages sent in the U.S. per day in June 2000: 400,000
- Number of text messages sent in the U.S. per day in June 2009: 4.5 billion

* Oliver J. Chiang, *Forbes*, December 28, 2009, “The Decade In Data: Our way of life has increasingly moved into bits and bytes,” <http://www.forbes.com/2009/12/27/broadband-text-messages-technology-cio-network-data.html>

- Number of pages indexed by Google in 2000: 1 billion
- Number of pages indexed by Google in 2008: 1 trillion

- Amount of hard-disk space \$300 could buy in 2000: 20 to 30 gigabytes
- Amount of hard-disk space \$300 could buy in 2009: 2,000 gigabytes (2 terabytes)

Note that the growth in each of these key metrics, in an unregulated environment, is at least three orders of magnitude.

Before regulations that would harm such geometric increases in Internet usage and commerce are adopted, those arguing for regulation based on a market-failure rationale must publicly contend with such data.

In his [speech](#) to the Brookings Institution last September**, Chairman Genachowski quoted Tim Berners-Lee’s observation -- and our ideal -- that "the Internet is a blank canvas allowing anyone to contribute and to innovate without permission."

In the same speech, Chairman Genachowski took note of the “great strides in the center of the network,” rightly acknowledging their “unparalleled record of success.”

We wholeheartedly agree with the Chairman Genachowski’s observation that:

“Most Americans’ early exposure to the Internet was through analog modems which allowed a trickle of data through the phone lines to support early electronic bulletin boards and basic email. Over the last two decades thanks to substantial investment and technological ingenuity, companies devised ways to retrofit networks initially designed for phones and one-way video to support two-way broadband data streams connecting homes and businesses across the country. And a revolution in wireless technologies using licensed and unlicensed spectrum and the creation of path-breaking devices like the Blackberry and the iPhone have enabled millions of us to carry the Internet in our pockets and our purses. The lesson of each of these stories and innumerable others like them is that we cannot know what tomorrow holds on the Internet except that it will be unexpected, that the genius of American innovators is unlimited and that the fewer obstacles those innovators face in bringing their work to the world the greater our opportunity as citizens and as a nation.” (Brookings, Sept, 2009)[†]

Proponents of regulation rightly promote success stories of Internet entrepreneurship in the application sector. However, they very often leave out the tremendously improved Internet infrastructure that is perhaps the greatest entrepreneurial story of all. Simply put, if the ever-increasing demand for bandwidth is to be met, the conditions allowing return on investment must

[†] Julius Genachowski, “Improving Broadband and Mobile Communications,” September 21, 2009, The Brookings Institution, Washington, D.C.

http://www.brookings.edu/~media/Files/events/2009/0921_broadband_communications/20090921_broadband.pdf

be maintained, and that starts with allowing all players, including bandwidth providers, to “innovate without permission.”

The Commission has not provided any evidence of a market failure or pattern of abuses.

We will watch with great anticipation to see if comments filed with the Commission document actual market failures, or anything but the infinitesimal fraction of network management or competitive decisions that have given rise to complaints. Given the vanishingly small number of complaints, and amazing speed with which they have been addressed and corrected, these are clearly the exceptions that prove the rule that the Internet as it exists is and has been open and free. Although we will honestly assess all the facts presented to the Commission, we will be greatly surprised if comments are filed that document actual market failures, page blocking, or anti-competitive behavior.

Even well-meaning regulations to enforce a policy of “non-discrimination” risks harming reasonable network management efforts which are clearly beneficial to the public.

The Commission must recognize that “non-discrimination” is a term that must be used with the rather large qualification that “discriminating” between some content and some types of Internet traffic is unquestionably beneficial to the public. Network managers routinely “discriminate” against illegal websites (such as those depicting child pornography) and against spam emails that would clog their customers’ inboxes on a daily basis if they were not deterred. Such discrimination is appropriate, as it offers broadband customers a much more enjoyable user experience.

