

**Remarks as Prepared for Delivery by Jon Leibowitz
Chairman, Federal Trade Commission
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Thank you, Joel, for that kind introduction. Let me also thank Chairman Genachowski and the other FCC Commissioners for having this workshop and for inviting me to speak. At the FTC, we are following your work with great interest, and we are impressed by the energy and vision the FCC – and you, the staff working to come up with ways to implement that vision – are bringing to a notoriously difficult and vexing issue. You have really begun to cut through the dystopian futures envisioned by each side of the Net Neutrality debate if the other side’s policy prescriptions are adopted. You seem to be headed toward a reasonable, thoughtful, pro-consumer middle ground.

As everyone here recognizes, transparency and an open Internet are critical components of future broadband services to consumers and of further innovation in this already incredibly innovative industry, especially on the content side. But it is also entirely clear that, absent some effort by the FCC, those principles are not certainties in the Internet of tomorrow.

Will carriers slow down or interfere with applications or services? Will some sorts of services be prioritized over others? If so, will consumers be told about any of this before they sign up? If they are told, will they be told in a way that they can understand without a Ph.D. in electrical engineering, and at a time when they can make a choice whether to accept those terms or not? Will they be told if the terms of service change? These are all important issues for consumers as they buy Internet access, and indeed, they are at the heart of what the FTC sees in a variety of other industries every day. These questions implicate some of our core concerns: whether consumers are told what they are paying for – in other words, transparency and disclosure, so that consumers can make informed decisions – and whether there is competition in the marketplace.

Let me start with this consumer protection component, which really boils down to: What will people know, and when will they know it? I am happy to see that the FCC has proposed to add a new principle of transparency to its set of four “Internet Freedoms.”¹ With adequate transparency, *consumers*

¹ FCC, In the Matter of Preserving the Open Internet / Broadband Industry Practices, Notice of Proposed Rulemaking (Oct. 22, 2009) (GN Docket No. 09-191) at 45, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-93A1.pdf.

are able to choose winners and losers in the marketplace. They can pick the technologies, services and companies that best fit their needs at the prices that they are willing to pay. Providers that offer the best deals can grow and serve even more consumers. This is true in any market, but it is especially important in a market such as broadband, where consumers may not know what services they are buying without adequate disclosures.

At the FTC we have been working on issues that involve transparency and disclosure to consumers for many years; these technologies are very familiar to us. For example, in 2007 we investigated claims by Sprint/Nextel that it was offering *unlimited* mobile web access for its subscribers when in fact it was actually selling services that were *limited by monthly ceilings*. We ended up closing the case because the claims appeared not to be part of a broad marketing plan to mislead consumers, and Sprint acted quickly both to remove the deceptive claims and to voluntarily make refunds to subscribers who may have been harmed by its failure to disclose its broadband access ceilings. But as staff noted in its letter to Sprint indicating that it was closing its investigation, we take “very seriously the sorts of claims investigated here and will continue to monitor such claims made by Sprint, as well as those made by the rest of the industry.”²

Transparency is important for another reason. Unless the FCC knows what ISPs are doing to manage their networks, how can it make the necessary distinctions between reasonable network management that allows ISPs to provide better services to their customers, and abusive behavior that harms consumers? Disclosure of network management techniques and plans by the providers is vital if we are to understand what the industry best practices are.

ISPs should be talking about what they believe are reasonable network management practices if they want a rule that benefits them and their customers.

I welcome the FCC’s involvement in this area. If this principle of transparency and disclosure is promulgated, I look forward to a close working relationship between our agencies that leverages the expertise of both on behalf of consumers.

The other principle that the FCC has proposed to add is non-discrimination: broadband providers must “treat lawful content, applications

² Closing letter from Lydia B. Parnes, Director, FTC Bureau of Consumer Protection, to John Villafranco & Lewis Rose, Counsel for Sprint Nextel Corp. (Aug. 8, 2007), available at <http://www.ftc.gov/os/closings/staff/070808sprintnextelclosingltr.pdf>.

and services in a nondiscriminatory manner,” subject to “reasonable network management.”³ From my perspective, some form of anti-discrimination language is critical to ensuring an open Internet, while reasonable network management is necessary to allow ISPs to serve their customers better by, for example managing network capacity, and stopping spam and spyware.

Non-discrimination is a somewhat controversial proposal, and one that FTC staff wrote extensively about in the wake of our Broadband Competition workshop on this topic in 2007.⁴ In that Report, staff reviewed the record created by the two day workshop and the evidence that existed at that time on the state of broadband competition, and the provision of broadband services. The FTC staff made what I believed in 2007, and still believe today, to be a useful contribution to the debate. Indeed, the Commission voted unanimously to issue that Report, and I concurred.⁵

But let me just caution those who refer to the Report in the current debate to do so carefully. In particular, it should be clear from reading the Report itself that while staff advised “proceeding with caution before enacting broad *ex ante* restrictions in an unsettled, dynamic environment,” they also recognized that a failure to act could be problematic.

