

challenge confronting our nation—improving energy efficiency, halting climate degradation, improving healthcare for all our citizens, educating our young (and our old, too), helping individuals with disabilities to realize their full potential, creating new public safety tools for first responders and opening the doors of economic and social opportunity for all. Broadband connectivity is about even more than that. Increasingly our national conversation, our news and information, our knowledge of one another, will depend upon access to the Internet. Each of these challenges I have mentioned has a broadband component as part of its solution. None has a solution without this broadband component. Private enterprise must lead the way with investment and innovation in broadband, to be sure. But only when it is accompanied by visionary public policy and meaningful oversight can we ensure that broadband will get built out to places where business has no incentive to go. We can no longer afford digital divides between haves and have-nots, between those living in big cities and those living in rural areas or on tribal lands, between the able-bodied and persons with disabilities.

Since the *Comcast* decision, I have heard opponents of reclassification make a number of self-serving arguments that range from the often-frivolous to the sometimes-nonsensical. For starters, let me be clear. Despite all the spin to the contrary, we are not talking—even remotely—about regulating the Internet. We are talking about meaningful oversight of the infrastructure and services that allow Americans to get to the Internet. This isn't about government regulating the Internet—it's about making sure that consumers, rather than a handful of entrenched incumbents, have maximum control over their access to the Internet.

I have also heard the perplexing contention by some that the Commission cannot move back to Title II classification because there have been no “changed circumstances,” which are supposedly needed to justify such a correction. No changed circumstances? Have the mind-bending changes we have seen throughout the country and around the world due to broadband access to the Internet been anything short of revolutionary? I don't think so. The market for broadband technologies and services, and the ways in which we as a people communicate, have undergone seismic changes over just the last decade. Remember that it was not so long ago that many Americans were just getting used to the Internet, and independent Internet service providers like AOL and CompuServe were the names of the game. Since then, it is a few huge access providers that have become the only real broadband game in town. Resellers and competitive local telephone companies have been driven from the field, for the most part. And competition—that wonderful goal of the 1996 Telecommunications Act—reposes more in our hopes and dreams than it does on the bottom line of the monthly phone and cable bills we all get to pay. How can anyone fail to find “changed circumstances” in these revolutionary transformations?

So beware of all the slick PR you hear, and remember that much of it is coming from lavishly-funded corporate interests whose latest idea of a “triple play” is this: (1) slash the FCC's broadband authority; (2) gut the National Broadband Plan; and (3) kill the open Internet.

Today we launch a proceeding to look at the options available to us. Should we continue down our failed Title I path? Should we rely on the full range of Title II requirements and safeguards? Or should we take a “third way” by applying a limited number of fundamental provisions of Title II to Internet access service? I have said before that plain and simple Title II reclassification through a prompt—and by that I meant immediate—declaratory ruling, accompanied by limited, targeted forbearance from certain provisions—would have been the quickest and cleanest way to remove all question marks. Clear rules of the road don't just help consumers—they provide clarity and certainty to business, too. My former boss, the legendary Senator Fritz Hollings, frequently reminded us that “business can't operate with a question mark.” Commission policies over the past decade have been replete with question marks for business, for consumers, for all of us.

So let's develop the record through this Notice, as quickly as we can. Let's then analyze the record, develop final recommendations and vote them out with the sense of urgency that the present situation compels. Let us put an end to a decade of detours and derailment, and ensure, for every American, a communications infrastructure that serves their purposes, protects their interests and vindicates the awesome promise of the Digital Age.

**DISSENTING STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

Re: *Framework for Broadband Internet Service*, GN Docket No. 10-127

First, I can't emphasize enough that we all want an open Internet that maximizes consumers' freedom. It is important to remember that an open and freedom-enhancing Internet is what we have today as the result of a decades-old, bipartisan and international consensus that governments should not interfere with Internet network management issues. At the same time, authorities should discourage and punish anti-competitive conduct, and they have the legal means to do so today as they have had for decades.

Before I go further, however, I thank the Chairman for his graciousness and generosity throughout this debate. He has consistently extended his hand in a willingness to discuss the issues. I'd like to underscore that 90 percent of what we accomplish at the FCC is not only bipartisan but unanimous as well. Few governmental institutions can make such a claim. That also means, however, that we disagree on one in 10 proceedings. Disagreement and debate are healthy and necessary components of a functioning democracy. Today's Notice of Inquiry is one of those moments of strong, but respectful, disagreement.

