

**Software & Information  
Industry Association**

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**Comments of the  
Software & Information Industry Association (SIIA)  
On GN Docket No. 09-191 and WC Docket No. 07-52  
Notice of Proposed Rulemaking (NPRM) by the  
Federal Communications Commission (FCC) on  
“Preserving the Open Internet”**

**Submitted January 14, 2010**

SIIA submits these comments in response to the NPRM, adopted October 22, 2009, seeking comment on the proposal to codify six principles to apply to all providers of Internet access service (other than via dial-up) regardless of the technology over which service is delivered to preserve open access to the Internet. As stated more fully below, SIIA supports the approach taken by the FCC in the proposed codification and anticipated implementation of these “Network Neutrality Principles.” Our comments below focus on specific areas of clarification that we believe will make the proposal more effective.

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## **INTEREST OF SIIA**

With over 500 member companies, SIIA is the principal trade association of the software and digital information content industry. Our members are global industry leaders in the development and marketing of software and electronic content for business, education, consumers and the Internet. They range from start-up firms to some of the largest and most recognizable corporations in the world. SIIA member companies are leading providers of, among other things:

- business, enterprise and networking software
- software publishing, graphics, and photo editing tools
- corporate database and data processing software
- financial trading and investing services, news, and commodities
- online legal information and legal research tools
- tools that protect against software viruses and other threats
- education software, digital content and online education services
- open source software, and
- many other products and services in the digital content industries.

As such, members of SIIA and our industry depend on an open, robust and competitive Internet service environment to ensure a return on their investments, create jobs, and provide users (both consumers and enterprises) with innovative products and services. SIIA supports policies that seek to ensure that software and digital content providers are not threatened by potential discrimination from broadband Internet providers in their ability to deliver lawful products and services to customers through the Internet. In reviewing the NPRM and open Internet access policy put forward by the FCC, we have drawn not only on our industry's experience in developing innovative products and services and delivering them to a variety of end users, we have also incorporated our experiences in promoting vigorous, but fair, competition within the software industry, working to maintain a competitive environment through balanced, comprehensive approaches.<sup>1</sup>

As requested in the NPRM (§179), the comments below follow, to the degree practical, the organization and structure of the NPRM.

## **BACKGROUND (Section III)**

The FCC correctly lays out that “[t]oday’s Internet embodies a legacy of openness and transparency that has been critical to the network’s success as an engine for creativity, innovation, and economic growth.” (§17) Without question, the “open Internet has had a transformative effect on commerce.” (§20) Since the 1990s, the rise of the Internet and proliferation of software and digital information technology have combined to create a global networked infrastructure. This infrastructure has, in turn, accelerated the

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<sup>1</sup> For background, see “Software Industry Competition” section of SIIA Public Policy website, available at: [http://www.sii.net/index.php?option=com\\_content&view=article&id=377&Itemid=225](http://www.sii.net/index.php?option=com_content&view=article&id=377&Itemid=225).

development of a new global “knowledge economy,” where business models are driven by expertise and intellectual capabilities and based on networking, connecting and collaborating. In 2008, SIIA published a report that measures the substantial economic impact of the software and digital content industries, demonstrating the critical role that these industries play in a vibrant and dynamic U.S. and global economy.<sup>2</sup>

The SIIA Report concludes that the S&I industries are among the fastest growing and most important for creating jobs and propelling continued U.S. economic growth. For instance, in 2005, S&I industry growth was up nearly 11 percent, compared with 3.2 percent for the economy as a whole, while software and information generated \$564 billion in revenue.

As laid out in its discussion of Historical Commission Policies and more recent Commission focus on Preserving the Open Internet, the FCC concludes (correctly, in our view) that it “is not writing a blank slate in this proceeding,” (¶46) and that “it has long been U.S. policy to promote an Internet that is both open and unregulated,”<sup>3</sup> specifically with regard to ensure an open, robust and competitive Internet service environment and “to prevent network operators from interfering with enhance service[s]” and addressing the “potential for anti-competitive abuses arising” from a variety of mergers and practices over the years. (¶47)

#### **NEED FOR COMMISSION ACTION (Section IV.A.)**

The continued development of new technologies and infrastructure to support the delivery of software and digital information products and services is not only crucial to the future of the software and digital content industries, but also to consumers and business enterprise users, and the U.S. economy more broadly. To further the development and implementation of such technologies, it is critical to ensure a level of Internet openness that enables providers of content that drives these innovations are not disadvantaged in the marketplace. Despite the efforts to date by the FCC to preserve the Internet’s openness, there is the stated concern that “the evolution in Internet usage, and associated developments in network technology, have respectively motivated and enabled network operators to differentiate price and service for end users and for providers of content, applications, and services.” (¶49) This concern is shared by SIIA and our industry, and we agree that “despite ... efforts to date, some conduct is occurring in the marketplace that warrants closer attention” and that it is “important to provide greater clarity and certainty ... to preserve the open, safe and secure Internet and promote public interests” listed in the NPRM. (¶50)

