

**NETWORK NEUTRALITY AND INTERNET  
REGULATION: WARRANTED OR MORE  
ECONOMIC HARM THAN GOOD?**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON COMMUNICATIONS AND  
TECHNOLOGY  
OF THE  
COMMITTEE ON ENERGY AND  
COMMERCE  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED TWELFTH CONGRESS  
FIRST SESSION

FEBRUARY 16, 2011

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# **NETWORK NEUTRALITY AND INTERNET REGULATION: WARRANTED OR MORE ECONOMIC HARM THAN GOOD?**

**WEDNESDAY, FEBRUARY 16, 2011**

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON ENERGY AND COMMERCE,  
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY,  
*Washington, DC.*

The subcommittee met, pursuant to call, at 9:33 a.m., in room 2123 of the Rayburn House Office Building, Hon. Greg Walden (chairman of the subcommittee) presiding.

Members present: Representatives Walden, Terry, Stearns, Shimkus, Bono Mack, Rogers, Bilbray, Bass, Blackburn, Gingrey, Scalise, Latta, Guthrie, Kinzinger, Barton, Upton (ex officio), Eshoo, Markey, Doyle, Matsui, Harman, Barrow, Towns, Pallone, Rush, Dingell, Inslee, and Waxman (ex officio).

Staff present: Neil Fried, Majority Chief Counsel; Michael Beckerman, Majority Deputy Staff Director; David Redl, Majority Counsel; Jeff Mortier, Majority Professional Staff; Carly McWilliams, Majority Legislative Clerk; Roger Sherman, Minority Chief Counsel; Shawn Chang, Minority Counsel; Jeff Cohen, Minority Counsel; Sarah Fisher, Minority Policy Analyst; Bruce Wolpe, Minority Advisor; Pat Delgado, Minority Chief of Staff (Waxman); and Phil Barnett, Minority Staff Director.

## **OPENING STATEMENT OF HON. GREG WALDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON**

Mr. WALDEN. Please take your seats, and the hearing is about to begin. I call to order the Subcommittee on Communications and Technology hearing on net neutrality. I want to welcome our witnesses who are here today, and we look forward to your testimony and the responses to your questions.

We all want an open and thriving Internet. That Internet exists today. Consumers can access anything they want with the click of a mouse, thanks to our historical hands-off approach. Changing direction now will only harm innovation and the economy. But before we even get into the harm the network neutrality rules will cause, it is important to realize the FCC's underlying theory of authority would allow the Commission to regulate any interstate communication service on barely more than a whim and without any additional input from the United States Congress. In essence, the FCC argues it can regulate anything if in its opinion doing so would encourage broadband deployment.

I am relieved, however, the FCC declined, under its newfound authority, to regulate coffee shops, bookstores, airlines, and other entities. This of course means the FCC believes it has the authority that it has so far declined. It could have subjected these entities to the new rules under its decision.

If left unchallenged, this claim of authority would allow the FCC to regulate any matter it discussed in the National Broadband Plan. Recall that the FCC concluded that consumers' concerns over privacy are deterring broadband. Does that mean the FCC can regulate Internet privacy?

The National Broadband Plan also addresses health IT, distance learning, smart grid, smart homes, smart transportation. Can the FCC regulate all of these matters too in the name of promoting broadband? Under the FCC's rationale, its authority is bounded only by its imagination.

Former FCC Chairman Kevin Martin tried to go down a very similar path. In the wake of Hurricane Katrina, he claimed that his authority over wireless services allowed him to require backup power at cell sites. During oral arguments, the courts questioned the FCC's logic, asking whether it would grant him seemingly endless authority over things like electric utilities and employees of wireless providers. The FCC eventually backed down. This overreach was problematic with a real disaster like Hurricane Katrina. I don't see how it is justified here.

From the Internet's inception, we have taken a hands-off approach. The Internet started as a defense agency project to connect computers to research facilities. It did not become the explosive driver of communications and economic growth it is today until we turned it over to free enterprise. Dating as far back as 1971, the FCC has consistently treated data services as unregulated information services and not as regulated telecommunications services. Congress codified this distinction in the 1996 Telecommunications Act.

FCC Chairman William Kennard reaffirmed this approach. In rebuffing requests to regulate cable Internet access service, Chairman Kennard explained in a 1999 speech, and I quote, "that the fertile fields of innovation across the communications sector and around the country are blooming because from the get-go we have taken a deregulatory competitive approach to our communications structure, especially the Internet." There is no crisis warranting departure from this approach.

The FCC hangs almost its entire case for regulating the Internet on Comcast's past attempt to combat network congestion by managing peer-to-peer traffic, but Comcast and the peer-to-peer community resolved that issue by gathering their engineers and developing alternative solutions that advanced traffic management techniques to everyone's benefit. No network neutrality rules were in place, and the D.C. Circuit overturned the FCC's attempts to regulate Comcast's network management because the Federal Communications Commission failed to demonstrate it had the authority to do so. Most everything else the order discusses is either an unsubstantiated allegation or speculation of future harm.

The FCC even confesses in its order that it has done no market analysis, none. It just selectively applied the rules to broadband

providers, shielding web companies. If the mere threat of Internet discrimination is such a concern and if the FCC has done no analysis to demonstrate why one company has more market power than another, why would discrimination by companies like Google or Skype be any more acceptable than discrimination by companies like AT&T and Comcast? Instead of promoting competition, such picking of winners and losers will stifle the investment needed to perpetuate the Internet's phenomenal growth, hurting the economy.

Section 230 of the Telecommunications Act makes it the policy of the United States to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services unfettered by federal or state regulation." Statutory statements of policy are not grants of regulatory authority but they can help delineate the contours of that authority. In light of Congress's statutory pronouncement that Internet regulation is disfavored, the FCC's theory of regulation by bank shot stretches too far.

At bottom, this is little more than an end run around the D.C. Circuit is April 2010 ruling in the Comcast case that the FCC failed to show it had the ancillary authority to regulate network management.

[The prepared statement of Mr. Walden follows:]

#### PREPARED STATEMENT OF HON. GREG WALDEN

We all want an open and thriving Internet. That Internet exists today. Consumers can access anything they want with the click of a mouse thanks to our historical hands-off approach. Changing direction now will only harm innovation and the economy.

But before we even get into the harm the network neutrality rules will cause, it's important to realize that the FCC's underlying theory of authority would allow the commission to regulate any interstate communication service on barely more than a whim and without any additional input from Congress. In essence, the FCC argues it can regulate anything if, in its opinion, doing so would encourage broadband deployment. I am relieved, however, that the FCC declined under its new-found authority to regulate coffee shops, bookstores, airlines and other entities. This of course means that the FCC believes if it had not so declined, it could have subjected these entities to these new rules.

If left unchallenged, this claim of authority would allow the FCC to regulate any matter it discussed in the national broadband plan. Recall that the FCC concluded that consumers' concerns over privacy are deterring broadband. Does that mean the FCC can regulate Internet privacy? The national broadband plan also addresses health IT, distance learning, smart grids, smart homes, and smart transportation. Can the FCC regulate all these matters, too, in the name of promoting broadband? Under the FCC's rationale, its authority is bounded only by its imagination.

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speech that “[t]he fertile fields of innovation across the communications sector and around the country are blooming because from the get-go we have taken a deregulatory, competitive approach to our communications structure—especially the Internet.”

There is no crisis warranting departure from this approach. The FCC hangs almost its entire case for regulating the Internet on Comcast’s past attempt to combat network congestion by managing peer-to-peer traffic. But Comcast and the peer-to-peer community resolved that issue by gathering their engineers and developing alternative solutions that advanced traffic management techniques to everyone’s benefit. No network neutrality rules were in place, and the D.C. Circuit overturned the FCC’s attempts to regulate Comcast’s network management because the FCC failed to demonstrate it had any authority to do so. Most everything else the order discusses is either an unsubstantiated allegation or speculation of future harm.

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At bottom this is little more than an end-run around the D.C. Circuit’s April 2010 ruling in the Comcast case that the FCC failed to show it had ancillary authority to regulate network management.

Mr. WALDEN. With that I now turn to the ranking member for her opening statement.

**OPENING STATEMENT OF HON. ANNA G. ESHOO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA**

Ms. ESHOO. Good morning, Mr. Chairman, and thank you, and warm welcome to all of the commissioners of the Federal Communications Commission. It is very good to see you. I want to thank Chairman Walden for calling the commissioners before us early in this Congress. It is vitally important that we hear from the full Commission to help members make informed decisions on the key telecommunications issues that will be before us in this Congress.

Today’s hearing is intended to examine the FCC’s action to preserve an open Internet and a proposed mechanism to unravel these rules. Since being elected to the House in 1992, I have witnessed my district lead a technology revolution, and the Nation has prospered as has the world. This success has come in large part due to the Internet’s growth, an open forum where companies compete online and consumers have a choice in the content they consume.

In only a few years, innovative companies like Netflix, Skype, and eBay have flourished. These companies have created tens of thousands of jobs and new competition in areas like telephone service, video, and online shopping, not just in my district but across the Nation. By one estimate, the open Internet ecosystem has resulted in more than 3 million new jobs, U.S. jobs, over the past 15 years. To promote the next Google or Facebook, we must preserve these essential qualities and ensure that the Internet remains open and free.

While the FCC's open Internet rules are not perfect, they are an important step forward. Without some clear rules of the road, large corporations can carve up the Internet into fast and slow lanes, charging a toll for content and blocking innovators from entering the information superhighway. I believe consumers, not corporations, should be in the driver's seat to pick the content they view, listen and watch over the Internet.

We are now faced with at least two legal challenges and the use of legislative maneuvers like the Congressional Review Act to overturn the FCC's work. These actions will inevitably create market uncertainty, and I want to repeat that, Mr. Chairman. These actions will inevitably create market uncertainty and delay future innovation in broadband technology.

Each member of this subcommittee has made it clear where they stand on the issue, and I don't expect this hearing to change those views. What is important to remember is what the FCC agreed to is a compromise, a word that a lot of Americans celebrate. That understand that compromises have to be made, reflecting the views of both sides of the issue, with more than 100,000 comments from more than 2 million people across the country, 90 percent of whom were in favor of open Internet rules. So the American people have really weighed in with the FCC.

There is broad agreement for the adoption of these rules. Comcast, the Nation's largest broadband provider, voluntarily agreed to abide by open Internet conditions for the next 7 years as part of its joint venture with NBC Universal. AT&T has said it will not engage in efforts to overturn the FCC's order. If these common-sense rules are good enough for the Nation's two largest broadband providers, then I think it is time we refocus our efforts on the next steps needed to promote jobs, broadband deployment, and new investment.

I think it is time to look forward. That is really what America is about, and on what we can work on together in a bipartisan way. We are faced with important issues like universal service reform, spectrum reform and ensuring that our country's first responders have a nationwide, interoperable public safety network. We will be coming up to the 10th anniversary of the attack on our country and we still do not have interoperability with our public safety community. That is what this Congress, this committee and full committee should be tackling. And when we tackle these issues, we will have an opportunity to create jobs in our country, grow the economy, and a platform we can all agree on.

I look forward to hearing from the distinguished chairman all of the commission, all the distinguished commissioners and their thoughts on how we can ensure that the Internet remains a vital resource, an American resource to improve the lives of every citizen and everyone around the world for generations to come. Thank you, Mr. Chairman, and I yield back.

[The prepared statement of Ms. Eshoo follows:]

PREPARED STATEMENT OF HON. ANNA G. ESHOO

Good morning Mr. Chairman and welcome to the FCC Commissioners.

I commend Chairman Walden for calling the Commissioners before us early in this Congress. It's vitally important that we hear from the full Commission to help Members make informed decisions on key telecommunications issues.

Today's hearing is intended to examine the FCC's action to preserve an open Internet and a proposed mechanism to unravel these rules. Since being elected to the House in 1992, I've witnessed my District lead a technology revolution and the nation has prospered. This success has come in large part due to the Internet's growth—an open forum where companies compete online, and consumers have a choice in the content they consume.

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While the FCC's open Internet rules are not perfect, a view I've made very clear, they are an important step forward. Without some clear rules of the road, large corporations can carve up the Internet into fast and slow lanes, charging a toll for content, and blocking innovators from entering the information superhighway. I believe consumers, not corporations, should be in the driver's seat to pick the content they view, listen and watch over the Internet.

We're now faced with at least two legal challenges and the use of legislative maneuvers like the Congressional Review Act (CRA) to overturn the FCC's work. These actions will inevitably create market uncertainty and delay future innovation in broadband technology.

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It's time to look forward and focus on what we can work on together in a bipartisan way. We're faced with important issues like universal service reform, spectrum reform and ensuring that our country's first responders have a nationwide, interoperable public safety network. By tackling these issues, we have an opportunity to create jobs and grow the economy -a platform we can all agree on.

I look forward to hearing the Chairman and the Commissioners' thoughts on how we can ensure the Internet remains a vital resource to improve the lives of Americans and everyone around the world for generations to come.

Mr. WALDEN. I thank the gentlelady for her comments.

I now yield 2 minutes to the chairman of the full committee, the gentleman from Michigan, Mr. Upton.

**OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN**

Mr. UPTON. Thank you, Mr. Chairman.

The FCC's recent adoption of network neutrality rules to regulate the Internet is perhaps the most striking example of a troubling trend that we have seen at this very important agency. Rather than serving as an impartial expert and authority, the Commission seems to be advancing a policy agenda of its own, often by twisting the arms of those who have come before it. The activist agenda is particularly embodied in the network neutrality regulations that are the subject of today's hearing.

We are pleased to see Chairman Genachowski today alongside of his fellow commissioners who announced plans in September of 2009 to codify four network neutrality principles as enforceable rules. However, the history of these principles is clear. First put forward in 2004, they were intended for all facets of the industry in lieu of regulations. Even when adopted as policies in 2005, the FCC made clear that they were not established as rules nor were they enforceable. The decision came only 3 months after taking the helm of the FCC despite the fact that he made no mention of those plans 4 days earlier during his first appearance before this committee.

I have made it clear that the Energy and Commerce Committee will be focused on jobs. As we have seen in the first couple weeks of the 112th Congress, one of the greatest threats to job creation in our current economy is runaway regulation. Regulations are not the problem in and of themselves. In fact, it is regulations that implement the laws passed by Congress. The problem comes when unelected personnel in the maze of the federal bureaucracy began using the regulations to impose their own agendas, and when they do so without congressional authority or thoughtful consideration of the economic consequences. Net neutrality is a case in point. The FCC has done nothing to specifically quantify any harm requiring intervention or the potential harm to consumers, innovation or the economy from the proposed rules. Where is the cost-benefit analysis that President Obama called for in his recent Executive order?

This hearing is to look into that, and I look forward to the answers of those that are here, and I ask that the rest of my statement be included as part of the record.

Mr. WALDEN. Without objection.

[The prepared statement of Mr. Upton follows:]

#### PREPARED STATEMENT OF HON. FRED UPTON

The FCC's recent adoption of network neutrality rules to regulate the Internet is perhaps the most striking example of a troubling trend we have seen at this important agency. Rather than serving as an impartial expert and authority, the commission seems to be advancing a policy agenda of its own—often, by twisting the arms of those who come before it. This activist agenda is particularly embodied in the network neutrality regulations that are the subject of today's hearing.

Chairman Genachowski—who we are pleased to see today alongside his fellow commissioners—announced plans in September 2009 to codify four network neutrality principles as enforceable rules. However, the history of these principles is clear: First put forward in 2004, they were intended for “all facets of the industry” in lieu of regulations. Even when adopted as policies in 2005, the FCC made clear they were not established as rules, nor were they enforceable.

Chairman Genachowski's decision came only 3 months after he took the helm at the FCC, despite the fact that he made no mention of those plans four days earlier during his first appearance before the House Energy and Commerce Committee.

I have made it clear that the Energy and Commerce Committee would be focused on jobs. And as we have seen in the first few weeks of the 112th Congress, one of the greatest threats to job creation in our current economy is runaway regulation. Regulations are not the problem in and of themselves—in fact, it is regulations that implement the laws passed by Congress. The problem comes when unelected personnel in the maze of the federal bureaucracy begin using regulations to impose their own agendas, and when they do so without congressional authority or thoughtful consideration of the economic consequences.

Net neutrality is a case in point. The FCC has done nothing to specifically quantify any harm requiring intervention, or the potential harm to consumers, innovation, or the economy from the proposed rules. Where is the cost-benefit analysis that President Obama called for in his recent executive order?

In addition to these economic concerns, there are serious legal questions. In April 2010, the D.C. Circuit found the FCC had failed to demonstrate it had the authority to impose these network neutrality rules against a particular provider. Rather than re-evaluating the wisdom of regulating the Internet, the FCC began scrambling to find an alternative legal theory.

The FCC proposed classifying Internet access service for the first time as a telecommunications service. This rightfully drew bipartisan alarm from more than 300 members of the House and Senate, as well as from industry. The FCC pivoted once more, now claiming it has authority to adopt any rules regarding information services that might have an impact on broadband, traditional wireline and wireless phone service, or broadcast and subscription television.

Chairman Walden and I have made no secret about our objections to this policy and our plans to overturn it using the Congressional Review Act. In fact, here in my hand is the resolution Chairman Walden and I intend to drop in the hopper down on the House floor. Before we do that, we are giving you this one last chance to convince us that you have a sound legal and policy basis for regulating the Internet.

We believe these rules will hurt innovation and the economy. But we are also concerned that this power grab will do irreparable harm to the FCC as an institution, and to the role of Congress as elected representatives of the people to determine the law of the land. We do not intend to allow either to occur.

Mr. WALDEN. And now I think we go to Mr. Barton for a minute on our side.

Mr. BARTON. We have a little high-tech problem getting the button on over here. It just went off again.

Welcome, our four commissioners and chairmen of the FCC. You are all great individuals. You are all very bright. I disagree with the majority of you on your net neutrality regulations that you put in place but I am impressed by your intellect.

Mr. Chairman, I will put my statement in the record. Suffice it to say that I do not see how this Commission with the intelligence that they have could have adopted the rule they did on a 3-2 partisan vote knowing that there was probably going to—in fact, knowing there has been a change in the Congress and that every candidate who ran on the net neutrality principle that they tried to establish was defeated and knowing that the majority of this committee and a majority of the Congress on both sides of the aisle opposed the rule that they have now put in place.

We have two hearings going on simultaneously so Mr. Upton and myself and others will be going up and down and back but I hope to come back in time to question the Commission and try to delve into why they did what they did when they did it, knowing that it was not going to be well reserved. Thank you, Mr. Chairman.

[The prepared statement of Mr. Barton follows:]

#### PREPARED STATEMENT OF HON. JOE BARTON

Thank you, Mr. Chairman, for holding this important hearing. I would like to welcome our impressive witnesses: all four commissioners and Chairman Genachowski.

This morning, Mr. Chairman, we are going to hear a familiar story about federal bureaucrats taking government regulations too far. The target this time is the Internet. This is the same Internet that has become a thriving force in this country and all without any type of formal federal government regulation.

If strict regulation of the internet was warranted, Congress would have taken appropriate action. However, Congress, the American people, and those in the industry saw no looming danger.

To say that I was stunned to see the backhanded tactics of the FCC when they adopted their network neutrality rules at the end of last year would be an understatement. The motives of the FCC on this matter are suspect. It is evident that the FCC's agenda comes straight out of the Obama Administration's playbook; de-

stroy the economy without any regard for the current economic situation and do so without showing an imminent threat.

The actions taken by the FCC have denied the markets from policing themselves. The rules for network neutrality serve only to stifle innovation of the services offered by broadband providers. I hope through Congressional action we can return to a mindset where we champion platforms that foster a healthy environment for competition.

As a Member of Congress, it is my duty to ensure that actions taken at the federal level are not harmful to citizens that elected us into office. The Internet has provided users from all backgrounds with an opportunity to freely explore new worlds and express new ideas across an unlimited number of networks. It should be our goal to preserve the vibrant competitive free market which allows for continued success and growth of the Internet.

Mr. WALDEN. I now yield a minute to the gentleman from Nebraska, the vice chair of the committee, Mr. Terry.

Mr. TERRY. Thank you, Mr. Walden.

I believe it is safe to say that everyone in this room today wants an open and thriving Internet. It is therefore important to point out that such an Internet exists today. It is no coincidence that today's Internet users can access anything they want very quickly and easily. This was made possible due to our historical hands-off approach to the Internet. As users demand more-sophisticated content, service and applications, we must maintain a similar course or face the inevitable decline in investment, service and overall blow to our economy.

I am worried that the FCC's adoption of its network neutrality rules regulating the Internet will do just that, and I am further concerned that they were adopted strictly on the speculation of future harm.

On October 5, 2009, my colleagues and I sent a letter asking that the Commission undertake a full market analysis prior to any consideration of network neutrality rules. It is made clear in the order that no such analysis took place. Instead the order selectively applies the rules to broadband providers while shielding Web-based companies. I am interested in learning today why the Commission instead of promoting competition decided it was more appropriate to pick the winners and the losers. If there were a mere threat of Internet discrimination is such a concern and the FCC has done no analysis to demonstrate why one company has more market power than another, why would discrimination like companies like Google or Skype be any more acceptable than discrimination by companies like Verizon and Cox?

Hopefully these questions will be answered today. I plan on seeking the answers to these questions and about impact on the market, and I yield back.

Mr. WALDEN. I now recognize the gentleman from Massachusetts, Mr. Markey, for a minute.

Mr. MARKEY. I thank you, Mr. Chairman.

I just want to speak on behalf of those of us who ran on net neutrality who are still in Congress, which starts with Ms. Eshoo to Mr. Waxman, to Mr. Markey, to Mr. Doyle, Ms. Matsui, all the way down just so the record is clear that we are here as we have been, and I also want to point out that AT&T was offered the contract to build the Internet in 1966 and they turned it down because they said they had a monopoly already and long lines and they did not want to build a packet switch network because they had to go to

BB&N, a small company up in Cambridge, Massachusetts, to build the Internet. AT&T didn't want it.

In 1996, after we passed the Telecom Act, Verizon sued saying we don't want to open up our network under that law to competitors, and the story goes on and on that the broadband barons, any time they have control of something they don't want competition, but this Internet revolution that created Google and eBay and Amazon and YouTube and Hulu and all of the rest of these companies, it is all as a result, not of the policy of Verizon, the policy of these other large companies, it is that the government acted.

So here is the interesting thing. The paradox of competition is that it takes regulations in order to create deregulation, in order to create a marketplace for small entrepreneurial companies can get into the marketplace. That is what has happened over the last 30 years. The government has acted in order to make sure that a company that had already invented broadband, already invented digital, that is AT&T, but had not deployed it so we were all still using black rotary dial phones 100 years after Alexander Graham Bell in our living room. You don't go from black rotary dial phones to BlackBerrys unless the government finally intervenes and says we want these entrepreneurs, we want these small new companies that are entering into the marketplace. That is what has happened over this last generation. That is what this debate is all about.