Having said that, I also thank the Chairman, his legal team and the bureau staff for writing a NOI that contains several open-ended questions that provide ample opportunity for public comment.

Nonetheless, I disagree with the premise of this proceeding. Not only is the idea of classifying broadband Internet access as common carriage under Title II unnecessary, already it has caused harm in the marketplace.

As a threshold matter, classifying broadband as a Title II service is not necessary to implement the recommendations of the National Broadband Plan. The *Comcast* decision certainly does not affect our ability to reallocate spectrum, one of the central pillars of the Plan. Nor does the decision undermine our authority to reform our Universal Service program, the other major component of the Plan. In the unlikely event that a court decided against granting us *Chevron* deference in the pursuit of directly supporting broadband with Universal Service distributions, the FCC could tie future subsidies to broadband deployment. This idea was agreed to in principle by a bipartisan group of four Commissioners in late 2008, and I remain optimistic that we could successfully defend such an idea on appeal.

In fact, the *Comcast* decision was quite limited in its scope. The court merely held that Title I does not grant us authority to regulate Internet network management. It reasoned that the Commission could not do so because its ancillary authority over Internet service providers was not tethered to a specific Congressional mandate. In short, if the Commission would like to regulate that activity, it must wait for Congress to change the law. We are not Congress.

As a young attorney 20 years ago, I cut my legal teeth on Title II. Over the decades, an overwhelming consensus emerged among tech companies and policy makers from both parties to insulate new technologies from the application of early 20th Century common carrier regulations. The fundamental Title II rules from the Communications Act of 1934, which the majority seeks to apply to today's broadband sector, are the same regulations adopted in the late 19th Century for the railroad monopolies. In essence, the Commission is seeking to impose 19th Century-style

regulations designed for monopolies on competitive, dynamic, and complex 21st Century Internet technologies.

The ideas put forth for comment in today's NOI are not new. In fact, they were discussed and *discarded* in an overwhelmingly bipartisan way in the 1990s. Let's look back at a 1998 Commission report under the leadership of Bill Kennard, Chairman during President Clinton's second term:

Turning specifically to the matter of Internet access, we note that classifying Internet access services as telecommunications services could have significant consequences for the global development of the Internet. We recognize the unique qualities of the Internet, and do not presume that legacy regulatory frameworks are appropriately applied to it.¹

Just two years later, then-Chairman Kennard said:

It just doesn't make sense to apply hundred-year-old regulations meant for copper wires and giant switching stations to the IP networks of today. . . . We now know that decisions once made by governments can be made better and faster by consumers, and we know that markets can move faster than laws.²

And here's what the Clinton White House had to say about placing legacy regulations on the Internet:

We should not assume . . . that the regulatory frameworks established over the past sixty years for telecommunications, radio and television fit the Internet.³

The regulatory regime suggested by the majority today is likely to create asymmetries in the market place. For example, investment and innovation at the "edge" of the Internet, specifically devices and applications, are largely unfettered by regulation. This is as it should be. But the proposed new regime will place the heavy thumb of government on the scale of a free market to the point where innovation and investment in the "core" of the 'Net are subjected to the whims of "Mother-May-I" regulators. Although I have a tremendous amount of respect for my colleagues, no one can predict who will occupy these chairs in the future, or how they will act. Or, as Senator Olympia Snowe warned the Commission in a letter earlier this month:

I am concerned about the long-term implications such classification could have on innovation occurring in all segments of the Internet supply chain and the uncertainty that would

¹ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd. 11501, ¶ 82 (1998).

² Remarks of the Honorable William E. Kennard, Chairman, FCC, *Voice Over Net Conference: Internet Telephony: America Is Waiting* (Sept. 12, 2000).

³ The White House, *A Framework for Global Electronic Commerce* (July 1, 1997).

prevail, since nothing precludes future Commissioners from retracting the very rules you plan to implement.⁴

Moreover, the agency's dramatic attempt to regulate broadband Internet access services comes at a time when consumers are demanding more convergence between the core and the edge. While consumers and their suppliers in a competitive marketplace have been erasing lines of distinction separating tech business models, the Commission is proposing to up-end market trends and draw artificial legal lines to create new regulatory silos.