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<sup>2</sup> *Software and Information: Driving the Global Knowledge Economy*; SIIA; 2008: <http://www.siiia.net/estore/globecon-08.pdf>

<sup>3</sup> As detailed further in our comments, there are legitimate areas of ‘regulation’ on the Internet which focus on areas of *conduct* reflecting long-standing policy objectives in both the online and offline world. SIIA understands the term ‘unregulated’ in this instance to reflect the substance of the cases cited by the FCC, which focus on preventing impediments to use and access of the Internet *a priori* of any such conduct regulation.

To provide meaningful clarity and certainty, the NPRM lays out an appropriate definition of broadband Internet access service for purposes of implementing the principles. At the same time, SIIA concurs with the FCC that the proposal would not apply to establishments such as coffee shops, waiting rooms and rest areas, or to a “service that is not intentionally offered for the benefit of others, such as a service from personal Wi-Fi networks.” (¶55) The FCC approach focuses on the specific question of access to the Internet that the FCC seeks to provide certainty for, consistent with its past history and statutory authority.

The evolution of the Internet marketplace and corresponding technological tools available to network operators provide fertile ground for Internet access service providers, seeking to maximize revenue opportunities from their networks, to offer access and provide these techniques only to their “own affiliates and partners” or turn them into “a service that ... providers offer to content and application providers for a fee.” (¶58) Because these “technologies now allow network operators to distinguish different classes of traffic, to offer different qualities of services, and to charge different prices to each class”, there is a real risk that, as the FCC contends, “safeguarding historic Internet traffic pricing and practices is needed to preserve the end-to-end architecture of the Internet,” so that innovative content and software companies are able provide “intelligence and control at the edge of the network.” (¶62, 63)

There are two distinct issues raised by the NPRM, both of which are essential underpinnings of the FCC proposal. First, there is the distinct risk that Internet access service providers may charge “inefficiently high prices to content, application and other service providers ... [which leads to the situation where] investing in innovative Internet content, application, and services is risky,” (¶68) and loss of investment confidence in independently generated products and services. Potentially “if the fees are sufficiently high across a small number of Internet access service providers with sufficient market share, then not only will content, application, and service providers’ incentive be reduced, but the fees could drive some content, application, and service providers from the market.” (¶69)

Second, separate from the issue of discrimination or anti-competitive pricing, our industry faces the risk that in cases where Internet access service providers have market power, “quality discrimination will have socially adverse effects ... [which] not only would harm users overall, but it could reduce innovation at the edge of the network....” (¶70) The FCC states correctly that such “service providers generally, and particularly [those] with market power, may have the incentive and ability to reduce or fail to increase the transmission capacity available for standard best-effort Internet access service, *particularly relative to other services they offer*, in order to increase revenues obtained from content, application, and service providers ... who desire a higher quality of service.” (¶71, emphasis added)

It is highly likely, in our industry’s view, that “where broadband Internet access service providers have market power and are vertically integrated or affiliated with content, application or service providers, ... that a broadband Internet access service provider serves as a gatekeeper to the content, applications, and services offered on the

Internet.” (§72) In addition to the pay television example used in the NPRM, SIIA offers several additional examples:

- A broadband Internet access service provider that is the owner of an online business financial information service or portal could use its gatekeeper position and technology to give preferential treatment to its own service or portal, either charging users for access to the competitor site, charging third parties for access to its own website or seek to protect its own information provider by degrading the performance of the competitor website for its subscriber end users.
- A broadband Internet access service provider enters into agreements with independent software, content or other service providers to market or promote their services to its base of subscribers and provides assurances that those entities will have preferential treatment by the Internet access service provider’s network; or a broadband Internet access service provider acquires or enters into an equity position with an independent software, content or other service provider and uses its technology or access gateway to provide better treatment of the products or services of that affiliated or related entity.

Central to the concerns outlined above is that even if there is competition among broadband Internet access providers, once an end-user has chosen to subscribe to a particular broadband Internet access service provider, the gatekeeper position of Internet access service provider gives it “the ability ... to favor or disfavor any traffic destined for that subscriber” (§73) and is likely to do so given the need to maximize return on revenue from its subscriber base.

### **FCC AUTHORITY TO PRESCRIBE RULES (Section IV.B)**

SIIA notes the various authorities put forward by the FCC. In our view, such authority adequately underpins the FCC proposal. However, nothing in these authorities, nor in the findings of the NPRM, should be interpreted to grant the FCC authority to set tariff rate schedules for access and service related to this proposal, nor to regulate the application and content layer of the Internet (see below).

