Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
E-Mail Address Portability	)	RM-11391
	)	

COMMENTS OF THE
VOICE ON THE NET COALITION

The Voice on the Net Coalition ("VON Coalition") respectfully submits these comments in opposition to the "Petition for Rulemaking" filed by Gail M. Mortenson July 20, 2007, to require Internet Service Providers (ISPs) to provide their customers with e-mail address forwarding for at least six months after a customer terminates service with an ISP.

While sympathetic to the issues encountered by the petitioner, we nonetheless believe that the Commission's regulation of e-mail 1) would represent an unprecedented leap into regulation of applications and web services; 2) exceeds the Commission's statutory authority; 3) could perversely stifle innovation and investment, reduce consumer choice, increase cost to service providers and increase prices to consumers; 4) would come at the expense of a provider's ability to protect the privacy and security of its users; 5) would create vast unintended and harmful consequences; and 6) would not have actually remedied the petitioner's specific case. Lastly, the petitioner has other more suitable recourses to address any concerns she might have. Petitioner's request to have the Commission apply telephone rules to E-mail is inapposite.

I. FCC intervention to regulate e-mail would represent an unprecedented leap into regulation of the applications, web services and information services.

E-mail is not a telecommunications service. At best, email is an unregulated information service and telephone type rules should not be applied to it. The Commission's regulation of e-mail would mark an unprecedented assertion of jurisdiction.

The FCC has previously rejected arguments that electronic mail constitutes a telecommunications service.[1] Congress too intended the Commission to preserve the vibrancy of the Internet unfettered by federal regulation. The U.S. *Telecommunications Act of 1996* makes it clear that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation."[2] … "It is the policy of the United States (1) to promote the continued development of the Internet and other interactive computer services and other interactive media; (2) to

[1] Senators Stevens and Burns, letter to FCC, stating that electronic mail constitutes a telecommunications service, and noting that the provision of a transmission path for the delivery of faxes constitutes telecommunications, and characterize electronic mail as "nothing more or less than a paperless fax." But in the Stevens report to Congress, the Commission "carefully considered this argument, but indicated that further analysis leads us to a different result." Instead, the commission concluded that it is appropriately classed as an "information service." (paragraph 80)

[2] Section 230(a)(4)

preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[3] Consistent with the Congressional directive the Commission has previously confirmed that it would continue its policy of regulatory restraint toward Internet protocol services.[4]

This commitment to preventing regulation of the Internet and the services that ride atop it is widely shared, and Congress has thus limited the Commission's authority. Even the petitioner recognizes that "the Commission's authority to regulate "information service providers" is less clear than its authority to regulate telecommunications carriers."

II. Granting the petitioner's request would require an unprecedented assertion of regulatory authority over information services.

Asserting regulatory authority over e-mail would require the Commission to reverse its longstanding pro-growth, pro-innovation policies and to engage in an unprecedented assertion of jurisdiction over an information service offering.

The petitioner asserts that because the Commission has broadly extended Title II regulations to Interconnected VoIP services using its Title I ancillary authority, that the Commission therefore has authority to regulate e-mail. The Commission's Title I ancillary jurisdiction may only be employed, when Title I of the Act gives the agency subject matter jurisdiction over the service to be regulated and the assertion of jurisdiction is "reasonably ancillary to the effective performance of [its] various responsibilities." However, the Commission first must find that it has subject matter jurisdiction over e-mail. We find nothing in the Communications Act or its Congressional history that indicates, even if e-mail is transmitted by wire or contains a communication component, that Congress granted the Commission express authority to regulate e-mail. Although in the case of Interconnected VoIP, the Commission found that VoIP involves the "transmission" of voice by wire or radio, e-mail is transmitted and is not transmission. Unlike other services regulated by the Commission, e-mail is not a facility, platform or transmission service. E-mail is an application. It is essentially a stored file or document that is transmitted, and does not itself contain a "transmission" component. Thus the commission lacks subject matter jurisdiction over e-mail. Second, regulation of e-mail does not meet the second leg of the test which requires government regulation of e-mail to be "reasonably ancillary to the effective performance of [its] various responsibilities." In the case of Interconnected VoIP, the Commission found this leg of the test true because it found that consumers were replacing their traditional phone service with interconnected VoIP service.[5] However, e-mail is not marketed or perceived by consumers as a substitute for traditional phone service.

