

combination of technologies.”<sup>131</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having \$13.5 million or less in annual receipts.<sup>132</sup> According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.<sup>133</sup> Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.<sup>134</sup> Thus, the majority of these firms can be considered small.

49. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers, nationwide.<sup>135</sup> Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.<sup>136</sup> In addition, under the Commission’s rules, a “small system” is a cable system serving 15,000 or fewer subscribers.<sup>137</sup> Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000–19,999 subscribers.<sup>138</sup> Thus, under this second size standard, most cable systems are small.

50. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”<sup>139</sup> The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>140</sup> Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small

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<sup>131</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers,” (partial definition), [www.census.gov/naics/2007/def/ND517110.HTM#N517110](http://www.census.gov/naics/2007/def/ND517110.HTM#N517110).

<sup>132</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>133</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, tbl. 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (rel. Nov. 2005).

<sup>134</sup> *Id.* An additional 61 firms had annual receipts of \$25 million or more.

<sup>135</sup> 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

<sup>136</sup> See BROADCASTING & CABLE YEARBOOK 2006, at A-8, C-2 (Harry A. Jessell ed., 2005) (data current as of June 30, 2005); TELEVISION & CABLE FACTBOOK 2006, at D-805 to D-1857 (Albert Warren ed., 2005).

<sup>137</sup> 47 C.F.R. § 76.901(c).

<sup>138</sup> TELEVISION & CABLE FACTBOOK 2006, at F-2 (Albert Warren ed., 2005) (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

<sup>139</sup> 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1–3.

<sup>140</sup> 47 C.F.R. § 76.901(f); see *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

under this size standard.<sup>141</sup> We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,<sup>142</sup> and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

## 7. Electric Power Generators, Transmitters, and Distributors

51. *Electric Power Generators, Transmitters, and Distributors.* The Census Bureau defines an industry group comprised of “establishments, primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer.”<sup>143</sup> The SBA has developed a small business size standard for firms in this category: “A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours.”<sup>144</sup> According to Census Bureau data for 2002, there were 1,644 firms in this category that operated for the entire year.<sup>145</sup> Census data do not track electric output and we have not determined how many of these firms fit the SBA size standard for small, with no more than 4 million megawatt hours of electric output. Consequently, we estimate that 1,644 or fewer firms may be considered small under the SBA small business size standard.

### D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

52. As indicated above, the Internet’s legacy of openness and transparency has been critical to its success as an engine for creativity, innovation, and economic development. To help preserve this fundamental character of the Internet, the Order requires that broadband providers must, at a minimum, prominently display or provide links to disclosures on a publicly available, easily accessible website that is available to current and prospective end users and edge providers as well as to the Commission, and at the point of sale. Providers should ensure that all website disclosures are accessible by persons with disabilities. We do not require additional forms of disclosure. Broadband providers’ disclosures to the public include disclosure to the Commission; that is, the Commission will monitor public disclosures and may require additional disclosures directly to the Commission. We anticipate that broadband providers may be able to satisfy the transparency rule through a single disclosure, and therefore do not require multiple disclosures targeted at different audiences. This affects all classes of small entities mentioned in Appendix

<sup>141</sup> See BROADCASTING & CABLE YEARBOOK 2006, at A-8, C-2 (Harry A. Jessell ed., 2005) (data current as of June 30, 2005); TELEVISION & CABLE FACTBOOK 2006, at D-805 to D-1857 (Albert Warren ed., 2005).

<sup>142</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules. See 47 C.F.R. § 76.909(b).

<sup>143</sup> U.S. Census Bureau, 2002 NAICS Definitions, “2211 Electric Power Generation, Transmission and Distribution,” [www.census.gov/epcd/naics02/def/NDEF221.HTM](http://www.census.gov/epcd/naics02/def/NDEF221.HTM).

<sup>144</sup> 13 C.F.R. § 121.201, NAICS codes 221111, 221112, 221113, 221119, 221121, 221122, n. 1.

<sup>145</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Utilities, “Establishment and Firm Size (Including Legal Form of Organization),” tbl. 4, NAICS codes 221111, 221112, 221113, 221119, 221121, 221122 (rel. Nov. 2005).

D, part C, *supra*, and requires professional skills of entering information onto a webpage and an understanding of the entities' network practices, both of which are easily managed by staff of these types of small entities.

**E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

53. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>146</sup>

54. The rules adopted in this Order are generally consistent with current industry practices, so the costs of compliance should be small. Although some commenters assert that a disclosure rule will impose significant burdens on broadband providers, no commenter cites any particular source of increased costs, or attempts to estimate costs of compliance. For a number of reasons, we believe that the costs of the disclosure rule we adopt today are outweighed by the benefits of empowering end users to make informed choices and of facilitating the enforcement of the other open Internet rules. First, we require only that providers post disclosures on their websites and at the point of sale, not that they bear the cost of printing and distributing bill inserts or other paper documents to all existing customers. Second, although we may subsequently determine that it is appropriate to require that specific information be disclosed in particular ways, the transparency rule we adopt today gives broadband providers flexibility to determine what information to disclose and how to disclose it. We also expressly exclude from the rule competitively sensitive information, information that would compromise network security, and information that would undermine the efficacy of reasonable network management practices. Third, by setting the effective date of these rules 60 days after notice in the Federal Register announcing the decision of the Office of Management and Budget regarding approval of the information collection requirements contained in the rules, we give broadband providers adequate time to develop cost effective methods of compliance. Thus, the rule gives broadband providers—including small entities—sufficient time and flexibility to implement the rules in a cost-effective manner. Finally, these rules provide certainty and clarity that are beneficial both to broadband providers and to their customers.

**F. Report to Congress**

55. The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.<sup>147</sup> In addition, the Commission will send a copy of the Order, including this FRFA,

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<sup>146</sup> 5 U.S.C. § 603(c).

<sup>147</sup> See 5 U.S.C. § 801(a)(1)(A).

to the Chief Counsel for Advocacy of the SBA. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.<sup>148</sup>

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<sup>148</sup> See 5 U.S.C. § 604(b).

**STATEMENT OF  
CHAIRMAN JULIUS GENACHOWSKI**

Re: *Preserving the Open Internet*, GN Docket No. 09-191, *Broadband Industry Practices*, WC Docket No. 07-52

Let me start with a quote: “The Web as we know it [is] being threatened.” That’s Tim Berners-Lee, the inventor of the World Wide Web, in a recent article. He continued, “A neutral communications medium is the basis of a fair, competitive market economy, of democracy, and of science. Although the Internet and the Web generally thrive on lack of regulation, some basic values have to be legally preserved.”

Today, for the first time, the FCC is adopting rules to preserve basic Internet values. While the Commission had in the past pursued bipartisan enforcement of Open Internet principles, we have not had properly adopted rules. Now, for the first time, we’ll have enforceable, high-level rules of the road to preserve Internet freedom and openness.

As we stand here now, the freedom and openness of the Internet are unprotected. No rules on the books to protect basic Internet values. No process for monitoring Internet openness as technology and business models evolve. No recourse for innovators, consumers, or speakers harmed by improper practices. And no predictability for Internet service providers, so that they can effectively manage and invest in broadband networks. That will change once we vote to approve this strong and balanced order.

The vote on this order comes after many months of debate – which has often produced more heat than light. Almost everyone says that they agree that the openness of the Internet is essential – that openness has unleashed an enormous wave of innovation, economic growth, job creation, small business generation, and vibrant free expression.

But despite a shared allegiance to the Internet as an open platform, there has been intense disagreement about the role of government in preserving Internet freedom and openness. On one end of the spectrum, there are those who say government should do nothing at all on open Internet. On the other end are those who would adopt extensive, detailed and rigid regulations. Both sides impose tests of ideological purity. To some, unless their test is met, open Internet rules are “fake net neutrality.” To others, unless their test is met, open internet rules are “a government takeover of the Internet.”

For myself, I reject both extremes in favor of a strong and sensible, non-ideological framework – one that protects Internet freedom and openness and promotes robust innovation and investment throughout the broadband ecosystem. Because none of these goals are abstractions. They live or die not in ideology or theory, but in practice – in the hard work of grappling with technology, business, and real-world consumer experiences.