Investors and international observers are expressing serious concerns about what the FCC is poised to do. In the past two weeks I have traveled to New York and Europe. I have met with a diverse assortment of investors, market analysts, regulators, business people and academics. At every turn, I was met with confusion and questions regarding the idea of regulating broadband as an old-fashioned phone service. For decades now, the international consensus has been for governments to keep their hands off the Internet and to leave Internet governance decisions to time-tested non-governmental technical groups. Once that precedent is broken, it will become harder to make the case against more nefarious states that are meddling with the Internet in even more extensive ways than are contemplated here. In short, we will have lost the moral high ground. Again, a version of this scenario was foreseen by the Clinton Administration's Secretary of Commerce, William Daley, in 1997:

[W]e have been working with the private sector to convince other nations of the advantages of a user empowerment approach over cumbersome government regulation of the Internet.⁵

Analysts are counseling a wide variety of investors to withhold badly needed investment capital in fear of regulatory uncertainty and litigation risks. While Title II classification is being advanced in the name of furthering broadband deployment, it may have the unintended consequence of stunting growth in this sector. Or, as written this week on a business website:

But while it's business as usual now, capital investment will come down if Title II becomes a reality, said Credit Suisse telecom services dir[ector] Jonathan Chaplin. He said the next place companies would look to capture some of the return is costs, which would mean jobs.⁶

In fact, one recent economist's study estimates that a net 1.5 million jobs could be put at risk by a Title II classification.⁷

These thoughts aren't coming just from Wall Street, but from those who represent America's small and disadvantaged businesses as well. Listen to last month's remarks of David Honig of the Minority Media and Telecommunications Council:

⁴ Letter from the Honorable Olympia Snowe, United States Senator, to the Honorable Julius Genachowski, Chairman, FCC (June 1, 2010).

⁵ Remarks of the Honorable William M. Daley, Secretary, U.S. Dept. of Commerce, *Internet Online Summit: Focus on the Children* (Dec. 2, 1997).

⁶ *Street Talk*, CableFAX, June 14, 2010.

⁷ Coleman Bazelon, *The Employment and Economic Impacts of Network Neutrality Regulation: An Empirical Analysis* (Apr. 23, 2010).

Lender and investor uncertainty stemming from potentially years of litigation over Title II reclassification could make it profoundly difficult for MBEs and new entrants to secure financing. MBEs, especially, continue to experience great difficulty securing access to capital in the broadband space.⁸

Members of Congress also are asking the Commission to abandon the Title II route citing the investment and economic risk that they fear will come with it. Here is a segment of a letter from 74 Democratic House Members:

The uncertainty this proposal creates will jeopardize jobs and deter needed investment for years to come. The significant regulatory impact of reclassifying broadband service is not something that should be taken lightly and should not be done without additional direction from Congress. We urge you not to move forward with a proposal that undermines critically important investment in broadband and the jobs that come with it.⁹

In fact, a large bipartisan majority of Congress – consisting of at least 291 Members – has weighed in asking the Commission to discard this idea or at least to wait for Congress to act. In other words, a commanding majority of the directly elected representatives of the American people do not want the FCC to try to regulate broadband Internet access as a monopoly phone service.

If my colleagues feel compelled to act, however, I hope that they would keep an open mind about an idea I have proffered for a couple of years now and that would certainly withstand appeal. In the absence of new rules, which already have started to create uncertainty and will be litigated in court for years, let us create a new role for the FCC to spotlight allegations of anti-competitive conduct while working with non-governmental Internet governance groups and consumer protection and antitrust agencies. In each of the small number of cases cited by proponents of network management rules, all were rectified quickly, without new rules. The recently announced technical advisory group could serve as a component of such an endeavor.

Additionally, it is my hope that instead of diverting precious resources towards creating new regulations, we focus on adopting policies that will help create abundance, competition and jobs. For instance, we could recapture the bipartisan and unanimous spirit of 2008 when the Commission approved the concept of unlicensed use of the television white spaces. This effort needs to be reenergized. American consumers will benefit tremendously from the unimaginable applications and devices that will use white spaces. Use of this spectrum also is an antidote to potential anti-competitive conduct by broadband providers as it will inject more competition into the “last mile.” For instance, if one last-mile broadband provider were to act in an anti-competitive way, it would risk losing its customer to a white spaces provider. Or, as the Commission unanimously stated in 2008:

⁸ Letter from David Honig, Counsel, Minority Media Telecommunications Council, to Marlene H. Dortch, Secretary, FCC (May 7, 2010).

⁹ Letter from the Honorable Al Green *et al.*, U.S. House of Representatives, to the Honorable Julius Genachowski, Chairman, FCC (May 24, 2010).