Further, all evidence-based public policy work comes with an expiration date that reflects the possibility that things can change after the work is finished. To some extent, that applies to the FTC staff’s 2007 Broadband Report. It has been nearly three years since that report was issued – an eternity in Internet time. Just as an example, the Report was completed before the Comcast Bit Torrent controversy that I am sure will be a topic of conversation today. Maybe because of that, the Report didn’t really focus on the question of “reasonable network management” as a component of a balanced net neutrality regime.

It seems to me that, taken together, experience suggests a reason to question now what was a reasonable concern then about potentially premature or unnecessary regulation. One of the critical predicates of staff’s caution regarding rules of the road for the Internet in 2007 was the presence or

³ See FCC Notice of Proposed Rulemaking, *supra* note 1 at 41.

⁴ See generally, “Broadband Connectivity Competition Policy” (June 27, 2007) available at <http://www.ftc.gov/reports/broadband/v070000report.pdf>.

⁵ Concurring Statement of Commissioner Jon Leibowitz Regarding the Staff Report: “Broadband Connectivity Competition Policy” (June 27, 2007) available at <http://www.ftc.gov/speeches/leibowitz/V070000statement.pdf>.

possible development of competition in broadband markets. As staff noted, “competition provides the best results for consumers, providing ... the lowest prices, the highest quality products and services, and the most choices.”⁶

I agree.

At the time, staff working on the Report focused on disagreements over whether there was competition in this industry. It’s a stretch, but one could have read FCC statistics available when the Report was written to indicate that consumers in many zip codes had access to a very large number of broadband Internet access providers. It seems clear now, though, that a better reading of these statistics – and analysis of today’s marketplace – is that broadband Internet access is at best essentially a duopoly in many markets. Nearly all consumers buy their broadband Internet access from either their cable provider or their local phone company.

More important, in the Report, FTC staff also foresaw potential entry from a number of new actors who had not provided broadband access to consumers in any volume before. Among those were entrants deploying Wi-Fi, Wi-Max, and other broadband technologies such as broadband over the power lines. What we’ve seen since then, however, is that the hoped for competition has largely not materialized. Most critical, what seemed at the time to be a burgeoning movement of municipally sponsored broadband has never occurred. The Wi-Max roll out also appears to have gone far more slowly than anticipated.

And the less said about broadband over the power lines the better.

On the other hand, mobile broadband, spearheaded by the iPhone and Google’s Android, has grown faster. It may become a “game changer” someday, but that day has not arrived yet.

To the extent that the Report was also skeptical about the need for rules given the ability of antitrust enforcement to ensure competition in these markets, it appeared to me even at the time that staff was overly confident about the ability of antitrust law to deal with net neutrality-based concerns. Since we released the Report, my colleague Commissioner Rosch has also looked at these issues and come to similar conclusions. To be sure, antitrust is a useful vehicle for thinking about these issues, and the FTC has a unique and broad enforcement authority under Section 5 of the FTC Act to stop “unfair methods of competition,” but it is reasonable and appropriate for the FCC to

⁶ See FTC Report, *supra* note 3 at 155.

consider the possibility that such enforcement may take too long to do much good in many cases.

The Report recommended a cautious and thorough approach to any net neutrality regulations. I agreed then and I agree now, but to my mind the FCC's initiative, as demonstrated by this workshop and the very thoughtful Notice of Proposed Rulemaking that began this process last year, does the job admirably. The rules that come out of this process have the potential to benefit everyone – not just consumers who need to understand what services they will receive, but also the businesses who provide those services. The need for predictability for these firms is critical given the long-term investments made by many in this industry, including ISPs. It seems to me that the current proposal does a better job of addressing those concerns *ex ante* than an *ad hoc* approach that leaves many uncertain about what they can and can't do.

And clear rules of the road, by the way, are a much better defense against a public outcry over a questionable practice that sometimes forces companies to backtrack on important investment decisions – long after those decisions have been made. As David Cohen from Comcast recently noted, we are all obviously better off having “clear rules.”⁷

Let me now introduce this terrific and very interesting panel on transparency and the open Internet. The panel will deal with a number of issues close to my heart as an FTC Commissioner: consumer choice and consumer sovereignty; and disclosure and transparency. This panel will also address the critical question – how can information in this area be effectively disclosed to consumers? The panel is going to be run by Joel Gurin who is Chief of the FCC's Consumer and Governmental Affairs Bureau.

Take it away, Joel.

⁷ Posting of David Cohen to Comcast Voices, <http://blog.comcast.com/2010/01/comcast-the-fcc-and-open-internet-rules-where-we-stand.html> (Jan. 11, 2010).