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January 14, 2010

Chairman Julius Genachowski
Commissioner Michael J. Copps
Commissioner Robert M. McDowell
Commissioner Mignon Clyburn
Commissioner Meredith Attwell Baker
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Preserving the Open Internet – Broadband Industry Practices
GN Docket No. 09-191

Dear Chairman and Commissioners:

We live in a period of continuing economic peril and unprecedented international competition.

Such a precarious moment therefore makes it even more critical that we as a nation pursue sensible policies that promote investment, growth, flexibility and innovation in order to bring new prosperity and employment. Conversely, we must avoid hasty, unnecessary, ideologically-driven policies that threaten to discourage growth and exacerbate our difficulties.

This is particularly important with regard to the nation's technological and Internet sectors, which constitute our most promising vehicles for future prosperity and advancement.

Accordingly, pursuant to Sections 1.415 and 1.419 of the Federal Communications Commission's (hereinafter "Commission") Rules,¹ the **Center for Individual Freedom** (hereinafter "**CFIF**") files this comment as an interested party in response to the Commission's Notice of Proposed Rulemaking (hereinafter "Notice") dated October 22, 2009, Preserving the Open Internet – Broadband Industry Practices, GN Docket No. 09-191.

¹ 47 C.F.R. §§ 1.415, 1.419.

CFIF is a non-profit, non-partisan organization with over 250,000 grassroots supporters and activists across America. It was established in 1998 for the purpose of safeguarding and advancing Constitutional rights, as well as ensuring continued American innovation, leadership, economic prosperity and worldwide entrepreneurial preeminence. As a central part of that mission, CFIF advocates public policies that advance technological, Internet and broadband development most effectively and efficiently.

We at CFIF are grateful for the opportunity to comment on the instant Notice, and welcome any and all responsive commentary.

The Internet Has Flourished Under a Hospitable Regulatory Climate Allowing Flexibility and Innovative Freedom

First and foremost, CFIF supports the Commission's acknowledgement that the Internet has positively transformed American lives and the U.S. economy. This has occurred because of a regulatory climate allowing flexibility and freedom to innovate, and we applaud the Commission's stated goal of cultivating continued progress.

As stated by the Commission itself in its Notice, Internet development over the past two decades has played a central role in maintaining America's status as the most prosperous, most entrepreneurial and most innovative nation in the world:

Forty years ago, the first packet switches linked computers into a network, laying the foundation for the Internet, which has transformed our nation's economy, culture, and democracy. The Internet has been a launching pad for innumerable creative and entrepreneurial ventures; enabled businesses small and large, wherever located, to reach customers around the globe; allowed individuals in remote parts of America to access information and services previously unavailable to them; and made it possible for the voice of a single citizen – whether in the form of a blog post, online video, or tweet – to influence world events. As recently as twenty years ago, it would have been difficult to imagine the profound benefits the Internet routinely provides today.

Chairman Genachowski echoed this observation in a speech before the Brookings Institute on September 9, 2009:

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 iPhone have enabled millions of us to carry the Internet in our pockets and purses. The lesson 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 these innovators face in bringing their work to the world, the greater our opportunity as citizens and as a nation.

None of that happened by accident. It occurred as a consequence of a regulatory climate that enabled and encouraged entrepreneurial freedom and flexibility to innovate.

The key phrase in the Commission’s observation may very well be that “it would have been difficult to imagine the profound benefits of the Internet,” and that, as Chairman Genachowski himself articulated, “the fewer obstacles these innovators face in bringing their work to the world, the greater our opportunity as citizens and as a nation.” CFIF wholeheartedly agrees – it is forever difficult to anticipate what tomorrow will bring. And fewer regulatory obstacles, especially in the absence of any record of recurring consumer harm, indeed promotes expansion, employment and innovation.

The Commission’s proposed Net Neutrality regulations, however, threaten the very progress and future growth that it professes to seek.

Obviously, the remarkable Internet revolution referenced above has occurred without the potentially stifling “Net Neutrality” regulations now contemplated, which illustrates the truth of the adage that Net Neutrality is therefore an illusory “solution” in search of a speculative problem.