The petition further erroneously asserts that the Commission has authority to apply email forwarding rules because it utilized Title I to apply portability rules to CMRS providers. However the circumstances and basis for CMRS portability rules is vastly different. In applying portability rules to CMRS providers, in addition to its Title I authority, the Commission recognized that "Section 251(b) requires local exchange carriers to provide number portability to all telecommunications carriers, and thus to CMRS providers as well as wireline service providers."[6] By contrast, local exchange carriers do not provide number

[3] Section 230(b)

[4] 47 U.S.C. §230(b)(2). See Universal Service Report to Congress at ¶ 45.

[5] See FCC disability order at 24.

[6] First Report and Order at 152, http://www.fcc.gov/Bureaus/Common_Carrier/Orders/1996/fcc96286.txt

portability to e-mail providers, there is no need for number conservation, and no authority granted.

The petition asserts that e-mail portability is like number portability. But number portability was instituted to jumpstart competition in the phone business. E-mail is already competitive as demonstrated by the multitude of firms offering free and low-cost service options, low barriers to entry and low switching costs. Email portability would also likely require the creation and maintenance of a third-party database similar to that which is used to support number portability. Enormous investment and ongoing costs to keep track of all email addresses, identifying who owns the address, who is responsible for sending and receiving emails, who is responsible for forwarding and for what period of time forwarding must be performed, would likely wipe out free e-mail services.

In addition, telephone numbers consist of generic numerals. E-mail addresses however contain terms in the second-level domain name that are almost always subject to trademark protection and usually are the name of or relate to the company providing the email service. The SMTP protocol requires translations of digits to domain names such as "AOL," "Gmail" or "Yahoo" and back again. It would be unprecedented for a government agency to require a company to continue to use its mark in association with a consumer when that consumer no longer has a relationship with the company. Contrary to the Lanham Act, such use would likely cause consumer confusion as well as dilute the protection afforded to the trademark holder.

Nor does the Commission's public interest authority justify government regulation of e-mail. It would be antithetical to the public interest to intervene where, as here, regulation is demonstrably inappropriate.

Regardless of the purported jurisdictional grounds, Commission entanglement in the regulation of e-mail could have serious and irreversible consequences for a variety of heretofore unregulated applications and web services. As a result, the legal theory espoused by the petitioner would likely push the Commission down a dangerous slippery slope by creating a precedent for ad hoc review of individual Internet applications. Such a precedent could open the door to a new era of harmful and counterproductive web services regulation. It would inject uncertainty into the Internet market, undermine the Commission's longstanding policy of preventing harmful regulation of the Internet, and disregard the directive from Congress that the Internet develop free from regulation.[7]

The slippery slope of Internet regulation is already evident in the petition itself. Now that the Commission has applied rules to Interconnected VoIP, the petitioner has seized upon the precedent to argue that the Commission now has authority to regulate e-mail. If the Commission regulates e-mail forwarding then every other unique identifier – handles, usernames, account names, social network profiles, IM addresses, and avatars – could also be at risk. Reaching applications and web services in such a vast and obtrusive way would have immeasurable, far reaching and irreversible implications for the future of the Internet.

[7] See 47 U.S.C 230(b)

III. Led by consumer focused innovation and pioneering new products, the e-mail marketplace is robustly competitive, free of barriers to entry or innovation, and offers vast consumer choice.

Once e-mail access was a luxury. Today, it is free and ubiquitous. Email service has been an extraordinary success. A robust and dynamic marketplace has enabled the proliferation of innovative and often free e-mail services that provide consumers with extraordinarily flexible and capable services never before possible. Imagine having access to your home or office e-mail from anywhere on the globe, anytime, for free. Imagine being able to access your e-mail from nearly any Internet connected device. These innovative e-mail services are here today and are phenomenal accomplishments, in part, because the government has wisely refrained from regulating e-mail.

E-mail is increasingly a gateway to finding a new job, learning a new skill, staying in touch with families, starting a small business, and communicating with elected leaders. With e-mail, workers can reach co-workers and clients from any location. Their customers are no longer just local, but global. These communication advances, and our ability to communicate more effectively, affordably, and flexibly, are creating unparalleled new opportunities for businesses and consumers alike. Consumers can now reach a hand across a keyboard and reach almost anyone they want, anywhere in the world, all often for free. This widespread availability and choice of often free e-mail offerings has contributed substantially to the explosive growth in usage of e-mail by all , kept us closer together as families, and has boosted productivity in the workplace. It has happened not because of, but in the absence of federal e-mail rules.