I wish the FCC had gone further so that we could have hundreds, thousands of newer companies coming in and not just relying upon Verizon to innovate because that will be a long day before you hear about the first new product that comes from Verizon. That has never happened and it is unlikely to ever happen in your lifetimes.

I yield back, Mr. Chairman.

Mr. WALDEN. There is Mr. Waxman. We are waiting for the chairman emeritus. Mr. Waxman, you have the remaining 2 minutes and 35 seconds once you are comfortably seated and ready to go.

Mr. WAXMAN. Thank you very much, Mr. Chairman, and I regret that this committee has another subcommittee meeting at the same time.

I am pleased you had this hearing today. This is the first FCC-related hearing of the subcommittee. I think it is appropriate that our witnesses are the five members of the Commission.

Last December, the FCC took landmark action to preserve the open Internet. These rules are a bill of rights for Internet users. They contain four key provisions: restore the FCC's authority to prevent blocking of Internet content applications and services, which was struck down by the court in the Comcast decision, prevent phone and cable companies from unreasonably discriminating against any lawful Internet traffic, prohibit wireless broadband providers from blocking Web sites as well as applications that compete with voice or video conferencing while preserving the FCC's authority to adopt additional standards and safeguards under existing authorities, and to direct the FCC to issue transparency regulations so consumers know the price, performance and network management practices.

We are going to hear about these regulations to protect the open Internet, and I think that we have to recognize that some of the claims that are being made and repeated over and over again are just not accurate. The most vibrant sector of our economy today is our Internet economy. U.S. companies like Google, Facebook, Amazon and eBay lead the world in innovation. They all urged the FCC to act to protect an open Internet because “commonsense baseline rules are critical to ensuring that the Internet remains a key engine of economic growth, innovation and global competitiveness.”

We need to make sure that the Internet is free and open and not regulated by anyone who is just simply delivering the service. Even AT&T and Comcast, which are two of the Nation’s largest network operators, support the rules. AT&T’s CEO stated, “We didn’t get everything we wanted. I wanted no regulation but we ended at a place where we have a line of sight and we know can commit to investments.” And earlier today we received letters from a broad and diverse coalition of more than 100 organizations that oppose efforts to use legislation to block the open Internet regulations.

The American people want us to be focusing on creating jobs and rebuilding our economy. We have important opportunities in this subcommittee to contribute to that effort by making more spectrum available, ensuring universal access to broadband. We have a lot of things we need to work on together, and I look forward to that. This issue has been resolved by the FCC, and I look forward to our following the implementation of it.

I would like to ask unanimous consent to put in the full statement.

Mr. WALDEN. Without objection, all members are allowed the opportunity to put their full statements in the record.

[Additional statement for the record follows:]

#### PREPARED STATEMENT OF HON. JOHN D. DINGELL

Thank you, Mr. Chairman, and I commend you for carrying on the Committee’s long tradition of fair and measured oversight. I would also like to welcome our witnesses this morning, especially Chairman Genachowski. I am confident he and his fellow commissioners will answer my questions and those of my colleagues with unequivocal candor and keen insight.

I understand my Republican colleagues intend to use this hearing to lay the groundwork for a resolution to nullify the Commission’s recently adopted Open Internet order. While I agree with them that the Commission lacks the statutory authority with which to regulate broadband Internet access services, the fact remains that the order has been finalized, and its future now resides within the purview of the courts. I respectfully suggest we not re-litigate the past and instead focus our attention on matters pending the Commission’s consideration which have the potential to expand our country’s communications infrastructure, enhance U.S. competitiveness, and, most importantly, create jobs. Chief among these matters are reform of the Universal Service Fund and spectrum policy.

I look forward to Chairman Genachowski’s and his fellow commissioners’ responses to my questions. I also hope they will affirm anew that the Congress is, as I have said so many times, the sole progenitor of the Commission’s authority and commit to working with this Committee in advancing that agency’s most important work.

I thank you for your courtesy, Mr. Chairman, and yield the balance of my time.

Mr. WALDEN. With that, I thank the folks who have offered up the opening statements, and I would now like to turn to our panel of witnesses, the distinguished members of the Federal Communications Commission, and I will start with that Commission’s

chairman, Mr. Genachowski. Thank you for being here today, and we look forward to your statement.

**STATEMENTS OF JULIUS GENACHOWSKI, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION; MICHAEL J. COPPS, PH.D., COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION; ROBERT M. MCDOWELL, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION; MIGNON CLYBURN, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION; AND MEREDITH ATTWELL BAKER, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION**

**STATEMENT OF JULIUS GENACHOWSKI**

Mr. GENACHOWSKI. Chairman Walden, Chairman Upton, Ranking Members Eshoo and Waxman, members of the subcommittee, this committee has jurisdiction over an area of increasing importance: communications and technology, including the Internet. I look forward to working with this committee in a variety of ways to strengthen our economy, promote our global competitiveness and extend opportunity to all Americans. I have submitted a written statement on our actions to preserve Internet freedom and openness. I will be brief here.

As we considered a framework for Internet freedom, I had three priorities. First, consumers, promoting consumer choice, making sure that people who use the Internet have the freedom to say what they want, go where they want and access any legal content or services on the Internet. Second, innovators, making sure that the Internet will continue to be a vibrant platform for American entrepreneurs, that the next inventor in his garage, the next Mark Zuckerberg in his dorm room, the next Jeff Bezos traveling across the country in his car can start and build the next great business on the Internet, creating jobs, growing our economy and helping us lead the world in innovation. It is essential that we incentivize billions of dollars of private investment in Internet content, applications and services businesses. Now, my third priority is the networks, promoting wired and wireless Internet networks in the United States that are the best in the world, fast, robust and universally available. We have to incentivize billions of dollars of private investment to the core of the network, to network infrastructure.

Throughout the history of Internet, innovative online applications and service have spurred broadband deployment and adoption which in turn have encouraged new applications and services. This virtuous cycle of innovation and investment throughout the broadband economy, that is what we want to maintain and advance. Why? Because the free and open Internet has led to the creation of tens of thousands of small businesses, millions of jobs and billions of dollars of investment.

Now, since 2005 the FCC on a bipartisan basis has made clear it would act to enforce open Internet protections. It did so several times but it did so without an appropriately adopted framework. That is why we acted to bring some resolution and certainty to this area, and after an open and participatory process with published rules, public workshops, extensive engagement, feedback from over

200,000 commenters, we established a sensible high-level framework to preserve Internet freedom and openness. The rules fit on one page and boil down to four things.

First, transparency so that consumers and innovators can have basic information to make smart choices about broadband networks or how to develop and launch the next killer app. Empowering them with information will reduce the need for government involvement. Second, no blocking so that consumers can be free to access lawful content or services and so startup and other Internet companies can be free to reach Internet consumers. Third, a level playing field, a fair, non-discrimination principle so that winners and losers online are picked by who should pick them: consumers and the market. And fourth, flexibility for Internet service providers, flexibility to manage networks, to deal with congestion and harmful traffic, flexibility to pursue innovation and business models and get a real return on investment.

Now, I understand that some people think this framework doesn't go far enough. Others think it goes too far. I believe it gets it about right: light-touch approach consistent with the FCC's history of bipartisan action on this issue. Informed by earlier FCC and Congressional initiatives, supported by the broadest consensus ever assembled on this challenging topic, the framework we adopted preserves Internet freedom, preserves the Internet job creation engine, protects consumer choices and promotes private investment throughout the broadband economy.

Now, while the Commission was divided on this particular issue, we resolve over 95 percent of our votes on a bipartisan basis, and I believe we are united on the need to promote broadband access, its importance to our 21st century economy and our global competitiveness and to expanding opportunity broadly.

So I look forward to working with my colleagues and with the committee on a series of initiatives including unleashing spectrum, reforming universal service, and removing barriers to broadband build-out, to harness the opportunities of communications technologies for all Americans.

Thank you, and I look forward to your questions.

[The prepared statement of Mr. Genachowski follows:]

**Written Statement Summary  
Julius Genachowski  
Chairman  
Federal Communications Commission**

**Before the  
Subcommittee on Communications and Technology  
Committee on Energy and Commerce  
U.S. House of Representatives**

**February 16, 2011**

Internet freedom and openness should be preserved, so that law-abiding citizens can say what they want and go where they want online.

Historically, the FCC has agreed on a bipartisan basis on both the importance of Internet freedom and openness, and on the idea that government action is sometimes necessary to protect it. From 2005 to 2008, under the leadership of my Republican predecessor, the FCC not only adopted a set of open Internet principles and enforced those principles against Internet service providers whose conduct potentially threatened Internet openness.

Unfortunately, the process by which the prior FCC sought to protect Internet openness raised doubts about the viability of the Commission's undertaking and generated a high level of uncertainty among Internet stakeholders.

In October 2009, we initiated a comprehensive public process to build upon the work of my predecessors and consider a set of high-level rules of the road to achieve the widely shared goal of preserving Internet freedom and openness.

We heard from many of the nation's leading entrepreneurs and investors who build new companies that their willingness to deploy capital and grow businesses was at risk without high-level rules of the road to ensure the Internet would remain an open platform. We also heard from broadband providers that their engineers need discretion to manage their networks to address challenges such as spam and congestion, and that providers needed flexibility to innovate with respect to business models to earn a return on their investments.

Based on this record, we refined our proposed framework and ultimately adopted strong and balanced rules of the road that provide greater certainty in this long-contested area.

Our framework for Internet freedom and openness promotes innovation, job creation, U.S. competitiveness, and private investment both at the edge and the core of broadband networks.

I understand that not everyone agrees with what we've done. I believe we did the right thing, and I am proud of the fact that our framework has attracted support from the broadest consensus ever assembled on this challenging topic.

**Written Statement of  
Julius Genachowski  
Chairman  
Federal Communications Commission**

**Before the  
Subcommittee on Communications and Technology  
Committee on Energy and Commerce  
U.S. House of Representatives**

**February 16, 2011**

Good morning, Chairman Walden, Ranking Member Eshoo, and congratulations on your new positions. I look forward to working with you and all the members of the subcommittee to promote our global competitiveness, grow our economy, empower consumers and protect public safety through communications technology.

This particular hearing focuses on the FCC's recent adoption of a high-level framework to preserve the free and open Internet, which has served as a remarkable engine for innovation, investment, job creation, and free expression.

I believe that Internet freedom and openness should be preserved, so that law-abiding citizens can say what they want and go where they want online.

I believe that preserving the free and open nature of the Internet is critical to sustaining its role as an engine of innovation and job creation, unleashing America's extraordinary entrepreneurs to start companies, and turn them into the next generation of strong and growing businesses.

I believe that preserving Internet freedom and openness is essential to maintaining American leadership in the technologies that rely on the Internet, as well as this nation's role as a beacon for political freedom and free expression around the world.

And I believe that a sensible open Internet framework promotes significant private investment throughout the broadband economy, both by companies creating Internet content, applications, and services and by those providing the wired and wireless broadband networks and infrastructure.

Historically, the FCC has agreed on a bipartisan basis on both the importance of Internet freedom and openness, and on the idea that government action is sometimes necessary to protect it. From 2005 to 2008, under the leadership of my Republican predecessor, the FCC not only adopted a set of open Internet principles and imposed open Internet conditions on mergers, it also enforced those principles against Internet service providers whose conduct potentially threatened Internet openness.

Unfortunately, the process by which the prior FCC sought to protect Internet openness raised doubts about the viability of the Commission's undertaking and generated a high level of uncertainty among Internet stakeholders. Accordingly, in October 2009, I initiated a comprehensive public process to build upon the work of my predecessors and consider a set of high-level rules of the road to achieve the widely shared goal of preserving Internet freedom and openness.

The process that ensued was one of most open and participatory in FCC history. In contrast with some previous FCC proceedings, at the very start of the process, we made public the text of proposed rules. To build a robust record and to make sure that we received input from all interested parties, we conducted numerous public workshops, provided for participation online as well as offline, and held hundreds of stakeholder discussions, all disclosed pursuant to our rules governing stakeholder meetings. In the end, more than two hundred thousand commenters expressed their views on our proposed framework.

We listened. What did we learn?

We heard from many of the nation's leading entrepreneurs and early-stage investors who build new companies that their willingness to deploy capital and start and grow businesses was at risk without high-level rules of the road to ensure the Internet would remain an open platform.

According to a letter in the record signed by dozens of prominent technology investors, "Permitting network operators to close network platforms or control the applications market by favoring certain kinds of content would endanger innovation and investment in an investment sector which represents many billions of dollars in economic activity."

We heard from those entrepreneurs and investors, as well as from economists and other market analysts, that broadband providers have the incentives and demonstrated ability to leverage their position as companies that control access to the Internet.

We heard from Internet founders that "the vast numbers of innovative Internet applications over the last decade are a direct consequence of an open and freely accessible Internet. . . . We are advocates for 'permissionless innovation' that does not impede entrepreneurial enterprise."

We heard from broadband providers that their engineers need discretion to manage their networks to address challenges such as spam and congestion. We also heard that providers need flexibility to innovate with respect to business models to earn a return on their investments and invest in network infrastructure. We also heard that while rules would provide needed certainty, overly prescriptive rules would stifle innovation and investment across the broadband ecosystem, and that the FCC had a limited but important role to play in preserving Internet openness.

Based on this record, we refined our proposed framework and ultimately adopted strong and balanced rules of the road that provide greater certainty in this long-contested area.

The rules of the road, which are less than one page long, are straightforward and sensible:

The framework starts with a meaningful transparency obligation, so that consumers and innovators have the information they need to make smart choices about broadband networks, or how to develop and launch the next killer app.

Next, the framework prohibits fixed broadband providers from blocking or unreasonably discriminating against lawful content, applications, services, and devices, and applies a basic no-blocking rule to mobile broadband.

This preserves consumers' freedom to go where they want, use the lawful services they want, and read and say what they want online. And it preserves the freedom for innovators and entrepreneurs to launch new products, reach new markets, and continue driving America's innovation economy. It also ensures a level playing field. No central entity, public or private, should have the power to pick which ideas or companies win or lose on the Internet; that's the role of the free market and the marketplace of ideas.

Finally, the framework recognizes that broadband providers must have the ability and investment incentives to manage and expand their networks. Broadband providers need flexibility, for example, to deal with traffic that's harmful to the network or unwanted by users, and to address the effects of congestion. And the framework recognizes that broadband providers must have flexibility to adopt innovative business models and obtain a return on investment.

Our framework for Internet freedom and openness promotes innovation.

The Internet's open architecture allows new ideas to come from anyone, anywhere and reach everyone, everywhere. Many of the giants of our 21st century economy started a few years ago with little more than a big idea and an Internet connection.

Our framework will help make sure that students in their dorm rooms and inventors in their garages will continue be able to launch their new ideas and businesses without having to ask for permission.

Our framework promotes job creation.

The free and open Internet has been central in creating thousands of new businesses and over a million new jobs. Small businesses, and in particular new businesses, are the primary generators of new jobs in our economy. Going back almost three decades, new businesses—start-ups—have created an average of 3 million new U.S. jobs per year. A free and open Internet empowers innovators to start businesses; it enables existing small businesses to expand, reaching new customers in new markets around the country and the globe, while lowering their costs through cloud-based services.

Our framework promotes U.S. competitiveness.

It will unleash technology innovation throughout our broadband economy, necessary for us to compete and lead in the 21<sup>st</sup> century global economy. 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.”

Our framework promotes private investment.

By increasing certainty and adopting balanced and sensible rules, it will bolster and encourage investment both at the edge and the core of broadband networks. For the success of our economy in the 21<sup>st</sup> century, we need many billions of dollars of private investment from companies throughout the broadband economy. Our framework is a balanced approach that helps ensure that companies and investors throughout the broadband ecosystem have the incentives they need to make those investments.

Some people say that our open Internet framework doesn't go far enough.

Some people say it goes too far.

I believe we did the right thing, and I am proud of the fact that our framework has attracted support from the broadest consensus ever assembled on this challenging topic. Our framework has drawn support from groups and individuals representing the technology industry; investors small and large; consumers, labor, and civil rights groups; and major broadband providers.

I'm also pleased that market analysts overwhelmingly found our action to be a light-touch approach that increases certainty throughout the broadband ecosystem, and that recognizes the need to earn returns on investments.

I look forward to continuing to work together in a variety of areas – including unleashing spectrum, reforming universal service, and reducing barriers to broadband deployment – to harness the opportunities of broadband for our economy and for all Americans, and promote U.S. leadership in communications globally.

Thank you.

Mr. WALDEN. Chairman, thank you for your testimony. We look forward to your answers.

I now recognize the distinguished gentleman, the commissioner, Mr. Copps. We are delighted to have you here this morning.

#### **STATEMENT OF MICHAEL J. COPPS**

Mr. COPPS. Thank you, sir. Good morning, Chairman Walden and Chairman Upton and Ranking Member Eshoo and Ranking Member Waxman and all friends on the committee. I appreciate your invitation to participate in this discussion to share with you my perspectives, and more importantly, to hear yours. I look forward to your counsel as we begin what I think can be a truly productive year in tackling many telecommunications challenges facing Congress, the Commission and the country.

It is my firm belief, first of all, that broadband is key to America's 21st century prosperity. The President, the Congress, and the Commission are all looking to this communications infrastructure as a key tool for ensuring a better and brighter future for America.

There is much work to be done to be ensured that everyone in this country has equal opportunity in the Digital Age. I believe that preserving a free and open Internet, the focus of today's hearing, is a central part of that challenge. I know there are disagreements among us about the issue but I have always been open and candid with you before the subcommittee and in your personal offices on where I stand, and I believe I have consistent in what I say both here and at the FCC. Most Americans have a broadband monopoly or at best, duopoly, from which to choose. Without adequate competition in the Internet access service market, allowing these companies to exercise unfettered control over America's access to the Internet not only creates risk to technological innovation and economic growth but also poses a real threat to freedom of speech and the future of our democracy. This is why I have long advocated for some limited rules of the road to maintain openness and freedom on the Internet. It is why the Commission adopted in 2005 on a bipartisan basis an Internet policy statement that contained the basic rights of Internet consumers. This is not about government regulating the Internet. It is about ensuring consumers rather than Big Telephone or Big Cable have maximum control over their experiences when they go online.

During the FCC's proceeding to examine the need for open Internet rules, I swung my door open wide so I could hear from every interested stakeholder. I met with broadband providers, online entrepreneurs, technology investors, consumer groups and many individual citizens from across the country. In the end, given that fewer and fewer places are controlling access to the Internet, I concluded again that we must make sure a few gatekeepers cannot favor their own content, throttle certain types of applications and block access to information at will. With the adoption of the open Internet order last December, we have at least some concrete rules to prevent gatekeepers from circumventing the openness that made the Internet the Internet. The Commission has acted using the authority I believe it has and that I lay out in greater length in my formal statement, and now both Congress and the courts will help to determine where we go from here.

While we may not always agree on how to proceed on every policy front, there are so many challenges confronting us where you and I share common cause and where I think we can make real progress this year. First and foremost among them is ensuring that our first responders have the communications tools they need to protect American lives and property. We are fast approaching the 10th anniversary year of 9/11. I believe we must make good on our promise to create a nationwide interoperable public safety network and make progress in significant and tangible ways this year.

Another area crying out for attention is spectrum policy as consumers expect ever-faster speeds and mobility for their broadband, the demand on our finite spectrum resource skyrockets. Just last week, the President set an ambitious goal of getting high-speed wireless coverage to 98 percent of Americans. This is another area where we can work hand in hand to find ways to maximize our spectrum resource. In addition, to help meet our shared broadband goals, the Commission took an important step last week toward transforming the Universal Service Fund, an intercarrier compensation system to address our going-forward communications infrastructure needs.

There are other challenges, privacy, digital literacy, to name a few, where I believe we can work together to ensure that our citizens have the tools they need for our increasingly online world. In addition, while I will not dwell on it here, I think most members of this subcommittee know of my concerns about America's current media environment, and this goes to the question of broadband and online too. A vibrant media landscape, traditional and online, is critical to providing our citizens with the news and information they need to participate in our democracy. There are some huge problems here.

Finally, as I do every time I come up here, I urge you to take action to modify the closed-meeting rule, which prohibits more than commissioners from ever talking with one another at the same time outside of a public meeting. I believe this prohibition has on many occasions during my 10 years at the Commission stifled collaborative discussions among colleagues, delayed timely decision-making and discouraged collegiality. Removal of this prohibition would, in my mind, constitute as major a reform of Commission procedures as anything I can contemplate.

Thank you again for the opportunity to be here today. I look forward to your comments, your counsel and your questions.

[The prepared statement of Mr. Copps follows:]

**ONE PAGE SUMMARY OF  
TESTIMONY OF FCC COMMISSIONER MICHAEL J. COPPS  
HEARING ON “NETWORK NEUTRALITY AND INTERNET REGULATION:  
WARRANTED OR MORE HARM THAN GOOD?”**

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There is much work to be done to ensure everyone in this country has equal opportunity in this new Digital Age—no matter who they are, where they live, or the particular circumstances of their individual lives. I believe that preserving a free and open Internet, the focus of today’s hearing, is a central part of that challenge. Most Americans have a broadband monopoly or, at best, duopoly from which to choose. Without adequate competition in the Internet access service market, allowing these companies to exercise unfettered control over Americans’ access to the Internet not only creates risks to technological innovation and economic growth, but also 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.

The Internet became a robust engine of economic development by enabling anyone with a good idea to connect to consumers and compete on a level playing field for their business. It meant that entrepreneurs in college dorms and garages, who started out with little more than inspiration, could see their dreams grow into companies that became household names. This is *not* about government regulating the Internet. It is about ensuring that consumers—rather than their telephone or cable company—have maximum control of their experiences when they go online.

During the FCC’s proceeding to examine the need for open Internet rules, I swung my door open wide so I could hear from every interested stakeholder. I met with broadband providers, online entrepreneurs, technology investors, consumer groups and many individual citizens across the country. In the end, given that fewer and fewer players are controlling access to the Internet, we needed to make sure that these gatekeepers could not favor their own content, throttle certain types of applications and block access to information at will. With the adoption of the *Open Internet Order* last December, we have 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.

There are so many issues that I hope we will be working together on in the months just ahead. Most of the work of the Commission, as well as most of the work of this Committee, is conducted in an open, bipartisan fashion. From my discussions with Members of this Subcommittee, I sense an intent to work together on deploying broadband and promoting its adoption, enhancing the public’s safety and meeting our country’s spectrum needs. Congress has given us landmark legislation to bring modern communications to our disabilities communities and the Commission is busy developing rules to implement your charge. Many of us also share an interest to bring modern communications to Indian Country, which has been left tragically behind the rest of the country. I look forward to working with you on these challenges.