Now, in this issue we encounter familiar arguments – we’ve heard some today – the kind trotted out to oppose almost any government action. We are told by some, for example, not to try to fix what isn’t broken, and that rules of the road protecting Internet freedom would discourage innovation and investment. But countless innovators, investors and business executives say just the opposite, including many who generally oppose government action.

Over the course of this proceeding we have heard from so many entrepreneurs, engineers, venture capitalists, CEOs and others working daily to invent and distribute new Internet products and thereby maintain U.S. leadership in innovation. Their message has been clear: the next decade of innovation in this sector is at risk without sensible FCC rules of the road. As one leading early stage investor put it, in thoughts echoed in a letter we receiving from 30 prominent venture capitalists: “the lack of basic ‘rules of the road’ for what network providers and others can and can’t do is starting to hamper innovation and growth.” And as we heard in a letter from more than two dozen leading technology CEOs: “Common sense baseline rules are critical to ensuring that the Internet remains a key engine of economic growth, innovation, and global competitiveness.”

The innovators, entrepreneurs, and tech leaders recognize, as I do, the vital need for massive investment in broadband infrastructure. Based on their in-market experience – they also tell us that broadband providers have natural business incentives to leverage their positions as gatekeepers of the Internet in ways that would stifle innovation and limit the benefits of the Internet. They point out that, even after the Commission on a bipartisan basis announced open Internet principles in 2005, we have seen clear and troubling deviations from open practices.

Given the importance of an open Internet to our economic future, given the potentially irreversible nature of some harmful practices, and given the competition issues among broadband providers, it is essential that the FCC fulfill its historic role as a cop on the beat to ensure the vitality of our communications networks and to empower and protect consumers of those networks. Now at the same time, government must not overreach by imposing rules that are overly restrictive or that assume perfect knowledge about this dynamic and rapidly changing marketplace.

We know that – to meet our broadband speed and deployment goals for the country – broadband providers must have the business incentives to invest many billions of dollars to build out their networks, the ability to run their networks effectively, and the flexibility to experiment with new business models to further drive private investment.

Today, we are adopting a set of high-level rules of the road that strikes the right balance between the imperatives. We’re adopting a framework that will increase certainty for businesses, investors, and entrepreneurs.

In key respects, the interests of edge innovators – the entrepreneurs creating Internet content, services, and applications – broadband providers, and American consumers are aligned. Innovation at the edge catalyzes consumer demand for broadband. Consumer demand spurs private investment in faster broadband networks. And faster networks spark ever-cooler innovation at the edge.

I believe our action today will foster an ongoing cycle of massive investment, innovation and consumer demand both at the edge and in the core of our broadband networks. Our action will strengthen the Internet job-creation engine. Our action will advance our goal of having America’s broadband networks be the freest and fastest in the world. Our action will ensure Internet freedom at home, a necessary foundation to fight for Internet freedom around the world.

The crux of the order we are adopting – which is based on a strong and sound legal framework – is straightforward. Here are the key principles it enshrines, and the key rules designed to preserve Internet freedom and openness:

First, consumers and innovators have a right to know the basic performance characteristics of their Internet access and how their network is being managed. The transparency rule we adopt today will give consumers and innovators the clear and simple information they need to make informed choices in choosing networks or designing the next killer app. Shining a light on network management practices will also have an important deterrent effect on bad conduct.

Second, consumers and innovators have a right to send and receive lawful traffic – to go where they want, say what they want, experiment with ideas – commercial and social, and use the devices of their choice. The rules thus prohibit the blocking of lawful content, apps, services, and the connection of devices to the network.

Third, consumers and innovators have a right to a level playing field. No central authority, public or private, should have the power to pick winners and losers on the Internet; that's the role of the commercial market and the marketplace of ideas. So we are adopting a ban on unreasonable discrimination. And we are making clear that we are not approving so-called “pay for priority” arrangements involving fast lanes for some companies but not others. The order states that as a general rule such arrangements won't satisfy the no-unreasonable-discrimination standard – because it simply isn't consistent with an open Internet for broadband providers to skew the marketplace by favoring one idea or application or service over another by selectively prioritizing Internet traffic.

Fourth, the rules recognize that broadband providers need meaningful flexibility to manage their networks to deal with congestion, security, and other issues. And we also recognize the importance and value of business-model experimentation, such as tiered pricing. These are practical necessities, and will help promote investment in, and expansion of, high-speed broadband networks. So, for example, the order rules make clear that broadband providers can engage in “reasonable network management”.

Fifth, the principle of Internet openness applies to mobile broadband. There is one Internet, and it must remain an open platform, however consumers and innovators access it. And so today we are adopting, for the first time, broadly applicable rules requiring transparency for mobile broadband providers, and prohibiting them from blocking websites or blocking certain competitive applications.

As I have said for many months, as many innovators and entrepreneurs have told us, and as the facts and record bear out, there are differences between mobile and fixed broadband that are relevant in determining what action government should take for mobile at this time. Among the differences: unique technical issues involving spectrum and mobile networks, the stage and rate of innovation in mobile broadband; and market structure. Also, one of the largest mobile broadband providers has just begun providing 4G service using wireless spectrum subject to openness conditions adopted in connection with the auction of that spectrum.

Importantly, our order makes clear that we are not endorsing or approving practices that the order doesn't prohibit, particularly conduct that is barred for fixed broadband. And we affirm our commitment to an ongoing process to ensure the continued evolution of mobile broadband in a way that's consistent with Internet freedom and openness. Any reduction in mobile Internet openness would be a cause for concern—as would any reduction in innovation and investment in mobile broadband applications, devices, or networks that depend on Internet openness.

Sixth, and finally, today's order recognizes the importance of vigilance – vigilance in promptly enforcing the rules we are adopting and vigilance in monitoring developments in areas such as mobile and the market for specialized services, which may affect Internet openness. That's why I'm pleased that we've committed to create an Open Internet Advisory Committee that will assist the Commission in monitoring the state of Internet openness and the effects of our rules.

We're also launching an Open Internet Apps Challenge on [challenge.gov](http://challenge.gov) that will foster private-sector development of applications to empower consumers with information about their own broadband connections, which will also help protect Internet openness.

The rules of the road we adopt today are rooted in ideas first articulated by Republican Chairmen Michael Powell and Kevin Martin, and endorsed in a unanimous FCC policy statement in 2005. And they are grounded in the record we have developed over the last 14 months, including more than 100,000 public comments, numerous public workshops, and hundreds of meetings with stakeholders ranging across the spectrum.

I am proud of this process, which has been one of the most transparent in FCC history. And I am proud of the result, which has already garnered broad support – from the technology industry, including TechNet, the Information Technology Industry Council, the Internet Innovation Alliance and the hundreds of technology companies those groups represent, as well as many other technology companies; support from investors of all sizes, including some of the nation's preeminent venture capitalists and angel investors.

Our framework has also drawn support from key consumer, labor, and civil rights groups, a list that includes the Consumer Federation of America, Consumers Union, the Center for Democracy and Technology, and the Communications Workers of America. I thank them and the other groups that have worked on this issue. And our framework has been supported by a number of broadband providers as well, who recognize the sensible balance of our action and the value of bringing a level of certainty to this fraught issue.

Our action today culminates recent efforts to find common ground on this challenging issue – here at the FCC, as well by private parties, and in Congress. I thank each of those who took their time over the last several months to take on these difficult issues, seeking to bridge gaps and find solutions, and who supported us in our efforts.

I want to praise and thank my colleagues Commissioners Copps and Clyburn particularly, for their vision and constancy in pushing this Commission to focus on the interest of consumers. Their work has certainly improved our rules and order. As Commissioner McDowell and Commissioner Baker pointed out, virtually all of our decisions are bipartisan or unanimous, and I look forward to working together on a series of items to serve the public and grow the economy. And I can't express enough appreciation to the remarkable staff of the FCC, who have worked so hard – and so well – to wrestle with difficult issues and turn complex ideas into simple rules. This includes many offices and bureaus at the FCC, including the Office of General Counsel, the Office of Strategic Planning, the Office Engineering and Technology, and the Wireline, Wireless, Media, Consumer, Enforcement, and International Bureaus. Thank you all. And thank you to all the staff on the 8<sup>th</sup> floor, and in particular to the extraordinary team I'm lucky to have in the Chairman's office. Eddie Lazarus, Zac Katz, Rick Kaplan, Josh Gottheimer, Jen Howard, Daniel Ornstein, and Maria Gaglio – you've each gone well above and beyond the call of duty. I

apologize to your families. But I know they join me in honoring your service. Thanks to the work of these incredible public servants, today a strengthened FCC is adopting rules to ensure that the Internet remains a powerful platform for innovation and job creation; to empower consumers and entrepreneurs; and protect free expression.