### **CODIFYING THE EXISTING FOUR INTERNET PRINCIPLES (Section IV.C)**

SIIA concurs that the existing four Internet principles have performed effectively and that after four years of evaluating market developments and experience implementing them that it is appropriate to codify the four principles.

The FCC has taken the appropriate approach of codifying the four existing principles at a level of generality that “establish clear requirements while giving [the FCC] flexibility to consider particular circumstances case by case.” (§89) By codifying the principles as

obligations of the broadband providers rather than on what “consumers are entitled to do,” (¶90) the focus of the principles is more precise and clearly gives notice to the Internet service providers. It also avoids an unintended consequence of focusing exclusively on the ‘needs’ of consumers, as the issue of open Internet access affects not only individuals in their household and personal capacities, but enterprise subscribers as well. Consistent with our analysis above regarding an appropriate and predictable definition of broadband Internet access service, SIIA concurs with the FCC’s affirmation that the principles “apply to all providers of Internet access service (other than via dial up), regardless of the technology over which such service is delivered.” (¶91) In this regard, the FCC’s inquiry as to whether the obligations should be binding on content, applications and other service providers (in addition to broadband Internet service providers) is misplaced: no record has been developed on this point, and nothing in the authorities outlined by the FCC (see comment on Section IV.B. above) would provide the FCC such authority.

The FCC’s approach in the NPRM that all principles will be subject to the needs of law enforcement, and that the agency has no intention of protecting unlawful activities in these rules, (¶96) is consistent with the overall approach of the proposal and should, of course, be subject to the existing procedures related to law enforcement, public safety, and national and homeland security needs.

#### **PRINCIPLE OF NON-DISCRIMINATION (Section IV.D.)**

The FCC appropriately recognizes that the ability of network operators to discriminate in price or service quality among different types of traffic or different providers or users may impose significant harms on content, application and other service providers, “particularly if the discrimination is motivated by anticompetitive concerns.” (¶103) At the same time SIIA recognizes – as stated by the FCC – that Internet access service providers are responsible for managing their networks, and should be able to innovatively apply new technologies and business models. Taking into account this tension, the FCC’s proposed general rule to prohibit a broadband Internet access service provider from discriminating against, or in favor of, any content, application, or service, subject to reasonable network management (¶104) appears workable, in accordance with the following comments.

First, it is the view of SIIA that the definition of “nondiscriminatory” is a useful starting point, but it does not fully account for the full array of relationships that a broadband provider can establish with discriminatory results. As drafted “nondiscriminatory” behavior means that a broadband Internet access service provider may not charge a content, application, or service provider for enhanced or prioritized access to the subscribers of the broadband provider, as described in more detail in the NPRM. (¶106) This is distinct from preventing a broadband Internet access service provider from charging their own end-user subscribers for varying levels of access to the overall Internet, and it is distinct from “managed” or “specialized” services. (¶108) Broadband providers may also benefit (in the form of return on investment, for example), even when there is no direct exchange, by giving wholly, partially owned, or otherwise

affiliated entities discriminatory advantages in the quality and pricing of their content, applications and other services to its subscriber base. The FCC's definition of 'non-discrimination' needs to take this specific anti-competitive impediment to the openness of the Internet into account.

Second, SIIA concurs with the FCC analysis that the proposed rules "would provide broadband Internet access service providers substantial flexibility to take reasonable measures to manage their networks or to address quality-of-service needs, and to provide a safe and secure Internet experience for their users." (§108) As explained by the FCC, the rules would not protect unlawful content, and thus would not in any way prevent "reasonable practices employed by a provider of broadband Internet access service to ... prevent the unlawful transfer of content." (§135) Thus, the principles "do not, for example, apply to activities such as the unlawful distribution of copyright works." As the FCC correctly states in the NPRM, such unlawful distribution "has adverse consequence on the economy and the overall broadband ecosystem." (§139) SIIA strongly concurs with this element of the FCC's proposal.

The FCC approach also considers the blocking of spam, malware and the malicious traffic originating from malware as 'reasonable network management' practices. (§138) SIIA concurs with this general proposition; however, the principle should still apply if, in the course of carrying out these specific network management practices, the broadband Internet access provider implements anti-spam or anti-malware tools and services in a way that discriminates against third party providers, either by giving preferential treatment to its own technology or services, or failing to disclose essential information to third parties that provide such tools and services directly to broadband end users.