Maintaining a regulatory climate that enables flexibility and freedom to meet growing consumer demands is critical to continued growth. Federal policy must not create an unnecessary regulatory straightjacket that may appear deceptively welcome in some isolated quarters today, but will create unforeseen future constraints and inhibit investment and innovation to the detriment of all moving forward. Although the past two decades have witnessed breathtaking progress and growth, much work remains to be done. Continued advancement in high-speed network infrastructure and innovative technologies is critical to American economic well-being, and the Commission’s and current administration’s stated goals for broadband development.

We Must Promote Policies That Actually Work, Not Serve Special Interests

The Commission cannot take the aforementioned progress for granted, and it must not descend into counterproductive and meritless regulations that will jeopardize future progress.

Whenever a government or regulatory entity such as this Commission endeavors to enter a field or contemplates a new set of rules and regulations, it must remain careful to maintain a sober and realistic view of what policies will actually facilitate its stated goals. Or, to apply the physicians' creed, "first, do no harm."

Regulatory policy should not become a political bludgeon for one community of self-interested corporate entities or partisan activists to cripple others. Namely, politically-powerful content providers cannot be allowed to commandeer the regulatory system to be used against Internet service providers in order to protect their own business models and profits. To the contrary, a thriving Internet will require cooperation between content providers and service providers.

At a minimum, the Commission must acknowledge the real-world data rebutting the inclination to impose its unnecessary and harmful Net Neutrality rules. For instance, according to Oliver J. Chiang of Stanford University, the past decade alone has witnessed a twenty-fold increase in email traffic (from 12 billion per day to 247 billion per day), a ten-thousand-fold increase in text messaging (from 400,000 per day to 4.5 billion per day), and a thousand-fold increase in the number of pages available via Google search (from approximately 1 billion to approximately 1 trillion).² This is remarkable progress by any reasonable measure.

As the Commission contemplates its proposed Net Neutrality rule, it must therefore focus on what policies actually *work*, rather than capitulating to a cacophony of divergent special interest groups or counterproductive agendas. Although public policy can trigger progress in achieving universal broadband access, a goal this Commission seeks, ill-advised policies such as the Commission's proposed Net Neutrality rule will only slow existing progress and create wholly new barriers to broadband access. The Commission must ascertain what efforts have worked most effectively and efficiently to date, and pursue the policies that promise continued concrete progress.

Otherwise, its effort will be for naught.

Stated simply, the Commission must avoid any well-meaning but counterproductive actions that ultimately *impair* investment in, and consumer access to, high-speed Internet and all of its benefits. Rather, the policies moving forward must encourage

² Oliver J. Chiang, *The Decade in Data*, *Forbes*, December 28, 2009.

more investment from the private sector and not stifle providers' ability to manage networks by responding to consumer demands and wishes.

Private Investment Will Be the Primary Engine to Achieve the Commission's Goals

The Internet revolution since 1996 could not have occurred without the cable and telecommunications sector's massive private investments during that span.

As a direct result of those enormous private investments, the incredible advances that America has witnessed include, but are not by any means limited to, healthcare information and delivery, education, police effectiveness, public safety, homeland security, emergency response, energy efficiency, workforce training, entertainment, interpersonal communication, office efficiency, news access, scientific research and innumerable other spheres of American life. Along the way, it has also generated countless millions of high-paying jobs and propelled American innovation and economic prosperity.

When the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) Act (amending the Communications Act of 1934) became law, just fourteen short years ago, the few Americans who did possess Internet access utilized excruciatingly slow dial-up connections. And as the Commission has noted, only a tiny percentage of Americans possessed cellular telephone service at that time, cable was a locally-regulated video delivery platform, and satellite and World Wide Web service were in their infancy.

Since 1996, however, the majority of American households and businesses have acquired broadband access, and now utilize the Internet via a multitude of technologies – wireless, satellite, cable, copper, and fiber. This achievement has been nothing short of remarkable.

In the past five years alone, American per capita bandwidth has increased by a multiple of twelve, from 262 kilobits per second to 3 megabits per second. Similarly, American Internet use per month has increased twelve-fold, from 170 million gigabytes per month to 2 billion gigabytes per month.³ Private telecommunications entrepreneurs have enabled this growth while maintaining reasonable costs to consumers. In America today, the cost of mobile voice remains 60% lower than our overseas counterparts.