These rules will increase certainty in the marketplace; spur investment both at the edge and in the core of our broadband networks, and contribute to a 21<sup>st</sup> century job-creation engine in the United States. Finally, these rules fulfill many promises, including a promise to the future – a promise to the companies that don't yet exist, and the entrepreneurs who haven't yet started work in their dorm rooms or garages. For all that, I am proud to cast my vote.

**CONCURRING STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

Re: *Preserving the Open Internet*, GN Docket No. 09-191, *Broadband Industry Practices*, WC Docket No. 07-52

In years to come, I hope we can look back on this day as an important turning point in the struggle to ensure the continued openness of the Internet against powerful gatekeeper control. On numerous fronts in the *Open Internet Order* before us today, the Commission is taking strides forward. On others, I pray that our timidity will not undermine the spirit of the Order that we are adopting. The Internet was born on openness, thrived on openness and will achieve its full potential only through continued openness. It is my fervent desire that, with this Order, we start to write the next chapter in the great Internet success story—one of continued openness, innovation without needing permission from anyone, and expanded access for all Americans. We cannot afford to permit special interests to relegate the awesome opportunity-creating power of the open Internet into the sad history of “what might have beens.”

Allowing gigantic corporations—in many cases, monopoly or duopoly broadband Internet access service providers—to exercise unfettered control over Americans’ access to the Internet not only creates risks to technological innovation and economic growth, but it poses a real threat to freedom of speech and the future of our democracy. Increasingly our national conversation, our source for news and information, our knowledge of one another, will depend upon the Internet. Our future town square will be paved with broadband bricks. It must be accessible to all—not handed over to a handful of gatekeepers who can control our access. As I have long argued—and as many students of the medium have written—previous telecommunications and media technologies, also conceived in openness, eventually fell victim to consolidated control by a few powerful interests, speculative mania by investors, and mistaken government policies which assumed that wise public policy was no public policy. We’re supposed to learn from history; too often we don’t. Increasingly, the private interests who control our Twenty-first century information infrastructure resemble those who seized the master switch, as Tim Wu’s new book calls it, of the last century’s communications networks.

In 2003, I cautioned, somewhat dramatically perhaps—but not inaccurately—that the “Internet may be dying . . . because entrenched interests [were] positioning themselves to control the Internet’s choke-points.” I called then—as I have repeatedly since—for clear rules to maintain openness and freedom on the Internet and to fight discrimination over ideas, content and technologies. Two years later, I was able to convince my colleagues to—at a minimum—adopt an *Internet Policy Statement* that contained the basic rights of Internet end-users to access lawful content, run applications and services, connect devices to the network and enjoy the benefits of competition. Now, at long last, we adopt at least some concrete rules to prevent gatekeepers from circumventing the openness that made the Internet the Internet and from stifling innovation, investment and job creation.

All we need to do is look at our history at the FCC as a cautionary tale. It wasn’t all that long ago (well, at least, when you’re my age) that one network—AT&T—ran the whole show. AT&T had the power to decide how the network would be used. When innovators showed up at the door with ideas and new technologies, they were often greeted with a courteous but quick “go away.” For a long time, the FCC fully supported this type of network, and in fact served as its protector. It was thought that only through comprehensive control by a single company could the quality, safety and scale economies of the network be guaranteed. Bigger was better, and

uniformity and stability were thought to be worth the price of lost opportunities for innovation and consumer benefits.

All of this began to change in the late 1960s when an innovator called Carter Electronics Corporation developed a device that connected mobile radio-telephone systems to the wireline network. This device, called the Carterfone, had a cradle into which a regular handset was placed. It converted voice signals to radio signals without the need for a direct electrical connection. But the entrenched incumbent claimed that allowing this innovative and foreign attachment would bring down its entire system. Why? Because the entrenched incumbent didn't build it, sell it and control it. Sound familiar?

Over the complaints of a powerful special interest, the Commission worked up enough courage to change tack, stand up to the network gate-keeper and do the right thing, requiring the network operator to permit attachment of this new application into the existing network. In spite of all the monopolist's alarm bells that this decision meant the end of network quality and the end of reliable service as we knew it, just the opposite came to pass. The idea of having a network that couldn't discriminate against innovators who wanted to improve it finally began to break the choke-hold that the gatekeeper had on the system.

Years after the *Carterfone* decision, as we entered the early days of the Internet age, the Commission reaffirmed its policy of openness and competition by protecting freedom on both the access layer and the architectural layer of the network. In the *Computer Inquiries*, earlier Commissions mandated that common carriers that own transmission pipes used to access the Internet must offer those pipes on non-discriminatory terms to independent Internet Service Providers, among others. Through these decisions the Commission fostered competition by ensuring that customers could reach independent providers. Congress then moved, in provisions of the Telecommunications Act of 1996, to protect the architectural layer. Congress said that local telephone companies with choke-point control of physical infrastructures would have to unbundle their transmission networks.

Sadly, both of these policies were, in fairly short order, decimated by the two Commissions that served between 2001 and 2009. Over my strenuous objections—and those of my colleague Jonathan Adelstein—the FCC took American consumers on a dangerous deregulatory ride, moving the transmission component of broadband outside of the statutory framework that applies to telecommunications carriers. When those Commissions stopped treating advanced telecommunications as telecommunications, they relegated American competitiveness to the sidelines. I don't like to see my country on the sidelines. Neither do most Americans. And remember, this was a major flip-flop from the historic—and successful—approach of requiring nondiscrimination in our communications networks. Because of the errors of those previous Commissions, a court told us earlier this year that the legal framework upon which the FCC built its action against Comcast for disrupting peer-to-peer traffic was inadequate.

Since the decision in *Comcast*, the “Good Ship FCC” has found itself adrift without the tools needed to keep even the most basic consumer protections afloat in today's communications networks. Today, we finally try to patch the hole left by the *Comcast* decision by adopting certain rules to preserve the openness of the Internet. To be clear, we do not anchor ourselves on what I believe to be the best legal framework. Nor have we crafted rules as strong as I would have liked. But, with today's action, we do nonetheless appear to steer ourselves back toward a better course.

I had hoped that we would move full-throttle to restore the kind of policies that had worked in the past. I wanted to put those eight years of public policy aberration—some, me included, dare call them years of abdication—totally behind us. So I pushed—pushed as hard as I could—to get broadband telecommunications back where they belonged, under Title II of our enabling statute, where hard-won consumer-friendly protections that had been built up over many years provided a framework under which business could do its job of building and managing this great communications enterprise—making handsome profits in the process—while operating within a public policy framework giving them certainty and giving consumers the protections they needed and deserved. I wanted to go back to that balancing act that had generally worked, for so many years, for the common good. So, yes, I continue to believe that a reassertion of our Title II authority would have provided the surest foundation for future Commission action. And I note with interest that the Commission's *Reclassification* docket will remain open.

There is more that I would have liked in this Order. I would have preferred a general ban to discourage broadband providers from engaging in “pay for priority”—prioritizing the traffic of those with deep pockets while consigning the rest of us to a slower, second-class Internet. I also believe we should have done more to strip loopholes from the definition of “broadband Internet access service” to prevent companies falsely claiming they are not broadband companies from slipping through. We've made some improvements on the definition, but I still have some worries. I also argued for real parity between fixed and mobile—read wireline and wireless—technologies. After all, the Internet *is* the Internet, no matter how you access it, and the millions of citizens going mobile nowadays for their Internet and the entrepreneurs creating innovative wireless content, applications and services should have the same freedoms and protections as those in the wired context. I had other areas of concern about something less than a bright-line nondiscrimination rule, keeping “reasonable network management” within bounds, and the substitution of monitoring for the certainty of enforcement in too many areas.