**TESTIMONY OF FCC COMMISSIONER MICHAEL J. COPPS  
U.S. HOUSE COMMITTEE ON ENERGY AND COMMERCE  
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY**

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**FEBRUARY 16, 2011**

Good morning, Chairman Walden, Ranking Member Eshoo, Members of the Subcommittee. I appreciate your invitation to participate in this discussion today, to share with you my perspectives and, more importantly, to hear yours. I look forward to your counsel as we begin what I believe can be a productive year in tackling the many telecommunications challenges facing Congress, the Commission and the country.

It is my firm belief that broadband is key to America's Twenty-first century prosperity. The President, the Congress, and the Commission are all looking to this communications infrastructure as a key tool for ensuring a better and brighter future for America. Broadband intersects with just about every great challenge confronting our nation today—jobs, international competitiveness, education, energy, health care, overcoming disabilities, news and information and our democratic dialogue. There is no solution for any of these challenges that does not have some broadband component to it. As we as a nation work our way out of today's economic downturn, economic recovery and job creation depend upon all of us having the information tools we need to develop ourselves, find opportunity, and help our nation compete. High-speed Internet access is not a luxury in today's global information economy. It is an absolute necessity.

All Americans—that means everyone—need access to robust and affordable broadband. To help meet our shared broadband goals, the Commission took an important step forward last week toward transforming the Universal Service Fund and Intercarrier compensation systems to meet our going-forward communications infrastructure needs. In the last century, our commitment to Universal Service ensured that most of our citizens—urban and rural—had access to plain old telephone service. We must find a way to do the same nearly-ubiquitous build-out of broadband because all of us benefit when more of us are connected. Private industry must lead the way, of course, but it falls upon policy makers to establish a legal and regulatory environment that encourages broadband deployment, promotes adoption, fosters competition and safeguards consumers. I know we all share the same desire for the United States to continue being the incubator for the ideas, inventions and innovations that drive the global economy.

While we won't all agree on how to proceed on every policy front, there are so many challenges confronting us where you and I share common cause. First and foremost among them is ensuring that our first responders have the communications tools they need to protect American lives and property. As my old boss, Senator Fritz Hollings, used to tell me (more than once I might add), "The safety of the people is the first obligation of the public servant." We are fast approaching the ten-year anniversary of 9/11. While some progress has arguably been made, we are nowhere near where we need to be in creating a nationwide interoperable public safety network. Together I hope

we can make good on an overdue promise to America's first responders to give them the tools they need to protect us. I believe we *must* make good on it, in significant and tangible ways, *this year*.

Another area crying out for our attention is spectrum policy. As consumers expect ever-faster speeds and mobility for their broadband, the demand on our finite spectrum resource skyrockets. Just last week, the President set an ambitious goal of getting high-speed wireless coverage to 98% of Americans. Chairman Genachowski has put laudable emphasis on the country's spectrum needs during his tenure at the FCC. This is another area where we must work hand-in-hand—the Congress, the Commission, industry and all stakeholders—to find ways to make additional spectrum available and to optimize our supply by expanding flexibility in the use of licensees and by improving efficiency through technology. To that end, I have long supported efforts for a spectrum inventory—the FCC's creation of the Spectrum Dashboard is a first step down that road—to examine what spectrum is actually being used, how it is being used, how intensively it is being used, and whether particular slices of spectrum can be put to better use to serve consumers. This spectrum-hungry nation of ours cannot afford to leave wide swaths of valuable airwaves going un- or under-utilized.

There are other challenges calling for action now. I know the issue of online privacy is important to many Members of the Subcommittee, no matter which side of the dais they are sitting on. As Americans share and receive evermore personal and sensitive information online, they become vulnerable in many invasive and costly ways. Here, too, we can work together to ensure that our citizens understand and are able to manage their privacy online.

That leads in to digital literacy, a cause close to my heart. We can do so much, in collaboration with non-governmental players, to make sure that individuals have the digital literacy skills they need to succeed. Our kids, my grandkids, need to understand the online world in which they live. They need the tools to know how to navigate the information available online, and how to discern truth from fiction. And they need to know not just how to use online media, but how these new media forms can use—or misuse—them.

I won't dwell on it here, but I think most Members of this Subcommittee know of my concerns about America's current media environment. A vibrant media landscape—both traditional and online—is critical to providing our citizens with the news and information they need to participate in our democracy. In less than a generation, I have seen a media landscape that should have been moving toward more diversity, more localism and more competition transformed into a market controlled by too few players providing too little accountability journalism. Newsrooms have been shuttered, reporters yanked off the beat and fired, and investigative journalism consigned to the endangered species list. We have lost tens of thousands of newsroom reporters in the United States in the last ten years. One result: when last I checked, twenty-seven states had no full-time reporters accredited to cover Capitol Hill. This crisis in journalism should command the attention of us all because the health of our democracy depends upon it.

So there is much work to be done to ensure everyone in this country has equal opportunity in this new Digital Age—no matter who they are, where they live, or the particular circumstances of their individual lives. I believe that preserving a free and open Internet, the focus of today’s hearing, is a central part of that challenge. I know there will be some disagreements among us about this issue, but I think most of you know where I have been on this issue since I arrived at the Commission nearly ten years ago. I have always been open and candid with you, before the Subcommittee and in your personal offices, and candid also with my Commission colleagues, no matter who is in control of Congress or the FCC at any particular time. Most Americans have a broadband monopoly or, at best, duopoly from which to choose. Without adequate competition in the Internet access service market, allowing these companies to exercise unfettered control over Americans’ access to the Internet not only creates risks to technological innovation and economic growth, but also 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 and it must be accessible to all.

Certainly companies must be able to exercise reasonable network management to safeguard the security and integrity of their networks. And those management practices will evolve over time. But citizens must have some recourse when they feel they have been discriminated against, and they need an expert venue that can make expert decisions about whether the practices they may complain about are legitimate or not. That’s the FCC.

The Internet became a robust engine of economic development by enabling anyone with a good idea to connect to consumers and compete on a level playing field for their business. It meant that entrepreneurs in college dorms and garages, who started out with little more than inspiration, could see their dreams grow into companies that became household names. History has shown us, however, that previous telecommunications and media technologies—radio, TV and cable—conceived in openness, eventually fell victim to consolidation and gatekeeper control that stifled innovation, squashed competition, and ultimately left consumers worse off. I support rules to protect the open Internet not just as a student of history, but also based on real threats. During my tenure at the Commission, we have seen a local phone company that blocked a competitive Voice Over Internet Protocol (VOIP) service. A wireless company censored political speech via text messages. And a cable company created quite a stir by blocking a download of the King James Bible in an indiscriminate and undisclosed manner. Other complaints are pending before the Commission. All this, I would add, when companies are ostensibly on their best behavior in order to avoid new legislation or Commission rules. Read the terms of service consumers get and you will usually find, hidden away in the fine print, a statement of the provider’s right to block your service. If ever the path is cleared of some basic oversight, I would count on many more dissatisfied consumers.

This is why I have long advocated for clear rules of the road to maintain openness and freedom on the Internet and to fight discrimination against ideas, content and

technologies. It is why the Commission adopted in 2005, on a bipartisan basis, an *Internet Policy Statement* that contained the basic rights of Internet consumers to access lawful content, run applications and services, attach devices to the network and enjoy the benefits of competition.

This is *not* about government regulating the Internet. It is about ensuring that consumers, rather than Big Telephone or Big Cable, have maximum control of their experiences when they go online.

At the same time, however, earlier majorities at the Commission were also moving the transmission component of broadband outside of Title II of our enabling statute. This was a major flip-flop from the historic—and successful—approach of requiring nondiscrimination in our communications networks. What’s more, these decisions seriously compromised the Commission’s ability to fulfill its statutory responsibilities: protecting public safety, promoting universal service, ensuring disabilities access, fostering competition and safeguarding consumers in the broadband world. Instead of relying on the Title II framework Congress designed for this job, the majority at the FCC moved our broadband authority and oversight to a different part of the statute—the vaguer and more tentative ancillary authority of Title I. It was pursuant to this assertion of ancillary jurisdiction that a federal appeals court ruled against the FCC in the *Comcast* case last year. This put the Commission’s fundamental responsibility—to protect consumers of 21<sup>st</sup> century advanced telecommunications—in serious jeopardy.

Fortunately, at the time the court decision came down, Chairman Genachowski had already launched a proceeding to examine the need for open Internet rules. For my part, I swung my door open wide so that I could hear from every interested stakeholder. I met with broadband providers, online entrepreneurs, technology investors, consumer groups and many individual citizens across the country.

In the end, given that fewer and fewer players are controlling access to the Internet, we needed to make sure that these gatekeepers could not favor their own content, throttle certain types of applications and block access to information at will. With the adoption of the *Open Internet Order* last December, we have 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.

To be sure, there is more that I would have liked to see in the *Order*. I would have preferred to see, for example, real parity in the treatment of fixed and mobile broadband access. The Internet *is* the Internet, no matter how you access it, and the millions of citizens going mobile for their Internet access and the entrepreneurs creating innovative wireless content, applications and services should have the same freedoms and protections as those in the wired context. I recognize there are differences requiring some different treatment as wireless technologies evolve, but I believe our rules can accommodate those differences and the principles should stand.

I have also made no secret that I would have preferred to reassert our Title II authority over broadband. Years of hard-won consumer protections were built upon a Title II foundation. I saw no reason to deviate from what has proven to be a workable framework for both businesses and consumers. After all, this framework gave the communications industry the certainty it needed to do its job of building and managing this nation's great communications enterprises, operating within a public policy framework that gave consumers protections they need and deserve.

As to the Commission's authority, I believe Congress has already given us the authority we need to do our job. No court that I know of has said the FCC cannot do these things. The highest court in the land—the Supreme Court—could not have been more clear in its *Brand X* decision. If there is ambiguity about the meaning of a statute's terms, the Commission's choice of one of them is entitled to deference in the courts. In the *Brand X* decision, the Supreme Court concluded that the FCC's decision that cable modems were exempt from common carrier oversight was a lawful construction of the statute. But so might another reading of the statute be a legitimate construction. And the same Court went on to say that the Commission is always free to change course if it adequately justifies the change. In any event, the Commission has voted, and now the ball appears to be in the courts and the Congress.

And that brings me full circle back to all the other issues that I hope we will be working together on in the months just ahead. Most of the work of the Commission, as well as most of the work of this Committee, is conducted in an open, bipartisan fashion. From my discussions with Members of this Subcommittee, I sense an intent to work together on deploying broadband and promoting its adoption, enhancing the public's safety and meeting our country's spectrum needs. Congress has given us landmark legislation to bring modern communications to our disabilities communities and the Commission is busy developing rules to implement your charge. Many of us also share an interest to bring modern communications to Indian Country and Native Americans who have been left tragically behind the rest of the country, not to mention the rest of the world. I look forward to working with you on these challenges.

Finally, as I do every time I come up here, I urge you to take action to modify the Closed Meeting Rule which prohibits more than two Commissioners from ever talking with one another at the same time outside of a public meeting. I believe this prohibition has, on many occasions during my time at the Commission, stifled collaborative discussions among colleagues, delayed timely decision-making, and discouraged collegiality. Not to infer we don't all get along wonderfully well, but elected representatives, cabinet officials and judges, to name just a few, all have the opportunity for face-to-face discussions about the issues before them. Each of the five Commissioners brings to the FCC unique experiences and talents that we cannot fully leverage without directly communicating with one another. Last year, now-Ranking Member Eshoo and former Congressman Bart Stupak introduced a well-thought-out bill to eliminate this statutory prohibition. I know there is support on the other side of the aisle for this initiative, in both the House and the Senate. So I truly hope Congress will

finish the job this year. Removal of this prohibition would, in my mind, constitute as major a reform of Commission procedures as any I can contemplate.

Thank you again for the opportunity to be here today. I look forward to your comments, counsel and questions.

Mr. WALDEN. Thank you, Commissioner, and that is why we have you all here so that you can all get along and chat. It is a good thing. And we have never questioned, Commissioner Copps, your forthright approach to telling us your opinions, either, nor has anyone in America, and we appreciate that.

I would like to go now to the commissioner, Mr. McDowell. Thank for you for being here. We welcome your comments and testimony as well.

#### **STATEMENT OF ROBERT M. MCDOWELL**

Mr. MCDOWELL. Thank you, Mr. Chairman and Ranking Member Eshoo and Chairman Upton and Ranking Member Waxman, and I also want to special shout-out to Congresswoman Harman. This is a sad day for me. This is the last time all of us will testify before you. I want to thank you for your years of public service. It is a sad day for the McDowell household. I know my brother, Kelly, the former mayor of El Segundo, California, is sad to have you leave the U.S. Congress, but I know the Woodrow Wilson Center will be in excellent hands with you at the helm, so thank you for your service.

Mr. Chairman and members of the Committee, the markets under the purview of the FCC are dynamic and ever evolving. Both the core and the edge of the Internet are growing at breakneck speeds, all to the benefit of American consumers. For instance, the United States leads the world in 4G wireless deployment and adoption. Wireless broadband is the fastest growing segment of the American broadband market. The United States I also the global leader in the creation and use of mobile apps. In fact, the top 300 free mobile applications in the U.S. app stores enjoyed an average of more than 300 million downloads per day last December, and I think most of those were on the McDowell kids' phones, actually. Not surprisingly, smartphone sales have outpaced PCs for the first time.

On the other hand, in spite of these positive developments, last year the private sector invested an estimated \$44 billion in new broadband technologies, which is significantly lower than years past. I am hopeful that the FCC can work constructively to increase opportunities for investment and job growth by bringing regulatory certainty to the broadband marketplace. With Congress's guidance I look forward to adopting policies that put the power of more spectrum into the hands of consumers, help accelerate broadband deployment and adoption, make our universal service subsidy program more efficient, and modernize our media ownership rules, among many, many other endeavors.

In addition, the FCC should also strive to clear away regulatory underbrush that may have outlived its usefulness and now only deters constructive risk taking. Congress empowered the Commission to do just that when it codified section 10s forbearance mandate more than 15 years ago. Streamlining our regulations could take significant burdens off the backs of entrepreneurs and give them more freedom to invest and innovate. Such deregulatory action could serve as a much-needed short in the arm for America's economy. President Obama said as much in his recent Executive order.

And a little secret about the FCC, which the chairman has already touched on. More than 90 percent of our votes are not only bipartisan but are unanimous. I have enjoyed working with my colleagues on many recent initiatives including continuation of our longstanding work on unlicensed use of the TV white space, simplifying the process for the construction of cell towers, spectrum re-allocation, and initiating the next step to perform our universal service subsidy system.

Obviously we have had a few respectful disagreements as well such as our differences concerning the new regulations of Internet network management, and I have included for your convenience a copy of my dissent. Nonetheless, I am confident that the five of us have the ability and the desire to continue to find common ground on an array of other issues that touch the lives of every American every day.

Thank you, Mr. Chairman, and I look forward to the questions from the committee.

[The prepared statement of Mr. McDowell follows:]

**STATEMENT  
of  
COMMISSIONER ROBERT M. McDOWELL  
FEDERAL COMMUNICATIONS COMMISSION**

**Before the  
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY  
COMMITTEE ON ENERGY & COMMERCE  
UNITED STATES HOUSE OF REPRESENTATIVES**

**February 16, 2011**

Thank you, Chairman Walden and Ranking Member Eshoo. It is an honor to appear before you and your colleagues today.

The markets under the purview of the FCC are dynamic and ever-evolving. Both the “core” and the “edge” of the Internet are growing at breakneck speeds – all to the benefit of American consumers. For instance, the U.S. leads the world in 4G wireless deployment and adoption. In addition, while only 2.6 million consumers in North America were mobile-only Internet users in 2010, that number promises to be 55 million by 2015. Moreover, by 2016, over 50 percent of U.S. households will use wireless broadband as their *only* form of high-speed Internet access. No wonder that we also are the global leader in the creation and use of mobile apps.

In fact, the top 300 free mobile applications in U.S. app stores enjoyed an average of more than 300 million downloads *per day* last December. Global mobile app downloads will more than double this year, reaching an estimated 17.7 billion downloads by year’s end. Last year, Amazon’s digital book sales exceeded its sales of hardcover books. Last month, e-book sales eclipsed paperbacks. And, smartphone sales have outpaced PCs for the first time. Manufacturers shipped 101.9 million smartphones in the fourth quarter of 2010, compared with 92.1 million PC shipments.

On the other hand, in spite of these positive developments, last year, the private sector invested around \$44 billion in new broadband technologies, which is significantly lower than in years past. I am hopeful that the FCC can work constructively to increase opportunities for investment and job growth by bringing regulatory certainty to the broadband marketplace. With Congress’s guidance, I look forward to adopting policies that put the power of more spectrum into the hands of consumers, help accelerate broadband deployment and adoption, make our

Universal Service subsidy program more efficient, and modernize our media ownership rules, among many other endeavors.

In addition, the FCC should also strive to remove regulatory underbrush that may have outlived its usefulness and now only deters investment and innovation. Congress empowered the Commission to do just that when it codified Section 10's forbearance mandate more than 15 years ago. Streamlining our regulations could take significant burdens off the backs of entrepreneurs and give them more freedom to invest and innovate. Such action could act as a much-needed shot in the arm for America's economy. President Obama said as much in his recent Executive Order.

A little secret about the FCC: More than 90 percent of our votes are not only bipartisan, but unanimous. I have enjoyed working with my colleagues on many recent initiatives including continuation of our long-standing work on unlicensed use of the TV white spaces, simplifying the process for the construction of cell towers, spectrum reallocation, and initiating the next step in comprehensive universal service reform.

Obviously, we have had a few respectful disagreements as well, such as our differences concerning the new regulations of Internet network management. For your convenience, I have attached a copy of my dissent as Exhibit A. Nonetheless, I am confident that the five of us have the ability and desire to continue to find common ground on an array of other issues that touch the lives of every American every day.

Thank you, Mr. Chairman. I look forward to your questions.

**Exhibit A**

Dissenting Statement of Commissioner Robert M. McDowell, *Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry Practices*, WC Docket No. 07-52; Report & Order, FCC 10-201 (rel. Dec. 23, 2010)

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

RE: *Preserving the Open Internet, et al.*, Report and Order (Dec. 21, 2010)

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.

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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>.

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.

**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.

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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*).

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 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

<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.

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 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>

<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 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

<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

<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 Red. 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.

expensive for *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).

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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600 F.3d at 645.

<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*

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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*Order*); *Appropriate Regulatory Treatment 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 senior analyst at GE Asset Management, stated that regulatory risk is

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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“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 to the FCC pursuant to Section 10. The D.C. Circuit made this point in *Comcast*, when it rejected the FCC’s use of *Ad Hoc Telecomms.* for its Section 706 authority arguments. *Comcast*, 600 F.3d at 659 (“In [*Ad Hoc Telecomms.*], however, we cited section 706 merely to support the Commission’s choice between regulatory approaches clearly within its statutory authority under other sections of the Act.”) (emphasis added). Second, the text of Section 706(a) actually lists “regulatory forbearance” as an example of one of the tools that the

price cap regulation.<sup>50</sup> Readers should keep in mind, however, that at the time Section 706 was enacted, 1996, price cap regulation of incumbent local exchange carriers was considered to be *deregulatory* when compared to the legacy alternative: rate-of-return regulation. The provision's remaining language is even more broad and deregulatory. For instance, the end of section 706(a) states that the FCC should explore "other regulating methods that *remove barriers to infrastructure investment*."<sup>51</sup> Additionally, its counterpart subsection, Section 706(b), states that if the FCC's annual inquiry determines that advanced telecommunications is not "being deployed to all Americans in a reasonable and timely fashion" the FCC shall take action to "*remove[e] barriers to infrastructure investment and ... promot[e] competition in the telecommunications market*."<sup>52</sup> As discussed above, the Order's actions will have the opposite effect.

Moreover, the Order's new interpretation of Section 706(a) is self serving and outcome determinative. The Order admits that its rationale requires reversing the Commission's longstanding interpretation of that subsection as conveying no authority beyond that already provided elsewhere in the Act.<sup>53</sup> This arbitrary and capricious move is not supported by evidence in the record or a change in law.<sup>54</sup> The Order offers the excuse that "[i]n the particular proceedings prior to *Comcast*, setting out the understanding of Section 706(a) that we articulate in this Order would not meaningfully have increased the authority that we understood the Commission already to possess."<sup>55</sup> In other words, apparently, the agency's confused

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FCC may employ in order to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." 47 U.S.C. § 1302(a). By contrast, network management regulations are not listed in Section 706 or anywhere else in the Act. Finally, as the D.C. Court reiterated in *Comcast*, 600 F.3d at 659, the central issue that it focused on in *Ad Hoc Telecomms.* was not jurisdictional; rather it was whether the FCC's underlying forbearance decision had been arbitrary and capricious, specifically "when and how much" can the FCC forbear from Title II obligations. *Ad Hoc Telecomms.*, 572 F.3d at 904. Moreover, the court was very clear in noting that such authority was "not unfettered." *Id.* at 907.

<sup>50</sup> On that note, the Order even highlights the fact that "706(a) expressly contemplates the use of "regulating methods" such as price regulation." See Order, n. 381. This aside is an unsettling foreshadow of how these rules could be used to regulate broadband rates in the future, through either *ad hoc* enforcement cases or declaratory rulings.

<sup>51</sup> 47 U.S.C. § 1302(a) (emphasis added). This focus on infrastructure investment makes sense in light of Congress' express concern that broadband facilities quickly reach "elementary and secondary schools and classrooms," *id.*, which in 1996 may have lacked the economic appeal of business and residential districts as early targets for infrastructure upgrades.

<sup>52</sup> 47 U.S.C. § 1302(b).

<sup>53</sup> Order, ¶ 120.

<sup>54</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 policy has engendered serious reliance interest that must be taken into account." *Id.* (internal citations omitted). This warning is thrown into sharp focus by the billions of dollars invested in broadband infrastructure since the Commission first began enunciating its decisions against Title II classification of broadband Internet networks. See, e.g., AT&T Comments at 19; Verizon Comments at 22.

