

Congress of the United States
Washington, DC 20515

December 16, 2010

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Genachowski:

We ask that you release the full text of your draft order regulating the Internet. You have said that you want to make the FCC more transparent and data-driven, and we commend you for your efforts. The unique history and character of this proceeding, however, demands an extra level of transparency that can only be accomplished by allowing the American people, public interest groups, and industry to review the item itself prior to adoption. Despite the reams of paper filed and scores of meetings held – or perhaps because of them – the public has not had a realistic and fulsome chance to analyze and comment on the proposal as it now stands. A theoretical opportunity to participate in this proceeding is not the same thing as transparency, especially with such a moving target. We also understand that close to two thousand pages of material have been added to the FCC record in this proceeding in just the last few days.

Your proposal to adopt network neutrality rules is likely the most controversial item the FCC has had before it in at least a decade. It holds huge implications for the future of the Internet, investment, innovation, and jobs. And even apart from the debate over the merits, the legal analysis underpinning the item will have huge implications for FCC jurisdiction, agency legitimacy, and the proper role of Congress as the original source of regulatory authority in a representative democracy. The stakes are high enough that you should go the extra mile.

You have said that you are simply proposing rules of the road that everyone supports and you have invoked the names of many companies and public interests groups as endorsing the draft. Yet many of these same entities have stressed that they have not seen the item and will reserve judgment until they can examine the text. It is only fair to allow those you say support the proposal to see what it is you say they are supporting.

The serpentine path we have travelled to reach these crossroads also argues for full disclosure. We began with Internet freedoms articulated by then-Chairman Michael Powell that he said were not intended to be rules. When the FCC modified and adopted the freedoms in 2005 as a policy statement, then-Chairman Kevin Martin said the statement did not establish rules and was not an enforceable document. Then, in 2008, he sought to enforce them. Not long after becoming chairman, you announced in 2009 your intentions to expand and codify the principles as rules. Much to your credit, in October of that year you released for comment an initial set of proposed regulations, consistent with requests by the Republican members of this Committee.

In April 2010, however, the D.C. Circuit's Comcast opinion vacated the Martin-era decision and called into question the authority you were likely to cite in support of your own initial proposal. You pivoted, expressing a lack of confidence in the Title I analysis your general counsel had

relied on in court and announced a Title II approach as your new “third way.” Concerns over this approach led first to negotiations between the FCC and a limited set of interested parties. It culminated in negotiations with a similar subset of interested parties over potential legislation advocated by Energy and Commerce Committee Chairman Henry Waxman. That legislative approach fell through for lack of bipartisan support. Since then, we have had an election, and a new Republican majority will lead the House next Congress.

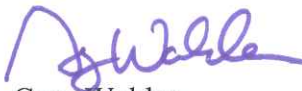
You have now announced efforts to regulatorily impose something similar, although not identical, to Chairman Waxman’s proposal, and to abandon the third-way approach. But because Chairman Waxman’s proposal was a non-public draft officially shared with only a small group, and because multiple prior drafts leaked, Chairman Waxman felt compelled to take the extraordinary step of making the last draft available on his Committee web site for all to see.

In light of all this, we ask that you – like Chairman Waxman – now make the latest version of your proposal available for all to see. The best course of action would be to put the item out for a short comment cycle or to at least give parties an opportunity to meet with the agency and submit feedback on the text of the draft through the ex parte process.

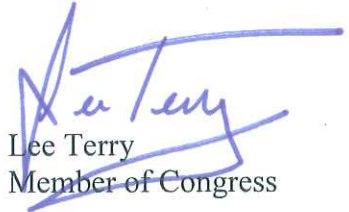
Sincerely,



Fred Upton
Member of Congress



Greg Walden
Member of Congress



Lee Terry
Member of Congress

cc: Commissioner Michael J. Copps
Commissioner Robert M. McDowell
Commissioner Mignon Clyburn
Commissioner Meredith Attwell Baker