We also anticipate that these new devices will have economic benefits for consumers and businesses by facilitating the development of additional competition in the broadband market.¹⁰

In sum, the Commission has many avenues it can pursue to further the cause of more broadband deployment and adoption without having to take on the risks associated with a Title II classification. I respectfully ask my colleagues to listen to the growing chorus of a large and bipartisan majority of voices in Congress and consider these different paths in lieu of the course they are embarking upon now. In the meantime, I fundamentally disagree with the premise that has been offered to support this item. As a result, I respectfully dissent.

¹⁰ *Unlicensed Operation in the TV Broadcast Bands: Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, ET Docket No. 02-380, Second Report and Order and Memorandum Opinion and Order, 23 FCC Rcd 16807, ¶ 32 (Nov. 4, 2008); Erratum, 24 FCC Rcd 109 (Jan. 9, 2009).

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: *Framework for Broadband Internet Service*, GN Docket No. 10-127

Thank you Austin, and to your team for your superb work on this item. It is essential that we ask probing questions that enable us to gather the information required to make informed and sensible policy decisions. This Notice of Inquiry sets forth the leading theories about how we can accomplish our shared goals for broadband service in the wake of the D.C. Circuit's *Comcast* decision. It affords all interested parties – industry, public interest groups, public officials, and ordinary Americans – the opportunity to weigh in on the specific legal and policy merits of those proposals. The item succeeds in taking a difficult and combustible topic and presenting it in a way that should produce meaningful and fruitful discourse.

My fear, however, is that there are efforts underway designed to stifle at all costs our ability to engage in reasonable and productive discussion about these pressing issues. Indeed, it appears that we are a long way from a sincere debate on the merits of these proposals. There is, I believe, a great deal of misinformation being disseminated, which is creating misplaced anxiety.

Perhaps most notably, one of the current narratives being put forth is that proceeding with this inquiry – let alone a change in classification – would freeze investment in the networks. This argument, however, is specious. First, notable telecommunications analysts at firms such as Bank of America Merrill Lynch, UBS, and Goldman Sachs have each asserted that the *public* reaction by industry to the Chairman's proposal is overblown. In fact, they believe the current landscape presents a tremendous buying opportunity. As one well-regarded analyst stated:

[T]he FCC's "Third Way" reclassification largely keeps the status quo intact, with key points being: 1) no rate regulation, 2) no unbundling, to require Cable to share its networks, 3) the forbearance is difficult to overturn, 4) no inconsistent state regulation, [(5)] provides no competitive advantage to DBS or Telco vs. Cable and [(6)] Wireless has a similar "Third Way" reclassification, which has not negatively impacted the business model.¹

Second, the public relations campaign being waged by some may itself be the catalyst for doubts about investment. There should be no surprise when the all-out effort to spin the Chairman's proposal as one that entails extensive regulation scares off potential investors. If you yell "The sky is falling!" enough times, people will eventually take cover.

Third, as noted earlier, wireless voice communications are currently subject to a nearly identical regulatory regime, and that sector, as you know, has flourished. In fact, as some of my colleagues shared at the agenda meeting last month, the level of investment in the wireless sector has been mind-boggling. Investors and companies have poured billions and billions of dollars into an industry subject to Titles II and III. Massive investment has taken place – and continues to take place – under a parallel paradigm.

But I can understand why powerful companies balk at government oversight. They view any government authority as a threat to their unbridled freedom. Indeed, if it were up to them, we would not enact rules; but rather, rely on "voluntary organizations and forums" made up solely of industry personnel to give us advice on how to serve as a backstop for consumers. I suppose one benefit of this model is that I could significantly shorten my workday.

The problem for me, however, is that I truly care about ensuring that everyone has the opportunity to get broadband through our universal service program. I take seriously the threats to our cyber security. I know all too well the challenge the Internet poses to our privacy. I believe strongly that

¹ Pull back is a buying opportunity, Cable/Satellite, Bank of America Merrill Lynch (May 6, 2010) (Jessica Reif Cohen).

ISP speeds and bills should be transparent. And I am committed to ensuring that people with disabilities have meaningful access to all that broadband has to offer. There is no effort, no matter how well-funded and coordinated, that will undermine my belief in these essential goals.

Today's NOI is a positive step towards fulfilling some key aspects of the National Broadband Plan, among other things. I intend on working closely with those companies, organizations, and individuals who engage seriously and forthrightly with these difficult issues. By working together, I have no doubt that we can produce an outcome that both continues to foster investment and innovation and serves the American people.