<sup>55</sup> See Order, ¶ 122; see also *Comcast Corp. v. FCC*, 600 F.3d 642, 658 (D.C. Cir. 2010) (noting that "[i]n an earlier, still binding order, however, the Commission ruled that section 706 'does not constitute an independent grant of

understanding of the limits of its ancillary authority meant that the Commission then did not have to rest on Section 706(a) in order to overreach by “pursu[ing] a stand-alone policy objective” not moored to “a specifically delegated power.”<sup>56</sup>

The Order’s reliance on Section 706(b) as providing a statutory foundation for network management regulations is similarly flawed. That subsection requires that the FCC determine on an annual basis whether “advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.”<sup>57</sup> Congress then further directed the Commission, if the agency’s determination were negative, to “take immediate action to accelerate deployment of such capability by *removing barriers to infrastructure investment* and by promoting competition in the telecommunications market” (emphasis added).<sup>58</sup>

To justify its use of this trigger, the Order points to the fact that approximately six months ago, the Commission on a divided 3-2 vote issued a report finding – for the first time in history – that “broadband deployment to all Americans is not reasonable and timely.”<sup>59</sup> This determination, in conflict with all previous reports dating back to 1999, was both perplexing and unsettling. It ignored the impressive strides the nation has made in developing and deploying broadband infrastructure and services since issuance of the first 706 Report. Amazingly enough, the most recent 706 Report managed to find failure even while pointing to data (first made public in the National Broadband Plan) showing that “95% of the U.S. population lives in housing units with access to terrestrial, fixed broadband infrastructure capable of supporting actual download speeds of at least 4 Mbps.”<sup>60</sup> In fact, only 15 percent of Americans had access to residential broadband services in 2003.<sup>61</sup> Only seven years later, 95 percent enjoyed access, making broadband the fastest penetrating disruptive technology in history.<sup>62</sup> At the time that I dissented from the 706 Report, I expressed concern that its findings could be a pretext for justifying additional regulation, rather than “removing barriers to infrastructure investment.”<sup>63</sup> Unfortunately, this Order reveals that my fears were well founded.

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authority.” (quoting *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, CC Docket No. 98-147, Memorandum Opinion and Order, 13 FCC Rcd. 24,012, 24,047 ¶ 77 (1988)).

<sup>56</sup> *Comcast*, 600 F.3d at 659.

<sup>57</sup> 47 U.S.C. § 1302(b).

<sup>58</sup> *Id.*

<sup>59</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 09-137, Sixth Broadband Deployment Report, 25 FCC Rcd. 9,556, 9,558 ¶¶ 2–3 (2010). Commissioner Baker and I dissented from the July 2010 adoption of the latest Section 706 Report.

<sup>60</sup> *National Broadband Plan* at 20.

<sup>61</sup> See John Horrigan, Pew Internet and American Life Project, *Home Broadband Adoption 2009*, 11 (2009).

<sup>62</sup> *National Broadband Plan* at 20.

<sup>63</sup> 47 U.S.C. § 1302(b).

One is left to wonder where this assertion of power, if left unchecked, may lead next.<sup>64</sup> As for the Order itself, the short-term path is clear: It will be challenged in court. Once there, the Commission must struggle with the fact that the empirical evidence in this docket demonstrates “no relationship whatever” between the plain meaning of Section 706 and the network management rules being adopted.<sup>65</sup>

**B. Efforts to Advance New Arguments for Exercising Ancillary Authority Will Not Survive Court Review.**

In spite of the D.C. Circuit’s decision in *Comcast*, the Order attempts to continue to assert ancillary authority as another basis for its imposition of network management rules. To bolster the Commission’s case this time, the Order points to some provisions of the Act that it failed to cite the first time around. Its arguments for new and putatively better bases for network management rules fall victim largely to the same weaknesses the court identified before.

Efforts to defend a valid exercise of the agency’s ancillary powers are subject to a two-part test – and the “central issue,” as the D.C. Circuit already has explained, is whether the Commission can satisfy the second prong of the test.<sup>66</sup> Under it, “[t]he Commission may exercise this ‘ancillary’ authority only if it demonstrates that its action ... is ‘reasonably ancillary to the ... effective performance of its statutorily mandated responsibilities.’”<sup>67</sup>

Those “statutorily mandated responsibilities” must be concrete and readily identifiable. As the Supreme Court instructed in *NARUC II* and the D.C. Circuit reiterated in *Comcast*, “the Commission’s ancillary authority ‘is really incidental to, and contingent upon, *specifically delegated powers under the Act.*”<sup>68</sup> For the ancillary authority arguments to prevail here, the Order must identify specific subsections within Title II, III or VI that provide the ancillary hook, and then show how the Commission’s assertion of power will advance the regulated services directly subject to those particular provisions. Existing court precedent shows that sweeping generalizations are not sufficient.<sup>69</sup> Nor may the general framework of one title of the Act –

<sup>64</sup> If the Commission is successful with this assertion of authority, the agency could use Section 706 as an essentially unfettered mandate to impose not only new regulations but to pick winners and losers – all without any grant of authority from Congress to intervene in the marketplace in such a comprehensive manner. In fact, this Order has already done so. For example, it decides that these new network management rules will apply to broadband Internet service providers but not to edge providers. See Order, ¶ 50. The Order makes an interesting attempt to justify this line-drawing. It rationalizes, *inter alia*, that because the new regulatory scheme is putatively an outgrowth of the Commission’s *Internet Policy Statement*, which was not aimed at edge providers, the Order’s new mandates should not apply to those entities either. This argument is irrationally selective at best and arbitrary and capricious at worst. If the Commission’s *Internet Policy Statement* was the “template” for the rules, why isn’t the substance of the rules the same as the previous principles? In particular, why does the Order add nondiscrimination to the regulations when that concept was never part of the previous principles?

<sup>65</sup> *Comcast*, 600 F.3d at 654.

<sup>66</sup> *Id.* at 647.

<sup>67</sup> *Id.* at 644 (citing *Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)).

<sup>68</sup> *Id.* at 653 (emphasis in original) (citing *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, 612 (D.C. Cir. 1976) (*NARUC II*)).

<sup>69</sup> Compare Order, ¶ 133 (opining that Open Internet rules for wireless services are supported by Title III of the Communications Act pursuant to the Commission’s authority “to protect the public interest through spectrum

such as common carriage obligations – be grafted upon services subject to another title that does not include the same obligations.<sup>70</sup> And long descriptions of services delivered via broadband networks do not substitute for hard legal analysis.<sup>71</sup>

Moreover, arguments must be advanced on “a case-by-case basis” for each specific assertion of jurisdiction.<sup>72</sup> *Comcast* explains that the Commission must “independently justif[y]” any action resting on ancillary authority by demonstrating in each and every instance how the action at issue advances the services actually regulated by specific provisions of the Act.<sup>73</sup> The D.C. Circuit apparently was concerned about the Commission’s ability to grasp this point, for the opinion makes it repeatedly.<sup>74</sup> In doing so, the court directed the Commission to

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licensing”) with *Comcast*, 600 F.3d at 651 (“each and every assertion of jurisdiction ... must be *independently justified* as reasonably ancillary to the Commission’s power”) (emphasis in original).

<sup>70</sup> See *Comcast*, 600 F.3d at 653 (discussing how the *NARUC II* court “found it ‘difficult to see how any action which the Commission might take concerning *two-way cable* communications could have as its primary impact the furtherance of any *broadcast* purpose.’”) (emphasis added); *id.* at 654 (discussing the *Midwest Video II* court’s recognition that the Communications Act bars common carrier regulation of broadcasting and therefore rejecting the imposition of public access obligations on cable because the rules would “relegate[ ] cable systems ... to common-carrier status.”).

<sup>71</sup> The fact that some regulated services may be mixed on the same transmission platform with unregulated traffic does not afford the Commission scope to impose legal obligations on all data streams being distributed via that system. For example, the D.C. Circuit also has rejected other past Commission efforts to extend its ancillary reach over all services offered via a transmission platform merely because the platform provider uses it to provide one type of regulated service along with other services not subject to the same regulatory framework. See *id.* at 653 (citing *NARUC II*, 533 F.2d at 615–16, that overturned a series of Commission orders that preempted state regulation of non-video uses of cable systems, including precursors to modern cable modem service); *NARUC II*, 533 F.2d at 616 (“[T]he point-to-point communications ... involve one computer talking to another....”). The Order appears to be silent on this issue.

<sup>72</sup> *Comcast*, 600 F.3d at 651. As the *Comcast* decision explained, although “the Commission’s ancillary authority may allow it to impose some kinds of obligations on cable Internet providers,” it does not follow that the agency may claim “plenary authority over such providers.” *Id.* at 650. To do so, would “run[ ] afoul” of the Supreme Court precedent set forth in *Southwestern Cable* and *Midwest Video I*.” *Id.* See also *id.* (“Nothing in *Midwest Video I* even hints that *Southwestern Cable*’s recognition of ancillary authority over one aspect of cable television meant that the Commission had plenary authority over all aspects of cable.”).

<sup>73</sup> *Id.* at 651. It follows that the potential for years of litigation over individual enforcement cases is high, thereby leading to a period of prolonged uncertainty that likely will discourage further investment in broadband infrastructure, contrary to the directives of Sec. 706.

<sup>74</sup> See, e.g., *id.* at 651, 653. For example, the court untangled the Commission’s arguments about the implications of language in *Brand X* for the agency’s assertion of authority over Internet network management by explaining that:

[n]othing in *Brand X*, however, suggests that the Court was abandoning the fundamental approach to ancillary authority set forth in *Southwestern Cable*, *Midwest Video I*, and *Midwest Video II*. Accordingly, the Commission cannot justify regulating the network management practices of cable Internet providers simply by citing *Brand X*’s recognition that it may have ancillary authority to require such providers to unbundle the components of their services. These are altogether different regulatory requirements. *Brand X* no more dictates the result of this case than *Southwestern Cable* dictated the results of *Midwest Video I*, *NARUC II*, and *Midwest Video II*. The Commission’s exercise of ancillary authority over *Comcast*’s network management practices must, to repeat, “be independently justified.” (emphasis added) (internal citation omitted).

more closely study the agency's failures in *NARUC II* and *Midwest Video II* to comprehend the limits of its ancillary reach.<sup>75</sup>

The Order's claim of ancillary jurisdiction is not convincing with respect to Title II because, *inter alia*, it invokes only Section 201 in support of its nondiscrimination mandate.<sup>76</sup> Yet in a glaring omission, Section 201 does not reference nondiscrimination – that concept is under the purview of Section 202, which appears not to be invoked in the Order.<sup>77</sup> (By this omission, it appears that the Order may be attempting an end run around the most explicit Title II mandates because of other considerations.) Nor are the arguments successful with respect to the Title III and VI provisions cited in the Order because those statutory mandates address services that are not subject to common carriage-style nondiscrimination obligations absent explicit application of statutory directives.<sup>78</sup>

<sup>75</sup> *Id.* at 653–54.

<sup>76</sup> It is curious that in reciting several provisions of Title II as potential bases for ancillary jurisdiction, the Order avoids the most obvious one: Section 202(a), which explicitly authorizes the nondiscrimination mandate imposed on Title II common carriers. This oversight is especially curious given the Order's reliance on the statutory canon of "the specific trumps the general" in revising the agency's interpretation of Section 706. See Order, ¶¶ 117–23 (distinguishing *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 24,012 (1998) (*Advanced Services Order*) as limited only to the determination that the general provisions of Section 706 did not control the specific forbearance provisions of Section 10). That canon would seem to apply here as well, given that Section 202(a) certainly is more specific about nondiscrimination than is Section 706. Perhaps reliance on Section 202(a) as a basis for ancillary authority was omitted here in order to avoid reopening divisions over potential Title II reclassification? Of course, any effort to classify broadband Internet access as a common carrier service would confront a different set of serious legal and policy problems, see, e.g., *Cable Modem Declaratory Ruling*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4,798 (2002); *Wireline Broadband Order*, 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); *Wireless Broadband Order*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd. 5,901 (2007), but violation of this basic canon of statutory construction would not be among them.

<sup>77</sup> Section 202(a)'s prohibition against "unjust or unreasonable discrimination" carries with it decades of agency and court interpretation which is much different from the Order's "nondiscrimination" mandate. For instance, the Order questions the reasonableness of tiered pricing and paid prioritization. Under the case history of Section 202, tiered pricing and concepts similar to paid prioritization are not presumed to constitute "unjust or unreasonable discrimination." See, e.g., *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1133 (D.C. Cir. 1984) ("But when there is a neutral, rational basis underlying apparently disparate charges, the rates need not be unlawful. For instance, when charges are grounded in relative use, a single rate can produce a wide variety of charges for a single service, depending on the amount of the service used. Yet there is no discrimination among customers, since each pays equally according to the volume of service used."); *Competitive Telecomm. Ass'n v. FCC*, 998 F.2d 1058, 1064 (D.C. Cir. 1993) ("By its nature, § 202(a) is not concerned with the price differentials between qualitatively different services or service packages. In other words, so far as 'unreasonable discrimination' is concerned, an apple does not have to be priced the same as an orange.").

<sup>78</sup> See, e.g., 47 U.S.C. § 153(11); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 705 (1979) (*Midwest II*) (construing the statute to prohibit treating broadcasters – and, by extension, cable operators – as common carriers). See also *infra* pp. 21-25. With respect to those Title III services that are subject to some common carriage regulation, mobile voice service providers bear obligations pursuant to explicit provisions of Title II of the Act, including but not limited to the provision of automatic voice roaming (Sections 201 and 202); maintenance of privacy of customer information, including call location information explicitly (Section 222); interconnection directly or indirectly with the facilities and equipment of other telecommunications carriers (Section 251); contribution to universal service

In addition, 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>79</sup> The D.C. Circuit's warning in *Comcast* against one form of overreaching – the misreading of policy statements as blanket extensions of power – applies here as well:

Not only is this argument flatly inconsistent with *Southwestern Cable*, *Midwest Video I*, *Midwest Video II*, and *NARUC II*, but if accepted it would virtually free the Commission from its congressional tether. As the 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.” Indeed, Commission counsel told us at oral argument that just as the Order seeks to make Comcast’s Internet service more “rapid” and “efficient,” the Commission could someday subject Comcast’s Internet service to pervasive rate regulation to ensure that the company provides the service at “reasonable charges.” *Were we to accept that theory of ancillary authority, we see no reason why the Commission would have to stop there, for we can think of few examples of regulations that apply to Title II common carrier services, Title III broadcast services, or Title VI cable services that the Commission, relying on the broad policies articulated in section 230(b) and section 1, would be unable to impose upon Internet service providers.* If in *Midwest Video I* the Commission “strain[ed] the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts,” and if in *NARUC II* and *Midwest Video II* it exceeded those limits, then here it seeks to shatter them entirely.<sup>80</sup>

Some of the Order's most noteworthy flaws are addressed below.

**1. The Order's patchwork citation of Title II provisions does not provide the necessary support for extending common carriage obligations to broadband Internet access providers.**

*Comcast* instructs the Commission that the invocation of any Title II citation as a basis for ancillary jurisdiction must be shown to be “integral to telephone communication.”<sup>81</sup> The

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subsidies (Section 254); and obligation to ensure that service is accessible to and usable by persons with disabilities (Section 255).

<sup>79</sup> For example, in the *Comcast* case, the 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. *Comcast*, 600 F.3d at 655.

<sup>80</sup> *Id.* at 655 (emphasis added).

<sup>81</sup> *Id.* at 657–58 (discussing *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 425 (D.C. Cir. 1989) (*NARUC III*) and noting that “the Commission had emphasized that “[o]ur prior preemption decisions have generally been limited to activities that are closely related to the provision of services and which affect the provision of interstate services.” The term ‘services’ referred to ‘common carrier communication services’ within the scope of the Commission’s Title II jurisdiction. ‘In short,’ the Commission explained, ‘the interstate telephone network will not function as efficiently as possible without the preemptive detariffing of inside wiring installation and maintenance.’ The Commission’s pre-emption of state regulation of inside wiring was thus ancillary to its regulation of interstate phone service, precisely the kind of link to express delegated authority that is absent in this

Order's efforts to meet this legal requirement are thin and unconvincing – and in some instances downright perplexing. For example, it points to Section 201 in arguing that it provides the Commission with “express and expansive authority”<sup>82</sup> to ensure that the “charges [and] practices in connection with”<sup>83</sup> telecommunications services are “just and reasonable.”<sup>84</sup> The Order contends that the use of interconnected VoIP services via broadband is becoming a substitute service for traditional telephone service and therefore certain broadband service providers might have an incentive to block VoIP calls originating on competitors' networks. The Order then stretches Section 201's language concerning “charges” and “practices” to try to bolster the claim that it provides a sufficient nexus for ancillary jurisdiction over potential behavior by nonregulated service providers that conceptually would best be characterized as “discrimination.”<sup>85</sup> There are at least two obvious weaknesses in this rationale. First, the Order ignores the D.C. Circuit's instruction that the Commission has “expansive authority” only when it is “regulating common carrier services, including landline telephony.”<sup>86</sup> Yet broadband Internet access providers are not common carriers and the Order purposely avoids declaring them to be so. Second, the Order seems to pretend that the plain meaning of Section 201's text is synonymous with that of Section 202, which does address “discrimination” but is not directly invoked here.

The Order's reliance on Section 251(a)(1) is flawed for similar reasons. That provision imposes a duty on telecommunications carriers “to interconnect directly or indirectly with the facilities of other telecommunications carriers.”<sup>87</sup> The Order notes that an increasing number of customers use VoIP services and posits that if a broadband Internet service provider were to block certain calls via VoIP, it would ultimately harm users of the public switched telephone network. All policy aspirations aside, this jurisdictional argument fails as a legal matter. As the Order admits, VoIP services have never been classified as “telecommunications services,” *i.e.*, common carriage services, under Title II of the Act.<sup>88</sup> Therefore, as a corollary matter, broadband Internet service providers are not “telecommunications carriers” – or at least the Commission has never declared them to be so. The effect of the Order is to do indirectly what the Commission is reluctant to do explicitly.

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case.” (quoting *Detariffing the Installation and Maintenance of Inside Wiring*, CC Docket No. 79-105, Memorandum Opinion and Order, 1 FCC Red. 1,190, 1,192, ¶ 17 (1986)).

<sup>82</sup> Order, ¶ 125 (quoting *Comcast*, 600 F.3d at 645).

<sup>83</sup> 47 U.S.C. § 201(b).

<sup>84</sup> *Id.*

<sup>85</sup> The term “discrimination” in the context of communications networks is not a synonym for “anticompetitive behavior.” While the word “discriminate” has carried negative connotations, network engineers consider it “network management” – because in the real world the Internet is able to function only if engineers may discriminate among different types of traffic. For example, in order to ensure a consumer can view online video without distortion or interruption, certain bits need to be given priority over other bits, such as individual emails. This type of activity is not necessarily anticompetitive.

<sup>86</sup> *Comcast*, 600 F.3d at 645 (citing to Section 201).

<sup>87</sup> 47 U.S.C. 251(a)(1).

<sup>88</sup> See *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 27 FCC Red. 22,404 ¶¶ 14, 20–22 (2004).

**2. The language of Title III and VI provisions cannot be wrenched out of context to impose common carriage obligations on non-common carriage services.**

The Order makes a rather breathtaking attempt to find a basis for ancillary authority to impose nondiscrimination and other common carriage mandates in statutory schemes that since their inception have been distinguished from common carriage. This effort, too, will fail in court, for it flouts Supreme Court precedent on valid exercises of ancillary authority, as reviewed in detail in *Comcast*. If the “derivative nature of ancillary jurisdiction”<sup>89</sup> has any objectively discernible boundaries, it must bar the Commission from taking obligations explicitly set forth in one statutory scheme established in the Act – such as the nondiscrimination mandates of Title II – and grafting them into different statutory schemes set forth in other sections of Act, such as Title III and Title VI, that either directly or indirectly *eschew* such obligations. Here, the Act itself explicitly distinguishes between broadcasting and common carriage.<sup>90</sup> And the Supreme Court long ago drew the line between Title VI video services and Title II-style mandates by forbidding the Commission to “relegate[] cable systems ... to common-carrier status.”<sup>91</sup>

The Order’s effort to search high and low through provisions of the Communications Act to find hooks for ancillary jurisdiction may be at its most risible in the broadcasting context. The attempt here seems hardly serious, given that the legal discussion is limited to a one-paragraph discussion that cites to no specific section within Title III.<sup>92</sup> Rather, it stands its ground on the observation that TV and radio broadcasters now distribute content through their own websites – coupled with the hypothetical contention that some possible future “self-interested” act by broadband providers could potentially have a negative effect on the emerging business models that may provide important support for the broadcast of local news and other programming.<sup>93</sup>

This is far from the kind of tight ancillary nexus that the Supreme Court upheld in *Southwestern Cable* and *Midwest Video I*,<sup>94</sup> and it is even more attenuated than the jurisdictional

<sup>89</sup> See *Comcast*, 600 F.3d at 654.

<sup>90</sup> 47 U.S.C. § 153(11).

<sup>91</sup> See *Comcast*, 600 F.3d at 654 (citing *Midwest Video II*, 440 U.S. 689, 700–01) (Commission could not “relegate[] cable systems ... to common-carrier status”). Although the *Midwest Video II* case predated congressional enactment of cable regulation, none of the statutory amendments of the Communications Act since that time – the 1984 Cable Act, the Cable Consumer Protection and Competition Act of 1992, and the Telecommunications Act of 1996 – have imposed any form of Title II-style nondiscrimination mandates on the multichannel video services regulated pursuant to Title VI. To the contrary, the court has recognized that by its nature MVPD service involves a degree of editorial discretion that places it outside the Title II orbit. See, e.g., *Denver Area Educ. Telecomm. Consortium, Inc., v. FCC*, 518 U.S. 727 (1996) (*DAETC*) (upholding § 10(a) of the 1992 Cable Act, which permitted cable operators to restrict indecency on leased access channels).

<sup>92</sup> Order, ¶ 128.

<sup>93</sup> *Id.*

<sup>94</sup> *United States v. Southwestern Cable*, 392 U.S. 157 (1968) (upholding a limit on cable operators’ importation of out-of-market broadcast signals); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest Video I*) (plurality opinion upholding FCC rule requiring cable provision of local origination programming); *id.* at 676 (Burger, C.J., concurring) (“Candor requires acknowledgment, for me, at least, that the Commission’s position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts.”). With respect to the local origination programming mandate at issue in *Midwest*

stretch that the Court rejected in *Midwest Video II*.<sup>95</sup> One wonders how far this new theory for an ancillary reach could possibly extend. Many broadcasters for years have benefitted through the sales of tapes and DVDs of their programming marketed through paper catalogs. Does the rationale here mean that the Commission has power to regulate the management of that communications platform, too?

