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Congress of the United States
House of Representatives
Washington, DC 20515-2208

COMMITTEES:
PERMANENT SELECT COMMITTEE ON
INTELLIGENCE
ENERGY AND COMMERCE
SUBCOMMITTEES:
HEALTH
COMMUNICATIONS, TECHNOLOGY,
AND THE INTERNET

December 16, 2010

1898

Hand Delivered

Chairman Julius Genachowski
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Dear Chairman Genachowski:

On December 1, 2010 you announced that you were moving forward to adopt net neutrality rules at the December 21, 2010 Open Meeting.

I was heartened by the colloquy we shared on March 25, 2010 at an Energy and Commerce Committee hearing where you stated, "Well, we are not in favor--I am not in favor of regulating the Internet." However, I am troubled by your indifference to the D.C. Circuit Court's April ruling and your defiance of the bipartisan will of Congress by classifying Internet regulation as permissible under the Communications Act and therefore under jurisdiction of the Federal Communications Commission (FCC). This is in direct contradiction to your testimony before Congress. I recommend you immediately postpone the adoption of these rules.

Moreover, a spokesman from the FCC was recently quoted saying, "The FCC has a very open and transparent process of discussions and dialogues on all the many items that are under review in each of the commissioner's offices." Your proposal speaks of transparency and openness yet this vote comes just days before Christmas and after Congress adjourns for the year; not to mention the 2,000 pages of documents filed by the Wireline Competition Bureau on Friday, December 10, 2010 and Monday, December 13, 2010. With the pre-Open Meeting sunshine period beginning Tuesday, December 14, 2010, there is no time for Congress or the public to review the information in a meaningful way.

The FCC's bold disregard of the law and the facts is troublesome. Furthermore, the FCC is not a legislating body. If this vote is successful, I intend to work with my colleagues to immediately move to enact a disapproval resolution through the Congressional Review Act as well as subpoena the Commission to a hearing examining your reasoning for ignoring the D.C. Circuit Court.

I strongly urge you to release an immediate notification announcing the cancelation of this vote. In the alternative, I would hope you pledge to vote "no" should this come before the commissioners on December 21. I would ask that you respond to this request by delivery to my office no later than noon on Friday, December 17, 2010.

Thank you for your consideration of this request.

Sincerely,



Mike Rogers
Member of Congress

cc. Chairman-elect Fred Upton
Commissioner Michael Copps
Commissioner Robert McDowell
Commissioner Mignon Clyburn
Commissioner Meredith Attwell Baker



OFFICE OF
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

December 17, 2010

The Honorable Mike Rogers
U.S. House of Representatives
133 Cannon House Office Building
Washington, D.C. 20515

Dear Congressman Rogers:

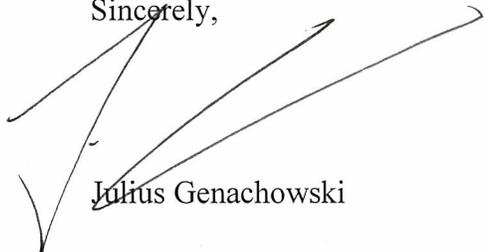
Thank you for your letter of December 16, 2010.

The Commission has announced a tentative agenda for its open meeting on December 21, 2010, which includes a proposed order adopting rules of the road to preserve the freedom and openness of the Internet. High-level rules to preserve Internet freedom and openness will foster innovation and investment in Internet networks and in the content, applications, and services that use those networks, as well as promote consumer choice and encourage consumers to subscribe to broadband – all in furtherance of stated goals for the Commission in congressional statutes.

I appreciate your perspective about whether the Commission possesses sufficient authority to proceed with this action. I am satisfied that the Commission has a sound legal basis for adopting these rules, grounded in its authority under the Communications Act of 1934 (the Act) and the Telecommunications Act of 1996 (the 1996 Act). In the following pages, I enclose a summary prepared by the Commission's General Counsel of the statutory authority currently available to the Commission.

I appreciate this opportunity to continue a dialog with you on this important matter. Please let me know if I can be of any further assistance.

Sincerely,



Julius Genachowski

Enclosure

Federal Communications Commission Office of the General Counsel

Section 706(a) of the 1996 Act directs the Commission to “encourage the deployment on a reasonable and timely basis” of “advanced telecommunications capability” (which includes broadband Internet access) to all Americans.¹ That broad mandate, the United States Court of Appeals for the District of Columbia Circuit recently explained, confers on the Commission the “authority and discretion to settle on the best regulatory or deregulatory approach to broadband.”² In the *Comcast/BitTorrent* case, the D.C. Circuit regarded the Commission as “bound by” one of its prior *Orders* that, in the court’s understanding, had held that Section 706(a) is not a grant of authority.³

The Commission’s prior *Order* appears to be consistent with a reading of Section 706(a) that authorizes the Commission to adopt open Internet rules. In any event, nothing in the *Comcast* opinion precludes the Commission from adopting a new interpretation of Section 706(a) so long as the Commission adequately explains its basis for doing so.⁴ Furthermore, Section 706(b) of the 1996 Act directs the Commission, if it finds that broadband has not been adequately deployed to all Americans, to “take immediate action” to “accelerate deployment” of broadband by “removing barriers to infrastructure investment” and “promoting competition in the telecommunications market.”⁵ The Commission made such a determination in July 2010.⁶

The Commission also has authority to adopt open Internet rules to protect and promote competition and investment in voice, video, and audio services. For instance, it has authority under the Act to protect over-the-top Internet voice (VoIP) services as a competitive constraint on traditional telephone services, and to protect interconnection between VoIP and traditional telephone providers. The Commission’s authority further derives from its statutory responsibility to ensure the “orderly development . . . of local television broadcasting”⁷ and the “more effective use of radio.”⁸ Practices of broadband providers that block, degrade, or otherwise disadvantage Internet traffic jeopardize television and radio broadcasters’ ability to offer their

¹ 47 U.S.C. § 1302(a).

² *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 906-07 (D.C. Cir. 2009).

³ *Comcast Corp. v. FCC*, 600 F.3d 642, 658-59 (D.C. Cir. 2010); see *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Mem. Op. & Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012 (1998).

⁴ See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (quoted in *Comcast*, 600 F.3d at 659).

⁵ 47 U.S.C. § 1302(b).

⁶ See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Sixth Broadband Deployment Report, GN Docket No. 09-137, paras. 2-3 (rel. July 20, 2010).

⁷ *United States v. Sw. Cable*, 392 U.S. 157, 177 (1968).

⁸ *Nat’l Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943) (citation omitted).

programming over the Internet and, in turn, threaten their ability to offer high-quality broadcast content. Open Internet rules are likewise necessary to address similar practices, prohibited under Title VI of the Act, that harm competition in the subscription video market.⁹ Finally, open Internet rules for fixed and mobile wireless services are supported by the Commission's authority, under Title III of the Act, to protect the public interest through spectrum licensing.¹⁰

⁹ See 47 U.S.C. §§ 548(b), 536(a).

¹⁰ See, e.g., 47 U.S.C. §§ 309(a) and (j)(3), 316(a)(1).