So, in my book, today's action could—and should—have gone further. Going as far as I would have liked was not, however, in the cards. The simpler and easier course for me at that point would have been dissent—and I considered that very, very seriously. But it became ever more clear to me that without some action today, the wheels of network neutrality would grind to a screeching halt for at least the next two years. So, reserving the right to dissent throughout, I spent the past three weeks in intensive discussions—with all interested parties—about how we might be able to do something to ensure the continued openness of the Internet and to put consumers—not Big Phone or Big Cable—in control of their online experiences. In the end, I believe we made some progress. Not nearly so much as I had hoped, but more, I think, than many people expected. The language in the Order that we will hopefully approve today moves the item, in my mind, from unacceptable to something in which I can concur. That is what I intend to do.

Among the many improvements to the Order we achieved, we now at least conclude that “pay for priority” arrangements would generally violate our “no unreasonable discrimination” rule. We have also explicitly changed the text of the definition of “broadband Internet access service” to close a loophole that, while protecting residential customers, would have jeopardized the open Internet rights of small businesses, educational institutions and libraries. We insisted on providing greater context to the definition so that broadband companies cannot easily evade the open Internet protections. We have expanded our transparency requirements to give consumers the information they need to make an informed choice by requiring disclosure on the broadband provider's website and also at the point of sale. In discussing the “no unreasonable discrimination” standard, we put particular emphasis on keeping control in the hands of users and

preserving an application-blind network—a key part of making the Internet the innovative platform it is today. Given the importance of preserving the open Internet, we have also provided for “rocket docket” expedited treatment to address consumer complaints. Rules on the books are simply a tool waiting to be wielded unless the Commission makes a priority of enforcing them.

While it is no secret that I would have liked to see much more in the mobile section of today’s Order, I believe the improvements we have made can start us on a path toward full parity with fixed broadband. After all, we clearly recognize today that “[t]here is one Internet, which should remain open for consumers and innovators alike, although it may be accessed through different technologies and services.” More narrowly, we have managed to better refine the actions we do take today. For example, we clarify that a wireless broadband provider cannot block applications that compete with not only its own competitive voice and video telephony applications, but also with those in which it has an attributable interest.

Separate and apart from today’s Order, we as a Commission must recognize that we have much urgent business to address to ensure a truly competitive mobile broadband environment—including resolving the pending proceedings related to early termination fees (ETFs), handset exclusivity arrangements, interoperability in the 700 MHz band, and data roaming, to name some of the pending decisions this Commission needs to make.

It is not the job of just the FCC or government writ large, or just consumers and citizens, or just innovators and entrepreneurs to keep our information infrastructure open and dynamic. It is the job of all of us. Why is this important? Because we have in our grasp now the most powerful and promising communications technology in all of history. If we allow this opportunity-creating technology the freedom and openness it needs to reach its full potential, we can prepare our kids for a future that our country is finding more and more challenging. We will give our schools powerful new tools to educate us, young and old. We will be able to deploy these tools to improve our health, decrease our energy dependence, and create opportunities for whole communities that are being left behind in this new century—rural communities, the inner cities, minorities, Indian country, and those with disabilities. The Internet has been accessible to all, responsive to all, and affordable to all. That’s what this country worked for—and largely achieved—in building out electricity and plain old telephone service to all our citizens. It is what we now need to work for with our Twenty-first century broadband infrastructure.

If vigilantly and vigorously implemented by the Commission—and if upheld by the courts—today’s Order could represent an important milestone in the ongoing struggle to safeguard the awesome opportunity-creating power of the open Internet. While I cannot vote wholeheartedly to approve the order, I will not block it by voting against it. It is a first step in the right direction—not that first sturdy step I hope my newest grandchild will take, but at least forward, if somewhat hesitant, movement.

Today’s majority was crafted by discussion, respectful consideration of one another’s thoughts, and give-and-take. I would have welcomed a little more “give,” but I suppose the Chairman might see it differently. In any event, I thank him for his engagement and his commitment. I want to pay special tribute to my colleague Commissioner Mignon Clyburn. We shared many of the same concerns, I think it is fair to say, and her thoughtful and creative work, along with her heartfelt commitment to make this item work for consumers—*all* consumers—had a lot to do with making this a better Order.

Finally, I want to express a deep sense of gratitude to staff. Mine was great in every aspect of this endeavor. John Giusti and Margaret McCarthy worked creatively and tirelessly into the wee hours of many nights and through some awfully long weekends. So, too, Commissioner Clyburn's excellent team, Dave Grimaldi and Angie Kronenberg. I know many folks in the Chairman's office sacrificed similarly, especially Rick Kaplan, Zac Katz and Eddie Lazarus. Literally dozens of people in the Bureaus have worked mightily here, too. I thank them all.

Thanks apart, our job doesn't end today. We haven't finished any race here. We haven't guaranteed an open Internet going forward. We will have, I suspect, a lot of new roads to build—and some other roads, even ones that we lay out in today's Order, that may require repaving and repair before long. If that happens, I hope we will be fast off the mark to do whatever needs to be done. So better than lapsing into a year of post-game armchair analysis, impugning motivations and all the rest, let's instead get to work on the huge job at-hand. Our challenge is nothing short of historic—it is to ensure that the liberating potential of our Twenty-first century communications tools are used to provide the opportunities our citizens—*all* our citizens—require to be fully productive citizens of a fully productive country.

Thank you.

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

Re: *Preserving the Open Internet*, GN Docket No. 09-191, *Broadband Industry Practices*,  
WC Docket No. 07-52

Thank you, Mr. Chairman. And thank you for your solicitousness throughout this proceeding. In the spirit of the holidays, with good will toward all, I will present a condensed version of a more in-depth statement, the entirety of which I respectfully request be included in this Report and Order.

At the outset, I would like to thank the selfless and tireless work of all of the career public servants here at the Commission who have worked long hours on this project. Although I strongly disagree with this Order, all of us should recognize and appreciate that you have spent time away from your families as you have worked through weekends, the holidays of Thanksgiving and Chanukah, as well as deep into the Christmas season. Such hours take their toll on family life, and I thank you for the sacrifices made by you and your loved ones.

For those who might be tuning in to the FCC for the first time, please know that over 90 percent of our actions are not only bipartisan, but unanimous. I challenge anyone to find another policy making body in Washington with a more consistent record of consensus. We agree that the Internet is, and should remain, open and freedom enhancing. It is, and always has been so, under existing law. Beyond that, we disagree. The contrasts between our perspectives could not be sharper. My colleagues and I will deliver our statements and cast our votes. Then I am confident that we will move on to other issues where we can find common ground once again. I look forward to working on public policy that is more positive and constructive for American economic growth and consumer choice.

William Shakespeare taught us in *The Tempest*, "What's past is prologue." That time-tested axiom applies to today's Commission action. In 2008, the FCC tried to reach beyond its legal authority to regulate the Internet, and it was slapped back by an appellate court only eight short months ago. Today, the Commission is choosing to ignore the recent past as it attempts the same act. In so doing, the FCC is not only defying a court, but it is circumventing the will of a large, bipartisan majority of Congress as well. More than 300 Members have warned the agency against exceeding its legal authority. The FCC is not Congress. We cannot make laws. Legislating is the sole domain of the directly *elected* representatives of the American people. Yet the majority is determined to ignore the growing chorus of voices emanating from Capitol Hill in what appears to some as an obsessive quest to regulate at all costs. Some are saying that, instead of acting as a "cop on the beat," the FCC looks more like a regulatory vigilante. Moreover, the agency is further angering Congress by ignoring increasing calls for a cessation of its actions and choosing, instead, to move ahead just as Members leave town. As a result, the FCC has provocatively charted a collision course with the legislative branch.

Furthermore, on the night of Friday, December 10, just two business days before the public would be prohibited by law from communicating further with us about this proceeding, the Commission dumped nearly 2,000 pages of documents into the record. As if that weren't enough, the FCC unloaded an additional 1,000 pages into the record less than 24 hours before the end of the public comment period. All of these extreme measures, defying the D.C. Circuit, Congress,

and undermining the public comment process, have been deployed to deliver on a misguided campaign promise.