The equally generalized Title III arguments based on “spectrum licensing” apparently are intended to support jurisdiction over the many point-to-point wireless services that are not point-to-multipoint broadcasting. They, too, appear off-point.<sup>96</sup> For example, the Order’s recitation of a long array of Title III provisions (*e.g.*, maintenance of control over radio transmissions in the U.S., imposition of conditions on the use of spectrum) seems misplaced. If this overview is intended to serve as analysis, it contains a logical flaw: Most of the rules adopted today are not being applied – yet – to mobile broadband Internet access service.<sup>97</sup> Certainly the Commission need not depend on the full sweep of Title III authority to impose the “transparency” rule; it need only act in our pending “Truth-in-Billing” docket.<sup>98</sup> Similarly, with regard to the “no blocking” rule, the Order need only rest on the provisions of Title III discussed in the *700 MHz Second Report and Order*, where this rule was originally adopted.<sup>99</sup>

With respect to the asserted Title VI bases for ancillary jurisdiction, the Order actually does point to three specific provisions, but none provides a firm foundation for extending the Commission’s authority to encompass Internet network management. The Order first cites Section 628, which is designed to promote competition among the multichannel video programming distributors (MVPDs) regulated under Title VI, such as cable operators and satellite TV providers. The best-known elements of this provision authorize our program access rules, but the Commission recently has strayed – over my dissent – beyond the plain meaning of

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*Video I*, the Commission reportedly “stepped back from its position during the course of the ... litigation” by “suspend[ing] the ... rule and never reinstat[ing] it.” T. BARRON CARTER, JULIET L. DEE & HARVEY L. ZUCKMAN, *MASS COMMUNICATIONS LAW* 522–23 (West Group 2000).

<sup>95</sup> *Midwest Video II*, 440 U.S. at 694–95 (rejecting rules mandating cable provision of public access channels, which the FCC claimed were justified by “longstanding communications regulatory objectives” to “increas[e] outlets for local self-expression and augment[ ] the public’s choice of programs”).

<sup>96</sup> One therefore must wonder whether by this argument the Order seeks to pave the way for future regulation of mobile broadband Internet services. The Order has taken great pains to explain that today’s treatment of mobile broadband Internet access service providers is in consumers’ best interest. History suggests that the Order may merely be postponing the inevitable. In fact, the new rule (Section 8.7) need only be amended by omitting one word: “fixed.” The Commission will be poised to do just that when it reviews the new regulations in two years.

<sup>97</sup> Taking the Order at its apparent word that it is not (yet) applying all new mandates on wireless broadband Internet service providers, it must be that the Order invokes the Commission’s Title III licensing authority to impose the rules on fixed broadband Internet access service providers – that is, cable service providers, common carriers, or both. If so, this is curious on its face because these services are regulated under Titles VI and II, respectively, and as a legal matter the Commission does not “license” either cable service providers or common carriers.

<sup>98</sup> See *Truth-in-Billing and Billing Format*, CC Docket No. 98-170, Notice of Inquiry, 24 FCC Rcd. 11,380 (rel Aug. 28, 2009) (*Aug. 2009 Truth-in-Billing NOI*).

<sup>99</sup> See *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, WT Docket No. 06-150, Report & Order, 22 FCC Rcd 15289 (2007).

the statutory language to read away explicit constraints on our power in this area.<sup>100</sup> Apparently the Commission is about to make a bad habit of doing this.

Of course, Section 628 does not explicitly refer to the Internet, much less the management of its operation. The Congressional framers of the Cable Consumer Protection and Competition Act of 1992, of which Section 628 was a part, were concerned about, and specifically referenced, video services regulated under Title VI.<sup>101</sup> Yet the Order employs a general statutory reference to “unfair methods of competition or unfair or deceptive acts or practices” as a hook for a broad exercise of ancillary jurisdiction over an unregulated network of networks.<sup>102</sup> This time the theory rests largely on the contention that, absent network management regulation, network providers might improperly interfere with the delivery of “over the top” (OTT) video programming that may compete for viewer attention with the platform providers’ own MVPD services.<sup>103</sup> The Order cites to no actual instances of such behavior, however, nor does it grapple with the implications of the market forces that are driving MVPDs in the opposite direction – to add Internet connectivity to their multichannel video offerings.<sup>104</sup>

<sup>100</sup> See *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, First Report and Order, 25 FCC Rcd. 746 (2010) (*Terrestrial Loophole Order*); *id.* at 822 (McDowell, Comm’r dissenting) (“Section 628 refers to ‘satellite’-delivered programming 36 times throughout the length of the provision, including 14 references in the subsections most at issue here. The plain language of Section 628 bars the FCC from establishing rules governing disputes involving terrestrially delivered programming, whether we like that outcome or not.”). This FCC decision currently is under challenge before the D.C. Circuit. See *Cablevision Systems Corporation v. FCC*, No. 10-1062 (D.C. Cir. filed March 15, 2010).

<sup>101</sup> See 47 U.S.C. § 522(13) (defining “multichannel video programming distributor”). Some of the transmission systems used by such distributors, such as satellites, also are regulated under Title III.

<sup>102</sup> Order, ¶ 130 (citing 47 U.S.C. § 548(b)).

<sup>103</sup> The D.C. Circuit has upheld the Commission’s reliance on Section 628(b) to help drive the provision of competitive Title VI multichannel video programming services into apartment buildings and similar “multi-dwelling unit” developments, see *Nat’l Cable & Telecoms. Ass’n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009), but the policy thrust of that case unquestionably concerned Title VI video services. As the Order acknowledges, it is an open question as to whether OTT video providers might someday be made subject to Title VI, with all of the attendant legal rights and obligations that come with that classification. Order at n. 417. But it is misleading in suggesting that the regulatory classification of OTT video providers has been pending only since 2007. *Id.* On the contrary, it has been pending before the Commission since at least 2004 in the IP Enabled Services docket, WCB Docket 04-36, and the agency has consistently avoided answering the question ever since. While I do not prejudge the outcome of that issue, I question the selective invocation of sections of Title VI here as a basis for ancillary jurisdiction. Such overreaching seems to operate as a way of prolonging our avoidance of an increasingly important, albeit complex, matter.

<sup>104</sup> See, e.g., Letter from William M. Wiltshire, Counsel for DIRECTV, to Marlene H. Dortch, Secretary, FCC, at 1 (Oct. 1, 2010) (DIRECTV Oct. 1 *Ex Parte* Letter) (outlining the wealth of innovative devices currently available in the market, including AppleTV, Boxee, and Roku); Adam Satariano & Andy Fixmer, *ESPN to Web Simulcast, Make Pay TV Online Gatekeeper*, BLOOMBERG, Oct. 15, 2010, at <http://www.bloomberg.com/news/2010-10-15/espn-to-stream-channels-to-time-warner-cable-users-to-combat-web-rivals.html> (explaining ESPN’s plan to begin streaming its sports channels online to Time Warner Cable Inc. customers as part of the pay-TV industry’s strategy to fend off Internet competitors); Walter S. Mossberg, *Google TV: No Need To Tune In Just Yet*, WALL ST. J., Nov. 18, 2010, at D1 (comparing Google TV technology to its rivals Apple TV and Roku); Louis Trager, *Netflix Plans Rapid World Spread of Streaming Service*, COMM. DAILY, Nov. 19, 2010, at 7 (examining Netflix’s plans to offer a streaming-only service in competition with Hulu Plus, as well as its plans for expansion worldwide).

The second Title VI provision upon which the Order stakes a claim for ancillary jurisdiction is Section 616, which regulates the terms of program carriage agreements.<sup>105</sup> The specific text and statutory design of this provision make plain that it addresses independently produced content carried by contract as part of a transmission platform provider's Title VI MVPD service, and not a situation in which there is no privity of contract and the service is Internet access. The Order attempts to make much of Section 616's rather broad definition "video programming vendor" without grappling with the incongruities created when one tries to shove the provision's explicit directives about carriage contract terms into the Internet context.<sup>106</sup> In fact, the application of Section 616 here is only comprehensible if one conceives of it as a new flavor of common carriage, with all the key contract terms supplied by statute.<sup>107</sup> Such a reading, however, would be in considerable conflict with the rationale of *Midwest Video II*,<sup>108</sup> as the D.C. Circuit in *Comcast* already has noted.<sup>109</sup>

In short, the Order's efforts to find a solid grounding for exercising ancillary power here – and thereby imposing sweeping new common carriage-style obligations on an unregulated service – strain credulity. Policy concerns cannot overcome the limits of the agency's current statutory authority. The Commission should heed the closing admonition of *Comcast*:

[N]otwithstanding the "difficult regulatory problem of rapid technological change" posed by the communications industry, "the allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammelled freedom to regulate activities over which the statute fails to confer ... Commission authority." Because the Commission has failed to tie its assertion of ancillary authority over

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<sup>105</sup> 47 U.S.C. § 536.

<sup>106</sup> For example, Section 616(a)(1) bars cable operators from linking carriage to the acquisition of a financial interest in the independent programmers' channel – a restraint borrowed from antitrust principles that is readily understandable in the context of a traditional cable system with a limited amount of so-called "linear channel" space. The construct does not conform easily to the Internet setting, which is characterized by a considerably more flexible network architecture that allows end users to make the content choices – and which affords them access to literally millions of choices that do not resemble "video programming" as it is defined in Title VI, *see* 47 U.S.C. § 522(20), including but not limited to simple, text-heavy websites, video shorts and all manner of personalized exchanges of data.

<sup>107</sup> The federal government first involved itself in setting basic rates, terms, and conditions in the context of service agreements between railroads and their customers, but at least one historian (and former FCC commissioner) traced the "'ancient law' of common carriers" back to the development of stage coaches and canal boats. *See* GLEN O. ROBINSON, "THE FEDERAL COMMUNICATIONS ACT: AN ESSAY ON ORIGINS AND REGULATORY PURPOSE," IN A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, 26 (Max D. Paglin, ed. 1989) (noting that a 19th Century Supreme Court case identified the concept emerging as far back as the reign of William and Mary).

<sup>108</sup> In *Midwest Video II*, the Supreme Court invalidated FCC rules that would have required cable operators to provide public access channels. The Court reasoned that, in the absence of explicit statutory authority for such mandates, the public access rules amounted to an indirect effort to impose Title II common carriage obligations – and that, in turn, conflicted with the Title III basis for the agency's ancillary jurisdiction claim. *See* 440 U.S. at 699-02.

<sup>109</sup> *Comcast*, 600 F.3d at 654.

Comcast's Internet service to any "statutorily mandated responsibility," we ... vacate the Order.<sup>110</sup>

The same fate awaits this new rulemaking decision.

### C. The Order Will Face Serious Constitutional Challenges.

It is reasonable to assume that broadband Internet service providers will challenge the FCC ruling on constitutional grounds as well.<sup>111</sup> Contrary to the Order's thinly supported assertions, broadband ISPs are speakers for First Amendment purposes – and therefore challenges on that basis should not be so lightly dismissed. There are several reasons for being concerned about legal infirmities here.

First, the Order is too quick to rely on simplistic service labels of the past in brushing off First Amendment arguments. For example, while it ostensibly avoids classifying broadband providers as Title II common carriers, it still indirectly alludes to old case law concerning the speech rights of common carriers by dismissing broadband ISPs as mere "conduits for speech" undeserving of First Amendment consideration.<sup>112</sup> There is good reason today to call into question well-worn conventional wisdom dating from the era of government-sanctioned

<sup>110</sup> *Comcast*, 600 F.3d at 661 (internal citations omitted).

<sup>111</sup> The Order incorrectly asserts that the new network management rules raise no serious questions about a Fifth Amendment taking of an Internet transmission platform provider's property. At the outset, the Order too quickly dismisses the possibility that these rules may constitute a *per se* permanent occupation of broadband networks. Under *Loretto v. Teleprompter Manhattan CATV Corp.*, a taking occurs when the government authorizes a "permanent physical occupation" of property "even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the [owner's] use of the rest of his [property]." 458 U.S. 419, 430 (1982). Here, the new regulatory regime effectively authorizes third-party occupation of some portion of a broadband ISP's transmission facilities by constraining the facility owner's ability to decide how to best manage the traffic running over the broadband platform. The new strictures have parallels to the Commission's decision to grant competitive access providers the right to the exclusive use of a portion of local telephone company's central office facilities – an action which the D.C. Circuit held constituted a physical taking. *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

But even assuming *arguendo* that the regulations may not constitute a physical taking, they still trigger serious "regulatory takings" concerns. Today's situation differs from the one at issue in *Cablevision Systems Corp. v. FCC*, where the court held that Cablevision had failed "to show that the regulation had an economic impact that interfered with 'distinct investment backed expectations.'" 570 F.3d 83, 98–99 (2d Cir. 2009). Here, many obvious investment-backed expectations are at stake: Network operators have raised, borrowed, and spent billions of dollars to build, maintain, and modernize their broadband plant – based at least in part on the expectation that they would recoup their investment over future years under the deregulatory approach to broadband that the Commission first adopted for cable in 2002 and quickly extended to other types of facilities. Moreover, today's action could result in significant economic hardships for platform providers even if they have no debt load to pay off. For example, the Order announces the government's "expectation" that platform providers will build-out additional capacity for Internet access service before or in tandem with expanding capacity to accommodate specialized services. Order, ¶ 114. Although property owners may not be able to expect existing legal requirements regarding their property to remain *entirely* unchanged, today's vague "expectation" places a notable burden on platform providers – heavy enough, given their legitimate investment-backed expectations since 2002, to amount to a regulatory taking under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

<sup>112</sup> Order, ¶ 144 (citing CWA Reply at 13-14, which cites to *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) and *Time Warner Entertainment, L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996)).

monopolies about common carriers' freedom of speech, particularly in the context of a competitive marketplace.<sup>113</sup> Indeed, at least two sitting Justices have signaled a willingness to wrestle with the implications of the issue of common carriers' First Amendment protections.<sup>114</sup>

Similarly, the Order offhandedly rejects the analogies drawn to First Amendment precedent concerning cable operators and broadcasters, based only on the unremarkable observation that cable operators and broadcasters exercise a noteworthy degree of editorial control over the content they transmit via their legacy services.<sup>115</sup> In so doing, the Order disregards the fact that at least two federal district courts have concluded that broadband providers, whether they originated as telephone companies or cable companies, have speech rights.<sup>116</sup> Although the Order acknowledges the cases in today's Order, it makes no effort to distinguish or challenge them. Instead, the Order simply "disagree[s] with the reasoning of those decisions."<sup>117</sup>

<sup>113</sup> The Supreme Court has never directly addressed the First Amendment issues that would be associated with a government compulsion to serve as a common carrier in a marketplace that offers consumers alternatives to a monopoly provider. This is not surprising, for the courts have had no opportunity to pass on the issue; the FCC in the modern era has found that it served the public interest to waive common carrier status on numerous occasions. See, e.g., *In re Australia-Japan Cable (Guam) Limited*, 15 FCC Rcd. 24,057 (2000) (finding that the public interest would be served by allowing a submarine cable operator to offer services on a non-common carrier basis because AJC Guam was unable to exercise market power in light of ample alternative facilities); *In re Tycom Networks Inc., et al.*, 15 FCC Rcd. 24,078 (2000) (examining the public interest prong of the *NARUC I* test, and determining that TyCom US and TyCom Pacific lacked sufficient market power given the abundant alternative facilities present). In fact, in the more than 85 reported cases in which the FCC has addressed common carrier waivers in the past 30 years, it has only imposed common carriage on an unwilling carrier once – and in that instance the agency later reversed course and granted the requested non-common carrier status upon receiving the required information that the applicant previously omitted. *In re Applications of Martin Marietta Communications Systems, Inc.; For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service*, 60 Rad. Reg. 2d (P & F) 779 (1986).

<sup>114</sup> The Order is flatly wrong in asserting that "no court has ever suggested that regulation of common carriage arrangements triggers First Amendment scrutiny." Order, ¶ 144 (emphasis added). In *Midwest Video II*, the Court stated that the question of whether the imposition of common carriage would violate the First Amendment rights of cable operators was "not frivolous." 440 U.S. 689 (1979), 709 n.19. In *DAETC*, 518 U.S. 727 (1996), the plurality opinion appeared split on, among other things, the constitutional validity of mandated leased access channels. Justice Kennedy reasoned that mandating common carriage would be "functional[ly] equivalent[t]" to designating a public forum and that both government acts therefore should be subject to the same level of First Amendment scrutiny. *Id.* at 798 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part). Justice Thomas' analysis went even further in questioning the old [dicta] about common carriers' speech rights. See *id.* at 824–26 (Thomas, J., concurring in the judgment in part and dissenting in part) (stating that "Common carriers are private entities and may, consistent with the First Amendment, exercise editorial discretion in the absence of a specific statutory prohibition").

<sup>115</sup> Order, ¶ 140 (citing, e.g., *Turner Broadcast Systems, Inc v. FCC*, 512 U.S. 622, 636 (1994) (*Turner I*)).

<sup>116</sup> *Illinois Bell Telephone Co. v. Village of Itasca*, 503 F. Supp. 2d 928 (N.D. Ill. 2007) (analogizing broadband network providers to cable and DBS providers); *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000) (relying on Supreme Court precedent in *Ex parte Jackson*, 96 U.S. 727, 733 (1878) and *Lovell v. Griffin*, 303 U.S. 444, 452 (1938), the court concluded that the message, as well as the messenger, receives constitutional protection because the transmission function provided by broadband services could not be separated from the content of the speech being transmitted).

<sup>117</sup> Order, n. 458.

Second, I question the Order's breezy assertion that broadband ISPs perform no editorial function worthy of constitutional recognition. The Order rests the weight of its argument here on the fact that broadband ISPs voluntarily devote the vast majority of their capacity to uses by independent speakers with very little editorial invention by the platform provider beyond "network management practices designed to protect their Internet services against spam and malicious content."<sup>118</sup> But what are acts such as providing quality of service (QoS) management and content filters if not editorial functions?<sup>119</sup>

And the mere act of opening one's platform to a large multiplicity of independent voices does not divest the platform owner of its First Amendment rights.<sup>120</sup> The Order cites no legal precedent for determining how much "editorial discretion" must be exercised before a speaker can merit First Amendment protection. Newspapers provide other speakers access to their print "platforms" in the form of classified and display advertising, letters to the editor, and, more recently, reader comments posted in response to online news stories. Advertising historically has filled 60 percent or more of the space in daily newspapers,<sup>121</sup> and publishers rarely turn away ads in these difficult economic times<sup>122</sup> – though they still may exercise some minor degree of "editorial discretion" to screen out "malicious" content deemed inappropriate for family consumption. Under the Order's rationale, would newspaper publishers therefore be deemed to have relinquished rights to free speech protection?

Third, it is undisputed that broadband ISPs merit First Amendment protection when using their own platforms to provide multichannel video programming services and similar offerings. The Order acknowledges as much but simply asserts that the new regulations will leave broadband ISPs sufficient room to speak in this fashion<sup>123</sup> – unless, of course, hints elsewhere in the document concerning capacity usage come to pass.<sup>124</sup> So while the Order concedes, as it

<sup>118</sup> Order, ¶ 143.

<sup>119</sup> In addition, the Order's citation to a Copyright Act provision, U.S.C. § 230(c)(1), to support the proposition that broadband providers serve no editorial function, see Order, ¶ 142, ignores the fact that broadband ISPs engage in editorial discretion – as permitted under another provision of the Copyright Act, 17 U.S.C. § 230(c)(2) – to block malicious content and to restrict pornography. See *Batzel v. Smith*, 333 F.3d 1018, 1030 n.14 (9th Cir. 2003) (noting that § 230(c)(2) "encourages good Samaritans by protecting service providers and users from liability for claims arising out of the removal of potentially 'objectionable' material from their services.... This provision insulates service providers from claims premised on the taking down of a customer's posting such as breach of contract or unfair business practices.").

<sup>120</sup> Nor does the availability of alternative venues for speech undercut the platform owner's First Amendment rights to be able to effectively use its own regulated platform for the speech it wishes to disseminate. See, e.g., *Nat'l Cable Television Ass'n v. FCC*, 33 F.3d 66 (D.C. Cir. 1994).

<sup>121</sup> See, e.g., McInnis & Associates, "The Basics of Selling Newspaper Advertising," Newspaper Print and Online ad Sales Training, at [http://www.ads-on-line.com/samples/Your\\_Publication/chapterone2.html](http://www.ads-on-line.com/samples/Your_Publication/chapterone2.html) (visited 12/7/10). This ratio has remained relatively constant for decades. See Robert L. Jones & Roy E. Carter Jr., "Some Procedures for Estimating 'News Hole' in Content Analysis," *The Public Opinion Quarterly*, Vol. 23, No. 3 (Autumn, 1959), pp. 399-403, pin cite to p. 400 (noting measurements of non-advertising newsholes as low as 30 percent, with an average around 40 percent) (available at <http://www.jstor.org/stable/2746391?seq=2>) (visited 12/7/10).

<sup>122</sup> Alan Mutter, "Robust ad recovery bypassed newspapers," *Reflections of a Newsosaur* (Dec. 3, 2010) (available at <http://newsosaur.blogspot.com/>) (visited 12/7/10).

<sup>123</sup> Order, ¶¶ 145-46.

<sup>124</sup> Order, ¶¶ 112-14.

must, that network management regulation could well be subject to heightened First Amendment review, it disregards the most significant hurdle posed by even the intermediate scrutiny standard.<sup>125</sup> The Order devotes all of its sparse discussion to the first prong of the intermediate scrutiny test, the “substantial” government interest,<sup>126</sup> while wholly failing to address the second and typically most difficult prong for the government to satisfy: demonstrating that the regulatory means chosen does not “burden substantially more speech than is necessary.”<sup>127</sup> And what is the burden here? One need look no further than the Order’s discussion of specialized services to find it. It announces an “expectation” that network providers will limit their use of their own capacity for speech in order to make room for others – an expectation that may rise to the level of effectively requiring the platform provider to pay extra, in the form of capacity build-outs, before exercising its own right to speak.<sup>128</sup> Such a vague expectation creates a chilling effect of the type that courts are well placed to recognize.<sup>129</sup>

Yet the Order makes *no* effort, as First Amendment precedent requires, to weigh this burden against the putative benefit.<sup>130</sup> Instead, Broadband ISP speakers are left in the dark to grope their way through this regulatory fog. Before speaking via their own broadband platforms, they must either: (1) guess and hope that they have left enough capacity for third party speech, or (2) go hat in hand to the government for pre-clearance of their speech plans.

Finally, it should be noted one of the underlying policy rationales for imposing Internet network management regulations effectively turns the First Amendment on its head. The

<sup>125</sup> Although the Order addresses only intermediate scrutiny, the potential for application of strict scrutiny should not be disregarded completely. Although the Court in *Turner I* declined to apply strict scrutiny to the statutorily mandated must-carry rules, the network management mandates established by today’s Order may be distinguishable. For example, while rules governing the act of routing data packets might arguably be content neutral regulations, application of the rules in the real world may effectively dictate antecedent speaker-based and content-based choices about which data packets to carry and how best to present the speech that they embody.

<sup>125</sup> *American Library Ass’n v. Reno*, 33 F.3d 78 (D.C. Cir. 1994).