Every year brings more and more technological and Internet access innovations that seemed beyond everyday consumers' wildest imaginations just twelve months before.

³ Bret Swanson, *Google and the Problem With 'Net Neutrality*, *The Wall Street Journal*. October 5, 2009.

So how did this incredible progress occur?

Primarily through massive investment by private Internet and telecommunications entrepreneurs. Since 1996, the cable and telecommunications sector has invested a remarkable \$147 billion in infrastructure development.⁴ In 2008 alone, the industry invested at least \$15 billion, and an even larger amount in 2009.⁵

To provide some perspective, the cable and telecommunication sector's \$15 billion 2008 investment alone amounts to over twice the \$7.2 billion allocated by Congress to expand broadband deployment through the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (Recovery Act signed into law on February 17, 2009). That massive private investment has provided the solid foundation upon which the progress cited by the Commission has occurred since 1996.

But the Commission cannot take these incredible achievements for granted. They were not inevitable.

Rather, this progress occurred because the nation's regulatory environment did not undermine or obstruct them. While more work certainly remains to be done, the Commission must resist calls to dismantle that foundation or halt momentum by imposing counterproductive re-regulation of, or new regulations upon, private industry actors that stand willing and able to further invest in network infrastructure and new technologies.

Net Neutrality Will Also Subvert the Commission's 2009 National Broadband Plan

Moreover, the proposed Net Neutrality rules would undermine the Commission's Notice of Inquiry dated April 8, 2009, A National Broadband Plan for Our Future, GN Docket No. 09-51. In that Notice of Inquiry, the Commission stated a professed goal of 100%, ubiquitous access to high-speed broadband technology, and complete build-out and utilization of America's broadband infrastructure.

As noted above, such network expansion can only occur if cable and telecommunications entrepreneurs are not discouraged by Net Neutrality regulations from further investment. Net Neutrality, as contemplated by this Commission, will dampen incentives to invest and expand because of its regulatory constraints, will make expansion less attractive and more risky for private investors. If the proposed Net Neutrality regulations are imposed, it will undercut private investment incentive, thereby stifling the Commission's own goal of universal broadband access.

⁴ See, National Cable & Telecommunications Association Industry Data, www.ncta.com/Statistics.aspx.

⁵ *Id.*

New Net Neutrality Regulations That Impair Private Investment Will Subvert the Commission's Central Goal of Internet Growth

The Net Neutrality regulations under consideration contradict this Commission's goal of universal broadband access, as it threatens to discourage further private investment in high-speed network infrastructure.

Ignoring the astounding achievements noted above, which resulted directly from private sector investments, some selfishly insist that the Commission's proposed regulation of – or the imposition of new regulations upon – high-speed network providers is necessary to address a hypothetical, speculative problem. These activists demand Net Neutrality regulations while openly confessing the ideal of “an Internet that is not private property, but a public utility.”⁶

Such an ideal contradicts Chairman Genachowski's wise observation that, “the fewer obstacles these innovators face in bringing their work to the world, the greater our opportunity as citizens and as a nation.” It also flies in the face of increasingly unsustainable burdens on regulatory agencies and growing public opposition to government growth.

Nevertheless, such voices incorrectly allege “failed policies” by the Commission that are somehow “the root of America's broadband decline.”⁷

The reality, however, is quite different.

As the latest data from the Organisation for Economic Cooperation and Development (OECD) demonstrates, the United States maintains the largest broadband market in the entire world – some 30% of the entire OECD total.⁸ This is despite America's greater geographical size and wider population dispersal. Furthermore, the International Telecommunications Union's 2009 Development Index found that the United States possessed the most affordable broadband in the world.⁹ A sampling of other recent data confirms these findings. For example, the World Economic Forum ranked the U.S. number one in its 2008-2009 Competitiveness Report,¹⁰ the Swiss IMD Business School found that “again this

⁶ *Media Capitalism, the State and 21st Century Media Democracy Struggles – An Interview with Robert McChesney, The Bullet*, August 9, 2009.

⁷ *See, Timothy Karr, America's Internet Recovery Plan*, May 11, 2009, <http://www.freepress.net/node/57116>.