The success of un-regulated e-mail is astonishing. According to IDC, since 1998 the number of email mailboxes has grown from 253 million to nearly 1.6 billion in 2006. Before the decade ends, IDC projects the number of mailboxes to reach nearly 2 billion. IDC estimates that in 2006, just the email traffic from one person to another – i.e., excluding spam – accounted for 6 exabytes (or 3%) of the digital universe.[8] Information workers now spend 14.5 hours per week reading and answering email.[9] Making this possible is a vibrant and competitive e-mail market which includes hundred of ISPs, thousands of individual e-mail servers, and more than 100 free e-mail services competing for users.[10]

IV. Commission regulation of e-mail is unnecessary in such a vibrant marketplace because consumers already have a variety of e-mail forwarding.

In such a dynamic marketplace, the variety of email choices allow consumers to switch freely between e-mail providers, sign up for service for multiple providers, obtain their own domain name to keep an address for life, utilizing existing e-mail forwarding services[11], access the e-mail using a POP client or a web portal anywhere in the world. Free E-mail services, for example, have cropped up which allow an Internet user to obtain and keep the same e-mail address while changing between ISPs. But requiring these services themselves

[8] The Expanding Digital Universe, A Forecast of Worldwide Information Growth Through 2010, March 2007, John F. Gantz, IDC

[9] According to surveys of U.S. companies by IDC

[10] There are at least 100 free e-mail services available online. http://dir.yahoo.com/Business_and_Economy/Business_to_Business/Communications_and_Networking/Internet_and_World_Wide_Web/Email_Providers/Free_Email/

[11] Gmail offers e-mail forwarding. So does Pobox.com, for $20 a year. http://www.news.com/8301-13578_3-9790821-38.html

to provide a costly and burdensome new forwarding function may eliminate the free services and the variety of option available to consumers.

Consumers can also register a domain name providing individuals and consumer/affinity organizations a highly-personalized, permanent and portable e-mail address. A consumer can obtain a personalized domain name (like "my-domain.com") for a small annual fee. A plethora of domain name registrars, ISPs, and other hosting services then provide email forwarding, so that "you@my-domain.com" can automatically be forwarded to whatever your "main" email account is. Even if you change your "main" email account from one provider to another, forwarding of your e-mail "you@my-domain.com" can be easily redirected so that your email will always reach you. It provides seamless portability. In fact some services[12] let you offer email, instant messaging, and calendar accounts on your own domain name, all for free. In many cases it's all hosted –online by a web hosting firm, so there's no hardware or software to install or download, and minimal setup and maintenance.

Consumers today have a multitude of options for managing their e-mail accounts, and a vibrant marketplace is likely to continue to meet consumer demands. But requiring a specific kind of email forwarding could upset the existing and orderly e-mail address schemes and the variety of businesses that exist today to help consumers manage personalized e-mail and domain names. Rather than fostering the current open and competitive environment, adopting this petition would be like requiring a city to allow residents to keep their home addresses for some period of time after moving to a new house in a new city. In both cases it undermines the existing address scheme, makes the new address an unreliable determiner of location, and creates vast new problems for the postman.

V. E-mail forwarding could come at the expense of a provider's ability to protect the privacy and security of its subscribers.

E-mail providers need the flexibility to aggressively deal with a variety of dynamic and ever-changing e-mail threats. For example, e-mail accounts are sometimes terminated in efforts to crack down on spammers – a scourge that costs businesses $50 billion in lost productivity and other expenses.[13] According to one estimate, approximately one million computers today are infected with "bots" intent on infecting other computers, often through e-mail with malicious code and with the result that more than 80 percent of inbound e-mail is spam.[14] In addition dealing with these viruses, worms, and other computer-related crimes costs U.S. businesses a staggering $67.2 billion a year, according to the FBI.[15] Terminating, rather that porting an e-mail address can sometimes be the most effective tool for stopping the spread of online attacks caused by compromised computers that have been unknowingly transformed into e-mail spam factories. Forwarding an e-mail address to a

[12] like https://www.google.com/a/org/

[13] Spam will cost the world $50 billion in lost productivity and other expenses, with more than a third of that -- $17 billion -- wasted by U.S. firms. http://www.msnbc.msn.com/id/20199343/

[14] Sarah D. Scalet, *Introducing AT&T, Your Internet Security Company*, CIO, May 17, 2007 (http://www.cio.com/article/110250/Introducing_AT_T_Your_Internet_Security_Company).