<sup>126</sup> Under First Amendment jurisprudence, it typically is not difficult for the government to convince a court that the agency’s interest is important or substantial. *See, e.g., Carey v. Brown*, 447 U.S. 455, 464–65 (1980) (“even the most legitimate goal may not be advanced in a constitutionally impermissible manner”); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (finding that the state interest was compelling, but the Son of Sam law was not narrowly tailored to advance that objective). But I question whether the Order will survive even this prong of the test because the Commission lacks evidence of a real problem here to be solved. Two examples plus some economic theorizing may be insufficient to demonstrate that the asserted harms to be addressed are, in fact, real and systemic. *See Century Communications Corp. v. FCC*, 835 F.2d 292, 300 (D.C. Cir. 1987) (suggesting that to establish a real harm the Commission has the burden of producing empirical evidence such as studies or surveys). The Commission’s most recent Section 706 Report, which – over the dissent of Commissioner Baker and me – reversed course on 11 years’ worth of consistent findings that advanced services are being deployed on a timely basis, is no foundation on which this part of the argument can securely rest. *See supra* Section A.

<sup>127</sup> *Turner I*, 512 U.S. at 662.

<sup>128</sup> *See Order*, ¶ 114 (“We fully expect that broadband providers will increase capacity offered for broadband Internet access service if they expand network capacity to accommodate specialized services. We would be concerned if capacity for broadband Internet access service did not keep pace.”).

<sup>129</sup> *See Fox v. FCC*, 613 F.3d 317 (2d Cir. 2010) (holding that the FCC’s indecency policy “violates the First Amendment because it is unconstitutionally vague, creating a chilling effect”).

<sup>130</sup> *See, e.g., Order*, ¶¶ 146-48.

Founders crafted the Bill of Rights, and the First Amendment in particular, to act as a bulwark against state attempts to trample on the rights of individuals. (Given that they had just won a war against government tyranny, they were wary of recreating the very ills that had sparked the Revolution – and which so many new Americans had sacrificed much to overcome.) More than 200 years later, our daily challenges may be different but the constitutional principles remain the same. The First Amendment begins with the phrase “Congress shall make no law” for a reason. Its restraint on government power ensures that we continue to enjoy all of the vigorous discourse, conversation and debate that we, along with the rest of the world, now think of as quintessentially American.

**Conclusion**

For the foregoing reasons, I respectfully dissent.

**ATTACHMENT A**

Letter of FCC Commissioner Robert M. McDowell to the Hon. Henry A. Waxman, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (May 5, 2010)



Office of Commissioner Robert M. McDowell  
 Federal Communications Commission  
 Washington, D.C. 20554

May 5, 2010

The Honorable Henry A. Waxman  
 Chairman  
 Committee on Energy and Commerce  
 United States House of Representatives  
 Washington, DC 20515

Dear Chairman Waxman:

Thank you for the opportunity to testify before you and your colleagues on the Subcommittee on Communications, Technology and the Internet on March 25 regarding the National Broadband Plan.<sup>1</sup> As I testified at the hearing, the Commission has never classified broadband Internet access services as "telecommunications services" under Title II of the Communications Act. In support of that assertion, I respectfully submit to you the instant summary of the history of the regulatory classification of broadband Internet access services.

In the wake of the privatization of the Internet in 1994, Congress overwhelmingly passed the landmark Telecommunications Act of 1996 (1996 Act) and President Clinton signed it into law. Prior to this time, the Commission had never regulated "information services" or "Internet access services" as common carriage under Title II. Instead, such services were classified as "enhanced services" under Title I. To the extent that regulated common carriers offered their own enhanced services, using their own transmission facilities, the FCC required the underlying, local transmission component to be offered on a common carrier basis.<sup>2</sup> No provider of retail information services was ever required to tariff such service. With the 1996 Act, Congress had the opportunity to reverse the Commission and regulate information services, including Internet access services, as traditional common carriers, but chose not to do so. Instead, Congress codified the Commission's existing classification of "enhanced services" as "information services" under Title I.

<sup>1</sup> *Oversight of the Federal Communications Commission: The National Broadband Plan: Hearing Before the Subcomm. on Communications, Technology, and the Internet of the House Comm. on Energy and Commerce*, 111<sup>th</sup> Cong., 2d Sess. (March 25, 2010).

<sup>2</sup> Some who are advocating that broadband Internet access service should be regulated under Title II cite to the Commission's 1998 *GTEADSL Order* to support their assertion. See *GTE Telephone Operating Cos.*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Red. 22,466 (1998) (*GTEADSL Order*). The *GTEADSL Order*, however, is not on point, because in that order the Commission determined that GTE-ADSL service was an interstate service for the purpose of resolving a tariff question.

Two years after the 1996 Act was signed into law, Congress directed the Commission to report on its interpretation of various parts of the statute, including the definition of "information service."<sup>3</sup> In response, on April 10, 1998, under the Clinton-era leadership of Chairman William Kennard, the Commission issued a *Report to Congress* finding that "Internet access services are appropriately classed as information, rather than telecommunications, services."<sup>4</sup> The Commission reasoned as follows:

The provision of Internet access service ... offers end users *information-service capabilities inextricably intertwined with data transport*. As such, we conclude that it is appropriately classed as an "information service"<sup>5</sup>

In reaching this conclusion, the Commission reasoned that treating Internet access services as telecommunications services would lead to "negative policy consequences."<sup>6</sup>

To be clear, the FCC consistently held that any provider of information services could do so pursuant to Title I.<sup>7</sup> No distinction was made in the way that retail providers of Internet access service offered that information service to the public. The only distinction of note was under the Commission's *Computer Inquiry* rules, which required common carriers that were also providing information services to offer the transmission component of the information service as a separate, tariffed telecommunications service. But again, this requirement had no effect on the classification of retail Internet access service as an information service.

In the meantime, during the waning days of the Clinton Administration in 2000, the Commission initiated a Notice of Inquiry (NOI) to examine formalizing the regulatory classification of cable modem services as information services.<sup>8</sup> As a result of the *Cable Modem NOI*, on March 14, 2002, the Commission issued a declaratory ruling

<sup>3</sup> Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2521-2522, § 623.

<sup>4</sup> *Federal-State Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Red. 11501, K 73 (1998) (*Report to Congress*).

<sup>5</sup> *Id.* at 180 (emphasis added).

<sup>6</sup> *Id.* at Tj 82 ("Our findings in this regard are reinforced by the negative policy consequences of a conclusion that Internet access services should be classed as 'telecommunications.'").

<sup>7</sup> As Seth P. Waxman, former Solicitor General under President Clinton, wrote in an April 28, 2010 letter to the Commission, "[t]he Commission has *never* classified any form of broadband Internet access as a Title II 'telecommunications service' in whole or in part, and it has classified all forms of that retail service as integrated 'information services' subject only to a light-touch regulatory approach under Title I. These statutory determinations are one reason why the Clinton Administration rejected proposals to impose 'open access' obligations on cable companies when they began providing broadband Internet access in the late 1990s, even though they then held a commanding share of the market. The Internet has thrived under this approach." (Emphasis in the original.)

<sup>8</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Notice of Inquiry, 15 FCC Red 19287 (2000) (*Cable Modem NOI*).

classifying cable modem service as an information service.<sup>9</sup> In the Commission's *Cable Modem Declaratory Ruling*, it pointed out that "[t]o date ... the Commission has declined to determine a regulatory classification for, or to regulate, cable modem service on an industry-wide basis."<sup>10</sup> Only one month earlier, on February 14, 2002, in its Notice of Proposed Rulemaking<sup>11</sup> regarding the classification of broadband Internet access services provided over wireline facilities, the Commission underscored its view that information services integrated with telecommunications services cannot simultaneously be deemed to contain a telecommunications service, even though the combined offering has telecommunications components.

On June 27, 2005, the Supreme Court upheld the Commission's determination that cable modem services should be classified as information services.<sup>12</sup> The Court, in upholding the Commission's *Cable Modem Order*, explained the Commission's historical regulatory treatment of "enhanced" or "information" services:

By contrast to basic service, the Commission decided not to subject providers of enhanced service, *even enhanced service offered via transmission wires*, to Title II common-carrier regulation. The Commission explained that it was unwise to subject enhanced service to common-carrier regulation given the "fast-moving, competitive market" in which they were offered.<sup>13</sup>

Subsequent to the Supreme Court upholding the Commission's classification of cable modem service as an information service in its *Brand X* decision, the Commission *without dissent* issued a series of orders classifying all broadband services as information services: wireline (2005)<sup>14</sup>, powerline (2006)<sup>15</sup> and wireless (2007).<sup>16</sup> Consistent with

<sup>9</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable and 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 Red 4798 (2002) (*Cable Modem Declaratory Ruling*), *aff'd*, *Nat'l. Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (*Brand X*).

<sup>10</sup> *Id.* at H 2.

<sup>11</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, Notice of Proposed Rulemaking, 17 FCC Red 3019 (2002) (*Wireline Broadband NPRM*).

<sup>12</sup> *Brand X*, 545 U.S. 967.

<sup>13</sup> *Id.* at 977 (emphasis added, internal citations to the Commission's *Computer Inquiry II* decision omitted).

<sup>14</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era*, CC Docket Nos. 02-33, 95-20, 98-10, 01-337, WC Docket Nos. 04-242,

the Court's characterization, the Commission made these classifications to catch up to market developments, to treat similar services alike and to provide certainty to those entities provisioning broadband services, or contemplating doing so. Prior to these rulings, however, such services were never classified as telecommunications services under Title II.

Again, I thank you for providing the opportunity to testify before your Committee and to provide this analysis regarding the regulatory classification of broadband Internet access services. I look forward to working with you and your colleagues as we continue to find ways to encourage broadband deployment and adoption throughout our nation.

Sincerely,



Robert M. McDowell

cc: The Honorable Joe Barton  
The Honorable Rick Boucher  
The Honorable Cliff Steams

05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Red 14853 (2005) (*Wireline Broadband Order*), *aff'd*, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

<sup>11</sup> *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Red 13281 (2006).

<sup>16</sup> *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Red 5901 (2007).

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

**February 16, 2011**

The markets under the purview of the FCC are dynamic and ever-evolving. Both the “core” and the “edge” of the Internet are growing at breakneck speeds – all to the benefit of American consumers. For instance, the U.S. leads the world in 4G wireless deployment and adoption. In addition, while only 2.6 million consumers in North America were mobile-only Internet users in 2010, that number promises to be 55 million by 2015. Moreover, by 2016, over 50 percent of U.S. households will use wireless broadband as their only form of high-speed Internet access. No wonder that we also are the global leader in the creation and use of mobile apps.

In fact, the top 300 free mobile applications in U.S. app stores enjoyed an average of more than 300 million downloads per day last December. Global mobile app downloads will more than double this year, reaching an estimated 17.7 billion downloads by year’s end. Last year, Amazon’s digital book sales exceeded its sales of hardcover books. Last month, e-book sales eclipsed paperbacks. And, smartphone sales have outpaced PCs for the first time. Manufacturers shipped 101.9 million smartphones in the fourth quarter of 2010, compared with 92.1 million PC shipments.

On the other hand, in spite of these positive developments, last year, the private sector invested around \$44 billion in new broadband technologies, which is significantly lower than in years past. I am hopeful that the FCC can work constructively to increase opportunities for investment and job growth by bringing regulatory certainty to the broadband marketplace. With Congress’s guidance, I look forward to adopting policies that put the power of more spectrum into the hands of consumers, help accelerate broadband deployment and adoption, make our Universal Service subsidy program more efficient, and modernize our media ownership rules, among many other endeavors.

In addition, the FCC should also strive to remove regulatory underbrush that may have outlived its usefulness and now only deters investment and innovation. Congress empowered the Commission to do just that when it codified Section 10’s forbearance mandate more than 15 years ago. Streamlining our regulations could take significant burdens off the backs of entrepreneurs and give them more freedom to invest and innovate. Such action could act as a much-needed shot in the arm for America’s economy. President Obama said as much in his recent Executive Order.

A little secret about the FCC: More than 90 percent of our votes are not only bipartisan, but unanimous. I have enjoyed working with my colleagues on many recent initiatives including continuation of our long-standing work on unlicensed use of the TV white spaces, simplifying the process for the construction of cell towers, spectrum reallocation, and initiating the next step in comprehensive universal service reform.

Obviously, we have had a few respectful disagreements as well, such as our differences concerning the new regulations of Internet network management. Nonetheless, I am confident that the five of us have the ability and desire to continue to find common ground on an array of other issues that touch the lives of every American every day.

Mr. WALDEN. We appreciate your testimony.

Now I'd like to go to the distinguished member of the Commission, Ms. Clyburn. Thank you for being with us today. We look forward to your comments.

#### **STATEMENT OF MIGNON CLYBURN**

Ms. CLYBURN. Thank you very much. Mr. Chairman, Congresswoman Eshoo, members of the subcommittee, good morning, and thank you for inviting me to testify.

The current success of the Internet is largely due to this open architecture. This tremendous technological leap is a great equalizer. It allows traditionally underrepresented groups to have an equal voice and equal opportunity. It enables any connected individual to distribute his or her ideas to a global network or run a business right from their very own home. The Internet reduces the barriers to entry for new players. It is a gateway to success at a low capital cost. That is why it is so important for me to see that this technological marvel remains open, accessible and affordable for every American regardless of where they live, work or play.

There have been strong criticisms over the past several months regarding the Commission's Open Internet Order. Some say that nothing was broken so rules aren't needed and that this will kill job opportunities and stifle innovation and investment. We have also heard that the order is riddled with loopholes, provides inadequate protections for wireless technologies and prioritizes profits over the general public good.

First, I want to speak to the assertion that the Internet marketplace is functioning fine and does not need fixing. There have been formal complaints filed and allegations lodged at the Commission about Internet service providers' behavior despite their expressed belief in an open Internet. To that point, the rules we codified in December will serve to ensure that the Internet remains open and vibrant and that millions of surfers, innovators and everyday consumers will have the essential protections they need so that an open Internet is still there tomorrow. The action we took in December will allow people to view photos, sitcoms and full-length movies without deliberate interruption, distortion or blockage by any ISP which may have competing economic interests.

I believe one of my primary obligations as an FCC commissioner is to protect consumers and allow for activities on the Internet. Our Open Internet Order does just that. I embrace the position that without clear rules, investment in new services and applications will be uncertain, overly cautious and will result in an underperforming marketplace. We have heard this repeatedly from innovators and small businesses. A number of companies told me of their difficulty, sometimes inability to obtain financing because the rules of the road were unclear or that open Internet protections were inadequate. Venture capitalists fear that ISPs would discriminate against their possible competitors, they said. Small businesses like these are the lifeblood of this Nation and the uncertainty and lack of investment in this sector will stifle the full potential of these American enterprises.

Others argue that existing law provides sufficient consumer protections and safeguards. I disagree. My understanding of current

antitrust law is that violations and harms are addressed only after an incident has occurred, thus ISPs have the ability and potentially the incentive to stifle new competitive businesses. No government action after the fact could properly address such significant impact. Therefore, I believe that putting basic protections in place was not a reckless act. The Commission did this in order to prevent very real and irreversible harms that could occur in the marketplace. Hugely effective business models that were not even in existence 10 years ago have experienced staggering growth due to their ability to directly offer their services to consumers on the Internet without ISPs demanding payment for prioritizing their Web sites. I want to ensure that many more businesses have those same opportunities in 2021.

Most people rely on the Internet on a regular basis as indicated in a recent Pew Research Center study, which shows that 78 percent of American adults sign on daily. The President has said that the Internet is a vital infrastructure and has become center to the daily economic life of almost every American, and you recognize its significance too by charging the FCC with developing a National Broadband Plan to ensure that high-speed Internet is available to all Americans no matter where they live. So I do not think we acted recklessly nor do I believe that we have harmed the Internet. What we did was put a policy in place that will ensure access to lawful Web sites, applications and services so that consumers, not their Internet service providers, can choose which companies, products services and ideas will succeed.

Thank you for this opportunity this morning and I look forward to answering any of your questions.

[The prepared statement of Ms. Clyburn follows:]

**Testimony of FCC Commissioner Mignon L. Clyburn**

**Subcommittee on Communications and Technology  
Committee on Energy and Commerce  
February 16, 2011**

**SUMMARY**

- The Internet is a crucial American marketplace that 78% of U.S. adults rely upon every day.
- The current success of the Internet is largely due to its open architecture, and it should remain open, accessible, and affordable for every American.
- With an open Internet, businesses both large and small, can offer their products and services to consumers no matter their location.
- Hugely effective new business models have experienced staggering growth, due in no small part, to their ability to directly offer their services to consumers online, without Internet Service Providers (“ISPs”) demanding payment from them for prioritizing their websites.
- Without clear rules protecting end users’ ability to access products and services on the web, investment in new services and applications will be uncertain and overly cautious, resulting in an underperforming marketplace.
- Open Internet rules protect consumers and small businesses’ ability to access lawful websites, applications, and services, so that they, not their ISPs, can choose which companies, products, services and ideas will succeed.

**Testimony of FCC Commissioner Mignon L. Clyburn**

**Subcommittee on Communications and Technology  
Committee on Energy and Commerce  
February 16, 2011**

Mr. Chairman, Congresswoman Eshoo, Members of the Subcommittee, good morning and thank you for inviting me to testify before you today regarding the Commission's Open Internet Order.

The Internet is a crucial American marketplace. With each passing day, it becomes more essential in our everyday lives. Whether it's finding a job, receiving comprehensive health care, applying for essential benefits, accessing educational materials, news and information, or participating in our democratic society—Americans are increasingly relying on this world wide network.

The current success of the Internet is largely due to its open architecture. It is a tremendous "technological leap," and I say without hesitation, that an open Internet is a great equalizer. It allows traditionally underrepresented groups to have an equal voice and equal opportunity. It enables any connected individual to distribute his or her ideas to a global network, or run a business right from their very own home. The Internet reduces the barriers to entry for new players. It is a gateway to success at a low capital cost.

That is why it is so important for me to see that this technological marvel remains open, accessible, and affordable for every American, regardless of where they live, work or play.

There have been strong criticisms over the past several months regarding the Commission's decision to convert the Four Internet Policy Principles—which in fact, were

agreed to by a bipartisan, unanimous vote at the Commission in 2005 and have been governing the marketplace for the past six years—to actual rules that were expanded to include transparency and unreasonable discrimination provisions. Included were criticisms that: “Nothing was broken, so rules aren’t needed.” “This will kill job opportunities and stifle innovation and investment in the Internet and broadband networks.” On the other hand, we also have heard, “The Order is riddled with loopholes, provides inadequate protections for wireless technologies, and prioritizes profits over the general public good.” Even people who can’t define Net Neutrality, or are unsure of what we mean when we talk about the open Internet, have strong opinions about the Commission’s Order. And while I am fairly certain that I won’t change many minds here today, as a Commissioner who voted to approve the decision, I would like to address some of those concerns; and when the time comes, I look forward to an exchange during the question and answer period, or at any point following this hearing.

First, I would like to address the criticism that the Commission’s process to consider and adopt the Open Internet rules was not sufficient. We received the Open Internet Order for Commission consideration on November 30, 2010, and voted it on December 21<sup>st</sup>. This three-week timeframe is in accordance with every other Commission Agenda Meeting framework in which I have participated over the past 18 months, and is consistent with the FCC’s typical monthly meeting processes.

I stress, however, that this three-week time period only represents a small fraction of the actual amount of time that went into deliberating, crafting, and vetting the issues in this proceeding. In fact, dozens of FCC personnel from the Wireline Competition Bureau, the Office of Strategic Planning & Policy Analysis, the Office of Engineering & Technology, the Wireless Telecommunications Bureau, the Office of General Counsel, to the Commissioners’ individual

offices, conducted hundreds, if not thousands of hours of meetings with outside parties, and took every perspective into account before the Open Internet Order was circulated for a vote. My staff and I put in innumerable hours meeting with diverse interests, considering the record, and reviewing the draft Order, and I can say, with all sincerity, that I did not rush to judgment. We were at this for more than a year, 14 months to be exact, and the process ran an orderly course. These efforts can all be traced through the public disclosure of our proceedings on the Commission's website.

Apart from process, there have been a number of strong criticisms about the Commission's decision that I wish to address in more detail.

First, I want to speak to the assertion that the Internet marketplace is functioning fine and does not need fixing. The fact is that there have been several formal complaints filed and informal complaints and allegations lodged at the Commission about Internet Service Provider ("ISP") behavior. This is so despite the fact that in general, ISPs claim that they believe in an open Internet and the Commission's 2005 Policy Statement. The Internet has thrived because of its openness, and I believe that the Commission has a duty to ensure that consumers continue to have unimpeded access to it. To that point, the rules we codified in December, will serve to ensure that the Internet *remains* open and vibrant, and that millions of surfers, innovators, and every day consumers, will have the essential protections they need, so that an open Internet is still there tomorrow.

I am certain that at least half of the people in this room use the web to view photos, sitcoms, and full-length movies on their personal computers. The action that we took in December, will allow them to continue doing so, without deliberate interruption, distortion, or

blockage by any ISP provider which has competing economic interests. I believe one of my primary obligations as an FCC Commissioner is to protect consumers and their lawful activities on the Internet, such as using VoIP services that compete with an ISP or watching video from an ISP competitor. Our Open Internet Order does just that.

Regarding the impact that our ruling will have on investment, I embrace the position that *without* clear rules, investment in new services and applications will in fact be uncertain and overly cautious, resulting in an underperforming marketplace. We have heard this concern repeatedly from innovators and small businesses in the proceeding. In the final days of our deliberation, I heard from numerous companies about their difficulty, and sometimes inability, to obtain financing to offer their services on the web, due to unclear rules of the road, or the lack of open Internet protections. They explained that venture capitalists feared that ISPs would discriminate against their possible competitors. Small businesses like these are the life blood of this nation. As you know, they are directly responsible for employing the majority of our citizens. The uncertainty and lack of investment in this sector will stifle the full potential of these enterprises, including their abilities as employers.

Since we adopted the Open Internet Order, some of the leading executives at telecommunications and technology companies, such as DISH, Time Warner Cable, and AT&T, have publicly stated that our ruling will have *no adverse effect* in the communications marketplace. Analysts have also kept their fingers off of the alarm buttons, saying our rules are in fact a light touch that will ultimately provide for a common-sense framework.

Another criticism offered revolves around the notion that existing law provides sufficient consumer protections and safeguards. I disagree. My understanding of current antitrust law is

that it addresses issues only *after* violations and harms have occurred. ISPs thus have the ability and potentially the incentive, to stifle new, competitive businesses on the Internet, and no government action *after the fact* could properly address such significant impact. Thus, I believe, that putting basic protections in place, was not a reckless act. The Commission did this in order to prevent very real and irreversible harms that could occur in the marketplace.

Allow me to further highlight a few facts that were at the front of my mind while dissecting and deliberating this matter. E-commerce shopping broke a single-day record in 2010, when on “Cyber-Monday,” the Monday following Thanksgiving, companies saw online retail spending surpass the \$1 billion dollar mark. What is even more fascinating than that statistic, is the realization that the Internet allowed small online retailers to compete with their much larger, big box counterparts on that day; thus, eliminating the physical stigma of being located miles from a popular shopping mall or heavily trafficked area of town. On the web, these sellers can offer their products and services to consumers no matter their location, and that is one vital aspect of an open Internet that I think is worth protecting.