Not only is today the winter solstice, the darkest day of the year, but it marks one of the darkest days in recent FCC history. I am disappointed in these “ends-justify-the-means” tactics and the doubts they have created about this agency. The FCC is capable of better. Today is not its finest hour.

Using these new rules as a weapon, politically favored companies will be able to pressure three political appointees to regulate their rivals to gain competitive advantages. Litigation will supplant innovation. Instead of investing in tomorrow’s technologies, precious capital will be diverted to pay lawyers’ fees. The era of Internet regulatory arbitrage has dawned.

And to say that today’s rules don’t regulate the Internet is like saying that regulating highway on-ramps, off-ramps, and its pavement doesn’t equate to regulating the highways themselves.

What had been bottom-up, non-governmental, and grassroots based Internet governance will become politicized. Today, the United States is abandoning the long-standing bipartisan and international consensus to insulate the Internet from state meddling in favor of a preference for top-down control by unelected political appointees, three of whom will decide what constitutes “reasonable” behavior. Through its actions, the majority is inviting countries around the globe to do the same thing. “Reasonable” is a subjective term. Not only is it perhaps the most litigated word in American history, its definition varies radically from country to country. The precedent has now been set for the Internet to be subjected to state interpretations of “reasonable” by governments of all stripes. In fact, at the United Nations just last Wednesday, a renewed effort by representatives from countries such as China and Saudi Arabia is calling for what one press account says is, “an international body made up of Government representatives that would attempt to create global standards for policing the internet.”<sup>1</sup> By not just sanctioning, but *encouraging* more state intrusion into the Internet’s affairs, the majority is fueling a global Internet regulatory pandemic. Internet freedom will not be enhanced, it will suffer.

My dissent is based on four primary concerns:

- 1) Nothing is broken in the Internet access market that needs fixing;
- 2) The FCC does not have the legal authority to issue these rules;
- 3) The proposed rules are likely to cause irreparable harm; and
- 4) Existing law and Internet governance structures provide ample consumer protection in the event a systemic market failure occurs.

Before I go further, however, I apologize if my statement does not address some important issues raised by the Order, but we received the current draft at 11:42 p.m. last night and my team is still combing through it.

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<sup>1</sup> John Hilvert, *UN Mulls Internet Regulation Options*, ITNEWS, Dec. 17, 2010, <http://www.itnews.com.au/News/242051,un-mulls-internet-regulation-options.aspx>.

## I. Nothing Is Broken in the Internet Access Market That Needs Fixing.

All levels of the Internet supply chain are thriving due to robust competition and low market entry barriers. The Internet has flourished because it was privatized in 1994.<sup>2</sup> Since then, it has migrated further away from government control. Its success was the result of bottom-up collaboration, not top-down regulation. No one needs permission to start a website or navigate the Web freely. To suggest otherwise is nothing short of fear mongering.

Myriad suppliers of Internet related devices, applications, online services and connectivity are driving productivity and job growth in our country. About eighty percent of Americans own a personal computer.<sup>3</sup> Most are connected to the Internet. In the meantime, the Internet is going mobile. By this time next year, consumers will see more smartphones in the U.S. market than feature phones.<sup>4</sup> In addition to countless applications used on PCs, growth in the number of mobile applications available to consumers has gone from nearly zero in 2007 to half a million just three years later.<sup>5</sup> Mobile app downloads are growing at an annual rate of 92 percent, with an estimated 50 billion applications expected to be downloaded in 2012.<sup>6</sup>

Fixed and mobile broadband Internet access is the fastest penetrating disruptive technology in history. In 2003, only 15 percent of Americans had access to broadband. Just seven years later, 95 percent do.<sup>7</sup> Eight announced national broadband providers are building out facilities in addition to the construction work of scores more local and regional providers. More competition is on the way as providers light up recently auctioned spectrum. Furthermore, the Commission's work to make unlicensed use of the television "white spaces" available to consumers will create even more competition and consumer choice.

In short, competition, investment, innovation, productivity, and job growth are healthy and dynamic in the Internet sector thanks to bipartisan, deregulatory policies that have spanned four decades. The Internet has blossomed under *current law*.

Policies that promote abundance and competition, rather than the rationing and unintended consequences that come with regulation, are the best antidotes to the potential

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<sup>2</sup> And at this juncture, I need to dispel a pervasive myth that broadband was once regulated like a phone company. The FCC's 2002 cable modem order did not move broadband from Title II. It formalized an effort to insulate broadband from antiquated regulations, like those adopted today, that started under then-FCC Chairman Bill Kennard. Furthermore, after the Supreme Court's *Brand X* decision, all of the FCC votes to classify broadband technologies as information services were bipartisan. A more thorough history is attached to this dissent as "Attachment A".

<sup>3</sup> See Aaron Smith, Pew Internet & American Life Project, *Americans and their gadgets* (Oct. 14, 2010) at 2, 5, 9 (76 percent of Americans own either a desktop or laptop computer; 4 percent of Americans have "tablet computers").

<sup>4</sup> Roger Entner, Nielsenwire, *Smartphones to Overtake Feature Phones in U.S. by 2011* (Mar. 26, 2010).

<sup>5</sup> See Distimo, GigaOm, Softpedia (links at: <http://www.distimo.com/appstores/stores/index/country:226>; <http://gigaom.com/2010/10/25/android-market-clears-100000-apps-milestone/>; and <http://news.softpedia.com/news/4-000-Apps-in-Windows-Phone-Marketplace-171764.shtml>).

<sup>6</sup> See Chetan Sharma, *Sizing Up the Global Mobile Apps Market* (2010) at 3, 9.

<sup>7</sup> Federal Communications Commission, *Connecting America: The National Broadband Plan* at 20 (rel. Mar. 16, 2010) (*National Broadband Plan*).

anticompetitive behavior feared by the rules' proponents. But don't take my word for it. Every time the government has examined the broadband market, its experts have concluded that no evidence of concentrations or abuses of market power exists. The Federal Trade Commission (FTC), one of the premier antitrust authorities in government, not only concluded that the broadband market was competitive, but it also warned that regulators should be "wary" of network management rules because of the unknown "net effects ... on consumers."<sup>8</sup> The FTC rendered that unanimous and bipartisan conclusion in 2007. As I discussed earlier, the broadband market has become only more competitive since then.

More recently, the Department of Justice's Antitrust Division reached a similar conclusion when it filed comments with us earlier this year.<sup>9</sup> While it sounded optimistic regarding the prospects for broadband competition, it also warned against the temptation to regulate "to avoid stifling the infrastructure investments needed to expand broadband access."<sup>10</sup>

Disturbingly, the Commission is taking its radical step today without conducting even a rudimentary market analysis. Perhaps that is because a market study would not support the Order's predetermined conclusion.

## II. The FCC Does Not Have the Legal Authority to Issue These Rules.

Time does not allow me to refute all of the legal arguments in the Order used to justify its claim of authority to regulate the Internet. I have included a more thorough analysis in the supplemental section of this statement, however. Nonetheless, I will touch on a few of the legal arguments endorsed by the majority.

Overall, the Order is designed to circumvent the D.C. Circuit's *Comcast* decision,<sup>11</sup> but this new effort will fail in court as well. The Order makes a first-time claim that somehow, through the *deregulatory* bent of Section 706, in 1996 Congress gave the Commission *direct* authority to regulate the Internet. The Order admits that its rationale requires the Commission to reverse its longstanding interpretation that this section conveys no additional authority beyond what is already provided elsewhere in the Act.<sup>12</sup> This new conclusion, however, is suddenly convenient for the majority while it grasps for a foundation for its predetermined outcome. Instead of "*remov[ing]* barriers to infrastructure investment," as Section 706 encourages, the Order fashions a legal fiction to construct *additional* barriers. This move is arbitrary and capricious and is not supported by the evidence in the record or a change of law.<sup>13</sup> The

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<sup>8</sup> Federal Trade Commission, Internet Access Task Force, Broadband Connectivity Competition Policy FTC Staff Report (rel. June 27, 2007) at 157.