[15] The 2,000 respondents spent nearly $12 million to deal with virus-type incidents, $3.2 million on theft, $2.8 million on financial fraud and $2.7 million on network intrusions.http://articles.techrepublic.com.com/2100-1009_11-6028946.html and http://www.digitalriver.com/v2.0-img/operations/naievigi/site/media/pdf/FBIccs2005.pdf

new domain could also substantially undermine specific ongoing technology efforts to prevent e-mail phishing and spoofing – scams that cost Americans nearly $1 billion in 2005 alone[16] -- by undermining the development of technologies that can authenticate e-mail by correlating it to the sender's domain. Thus government imposed e-mail forwarding, while laudable, could be extraordinarily counterproductive – potentially exposing e-mail users to additional spam, identity theft, and exposure to viruses.

VI. E-mail is just one of many Internet applications utilizing a user name or other proxy as an essential online identifier.

The petitioner asserts that e-mail has become an essential "online identity" and therefore must be portable. However, e-mail is just one of many forms of online identities that have the ability to become uniquely identified with an online identity and therefore equally "essential". The petitioner relied upon a "screen name" which is often tied to a specific e-mail address. Some consumers have come to rely upon the use of "handles" in online discussion forums or blogs for their identity. Teens often choose instant messaging over e-mail to communicate and for their identity.[17] MySpace, Facebook, online dating and other social networking sites each represent additional Internet tools that can each become a person's essential online identity. Just because an Internet account becomes a unique "online identity", as the petition argues, doesn't justify regulatory portability. For example on Youtube, the identity Lonelygirl15 became a cyberspace superstar, media sensation, and online moniker for Bree Avery[18] whose work was viewed by more than 50 million viewers. Even though such usernames can become a unique "online identity," no one would suggest, nor do we support, that there should be portability of video site usernames. In fact, the average American Internet user spends 80 hours a month online at work and 30 hours at home, according to Nielsen-NetRatings. While online, people often form a unique online identity – often never tied to an e-mail address. In some cases, these online identifiers look less like an e-mail address, or an IM username, and sometimes more like facsimiles of physical existence through use of avatars. Today, tens of millions of Internet users have online avatars or doppelgangers they design to act as their proxy online – and primary means of online interaction.[19] While each of these innovative online identifiers has become essential tools for their users, the FCC should not become the regulator of online identity – for e-mail or any other online identifier.

Conclusion:

Given the e-mail options available for consumers and the reality that this issue is not of widespread consumer concern, there is no reason for the FCC to regulate, and instead it should deny the petition. Furthermore, Congress has often perceived these types of issues

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[16] The Sender ID Framework is an e-mail authentication technology protocol that helps address the problem of spoofing and phishing by verifying the domain name from which e-mail messages are sent. Sender ID validates the origin of e-mail messages by verifying the IP address of the sender against the alleged owner of the sending domain. For phishing costs, see http://www.techweb.com/wire/security/164902671

[17] Emarketer reports that instant messaging is often the preferred method of communication among tweens and teens. Among teens ages 12 to 14, one-third preferred instant messages and 15 percent preferred email as a way to communicate with friends. Among older teens, their preference for instant messaging grew. http://www.imediaconnection.com/content/11691.asp

[18] http://www.msnbc.msn.com/id/20199343/

[19] As researchers like Ralph Schroeder, a research fellow at the Oxford Internet Institute at Oxford University who studies the sociology of online behavior, says about avatars, "People become attached to their online identity" said.http://www.washingtonpost.com/wp-dyn/content/article/2005/11/21/AR2005112101787.html

to be consumer protection issues. For example, when Congress decided to attack e-mail spam, it rested authority with the FTC and it gave the FTC authority to deal with protecting the privacy of children under the age of 13, which may be the underlying issue that led to the petitioner's problem in the first place. Thus the petitioner has the option of pursuing it as a consumer protection or as a litigation issue. Such approaches are much better than reversing the pro-growth pro-innovation polices that have let e-mail and other Internet services grow and thrive outside of government mandates and telephone type rules for e-mail. The issue should not be pursued regulatorily.

For these reasons, we ask the FCC to dismiss the petition.

Respectfully submitted,

_____/s/_____
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