⁸ *See, Organisation for Economic Cooperation and Development Broadband Statistics*, www.oecd.org/sti/ict/broadband.

⁹ *See, International Telecommunication Union, Measuring the Information Society*, www.itu.int/ITU-D/ict/publications/idi/2009/material/IDI2009_w5.pdf

¹⁰ *See, World Economic Forum, The Global Competitiveness Report 2008-2009*, <http://www.weforum.org/en/initiatives/gcp/Global%20Competitiveness%20Report/index.htm>.

year, the United States is first in the rankings of the 2008 IMD World Competitiveness Yearbook,”¹¹ and the University of Calgary ranked the U.S. atop its “Connectivity Scorecard.”¹²

Those who nevertheless advocate unwise overregulation of Internet service providers typically cite hypothetical future harm based upon defective data to advance their agenda. For instance, they employ flawed mathematical models that simply divide the number of broadband connections in a given nation by its total population, even though broadband service is overwhelmingly accessed at the household or business structure level. Consequently, such rankings ignore the fact that the average American household is larger than other OECD nations, and result in unsound conclusions.¹³

These Net Neutrality advocates cannot cite factual evidence of any substantive market-wide failure. Instead, they cling to isolated, anomalous deviations from the norm of a heretofore free and open Internet. Such flawed citations and policy prescriptions will only serve to obstruct the Commission’s effort to continue progress from which the nation and consumers have benefitted to date.

We Must Encourage New Private Investment to Achieve Continued Progress

The evidence thus demonstrates that instead of imposing counterproductive regulation of Internet service providers, the Commission should partner with private investors to achieve the mutual goal of growth and universal broadband access.

In an era in which a small percentage of Internet users consume a disproportionately high amount of its traffic, sector participants must be free to invest and pursue innovative solutions to ensure continued growth. Net Neutrality rules, in contrast, will merely serve as a method by which some corporate interests protect their particular business models at the expense of consumer freedom and future growth. These rules attempt to impose a “one-size-fits-all” business model that benefits one set of interests at the expense of other actors necessary to facilitate growth.

New Net Neutrality rules, as proposed by the Commission, will also result in greater Internet congestion and service interruptions for consumers, because service providers will be prohibited from flexible network management and experimentation. Moreover, imposition of Net Neutrality regulations will trigger an

¹¹ See, *IMD World Competitiveness Yearbook 2008*, <http://www.imd.ch/about/pressroom/pressreleases/PR-WCY2008.cfm?bhcp=1>.

¹² See, <http://www.connectivityscorecard.org/countries/usa/>.

¹³ See, http://www.oecd.org/document/46/0,3343,en_2649_34225_39575598_1_1_1_1,00.html.

avalanche of legal challenges to the Commission's legal imposition authority, and years of costly litigation for all involved parties.

Rather than discouraging further private investment in network infrastructure, as the proposed Net Neutrality rule would do, the Commission should instead embrace and facilitate further private investment and innovation in high-speed networks so that the goal of universal access can be achieved.

The only way this will occur is if regulatory policy focuses upon further incentivizing – or more importantly, avoids disincentivizing – private investment to extend smart, secure, effective and fully accessible networks.

Conclusion

In sum, the Internet Era has witnessed an increase, not decrease, in America's standing as the most prosperous, innovative nation in the history of mankind. It is not by coincidence that this occurred in the absence of Net Neutrality laws.

So while CFIF applauds the Commission's effort to foster Internet growth and innovation, the past two decades demonstrate that the best method to accomplish that goal is to facilitate the private investments that have achieved such breathtaking progress. The Commission must ensure that Internet innovators, investors and consumers possess the freedom and flexibility to evolve and capitalize upon future opportunities that today cannot be foreseen. The proposed Net Neutrality rule will undermine that flexibility. Together, the Commission and America's Internet entrepreneurs can make the next two decades even more innovative than the past two. Doing so, as the Commission has observed, will "restore America's economic well-being and open the doors of opportunity for more Americans, no matter who they are, where they live, or the particular circumstances of their lives."

Thank you for your attention to this matter. Please don't hesitate to contact us with any questions, concerns or additional comments.

Sincerely,

/s/

Timothy H. Lee

Vice-President of Legal and Public Affairs