<sup>9</sup> See *Ex Parte* Submission of the U.S. Dept. of Justice, GN Docket No. 09-51 (dated Jan. 4, 2010).

<sup>10</sup> *Id.* at 28.

<sup>11</sup> *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

<sup>12</sup> Order, ¶ 118.

<sup>13</sup> While it is true that an agency may reverse its position, "the agency must show that there are good reasons." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). Moreover, while *Fox* held that "[t]he agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate," the Court noted that "[s]ometimes it must – when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior

(continued....)

Commission's gamesmanship with Section 706 throughout the year is reminiscent of what was attempted with the contortions of the so-called "70/70 rule" three years ago. I objected to such factual and legal manipulations then, and I object to them now.

Furthermore, the Order desperately scours the Act to find a tether to moor its alleged Title I ancillary authority. As expected, the Order's legal analysis ignores the fundamental teaching of the *Comcast* case: Titles II, III, and VI of the Communications Act give the FCC the power to regulate specific, recognized classes of electronic communications services, which consist of common carriage telephony, broadcasting and other licensed wireless services, and multichannel video programming services.<sup>14</sup> Despite the desires of some, Congress has *not* established a new title of the Act to police Internet network management, not even implicitly. The absence of statutory authority is perhaps why Members of Congress introduced legislation to give the FCC such powers. In other words, if the Act already gave the Commission the legal tether it seeks, why was legislation needed in the first place? I'm afraid that this leaky ship of an Order is attempting to sail through a regulatory fog without the necessary ballast of factual or legal substance. The courts will easily sink it.

In another act of legal sleight of hand, the Order claims that it does not attempt to classify broadband services as Title II common carrier services. Yet functionally, that is precisely what the majority is attempting to do to Title I information services, Title III licensed wireless services, and Title VI video services by subjecting them to nondiscrimination obligations in the absence of a congressional mandate. What we have before us today is a Title II Order dressed in a threadbare Title I disguise. Thankfully, the courts have seen this bait-and-switch maneuver by the FCC before – and they have struck it down each time.<sup>15</sup>

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(...continued from previous page)

policy has engendered serious reliance interest that must be taken into account." *Id.* (internal citations omitted).

<sup>14</sup> The D.C. Circuit in *Comcast* set forth this framework in very plain English:

Through the Communications Act of 1934, ch. 652, 48 Stat. 1064, as amended over the decades, 47 U.S.C. § 151 *et seq.*, Congress has given the Commission express and expansive authority to regulate common carrier services, including landline telephony, *id.* § 201 *et seq.* (Title II of the Act); radio transmissions, including broadcast television, radio, and cellular telephony, *id.* § 301 *et seq.* (Title III); and "cable services," including cable television, *id.* § 521 *et seq.* (Title VI). In this case, the Commission does not claim that Congress has given it express authority to regulate Comcast's Internet service. Indeed, in its still-binding 2002 *Cable Modem Order*, the Commission ruled that cable Internet service is neither a "telecommunications service" covered by Title II of the Communications Act nor a "cable service" covered by Title VI. *In re High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4802, P 7 (2002), *aff'd Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005).

600 F.3d at 645.

<sup>15</sup> See, e.g., *id.*; *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (*Midwest II*).

The Order's expansive grasp for jurisdictional power here is likely to alarm any reviewing court because the effort appears to have no limiting principle.<sup>16</sup> If we were to accept the Order's argument, "it would virtually free the Commission from its congressional tether."<sup>17</sup> "As the [Supreme] Court explained in *Midwest Video II*, 'without reference to the provisions of the Act' expressly granting regulatory authority, 'the Commission's [ancillary] jurisdiction ... would be unbounded.'"<sup>18</sup> I am relieved, however, that in the Order, the Commission is explicitly refraining from regulating coffee shops.<sup>19</sup>

In short, if this Order stands, there is no end in sight to the Commission's powers.

I also have concerns regarding the constitutional implications of the Order, especially its trampling on the First and Fifth Amendments. But in the observance of time, those thoughts are contained in my extended written remarks.

### **III. The Commission's Rules Will Cause Irreparable Harm to Broadband Investment and Consumers.**

DOJ's cogent observation from last January regarding the competitive nature of the broadband market raises the important issue of the likely irreparable harm to be brought about by these new rules. In addition to government agencies, investors, investment analysts, and broadband companies themselves have told us that network management rules would create uncertainty to the point where crucial investment capital will become harder to find. This point was made over and over again at the FCC's Capital Formation Workshop on October 1, 2009. A diverse gathering of investors and analysts told us that even rules emanating from Title I would create uncertainty. Other evidence suggests that Internet management rules could not only make it difficult for companies to "predict their revenues and cash flow," but a new regime could "have the perverse effect of raising prices to all users" as well.<sup>20</sup>

Additionally, today's Order implies that the FCC has price regulation authority over broadband. In fact, the D.C. Circuit noted in its *Comcast* decision last spring that the Commission's attorneys openly asserted at January's oral argument that "the Commission could someday subject [broadband] service to pervasive rate regulation to ensure that ... [a broadband] company provides the service at 'reasonable charges.'"<sup>21</sup> Nothing indicates that the Commission

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<sup>16</sup> For example, in the *Comcast* case, FCC counsel conceded at oral argument that the ancillary jurisdiction argument there could even encompass rate regulation, if the Commission chose to pursue that path. *Id.* at 655 (referring to Oral Arg. Tr. 58-59).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* (quoting *Midwest Video II*, 440 U.S. at 706).

<sup>19</sup> Order, ¶ 52.

<sup>20</sup> Howard Buskirk, *Investors, Analysts Uneasy About FCC Direction on Net Neutrality*, COMM. DAILY, Oct. 2, 2009, at 2; see also National Cable & Telecommunications Association Comments at 19; Verizon and Verizon Wireless Reply Comments at 17-18.

<sup>21</sup> *Comcast*, 600 F.3d at 655 (referring to Oral Arg. Tr. 58-59).

has changed its mind since then. In fact, the Order appears to support both indirect and direct price regulation of broadband services.<sup>22</sup>

Moreover, as lobbying groups accept this Order's invitation to file complaints asking the government to distort the market further the Commission will be under increasing pressure from political interest groups to expand its power and influence over the broadband Internet market. In fact, some of my colleagues today are complaining that the Order doesn't go far enough. Each complaint filed will create more uncertainty as the enforcement process becomes a *de facto* rulemaking circus, just as the Commission attempted in the ill-fated *Comcast/BitTorrent* case.<sup>23</sup> How does this framework create regulatory certainty?<sup>24</sup> Even the European Commission recognized the harm such rules could cause to the capital markets when it decided last month *not* to impose measures similar to these.<sup>25</sup>

Part of the argument in favor of new rules alleges that "giant corporations" will serve as hostile "gatekeepers" to the Internet. First, in the almost nine years since those fears were first sewn, net regulation lobbyists can point to fewer than a handful of cases of alleged misconduct, out of an infinite number of Internet communications. *All* of those cases were resolved in favor of consumers under *current* law.

More importantly, however, many broadband providers are not large companies. Many are small businesses. Take, for example, LARIAT, a fixed wireless Internet service provider serving rural communities in Wyoming. LARIAT has told the Commission that the imposition of network management rules will impede its ability to obtain investment capital and will limit the company's "ability to deploy new service to currently unserved and underserved areas."<sup>26</sup> Furthermore, LARIAT echoes the views of many others by asserting that, "[t]he imposition of regulations that would drive up costs or hamper innovation would further deter future outside investment in our company and others like it."<sup>27</sup> Additionally, "[t]o mandate overly [burdensome] network management policies would foster lower quality of service, raise operating costs (which in turn would raise prices for all subscribers), and/or create a large backlog of adjudicative proceedings at the Commission (in which it would be prohibitively expensive for

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<sup>22</sup> See, e.g., Order, ¶ 76.