Hugely effective new business models have experienced staggering growth, due in no small part, to their ability to directly offer their services to consumers on the Internet without ISPs demanding payment from them for prioritizing their websites. The ability to see the profile picture of someone you just met or to offer your own content—photos, backyard movie clips, sound recordings, etc—is what many are doing, and I believe that our ruling safeguards their ability to do so, without delays in sending or receiving that could result from ISPs picking winners or losers on the Internet, through their gatekeeper role to end users.

Thousands of sites with some incredibly unique features and characteristics were not even in existence 10 years ago, and I want to ensure that many more that offer spectacular, as-yet-unheard of functionalities, are here in 2021. More people rely on the Internet on a regular basis, as indicated in a recent Pew Research Center study, which shows that 78% of American adults sign on daily. The President has said that the Internet is “vital infrastructure” and “has become central to the daily economic life of almost every American.” And the U. S. Congress recognized its significance too, as it charged the FCC with developing a National Broadband Plan to ensure that high-speed Internet is available to *all* Americans—no matter where they live. This is a goal we continue to work towards, as evidenced by our recent unanimous decision to reform the Universal Service Fund and intercarrier compensation regime to bring high-speed Internet capacity to every American home.

So I do not think we acted recklessly, nor do I believe that we have harmed the Internet. What we did was put a policy in place that will ensure and enable users to access lawful websites, applications, and services, so that they, not their Internet Service Providers, can choose which companies, products, services and ideas will succeed.

Mr. WALDEN. And we appreciate your testimony and look forward to your answers.

Now I would like to recognize Commissioner Baker. We are delighted to have you here as well. We look forward to your testimony and your answers. Please go ahead.

**STATEMENT OF MEREDITH ATTWELL BAKER**

Ms. BAKER. Thank you very much. Good morning, Chairman Walden, Ranking Member Eshoo, Chairman Upton and Ranking Member Waxman. I could on. Thank you all, distinguished members of the subcommittee for the opportunity to appear before you.

Today, 95 percent of U.S. households have access to broadband, and the vast majority of those have broadband choice. Our regulatory approach has attracted over half a trillion dollars to build a new network infrastructure since 2000. Billions more have been invested in devices and applications that ride on those networks. This is an area of our economy that is clearly working. The Commission's most significant challenge is how to build on this success. Given our Nation's significant budgetary constraints, it is clear that the next generation of networks will be constructed primarily by private capital just as today's networks were built. It is through this prism, how do we craft policies to promote greater investment in our Nation's infrastructure, that I view all FCC decisions.

With that perspective, I believe that net neutrality was both the wrong policy and the wrong priority. Further, establishing a nationwide policy is Congress's role, not the FCC's. We exceeded our statutory authority. Preserving open Internet is non-negotiable. It is a bedrock principle shared by all in the Internet economy. The Internet is open today without the need for affirmative government regulation.

Lacking an evidentiary record of industry-wide abuses, the Commission's net neutrality decision was based on speculative harms. The word "could" alone appears over 60 times. By acting in anticipation of hypothetical harms, the result is overly broad rules which I fear will force the government into too prominent a role in shaping tomorrow's Internet.

The genius of the Internet is that there is no central command to dictate how innovation is to occur. The Commission has now inserted itself into that role of judging how the Internet will resolve. Government will be hard pressed to manage the next generation of the Internet as well as competition and consumer demand have done for previous generations. This risk is heightened because the Internet and our broadband networks are still very much in their infancy. The Internet will increase fourfold by 2014, and mobile broadband will more than double each and every year.

To respond to the consumer demands for faster and more-robust broadband services, operators will have to invest billions more in their infrastructure. They will need to experiment and innovate to serve consumers. Decisions about the future of the Internet will now be managed by the Commission subject to the uncertainty of government sanction and delay of government decision-making. The open-ended nature of this decision both in how it was legally justified and in the number of issues left undefined or undecided will only breed greater regulatory uncertainty which necessarily

raises the cost of capital. In too many decisions, this decision was a first step, not a last.

Congress has given the Commission clear statutorily mandated responsibilities, and net neutrality is not one of those. Lacking explicit authority, the Commission twisted the statute in order to establish a national Internet policy. Under the same unbounded claim of legal authority, the FCC could adopt any policies it desires to promote its particular vision of the Internet. Net neutrality was also the wrong priority for the Commission. The focus on net neutrality diverted resources away from the bipartisan reform efforts that could have directly addressed the core challenge of promoting broadband deployment. This lost opportunity is one of the gravest consequences of the net neutrality debate.

While we may disagree on particular details, I welcome the chairman's renewed focus on universal service, spectrum and broadband infrastructure. All of these reforms are directly linked to broadband deployment, and I only regret that we did not place a higher priority on these efforts sooner. Our ability to successfully take any of these steps is dependent upon our strong working relationship with Congress to ensure that we prioritize and target our efforts appropriately and that we have sufficient statutory authority to move forward to promote our shared goals.

I look forward to your questions. Thank you.

[The prepared statement of Ms. Baker follows:]

**Written Statement of Commissioner Meredith Attwell Baker  
Federal Communications Commission**

**Before the Committee on Energy and Commerce  
Subcommittee on Communications, Technology, and the Internet.  
United States House of Representatives**

**“Network Neutrality and Internet Regulation:  
Warranted or More Economic Harm than Good”**

**February 16, 2011**

Good Morning Chairman Walden, Ranking Member Eshoo, and distinguished members of the Subcommittee. Thank you for the opportunity to appear before you.

Today, 95 percent of U.S. households have access to high-speed broadband services, and the vast majority of those households have a choice between competing broadband providers. Our regulatory approach has attracted over half a trillion dollars to build new network infrastructure since 2000. Billions more have been invested in devices and applications that ride on those networks. This is an area of our economy that is clearly working, and our surveys reveal that 93 percent of subscribers are happy with their broadband service. On this strong foundation lies the promise of future innovation, our nation’s global competitiveness, and high-paying jobs across the Internet sector.

The Commission’s most significant challenge is how to build on this success: How do we craft the regulatory environment that will incent broadband deployment to extend networks deeper into communities; to upgrade networks for next-generation services; and to foster broadband competition. Given our nation’s significant budgetary constraints, it is clear that the next generation of networks will be constructed primarily by private capital, just as today’s networks were built.

It is through this prism—how do we craft policies to promote greater private investment in our nation’s telecommunications infrastructure—that I view all of our decisions at the FCC, including Net Neutrality. With that perspective, I believe that Net Neutrality was both the wrong policy and the wrong priority. This action also exceeded our statutory authority—establishing a national policy is Congress’s role, not the FCC’s role.

Preserving the open Internet is non-negotiable: it is a bedrock principle shared by all in the Internet economy. There were no systemic problems around Net Neutrality for the Commission to solve in December. The Internet is open without the need for affirmative government regulation. Lacking an evidentiary record of documented industry-wide abuses, the Commission’s Net Neutrality decision was based on speculative harms—the word “could” alone appears over 60 times. By acting in anticipation of hypothetical harms, the Commission was unable to act in a targeted manner to address specific market failures or harm to consumers.

The result is overly broad rules, which I fear will force the government into too prominent a role in shaping tomorrow’s Internet. The genius of the Internet is that there is no central command, no unitary authority to dictate how innovation is to occur. The Commission has now inserted itself into the role of judging how the Internet and broadband networks will evolve. Government will be hard pressed to manage the next-generation of the Internet as well as competition and consumer demand have done for previous generations.

This risk is heightened because the Internet and our broadband networks are still very much in their infancy. These networks cannot sit still. The Internet will increase fourfold by 2014, and mobile broadband will more than double each and every year. To respond to the consumer demands for faster and more robust broadband services, operators will have to invest

billions more in their infrastructure. They will need to experiment and innovate with new approaches, new network management techniques, and new business models to serve consumers. Those decisions will now be regulated and managed by the Commission, subject to the uncertainty of government sanction and the delay of government decision-making. This regulatory uncertainty is already beginning to cast its shadow on new technology and service offerings.

The FCC's rules will surely impact network operators' incentive to innovate, invest, and deploy broadband, directly counter to our primary mission to foster nationwide broadband availability. The FCC's decision also suggests a preference for the Internet edge companies over networks. I disagree with that approach, because there was no need to pick winners and losers in the Internet economy. Indeed, the Commission should have sought to maintain an environment in which companies across the Internet economy continue to have the incentives to invest and innovate.

All regulations have costs, and the costs of Net Neutrality regulations going forward could be dramatic given the potential distortive effect of government micromanagement of broadband networks. This could be to the direct detriment of consumers and entrepreneurs who will be adversely affected if network upgrades and improvements are delayed or forgone.

The open-ended nature of the decision—both in how it was legally justified and in the number of issues left undefined or undecided—will only breed greater regulatory uncertainty, which necessarily raises the cost of capital for infrastructure investment. Congress has given the Commission clear statutorily mandated responsibilities, and Net Neutrality is not one of those. Lacking explicit authority, the Commission twisted the statute in order to establish a national

Internet policy. By effectively creating its own authority, the Commission chose to regulate an entire sector of the Internet, and could subsequently expand its rules further under this same unbounded claim of legal authority.

Similarly, by avoiding definitions of key terms, questioning but not banning practices, couching decisions as “at this time” repeatedly, and inviting both case-by-case complaints and declaratory rulings, the Net Neutrality decision—in too many ways—was a first step, not a last step. We already see special interest groups pushing to change and expand the rules even before they become effective. This uncertainty – a direct result of the Commission acting broadly without congressional directive –only reinforces that the proper government role over the Internet is a question best left to the stability and finality of legislation.

Net Neutrality was also the wrong priority for the Commission. The focus on Net Neutrality diverted resources away from bipartisan reform efforts that could have directly addressed the core challenge of promoting broadband deployment and investment. This lost opportunity is one of the gravest consequences of the Net Neutrality debate. Reforming universal service and intercarrier compensation regimes to focus on broadband and IP networks would remove uncertainty around today’s outdated system, promote fiscal discipline and accountability, affirm providers’ future revenue streams necessary to invest, and target federal support to those areas where private capital will not build broadband services.

The launch of 4G next-generation wireless services will unleash billions in investment in our mobile broadband infrastructure. 4G wireless offerings can be the third, fourth, fifth, and sixth broadband choice for consumers if our spectrum policy keeps apace with technology and

consumer demands. Accordingly, we need a paradigm shift in how we address spectrum policy to combat spectrum exhaustion and ensure the most efficient use of finite spectrum resources.

Lastly, broadband infrastructure reform to streamline the timelines and reduce the costs to build towers and lay fiber can mean the difference in whether broadband will reach that next subdivision, town, or farmhouse.

While we may disagree on particular details, I welcome the Chairman's renewed focus on these three areas directly linked to broadband deployment and only regret that we did not place a higher priority on these efforts sooner. Our ability to successfully take any of these steps is dependent upon our strong working relationship with Congress and this Subcommittee in particular. It is critical we work collaboratively with you to ensure that we prioritize and target our efforts appropriately and that we have sufficient statutory authority to move forward to promote nationwide broadband, a vital platform for our future.

Thank you.

Mr. WALDEN. Thank you very much for your testimony and the testimony by all the commissioners and the chairman. We appreciate it.

Just for the Committee as an announcement, we are going to try and do two rounds at least of questions and we will go in the order in which you arrived and then by seniority after the gavel fell, and I want to just point out that in the great spirit of bipartisanship here on the subcommittee, the Democrats actually have three witnesses and we only have two.

Mr. UPTON. We are looking to change that after 2012.

Mr. WALDEN. We will try not to let that happen again.

All right. I will start with the first questions. Commissioner McDowell, you said on page 154 of your dissent that less than a year ago the Commission in attempting to defend its Comcast BitTorrent decision in the D.C. Circuit “acknowledged that it has no express authority over an Internet service provider’s network management practices.” They rely on section 706 to authorize the FCC in this order to adopt network neutrality rules. Section 706 also states that “each State commission” and Commissioner Clyburn, you will be interested in this “with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capabilities to all Americans.” If the FCC is relying on section 706 and perhaps B, not A, but you do trigger the entire statute, I believe, does that not mean that every State regulatory commission as authorized in 706(a) can also adopt its own network neutrality rules including price caps as specified in that statute?

Mr. MCDOWELL. It could absolutely, Mr. Chairman. One of the concerns is that in the FCC’s order, there is no limiting principle on the FCC’s authority so that is not defined or limited in the FCC order.

Mr. WALDEN. Commissioner Clyburn, in early January just a few weeks after the Commission’s open meeting, a complaint was already filed alleging that a wireless provider offering a low-cost data plan to informed customers is violating the Commission’s rules. The rules still have not taken effect. So the question is, is Metro PCS’s low-cost data plan a violation of the Commission’s order?

Ms. CLYBURN. Those type of complaints generally that come before the Commission, I generally do not comment on before a decision is rendered, so I don’t know if you have a follow-up but that particular one I am not comfortable in commenting on.

Mr. WALDEN. Well, I guess the question is not—let me back off then. Would a complaint like that violate the Commission’s rules in general?

Ms. CLYBURN. I can say that in general to answer your question more broadly, in fact there have been complaints before the agency and that is why the chair and the commissioners voted to move in this particular direction. It is in order to be able to have the dexterity to address those particular issues as proof that there are some issues in the market.

Mr. WALDEN. Commissioner Baker, the order argues that it can regulate cable Internet access because broadcasters are increasingly providing video over the Internet. Does that mean then, taken to an extreme, that the FCC could regulate Netflix since

broadcasters are increasingly offering shows on DVD or Netflix Web service?

Ms. BAKER. Well, I think that is the concern with the statutory authority the Commission is using for this order and that we have unbridled access to regulate whatever we want to do on the Internet ecosystem.

Mr. WALDEN. It has also been widely reported, Commissioner Baker, that you and Commissioner McDowell did not receive the final draft of the order until close to midnight the day before the vote. Is that correct?

Ms. BAKER. Yes, sir.

Mr. WALDEN. Commissioner McDowell, do you want to speak to that at all?

Mr. MCDOWELL. That is true. We had received other drafts prior to that but the final draft that we were to vote on and base our dissent on didn't come until close to midnight the night before the meeting.

Mr. WALDEN. And Commissioner McDowell, while the order does not explicitly apply Title II to broadband Internet access services, aren't the rules that were imposed tantamount to common carriage?

Mr. MCDOWELL. Mr. Chairman, as I point out in my dissent, I think the rules really is a Title II order in disguise, this sort of a threadbare Title I disguise, and that is part of the concern that you were asking Commissioner Clyburn about the potential for rate regulation. You know, last year, last January when the FCC argued before the D.C. Circuit in the Comcast BitTorrent case that the general counsel was cited in the D.C. Circuit's order from last April. The general counsel said that the Commission could have the authority to regulate broadband rates as well, and there is no limiting principle in the order that would restrain the Commission from regulating the—

Mr. WALDEN. I think that the concern some of us have is, this box has been opened pretty widely. The tether seems to have been snapped and the authority could be taken clear to the extreme of where the States now under section 706(a) if it is read that way, it could trigger the statute and the States could enter into regulation of the Internet.

Now, Commissioner McDowell, if the FCC has conducted no market analysis, which it says it has not, is there any principled reason for excluding companies like Google and Skype from these rules?

Mr. MCDOWELL. Again, there is no limiting principle in the order so I think under the logic of the order, the FCC's jurisdiction is boundless.

Mr. WALDEN. And after all, Skype blocks access to competing application providers like fring, right? You have a blockage going there, and Google and Facebook have had some blocking issues involving consumer access to their own contacts.

My time is expired. With that, I would recognize the gentlelady from California, Ms. Eshoo.

Ms. ESHOO. Thank you, Mr. Chairman, and thank you to each of the commissioners for your excellent opening statements.

Today's hearing is entitled "Network Neutrality and Internet Regulation: Warranted or More Economic Harm than Good?" The

three basic rules that the chairman rolled out, which is the framework for what the Commission did—transparency, no blocking, no unreasonable discrimination—I don't think anyone is against transparency, for blocking and for unreasonable discrimination. If you are, raise your hand on the subcommittee. But I want to examine the issue of harm and what led to the framework that the chairman stated and which I just restated. What were the harmful things that have arisen at the FCC that led to rules of the road? I mean, the Republicans are the ones saying the sky is caving in. Really, life is tidy. No one has crossed any lines. There isn't any reason to do this; in fact, it is really going to hurt our country. But I want to give you the opportunity to state as briefly as you can what led to this and what examples exist and were brought to the Commission's attention?

Mr. GENACHOWSKI. Thank you. Well, going back to at least 2005, the Commission made clear on a bipartisan basis that it would enforce open Internet violations. Against that background, it is surprising that there would be any violations of Internet freedom at all but there have been. There was a telephone company called Madison River that blocked access to competing voice over Internet providers. There was a cable company last year that became significant litigation that blocked competing video providers. Last year there was a mobile company that blocked access to mobile VoIP. There have been court settlements that are part of the record where as part of the settlements, Internet service providers agree that they engaged in conduct that was inconsistent with open Internet principles. So as against the history of bipartisan intention to enforce, it is surprising there were any violations at all.

One of the harms that we looked at was, if we for the first time would be to remove basic open Internet protections, what we heard repeatedly from startup companies, entrepreneurs, investors was that without that, they would lose the confidence to invest in startup companies to develop the kind of innovative products and services and applications that we are all so excited about and that we need to lead the world in innovation in the 21st century.

Ms. ESHOO. Thank you.

I have a question for each one of the commissioners, and a yes or no will do. The Republican House leaders and members of this committee are considering using a resolution of disapproval under the CRA, the Congressional Review Act, to overturn the FCC's Open Internet Order. Do you support or oppose Congress using the CRA to overturn the order? Chairman Genachowski?

Mr. GENACHOWSKI. Well, I don't have a vote in the Congress. I don't think it is the right idea because I think it will increase uncertainty in this area.

Ms. ESHOO. Commissioner Copps?

Mr. COPPS. I would not be for it.

Ms. ESHOO. Commissioner McDowell?

Mr. MCDOWELL. First of all, all the examples cited by Chairman Genachowski were resolved in favor of consumers under existing law before the FCC's action. I think that is important to note. But I also subscribe to the notion that Congress tells me what to do, I don't tell Congress what to do, so if Congress wants to overturn an FCC order under the CRA—

Ms. ESHOO. But do you think it is a good idea? Do you support it?

Mr. MCDOWELL. Well, obviously I dissented so I think the order isn't founded in law or fact.

Ms. ESHOO. Commissioner Clyburn?

Ms. CLYBURN. One of the things that I wanted to point out, if you will allow me a second, is that the companies that were cited by the chairman, those companies in fact have millions of customers who have potential vulnerabilities and who might not have the ability or the expertise to file a formal complaint.

Ms. ESHOO. About the CRA?

Ms. CLYBURN. So in terms of your question, while I respect the body, I am not embracing of the idea.

Ms. ESHOO. Thank you.

Commissioner Baker?

Ms. BAKER. I will be respectful of your time. We take our orders from Congress so I think it is important for Congress to tell us what their opinion is.

Ms. ESHOO. I don't know what that means.

Ms. BAKER. It means if Congress has——

Ms. ESHOO. Do you think it is a good idea?

Ms. BAKER [continuing]. The CRA to tell us that they disapprove of this action, I think——

Ms. ESHOO. Do you think a CRA is a good idea?

Ms. BAKER. I would say I also dissented in the order. I disagree with that we have statutory authority to do what we have done.

Mr. WALDEN. The gentlelady's time has expired.

Ms. ESHOO. Thank you.

Mr. WALDEN. And just for the record, Ms. Clyburn, we have two chairmen here. I assumed you were referring to that chairman, not this chairman in your comments there.

Ms. CLYBURN. Yes.

Mr. WALDEN. So now let us go to the other chairman, Mr. Upton, for 5 minutes.

Mr. UPTON. Thank you, Mr. Chairman.

I know as George Will said not too long ago that most folks, most Americans are not real fans of how the U.S. government works. I don't think it works very well. But in fact the Internet does. Why in the world would you put the government in charge of the Internet? And as Ranking Member Eshoo said and also my good friend, Ed Markey, on net neutrality I think there is no secret that at least this side of the aisle is not particularly fond of the new net neutrality rules and I know that some 300 Members of Congress contacted the FCC in the last year voicing such concerns, and probably agree that it really isn't the light touch that we were hoping, which is why in fact a CRA may be introduced in the next couple of days and the Congress of course then has 60 days, legislative days, to act in both the House and the Senate.

Commissioner McDowell, you were very outspoken in your dissent on the need for a market analysis. Would a market analysis have validated the order, the order's consent?

Mr. MCDOWELL. I don't think so. Each time the government has examined the broadband Internet access market, whether it was the Federal Trade Commission in 2005, or 2007, the FCC itself in

2007, the antitrust division when they filed comments to the FCC a year ago in January, we can debate exactly what they said but what they did not say, they did not say that there was a concentration and abuse of market power or any sort of market failure and that actually in many of those cases independent government agencies had warned against the uncertainty and the negative collateral effects of potential regulation in this area.

Mr. UPTON. You mentioned a little bit earlier in response to the Madison River and the one phone company and a few others as it related to what the FCC had done. Do you believe that there are existing FCC remedies that are in place if in fact an Internet service provider engaged in that type of prospective conduct that this order is designed to prevent?

Mr. MCDOWELL. I think there are laws already on the books that would prevent this, whether it is section 2 of the Sherman Act or section 5 of the Federal Trade Commission Act. There are general consumer protection powers that the government has here so if it is refusal to deal or exclusive dealings and things of that nature, the government has the power to cure that.

Mr. UPTON. And that was a little bit of the result of that debate and that answer came out of the Judiciary Committee yesterday. Is that not correct?

Mr. MCDOWELL. That is what I read, yes, sir.

Mr. UPTON. Chairman Genachowski, wouldn't it have been prudent for the Commission to do a simple market analysis before adopting the rules that we hear so much will burden the industry if in fact the order is pursued?

Mr. GENACHOWSKI. Mr. Chairman, the order engages in extensive market analysis. There is a specific section on costs and benefits. There is a footnote that points out that the order doesn't make a specific market power finding which would put this in the anti-trust area but the order extensively analyzes the market. We received significant input and a record from market participants, economists and others and so I think the Commission engaged in extensive market analysis.

Mr. UPTON. Now, I know Verizon and others have threatened, will be taking this to court to look at a legal challenge. Has your legal team given you an analysis that they think this order will be able to stand on its two feet and will be verified by the courts?

Mr. GENACHOWSKI. Yes, they have, that it is consistent with the Communications Act, with Supreme Court precedent in this area and with the D.C. Circuit Comcast decision last year.