Third, SIIA views the "reasonable network management" principle as more resembling the "unqualified prohibitions on discrimination" added to Title II of the 1996 Telecommunication Act than it does the general prohibition on 'unjust or unreasonable discrimination' by common carriers in section 202(a) of the Act. (§109) SIIA concurs with the FCC analysis that extending a model developed for common carriers is less useful and less relevant. While SIIA takes issue with the approach of enumerated exceptions, we agree with the FCC that "a bright-line rule against discrimination [embodied in the 'unqualified prohibitions on discrimination standard'], subject to reasonable network management ..., may better fit the unique characteristics of the Internet..." (§109)

With regard to the question posed by the FCC as to whether it is necessary for a rule prohibiting broadband Internet access service providers from charging content, application and service providers fees, (§111) the approach of the FCC both in the medium- and long-term focuses specifically on the issue of ensuring that end users get the content, applications and other services they want. If the broadband providers were to charge content, application and service providers fees, as posited by the FCC, users would be unable to reap the benefits of the Internet as it was designed.

## **PRINCIPLE OF TRANSPARENCY (Section IV.E.)**

The FCC posits a sixth principle of transparency which focuses on disclosing relevant network management practices to consumers, as well as to content, application, and service providers and to government. (¶118) Our comments address the first two categories of disclosures.

As the FCC finds in the NPRM, there is evidence of service providers concealing information that consumers would consider relevant in choosing a service provider or a particular service option. (¶123) SIIA notes these incidences, but urges the FCC to focus on *users*, which include enterprise as well as consumer subscribers. Given the complex set of applications that enterprises run, and the diverse set of content and service they rely on, the need for accurate and reliable network management and other practices engaged in by broadband service providers is essential for business enterprise operations. Such information should include transmission rates, capacity, limitations on use of any applications, and any network management practices that could interfere with or restrict service. (¶125)

SIIA also commends the FCC proposal that content, application, and service providers should have adequate information about network management practices to enable them to innovate and provide their products and services effectively to users. (¶127) In the software industry, there are well-known methods of disclosing essential interoperability and application interface information which could be a useful benchmark for determining appropriate disclosures. Without reliable and timely information on how network management practices might affect such interoperability, independent content, application and other service providers will be unable to make sure that their products and services can be delivered to users consistent with the product and services design. Disclosure should be made available on broadband providers' websites, consistent with our industry's practice.

SIIA concurs with the FCC's conclusion that the transparency disclosures provided in the proposed rule do not implicate personally identifiable information or individuals' privacy interests. (¶130)

## **REASONABLE NETWORK MANAGEMENT, ETC. (Section IV.F.)**

SIIA concurs with the definition of "reasonable network management" included in the NPRM, subject to the comments above regarding "non-discrimination." (Section IV.D.)

## **MANAGED OR SPECIALIZED SERVICES (Section IV.G.)**

SIIA refers to our comments above relating to "non-discrimination" (Section IV.D.) on this issue. We also reiterate that our industry relies upon an open, robust and competitive Internet service environment to ensure that our industry can continue to invest, innovate and create jobs. Any exception for managed or special services should

not impede the robustness of the open Internet experience for users and should encourage, over time, increased capacity for open Internet access so that Internet-delivered applications, content and services will continue to flourish.

#### **APPLICABILITY OF PRINCIPLES TO DIFFERENT BROADBAND TECHNOLOGY PLATFORMS (Section IV.H.)**

The FCC seeks to affirm that the six principles for open Internet access would apply to all platforms for broadband service, including mobile Internet access. (¶154) In general, SIIA believes that the principles should apply in this instance, but recognizes that the state of development – including market share – of these platforms is at a different stage in many ways from that of fixed, wireline broadband access.

Based on the experience of our members, we note that the mobile environment is increasingly an essential platform for reaching users with content, applications and other services in the enterprise environment where dependency on mobile broadband access is growing substantially. As such, the potential risk of foreclosure to software and digital content providers being able to access this otherwise open Internet environment exists. While the FCC appropriately recognizes that the issues related to these alternative platforms are “challenging” (¶157) (particularly with regard to network management), in our view the differences touch on how the principles should be analyzed and applied in this specific context, rather whether they are relevant at all.

SIIA awaits review of the comments submitted at this stage of the NPRM before offering further views on this issue.

#### **ENFORCEMENT (Section IV.I.)**

The FCC intends to enforce the rules on a case-by-case basis through adjudication. (¶175), which SIIA believes is appropriate.

#### **TECHNICAL ADVISORY PROCESS (Section IV.J.)**

SIIA supports the FCC creating an inclusive, open, and transparent process for obtaining the best technical advice and information from a broad range of engineers to stay abreast of current technology and future technological trends. (¶177) To achieve this objective, the technical advice and information should come not only from a wide range of broadband Internet service providers, but also from a wide range of content, application, and other service providers, as well as representatives of the Internet business and consumer user communities.

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