<sup>23</sup> See *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, File No. EB-08-IH-1518, Memorandum Opinion and Order, 23 FCC Rcd. 13,028 (2008) (*Comcast Order*). Comcast and BitTorrent settled their dispute, in the absence of net neutrality rules, four months before the Commission issued its legally flawed order. See, e.g., David Kirkpatrick, *Comcast-BitTorrent: The Net's Finally Growing Up*, CNN.COM, Mar. 28, 2008, at <http://money.cnn.com/2008/03/27/technology/comcast.fortune/index.htm>

<sup>24</sup> Furthermore, as Commissioner Baker has noted, with this Order the Commission is inviting parties to file petitions for declaratory rulings, which will likely result in competitors asking the government to regulate their rivals in advance of market action. I am hard pressed to find a better example of a "mother-may-I" paternalistic industrial policy making apparatus.

<sup>25</sup> Neelie Kroes, Vice President for the Digital Age, European Commission, Net Neutrality – The Way Forward: European Commission and European Parliament Summit on "The Open Internet and Net Neutrality in Europe" (Nov. 11, 2010).

<sup>26</sup> LARIAT Comments at 2-3.

<sup>27</sup> *Id.* at 3.

*small and competitive ISPs to participate*)”.<sup>28</sup> LARIAT also notes that the imposition of net neutrality rules would cause immediate harm such that “[d]ue to immediate deleterious impacts upon investment, these damaging effects would be likely to occur even if the Commission’s Order was later invalidated, nullified, or effectively modified by a court challenge or Congressional action.”<sup>29</sup> Other small businesses have echoed these concerns.<sup>30</sup>

Less investment. Less innovation. Increased business costs. Increased prices for consumers. Disadvantages to smaller ISPs. Jobs lost. And all of this is in the name of promoting the exact opposite? The evidence in the record simply does not support the majority’s outcome driven conclusions.

In short, the Commission’s action today runs directly counter to the laudable broadband deployment and adoption goals of the National Broadband Plan. No government has ever succeeded in mandating investment and innovation. And nothing has been holding back Internet investment and innovation, until now.

#### IV. Existing Law Provides Ample Consumer Protection.

To reiterate, the Order fails to put forth either a factual or legal basis for regulatory intervention. Repeated government economic analyses have reached the same conclusion: no concentrations or abuses of market power exist in the broadband space. If market failure were to occur, however, America’s antitrust and consumer protection laws stand at the ready. Both the Department of Justice and the Federal Trade Commission are well equipped to cure any market ills.<sup>31</sup> In fact, the Antitrust Law Section of the American Bar Association agrees.<sup>32</sup> Nowhere does the Order attempt to explain why these laws are insufficient in its quest for more regulation.

<sup>28</sup> *Id.* at 5 (emphasis added).

<sup>29</sup> Letter from Brett Glass, d/b/a LARIAT, to Julius Genachowski, Chairman, FCC, *et al.*, at 2 (Dec. 9, 2010) (LARIAT Dec. 9 Letter).

<sup>30</sup> *See, e.g.*, Letter from Paul Conlin, President, Blaze Broadband, to Marlene H. Dortch, Secretary (Dec. 14, 2010) (Blaze Broadband Dec. 14 Letter).

<sup>31</sup> Section 2 of the Sherman Act, 15 U.S.C. § 2, prohibits conduct that would lead to monopolization. In the event of abuse of market power, this is the main statute that enforcers would use. In the context of potential abuses by broadband Internet access service providers, this statute would forbid: (1) Exclusive dealing – for example, the only way a consumer could obtain streaming video is from a broadband provider’s preferred partner site; (2) Refusals to deal (the other side of the exclusive dealing coin) – *i.e.*, if a cable company were to assert that the only way a content delivery network could interconnect with it to stream unaffiliated video content to its customers would be to pay \$1 million/port/month, such action could constitute a “constructive” refusal to deal if any other content delivery network could deliver any other traffic for a \$1,000/port/month price; and (3) Raising rivals’ costs – achieving essentially the same results using different techniques.

Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, essentially accomplishes the same curative result, only through the FTC. It generally forbids “unfair competition.” This is an effective statute to empower FTC enforcement as long as Internet access service is considered an “information service.” The FTC Act explicitly does not apply to “common carriers.”

*See also*, 15 U.S.C. §13(a), *et seq.*

<sup>32</sup> ABA Comment on Federal Trade Commission Workshop: Broadband Connectivity Competition Policy, 195 Project No. V070000 (2007).

Moreover, for several years now, I have been advocating a potentially effective approach that won't get overturned on appeal. In lieu of new rules, which will be tied up in court for years, the FCC could create a new role for itself by partnering with already established, non-governmental Internet governance groups, engineers, consumer groups, academics, economists, antitrust experts, consumer protection agencies, industry associations, and others to spotlight allegations of anticompetitive conduct in the broadband market, and work *together* to resolve them. Since it was privatized, Internet governance has always been based on a foundation of bottom-up collaboration and cooperation rather than top-down regulation. This truly "light touch" approach has created a near-perfect track record of resolving Internet management conflicts without government intervention.

Unfortunately, the majority has not even considered this idea for a moment. But once today's Order is overturned in court, it is still my hope that the FCC will consider and adopt this constructive proposal.

In sum, what's past is indeed prologue. Where we left the saga of the FCC's last net neutrality order before was with a spectacular failure in the appellate courts. Today, the FCC seems determined to make the same mistake instead of learning from it. The only illness apparent from this Order is regulatory hubris. Fortunately, cures for this malady are obtainable in court. For all of the foregoing reasons, I respectfully dissent.

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***Extended Legal Analysis:***  
**The Commission Lacks Authority to Impose**  
**Network Management Mandates on Broadband Networks.**

The Order is designed to circumvent the effect of the D.C. Circuit's *Comcast* decision,<sup>33</sup> but that effort will fail. Careful consideration of the Order shows that its legal analysis ignores the fundamental teaching of *Comcast*: Titles II, III, and VI of the Communications Act regulate specific, recognized classes of electronic communications services, which consist of common carriage telephony, broadcasting and other licensed wireless services, and multichannel video programming services.<sup>34</sup> Despite any policy desires to the contrary, Congress has not yet

<sup>33</sup> *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

<sup>34</sup> The D.C. Circuit in *Comcast* set forth this framework in very plain English:

Through the Communications Act of 1934, ch. 652, 48 Stat. 1064, as amended over the decades, 47 U.S.C. § 151 *et seq.*, Congress has given the Commission express and expansive authority to regulate common carrier services, including landline telephony, *id.* § 201 *et seq.* (Title II of the Act); radio transmissions, including broadcast television, radio, and cellular telephony, *id.* § 301 *et seq.* (Title III); and "cable services," including cable television, *id.* § 521 *et seq.* (Title VI). In this case, the Commission does not claim that Congress has given it express authority to regulate Comcast's Internet service. Indeed, in its still-binding 2002 *Cable Modem Order*, the Commission ruled that cable Internet service is neither a "telecommunications service" covered by Title II of the Communications Act nor a "cable service" covered by Title VI. *In re High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4802, P 7 (2002), *aff'd Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005).

600 F.3d at 645.

established a new title of the Act to govern some or all parts of the Internet – which includes the operation, or “management,” of the networks that support the Internet’s functioning as a new and highly complex communications platform for diverse and interactive data, voice, and video services. Until such time as lawmakers may act, the Commission has no power to regulate Internet network management.

As detailed below, the provisions of existing law upon which the Order relies afford the Commission neither direct nor ancillary authority here. The tortured logic needed to support the Order’s conclusion requires that the agency either reverse its own interpretation of its statutorily granted express powers or rely on sweeping pronouncements of ancillary authority that lack any “congressional tether” to specific provisions of the Act.<sup>35</sup> Either path will fail in court.

Instead, the judicial panel that ends up reviewing the inevitable challenges is highly likely to recognize this effort for what it is. While ostensibly eschewing reclassification of broadband networks as Title II platforms, the Order imposes the most basic of all common carriage mandates: nondiscrimination, albeit with a vague “we’ll know it when we see it” caveat for “reasonable” network management. This may be only a pale version of common carriage (at least for now), but it is still quite discernible even to the untrained eye.

