

Congress of the United States
Washington, DC 20515

October 5, 2009

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

Dear Chairman Genachowski:

Thank you for explaining the circumstances surrounding your announcement of plans to adopt proposed network neutrality rules. You said that you intended to be transparent and we are encouraged by this pledge as well as your desire to be bipartisan.

Turning to the substance of the matter, you should provide a thorough market analysis prior to proposing any regulation. The FCC bears the responsibility to prove a market failure, especially since its 2002, 2005, 2006, and 2007 decisions on cable modem service, digital subscriber line service, broadband over power line service, and wireless broadband service were predicated on the notion that the broadband market nationwide is competitive and that regulation is unwarranted. In a sector this innovative and this vital to our economy, it would be irresponsible for the Commission to do anything less, especially since this is one of the few sectors that is still investing billions of dollars in the current financial climate. You have repeatedly said that you want this to be the most data-driven FCC ever. This is an opportunity to demonstrate that commitment.

Will the FCC be examining networks, services, consumer electronics equipment, applications, or all four? Will it be examining cable, wireline, wireless, satellite, broadband over power line, or all five? Are they each individual markets or one larger one? What data speeds will you use to define the market?

Once you answer these questions, you should determine if any entity has market power. In doing so, you should look at availability rather than adoption. The ability of a consumer to choose an alternative source will prevent a company from being able to exert market power, regardless of the level of actual adoption. You also should examine the ability of other entities to enter the market. Even if a competitor is not already deployed, the threat of new entry places a check on a company's ability to exert market power. In addition to any finding of market power, there should be real evidence that such market power is being used to the detriment of consumers, and that such exercise of market power could be continued profitably in the long run. Only then is there a market problem.

All of this should be part of a notice of inquiry, since it would only be appropriate to propose rules after finding a market failure. Ideally, you would also wait until you have the broadband mapping complete and we have seen the results of the stimulus plan, as both will be relevant in determining if there are any competitive problems. This fits with your desire to make the FCC more data-driven.

There also should be a cost benefit analysis of any regulations you propose. In the first instance, this requires identifying the specific practice or practices arising from the exercise of market power that you believe warrant regulatory intervention. For instance, we do not believe the possibility of “discrimination,” without more detail, would be sufficient.

Moreover, regulations are only the proper response to a problem if they result in a net improvement in the status quo. If they cause more harm than the issue they are trying to resolve, they should never have been adopted in the first place. Thus, any harm found in your analysis should be balanced against the harm to investment, innovation, and competition that regulation would cause.

This analysis is particularly important since your recent status report on the national broadband plan estimates that the total investment required to achieve universal broadband deployment will require between \$20 billion and \$350 billion. Network neutrality rules would make it harder, not easier, for such investment to occur. A one-size-fits-all Internet where every entity must provide the exact same levels of service and that costs consumers more on average for slower speeds and less innovation will not be very competitive. Nor will it serve consumers well or draw much investment for further improvements. Even if there is a problem, it does no good to adopt a regulation if it performs more poorly than engineers and markets in addressing that problem. For instance, we caution against either limiting the ability of network providers to offer managed services or restricting the use of those services only to certain purposes.

If after this analysis you conclude that intervention is necessary, the intervention should be tailored to your analysis and should be the minimum required to prevent the practices you have identified as appropriate targets of regulation. And, of course, you will need to address where in the Communications Act you find jurisdiction to impose any new regulations.

You say that you have not made any conclusions, that you have an open mind, and that you will let the facts take you where they may. Following this framework will go a long way to instill confidence in the process.

Please include a copy of this letter in the appropriate dockets. Thank you again for your service and we look forward to working with you. If you need further information, please don't hesitate to call our committee counsel, Neil Fried, at 225-3641.

With kind regards, we are

Sincerely,



Cliff Stearns
Ranking Member
Subcommittee on Communications,
Technology, and the Internet



Roy Blunt
United States Representative



Marsha Blackburn
United States Representative



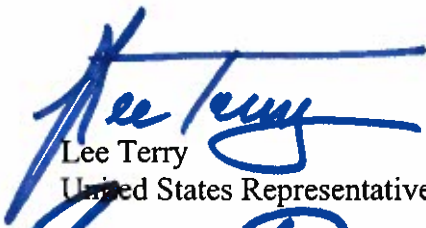
Mike Rogers
United States Representative



Fred Upton
United States Representative



Steve Buyer
United States Representative



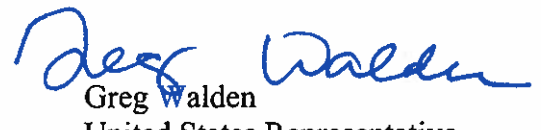
Lee Terry
United States Representative



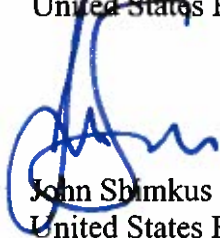
Phil Gingrey
United States Representative



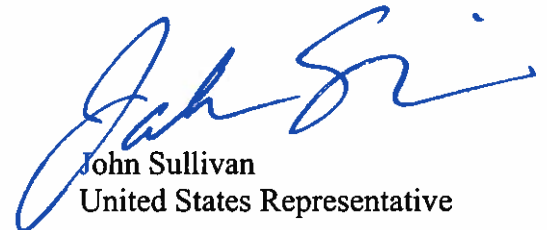
George Radanovich
United States Representative



Greg Walden
United States Representative



John Shimkus
United States Representative



John Sullivan
United States Representative



Sue Myrick
United States Representative



Ed Whitfield
United States Representative



Mary Bono Mack
United States Representative



Tim Murphy
United States Representative



John Shadegg
United States Representative

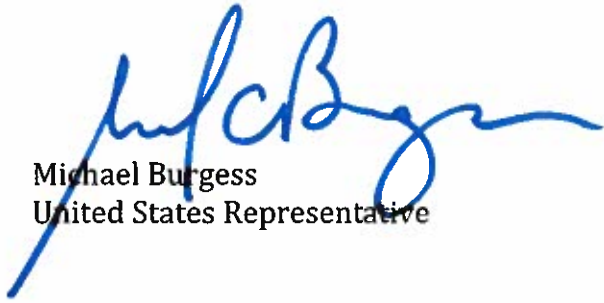


Ralph Hall
United States Representative



Steve Scalise
United States Representative

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

A handwritten signature in blue ink, appearing to read "Michael Burgess". The signature is stylized and cursive, with a long horizontal stroke at the end.

Michael Burgess
United States Representative