Conversely, broadband customers would clearly rebel against an unqualified policy of “non-discrimination,” as their Internet experience would be severely degraded -- overwhelmed and slowed with unwanted, unwelcome, and even illegal content.

Network managers have an obligation to maximize the efficiency of their networks to make the fullest use of their infrastructure, to fulfill contractual obligations to their customers and enhance their user experience, to prevent abuses of their networks that would limit the bandwidth available to their customers, and to prevent attacks on their own network and those of their customers. These are serious issues network managers must deal with in real time. The integrity of their networks and the satisfaction of their customers are being threatened every day by very determined individuals and organizations seeking to abuse the network and attack it and its users. The public is well-served by network managers responding to these constantly changing threats rapidly and creatively, and the Commission should not adopt rules that would interfere with that response.

Finally, the Commission must take note that an obligation to make network management practices “transparent” to the Commission and to the general public risks making them transparent to the very individuals and organizations that are attempting to abuse and attack the networks.

It remains a question whether the FCC has legal authority to promulgate network neutrality rules, and even if it did, the Justice Department and the FTC are better suited to make judgments as to anti-competitive behavior.

It is by no means certain that the Commission has the legal authority to promulgate network neutrality regulations. Congress has not given the Commission the authority to regulate the Internet for the purposes of ensuring network neutrality, nor have they, or the Executive, or the Courts, even clearly defined such a policy.

The lack of a clearly defined policy of network neutrality is mainly owing to there being no clearly identified problem in the first place that such a policy would efficiently address.

This “solution in search of a problem” also poses significant threats to search-application and content-provision platforms. While some search or content-provision firms may now support regulating broadband providers into narrow legal patterns of “non-discrimination,” “transparency,” and “neutrality,” if such ill-designed and ill-defined regulations were applied to them, their own business models would be severely undermined, if not destroyed.

If those who are calling on the Commission to regulate another market sector are not willing to submit their own market sector to the same regulatory regime, the Commission should be cautioned that they are in fact being asked to pre-select the winners and losers in a dynamic and competitive marketplace, where consumers are in a far better position to determine their own desires and interests than is the Commission.

Finally, anti-competitive behavior is not significantly different as it would play out on the Internet than it plays out anywhere else. There is a robust legal and regulatory structure for dealing with anti-competitive behavior that rests with the Department of Justice and the Federal Trade Commission.

Unless and until the Commission determines both that a significant problem exists, and also that the Commission is more qualified to deal with that problem than are the existing antitrust authorities – which unlike the Commission, have clear congressional authority -- the Commission should defer to those existing authorities.

Signatories

Phil Kerpen
Chairman, Internet Freedom Coalition
VP for Policy, Americans for Prosperity

Tim Phillips
President
Americans for Prosperity

Andrew Langer
President
Institute for Liberty

Pete Sepp
Vice President for Policy & Communications
National Taxpayers Union

Hance Haney
Director & Senior Fellow
Technology & Democracy Project
Discovery Institute

Jeffrey Mazzella
President
Center for Individual Freedom

Grover Norquist
President
Americans for Tax Reform

Chris Butler
Executive Director
Media Freedom Project

Karri Bragg
Executive Vice President
Citizen Outreach

Clyde Wayne Crews Jr.
VP for Policy, Director of Technology Studies
Competitive Enterprise Institute

Don Racheter
President
Public Interest Institute (Iowa)

James G. Lakely
Co-director, Center on the Digital Economy
The Heartland Institute

Susan Gore
Founder
Wyoming Liberty Group

Tom Schatz
President
Citizens Against Government Waste

David A. Keene
Chairman
American Conservative Union

Bartlett D Cleland
Director, Center for Technology Freedom
Institute for Policy Innovation

Jim Martin
Chairman
60 Plus Association

Andrew F. Quinlan
President
Center for Freedom and Prosperity

Barrett E. Kidner
Chairman & CEO
Caesar Rodney Institute