**A. Reversal of the Commission’s Interpretation of Section 706 Cannot Provide Direct Authority for Network Management Rules.**

Less than one year ago, the Commission in attempting to defend its *Comcast/BitTorrent* decision at the D.C. Circuit “[a]cknowledged that it has no express statutory authority over [an Internet service provider’s network management] practices.”<sup>36</sup> The Commission was right then, and the Order is wrong now. Congress has never contemplated, much less enacted, a regulatory scheme for broadband network management, notwithstanding the significant revision of the Communications Act undertaken through the Telecommunications Act of 1996 (1996 Act).<sup>37</sup> It is an exercise in legal fiction to contend otherwise.

Any analysis of an arguable basis for the Commission’s power to act in this area must begin with the recognition that broadband Internet access service remains an unregulated “information service” under Title I of the Communications Act.<sup>38</sup> Overtly, the Order does not

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<sup>35</sup> *Id.* at 655.

<sup>36</sup> *Id.* at 644.

<sup>37</sup> The scattered references to the Internet and advanced services in a few provisions of the 1996 Act, *see, e.g.*, 47 U.S.C. §§ 230, 254, do not constitute a congressional effort to systemically regulate the management of the new medium. A better reading of the 1996 Act in this regard is that Congress recognized that the emergence of the Internet meant that something new, exciting, and yet still amorphous was coming. Rather than act prematurely by establishing a detailed new regulatory scheme for the Net, Congress chose to leave the Net unregulated at that time.

<sup>38</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4,798 (2002) (*Cable Modem Declaratory Ruling*); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14,853 (2005) (*Wireline Broadband Order*); *Appropriate Regulatory Treatment* (continued....)

purport to change this legal classification.<sup>39</sup> Yet a reviewing court will look beyond the Order's characterization of the Commission's action to scrutinize what the new codified rules – and the directives and warnings set forth in the text – actually do.<sup>40</sup> Dispassionate analysis will lead to the conclusion that the Order attempts to relegate this type of information service to common carriage by effectively applying major Title II obligations to it. The Title I disguise will not be convincing.

The threadbare nature of the disguise becomes clear with scrutiny of the Order's claims for a legal basis for the new regulations. The Order's only serious effort to assert direct authority is based on Section 706.<sup>41</sup> The Order glosses over the key point that no language within Section 706 – or anywhere else in the Act, for that matter – bestows the FCC with explicit authority to regulate Internet network management. Rather, Section 706's explicit focus is on “deployment” and “availability” of broadband network facilities.<sup>42</sup> So what precisely is the nexus between Section 706's focus on broadband deployment and availability and the Order's focus on network management once the facilities *have been* deployed and the service *is* available? The Order seems to imply that Section 706 somehow provides the Commission with network management authority because if the government lacks such power, some American might have less access to the Internet. This rationale is contrary to the provision's language and illogical on its face. Imposing new regulations on network providers in the business of deploying broadband<sup>43</sup> will have the opposite effect of what Section 706 seeks to do. Instead, the imposition of network management rules will likely depress investment in deployment of broadband throughout our nation.<sup>44</sup> This outcome will prove true not simply for the large providers tracked by Wall Street

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for *Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd. 5,901 (2007) (*Wireless Broadband Order*).

<sup>39</sup> Order, ¶¶ 121-23.

<sup>40</sup> See, e.g., *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) (“in the context of reviewing a decision ... courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance – or lack of significance – of the new information.”).

<sup>41</sup> To the degree that the Order suggests that other sections in the Act provide it with direct authority to impose new Internet network management rules, such arguments are not legally sustainable. For the reasons set forth in Section B of this extended legal analysis, *infra*, the claimed bases for extending even ancillary authority are unconvincing, which renders contentions about direct authority untenable.

<sup>42</sup> 47 U.S.C. §§ 1302 (a), (b).

<sup>43</sup> The National Broadband Plan even noted that, “[d]ue in large part to private investment and market-driven innovation, broadband in America has improved considerably in the last decade.” Federal Communications Commission, *Connecting America: The National Broadband Plan* at 3 (rel. Mar. 16, 2010) (*National Broadband Plan*). Note that during this same time period of investment, no network management rules existed.

<sup>44</sup> The Commission has been warned about this consequence many times in the recent past. For example, during the Commission's October 2009 Capital Formation Workshop, several investment professionals raised red flags about a Title I approach to Internet regulation. Trade press accounts reported Chris King, an analyst at Stifel Nicolaus, as saying that “[w]hen you look at the telecom sector or cable sector, one of the things that scares them to death is net neutrality.... Any regulation that would limit severely [Verizon's and AT&T's] ability to control their own networks to manage traffic of their own networks could certainly have a negative role in their levels of investment going forward.” Howard Buskirk, *Investors, Analysts Uneasy About FCC Direction on Net Neutrality*, COMM. DAILY, Oct. 2, 2009, at 1. Similarly, Tom Aust, a  
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analysts but for the small businesses that supply vital and competitive broadband options to consumers in many locales across the nation.<sup>45</sup>

A closer reading of the statutory text bears out this assessment. Turning specifically to the language of Section 706(a), the provision opens with a policy pronouncement that the Commission “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”<sup>46</sup> As *Comcast* already has pointed out, “under Supreme Court and D.C. Circuit case law statements of policy, by themselves, do not create ‘statutorily mandated responsibilities.’”<sup>47</sup> Rather, “[p]olicy statements are just that – statements of policy. They are not delegations of regulatory authority.”<sup>48</sup> The same holds true for congressional statements of policy, such as the opening of Section 706, as it does for any agency’s policy pronouncements.

The Order makes a strenuous effort to argue that Section 706 is not limited to deregulatory actions, a herculean task taken on because the Order rests nearly all of its heavy weight on this thin foundation.<sup>49</sup> Section 706 does refer to one specific regulatory provision –

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senior analyst at GE Asset Management, stated that regulatory risk is “ultimately unknowable because it’s so broad and it can be so quick. For a company it means that they can’t predict their revenues and cash flows as well, near or long term.” *Id.* at 2.

<sup>45</sup> Network management regulations will affect the investment outlook for transmission providers large and small. In the latter category, Brett Glass, the sole proprietor of LARIAT, a wireless Internet service provider in Wyoming, has filed comments expressing concern that the imposition of network management rules will impede his ability to obtain investment and will limit his “ability to deploy new service to currently unserved and underserved areas.” LARIAT Comments at 2–3. He stated that “[t]he imposition of regulations that would drive up costs or hamper innovation would further deter future outside investment in our company and others like it.” *Id.* at 3. Specifically, he argues that “[t]o mandate overly [burdensome] network management policies would foster lower quality of service, raise operating costs (which in turn would raise prices for all subscribers), and/or create a large backlog of adjudicative proceedings at the Commission (in which it would be prohibitively expensive for small and competitive ISPs to participate).” *Id.* at 5. “Due to immediate deleterious impacts upon investment, these damaging effects would be likely to occur even if the Commission’s Order was later invalidated, nullified, or effectively modified by a court challenge or Congressional action.” Letter from Brett Glass, d/b/a LARIAT, to Julius Genachowski, Chairman, FCC, *et al.*, at 2 (Dec. 9, 2010) (Glass Dec. 9 Letter). *See also* Letter from Paul Conlin, President, Blaze Broadband, to Marlene H. Dortch, Secretary (Dec. 14, 2010) (Blaze Broadband Dec. 14 Letter).

<sup>46</sup> 47 U.S.C. § 1302(a).

<sup>47</sup> *Comcast*, 600 F.3d at 644.

<sup>48</sup> *Id.* at 654.

<sup>49</sup> In support of its jurisdictional arguments, the Order cites to language in *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009). In that case, the D.C. Circuit does, in fact, state that “[t]he general and generous phrasing of § 706 means that the FCC possesses significant albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband – a statutory reality that assumes great importance when parties implore courts to overrule FCC decisions on this topic.” *Ad Hoc Telecomms.*, 572 F.3d at 906–07. But, there are several reasons why that statement in *Ad Hoc Telecomms.* cannot be used for the proposition that Section 706 provides the FCC with the authority to impose network management rules. First, it is notable that the petitioners in *Ad Hoc Telecomms.* were challenging one of the FCC’s forbearance decisions. As such, the FCC was not relying on Section 706 authority *alone* in that case, it was also relying on its forbearance authority which is specifically delegated

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