Thank you, Mr. Chairman, for showing great leadership and vision. I am pleased to support this inquiry.

**DISSENTING STATEMENT OF
COMMISSIONER MEREDITH A. BAKER**

Re: *Framework for Broadband Internet Service*, GN Docket No. 10-127

The foundation of a strong national broadband policy is already in place, and we do not need to alter the regulatory classification of broadband Internet access service to achieve the important goals unanimously agreed to in the Joint Statement on Broadband.¹ We have a proven way forward under the existing “information services” classification by lawfully asserting our direct and ancillary authority to address universal service reform, disability access, and other consensus policy goals.² I greatly appreciate the Chairman’s inclusion of a robust and balanced discussion of how the Commission could proceed based upon the existing classification, and hope this demonstrates a good faith effort to reach a true bipartisan solution.

Unfortunately, I am compelled to dissent because there are significant consequences to even initiating this far-reaching proceeding. Although I generally support building robust public records to bolster the Commission’s work and asking questions that lead to a developed analysis of all sides of an issue, this is the rare case where opening a proceeding creates so much regulatory uncertainty that it harms incentives for investment in broadband infrastructure and makes providers and investors alike think twice about moving forward with network investments under this dark regulatory cloud. This outcome can only harm consumers who need better, faster, and more ubiquitous broadband today. For those that suggest the D.C. Circuit forced our hand, I respectfully disagree. Nothing in the recent *Comcast* decision requires the Commission to revisit broadband’s classification.

I also have significant concerns that the outcome in this proceeding has been prejudged. The Chairman has publicly endorsed the so-called “Third Way” approach in the days leading up to this Notice, and I cannot support such a conclusion. At the outset, I reject the effort to re-brand a Title II classification with forbearance as a middle ground, it is not. There will be time to address all of the legal and factual infirmities of a Title II approach for broadband, and its adverse impact on capital markets, consumer welfare, and international regulatory norms. Today, I will limit my initial comments to the central question of legal and regulatory predictability. This approach will subject the Internet and consumers to years of litigation and uncertainty. I acknowledge that retaining our Title I framework is not without some legal risk too—no approach is. It is, however, substantially less risky than reclassifying broadband and overturning forty years of Commission precedent codified by Congress, and affirmed by the courts. And, if legal certainty is paramount, only Congress has the ability to provide the Commission with clear jurisdictional footing and direction to move forward to tackle the challenges of the broadband age.

It is also important to view this proceeding in context of other recent statements in which the Commission has conveyed a pessimistic view of competition and market conditions. First, we had the National Broadband Plan that did not conclude that having more than 80 percent of Americans living in markets with more than one provider capable of offering download speeds in excess of 4 Mbps was a success. Last month, the Commission was silent as to whether a wireless market in which 91.3 percent of Americans can choose from four or more providers is competitive. Then, in releasing consumer survey

¹ *Joint Statement on Broadband*, GN Docket No. 10-66, FCC 10-42 (Mar. 16, 2010).

² Remarks of Commissioner Meredith Attwell Baker at Broadband Policy Summit VI, The Proven Way: A Regulatory Approach to Promote the Public Interest by Creating Jobs, Fostering Investment, and Driving Broadband Opportunity (June 10, 2010).

results this month, the Consumer & Governmental Affairs Bureau's headline was that 80 percent of households do not know their broadband speeds. The more important and positive fact to me was that 91 percent of consumers are satisfied with their broadband speed, yet that finding received significantly less attention. The next test will be the section 706 report in which the Commission will have to evaluate whether broadband deployment is timely and reasonable, a finding that has been made in the affirmative in every prior report. Taken as a whole, I have concerns that these statements represent a view that government should try to engineer better results, and a Title II classification would certainly provide a stronger platform from which to take a more intrusive regulatory approach. I recognize that industry alone will not solve every challenge and no commercial market is perfect, but I fear that a more proactive broadband regulatory approach would adversely affect consumers, competition, and investment.

I want to thank the staff for the hard work that went into this item, and I truly appreciate that this *Notice* does not close the door on Title I. I agree with the Chairman that we share many of the same policy goals, and I commit to working with my colleagues constructively on a consensus broadband agenda. Reclassifying and regulating an entire sector of the Internet is not necessary to achieve this. I am hopeful that this proceeding will not divert the agency's or industry's resources and attention away from addressing the core spectrum, broadband adoption, and broadband deployment challenges facing our nation in the months to come.