Mr. UPTON. Mr. McDowell, do you agree with that?

Mr. MCDOWELL. Well, I disagree obviously. I wrote a very lengthy dissent with 130 footnotes, mainly focusing on our lack of legal authority, so I think it will fail on appeal.

Mr. UPTON. Thank you. Yield back.

Mr. WALDEN. The gentleman yields back his time, and now recognize the chairman emeritus of the committee, Mr. Waxman.

Mr. WAXMAN. Thank you very much, Mr. Chairman. I think the American people would be outraged if they had some Internet carrier or some provider of the service to their home, their cable or a telephone company blocking what they can get on the Internet or choosing something that benefited them economically and then

keeping consumers from getting programs. I hope nobody would think the idea of stopping Internet freedom, allowing the Web to be treated in a neutral way, giving the consumers the power to access whatever they want, that is what I think American people would support. And if they found that this was happening, they would want it stopped.

Now, Chairman Genachowski, you think you had enough reason to believe this could happen unless you set some rules in place. Is that correct?

Mr. GENACHOWSKI. That is correct.

Mr. WAXMAN. Freedom is a strange word. It is overused and misused a lot, especially around this place. Freedom for the consumer is to get whatever they hope to access but that freedom can be curtailed, some people say by government, but it also can be curtailed by other private interests, and government sometimes has to regulate hopefully in a light enough way that they don't discourage investment and competition and all the good things but the government needs to set rules of the road, saying you cannot do this. Otherwise we saw what happened in Wall Street, we see in other places. No regulation means less freedom for the consumers.

Mr. Copps, is that what your thinking was when you looked at the Commission regulating in this area?

Mr. COPPS. I think that is absolutely correct. That would reflect the thinking I have, and you know we have talked about some of the specific problems that have come before the Commission but there is a historical dimension to this too. This is such an open and dynamic and opportunity creating technology and to make sure that it is unfettered as we go down the road is so important. The history of every other media generation that we have had shows that it goes from being open, first being touted as the great new opener and a great new vista for the American people's freedom and inevitably what you get is closure and consolidation and tighter and tighter control. That is happened to radio, that has happened to television. It happened to the film industry, and I think we need to be taking some precautionary steps to make sure that this doesn't happen in this particular technology.

Mr. WAXMAN. Well, those precautionary steps could be taken by Congress and we could pass a law. We tried to pass a law. We even had most of the stakeholders agreeing to a law. We couldn't get the Republican members to pay attention to it. Congress could pass a law but evidently the FCC thinks it has the power, and there is some dissent as to whether you have the legal authority or not. That will be decided by the courts. But meanwhile, what you are trying to do is preserve the freedom of the Internet, and a lot of the complaints we hear about stopping innovation and investment seem to be quite remarkable when you look at the fact that most of the groups that are being regulated feel that this regulation, that there is a light enough approach that will not have an undue impact on them, and in fact, it is welcomed by everybody because it provides some regulatory certainty. Today in Bloomberg, they said investors so far don't seem to see the new rules as a threat, and they say that you look at Comcast, Time Warner cable, AT&T, they are all saying they can live with this. So it seems to me to sound the alarm over whether this was a good idea and whether

we are hurting some of the industry in the United States is not accurate.

But I found it interesting that one of the questions that was raised is how speculative the harm was for the interference in the Internet, and in order to attack the proposal, they raised the specter of price controls as a potential for the FCC. Does the FCC plan to do price controls? They say this is a slippery slope, opening the road to regulation that is unfettered. Is that what is happening, Chairman Genachowski?

Mr. GENACHOWSKI. Not at all. This is in no way about price controls.

Mr. WAXMAN. Does anybody in this group believe there ought to be price controls? If you think so, just say yes.

Ms. CLYBURN. Mr. Chairman, if you say those words inside of the walls of the FCC, there is trouble.

Mr. WAXMAN. We don't want price controls either. You don't want price controls. So to raise that as a specter, it seems to be unfortunate. Now, this Congressional Review Act not only repeals this rule but it prevents the FCC from acting at all in this area, and I would hope that Commissioner McDowell and Commissioner Baker wouldn't want to take the power away from the FCC to act when they feel it is appropriate to act if Congress hasn't passed any legislation. I strongly hope we can stop that Congressional Review Act attempt to overturn the FCC's actions.

I yield back my time, Mr. Chairman.

Mr. WALDEN. The gentleman's time is expired. I now recognize the other chairman emeritus, Mr. Barton, for 5 minutes.

Mr. BARTON. Thank you, Mr. Chairman. And again, nothing but compliments to the Commission for the intellectual ability that is assembled here. I am very proud that we have jurisdiction over the FCC, and on an individual basis, I consider each of you friends.

Having said that, I am at a loss as I listen to what my good friend from California, Mr. Waxman, just said that no regulation means less freedom, that is Orwellian in the extreme just on the face of it. We are not so opposed, those of you that oppose this 3-2 ruling, because of what you ruled but the fact that you established the principle if it goes unchallenged that you can regulate the Internet. That is what troubles me, not the light touch that Mr. Waxman refers to, the fact that if we let this ruling stand, this Commission is not going to do price controls. I believe the gentlelady from South Carolina when she says, you know, if you mouth the word price controls within the walls of the FCC, bad things happen. I understand that. But a future FCC could. That is why Chairman Upton and Chairman Walden and others are going to introduce this Congressional Review Act or a standalone bill to overturn it. What Chairman Genachowski and the two commissioners that sided with him have said is, we have got the votes and we are going to establish the principle that we can regulate the Internet. Now, we understand how controversial that is so we are not going to do a lot, we are just going to try to get the nose of the camel under the tent, and once we have got that established, in the future some future Commission can come forward.

I am so appreciative of Commissioner McDowell and his dissent and all the intellectual footnotes that he put into that. I am very

appreciative of what Commissioner Baker put in the record in her opening statement and I associate myself 100 percent with that. It just seems to me that this ruling, when you listen to the answers to my friends on the minority side, you are concerned about potential harm in the future so you have to establish the principle now that we can regulate to protect against some unknown harm in the future.

Now, Commissioner McDowell, you said, I believe in your dissent and again in your opening statement and again in response to a question that the existing statutory law and authority that the FCC has is sufficient to handle any conceivable potential harm in the future without establishing these rules. Is that not correct?

Mr. MCDOWELL. I think what I said is that we have—the government in general under general consumer protection and antitrust laws has ample authority so there are a lot of agencies that could intervene.

Mr. BARTON. And Commissioner Copps, nobody has asked you a question yet and you are a bright fellow. Why do you disagree with what your fellow commissioner, oddly, to your left, just said?

Mr. COPPS. I have a little different take on this than probably all of my colleagues that the Commission has this authority, has had this authority for a long time, has had this authority recognized by Congress and the courts for a long, long period of time and that the best way for us to express and exercise that authority is to put advanced telecommunications transmission back where it belongs and that is in Title II. I think the Title I road that we went down has a substantially better chance in court than the previous decision that went on the Comcast case, but my best reading of the statute and the legislative history and the court decision is that this belongs within Title II. I do not know of a court in the land including the Supreme Court that has said we don't have that authority. In the Brand X case, I don't think the court could have been clearer in saying that deference is accorded to the Commission in these cases where there is ambiguity or difference in the definition of the statute or the terms of the statute. There are two or more reasonable ordinary ways to interpret it, that our choice of one of them was accorded deference and they accorded deference to the decision that was made on cable modems in 2005 over my objection but they also made clear that times change and our classification can change and our decisions can change, and Justice Thomas and others were eloquent in pointing out that that is where the expertise to make a lot of these judgments resides. I am not as much in search for that authority as some other folks are.

Mr. BARTON. Thank you.

And we are going to do another round?

Mr. WALDEN. Yes, we are, sir.

Mr. BARTON. Thank you.

Mr. WALDEN. We appreciate your response.

I now go to the gentleman from Massachusetts, Mr. Markey, for 5 minutes.

Mr. MARKEY. Thank you, Mr. Chairman, very much.

First of all, most of the industry supported the decision. Comcast has made a commitment to comply with them for 7 years as part of the Comcast/NBCU merger conditions regardless of the outcome

of any judicial review. Many wished that the Commission had gone much further, restoring Title II authority as Congress originally intended in the Telecom Act of 1996. I wish the Commission had gone much further than they did.

And let me also say that there is a misunderstanding here about the Commission's role here. When AT&T had 1.2 million employees and they were the only phone company, it was the Commission that made the decision that said if you want to go down to a store and buy another phone other than the black rotary dial phone, you could do so. AT&T said you are interfering with the free market if you let people go and buy another phone other than the black rotary dial phone. In the 1970s when MCI and Sprint were starting up, AT&T said that a consumer should have to dial 21 additional numbers before you reached the number that your mother told you to memorize in case you were ever in an accident. Well, those additional 21 numbers made it very hard to have competition but the FCC made sure that competition and consumers would be king and queen. That is what the FCC has been doing over the years.

There is a long history here of AT&T and the Baby Bells of engaging in anticompetitive, anticonsumer activity. They said a phone call, a long-distance phone call should cost a dollar a minute before the government got in. When you were making a long-distance phone call or you got one, you would say hurry, grandma is calling from California, it is long distance, and it was. It was a dollar a minute until we got the competition in and the FCC ensured that there would be protection of consumers. Now it is under 10 cents a minute.

So all of this history of light touch, yeah, light touch, to make sure that a two by four didn't come in from the big companies and crush the consumers, making them, you know, be tipped upside down and paying more than they should have to.

So Mr. Chairman, we have fallen in the United States to 15th in broadband ranking in price and accessibility and in capacity. Is this ruling part of your goal to make sure that America regains its position as number one and two in the world before George Bush was sworn in and appointed the FCC that was chaired by Michael Powell?

Mr. GENACHOWSKI. Absolutely, and I would say before addressing that directly, in response to what you said before, in each of those cases where the FCC took action to protect consumers, promote competition and innovation, someone sued and someone said the sky would fall, and in each case that is not what happened. Competition was enhanced, innovation was enhanced and the authority was established.

Mr. MARKEY. Who sued after we passed the 1996 Telecom Act?

Mr. GENACHOWSKI. A number of the carriers.

Mr. MARKEY. Verizon sued. They said oh, that is anticompetitive. Pac Bell sued, Bell South sued. They said, oh, that is anticompetitive, you are going to let more consumers in. The people who sued are the same companies that right—actually AT&T and the NCTA and Comcast, they are not saying that. It is Verizon that is coming in and saying that they are going to sue but the rest of the industry so far has stayed on the sidelines. Yes, Mr. Genachowski?

Mr. GENACHOWSKI. On your point about U.S. leadership in innovation, it is so tied to preserving, in my opinion, the freedom and openness of the Internet. I mentioned before some of the Internet openness violations that we have seen, even as protections were in place, one of the things that we heard from innovators, startup companies, technology companies in terms of harm that would occur now if we didn't adopt baseline rules is that without that investment would dry up. Investment in early—

Mr. MARKEY. Predictability in the marketplace is very important to unleash billions of dollars in private sector investment.

Mr. GENACHOWSKI. Exactly. For us to lead the world in innovation, in my opinion, we need to have rules and a climate that drive billions of dollars of investment throughout the broadband economy to technology companies, early-stage startups and investors and also to our infrastructure, and I think in my opinion what we have accomplished here, and it is why there is a broad consensus in favor of this approach, is a framework in which there is certainty—

Mr. MARKEY. I agree with you.

Mr. GENACHOWSKI [continuing]. And investment is driven throughout the broadband economy.

Mr. MARKEY. Does the FCC intend on following through on the law and launching a set-top box unbundling proceeding and all video proceeding? Are you intending on doing that?

Mr. GENACHOWSKI. Well, that is something that is under consideration. We haven't announced a timetable for that but clearly people would like to see more innovation on their TV sets in their living.

Mr. MARKEY. That is the language Mr. Bliley and I put in the 1996 Act, and I really urge you—I think there are 100,000 new jobs that can be created if we give consumers access to new applications and new hardware out there in the marketplace.

I thank you so much for all your good work. I think it was a very good decision that you made at the FCC.

Mr. WALDEN. The gentleman's time is expired. We now go to the vice chair of the committee, Mr. Terry, for 5 minutes.

Mr. TERRY. Thank you, Mr. Chairman.

And let me just start with this observation, is that much of our side of this dais, our concern is that and what we are opposed to is an agency, whether it is FCC or EPA, sua sponte issuing a set of rules without congressional authority or specific authority from this body, and in fact a majority of Congress in the past term under Democrat majority signed on to letters opposing this rule or this procedure. And I would like to for the record submit unanimous consent, to submit for the record the three letters dated October 15th, May 28th, and November 19th.

Mr. WALDEN. Without objection.

[The information appears at the conclusion of the hearing.]

Mr. TERRY. I think the signatures on these objecting to the procedures are over 300 members but yet the FCC continued.

Now, I want to get to another issue that has been hit on here about price regulation. At home and my campaign, I have Trend Micro to block all of the viruses and spyware, and I got as my monthly newsletter, e-mail newsletter from Trend Micro yesterday

coincidentally, and I am just going to read one part of Trend Micro Trendsetter newsletter here under net neutrality sent to all of their customers. “For consumers, deregulation” which is what we are trying to on this side of the aisle evidently do “of the Internet could mean higher Internet access prices as ISPs institute tiered models that offer speedier downloads to higher-paying customers.” Some people also worry that allowing businesses to choose what content or sites they will be offer will result in the commoditization of a formally free and open environment akin to the evolution of television from an essentially free service to a highly fragmented and fairly expensive, and like Anna Eshoo said, we all agree on the blocking and we can get into the issue of the principle base that seem to be working but obviously Trend Micro thinks that you have the power now and they want to get their customers lobbying here to make sure that you have the power of price setting. Then under 706, section—oh, and by the way, unanimous consent to submit—

Mr. WALDEN. Without objection.

Mr. TERRY [continuing]. The Trend Micro e-newsletter on net neutrality.

[The information appears at the conclusion of the hearing.]

Mr. TERRY. And in section 706(a) says that this is the basis for your authority and the order has stated that price cap regulation is part of this, so obviously if you are saying that section 706 is the basis for your authority, you have authority to regulate prices, and there are companies out there that are now manipulating this rule to see if they can get a price advantage from the FCC. This seems to me to be anticompetitive and creates an atmosphere of uncertainty to new entrants in business operations about what can the FCC do to them or for them, so I am going to ask Commissioner Baker, has the FCC in developing this rule made any conclusions about the cost effect of flattening a tier to a one-price system like Trend Micro is requesting and saying that you should be doing? Has that been thought through? Is there an economic analysis of how that will affect the marketplace?

Ms. BAKER. It is a good question and one of the biggest concerns that I have is where we are going with this in preserving the status quo of the Internet today where we are missing what the Internet may offer tomorrow, and so I think that through the special-interest groups as they push into tighten the regulations through wireless such as the Metro PCS complaint that has been mentioned or specialized services or prioritization eliminating these, they will eliminate what is going to fund our next generation of broadband networks. So I worry that we in the rush to put out net neutrality rules, we are missing—we are flattening to a one-size-fits-all broadband what may be the next generation of the Internet.

Mr. WALDEN. The gentleman’s time is expired. I now recognize the gentleman from Michigan, the chairman emeritus of the committee, Mr. Dingell, for 5 minutes.

Mr. DINGELL. Mr. Chairman, I thank you for your courtesy.

To Chairman Genachowski, there is broad agreement that reform of the Universal Service Fund is necessary. I believe that if done properly, such reform can support broadband build-out and create

jobs. Will you commit to completing proceedings to reform USF by the end of the year? Yes or no.

Mr. GENACHOWSKI. Yes.

Mr. DINGELL. To the remaining commissioners, going across starting with you, Mr. Copps, do you support the idea that we should have a completed survey by the end of the year?

Mr. COPPS. A completed survey of?

Mr. DINGELL. Of the spectrum.

Mr. COPPS. Yes, I think it would be most helpful to have a spectrum, and it is a time-consuming process but the sooner we can get it, the better it will be.

Mr. DINGELL. Thank you.

Mr. McDowell?

Mr. MCDOWELL. Yes.

Mr. DINGELL. Commissioner Clyburn?

Ms. CLYBURN. Yes, we have already started in that direction with the Spectrum Dashboard and other initiatives.

Mr. DINGELL. And the last of our commissioners?

Ms. BAKER. Yes, sir, absolutely.

Mr. DINGELL. Again, Chairman Genachowski, I understand that the Commission is completing a spectrum inventory. Is that true? Yes or no.

Mr. GENACHOWSKI. Yes.

Mr. DINGELL. Again to Chairman Genachowski, when will the Commission have completed this inventory?

Mr. GENACHOWSKI. Well, we have already completed the first phase. Our Spectrum Dashboard is up on our Web site. We will be proceeding the next phase relatively soon and we want to provide the public more and more information about how spectrum is actually being used.

Mr. DINGELL. Now, again, Mr. Chairman, will that inventory be as comprehensive as the one mandated last year in the House-passed Radio Spectrum Inventory Act? Yes or no.

Mr. GENACHOWSKI. Yes, and we have been working with the committee on that.

Mr. DINGELL. Now, again, Mr. Chairman, similarly, will the results of the Commission's spectrum inventory be made available to the public? Yes or no.

Mr. GENACHOWSKI. Yes, unless there is some compelling reason for a piece to not be, but yes.

Mr. DINGELL. Now, will the Commission also submit a report to the Congress concerning the inventory?

Mr. GENACHOWSKI. Concerning the inventory?

Mr. DINGELL. Yes.

Mr. GENACHOWSKI. We will make it public and we will provide Congress and the committee whatever reports it desires.

Mr. DINGELL. Good. Now again, Mr. Chairman, with respect to the spectrum auctions, I note the National Broadband Plan states on page 79 that the government's ability to reclaim clear and re-auction spectrum is the ultimate backstop against market failure and is an appropriate tool when the voluntary process stalls entirely. Does this mean that the Commission will forcefully take spectrum from broadcasters if too few participate in voluntary spectrum auctions? Yes or no.

Mr. GENACHOWSKI. Well, we haven't addressed the question. We have proposed a win-win-win incentive auction that will free up billions of dollars and bring market incentives into spectrum allocation, helping give this country what it needs, a lot more spectrum for mobile broadband.

Mr. DINGELL. Now, I am just a Polish lawyer from Detroit, and sometimes I have trouble understanding some of these things, but you are going to have a voluntary spectrum auction. How is it going to be voluntary if there is pressure which is placed on the holders of this spectrum by the Commission?

Mr. GENACHOWSKI. Because the auctions themselves would rely on market incentives, allowing the market to set a price for existing owners of licenses to make the choice between continuing what they are doing or transferring the license in exchange for the offer from the auction.

Mr. DINGELL. Sounds kind of like a bank holdup to me. You hold a gun at the teller's head and say we know that you are going to voluntarily give me this money, and if you don't, I'm going to shoot you in the brains.

Mr. GENACHOWSKI. Only if the free market is a bank holdup.

Mr. DINGELL. Well, I want you to know I have some dark suspicions on this matter.

Now, Mr. Chairman, do you believe that a broadcaster who does not participate in voluntary incentive action should be forced to relinquish its current channel allocation and spectrum? Yes or no.

Mr. GENACHOWSKI. Well, the first thing I would say is that broadcasting is a very important business in the country and everything we are doing—

Mr. DINGELL. No, no, no. Yes or no.

Mr. GENACHOWSKI [continuing]. Recognizes its importance. That is something we are looking at. It is something that actually Congress is looking at because—

Mr. DINGELL. Would you please go off, contemplate your navel and come back with us an answer yes or no to this question? And would the other members of the Commission please do the same thing because I am having a hard time understanding this.

Now, to all commissioners, does the Commission possess the necessary authority with which to engage in voluntary incentive auctions of a spectrum? Yes or no.

Mr. GENACHOWSKI. We would ask Congress for the authority.

Mr. DINGELL. I am sorry?

Mr. GENACHOWSKI. We would ask Congress for the authority.

Mr. DINGELL. All right. Would each of the commissioners submit to me a yes or no on that?

Mr. WALDEN. And then the gentleman's time is expired.

Mr. DINGELL. I sure would like to have an answer to this question.

Mr. WALDEN. Yes, if the commissioners could go ahead and respond to the chairman emeritus's question.

Mr. DINGELL. I do have a few other useful questions that I would like to get the answer to. I will be submitting a letter to the Commission and I would ask that the Commission respond, and Mr. Chairman, I would ask your courtesy and that of my colleagues on

the committee in giving me unanimous consent so that both my letter and the response may be inserted into the record.

Mr. WALDEN. Absolutely, Mr. Chairman, and just for the record, Mr. Chairman, the committee is going to have a second round of questions here today if other conflicts in your schedule don't preclude you—

Mr. DINGELL. I don't want you to take my comments as critical of you. Thank you.

Mr. WALDEN. No, we are fine.

All right. With that, we will—did the other members of the Commission want to answer that question the chairman emeritus asked yes or no?

Mr. COPPS. I think the chairman's answer, we have asked Congress for that authority is correct.

Mr. MCDOWELL. I don't think we have the authority to do the incentive auctions as many proposals have outlined.

Ms. CLYBURN. Right now, no.

Ms. BAKER. To do voluntary authority, we need congressional authority.

Mr. WALDEN. Thank you.

I am going to go now to Mr. Shimkus for 5 minutes.

Mr. SHIMKUS. Thank you, Mr. Chairman. It is great to have the Commission before us. I appreciate all the time. Many of you have come by to talk in the office one on one, and that really is appreciated. I learned a new Latin word, *sua sponte*.

Mr. Copps, I think via *sua sponte* maybe we can address the two-member rule and we will legislate and maybe we can do that. I just think it is ridiculous, and if there needs to be someone to lead that small change, we might be able to do small things in this Congress that don't get devolved into too much, but that is really silly, and you say it every time and many of agree with you, and we don't seem to do anything on it, so let me see if I can take that up as a challenge.

You know, this net neutrality debate, one side says it is going to create jobs, the other says no, it is going to hurt jobs, and we are focused in this Congress on job creation. The public is confused who is right and who is wrong. It is he said, she said. I boil it down to the simplest folks in my district who, you know, if they can get broadband service—we don't still have it. High speed, that is mapping and all the other things. But they really do want jobs. You know, if we are not going to spend money, we are not going to borrow money in this Congress to try to create jobs, we think that failed in the last Congress, plus we are talking about debt and deficit and job creation.

Mr. WALDEN. This is government control of the microphones.

Mr. SHIMKUS. Government control. I am on again. So if we are going to create jobs without spending money, we have to ease the regulatory burden. I don't know how because that provides more certainty. Capital borrowing is lowered when you have more certainty, ease in regulatory burden. The President has agreed to that. I think, Mr. Genachowski, you sent out an e-mail asking your agency to look at ways where regulatory burden might impinge job creation.

So let me ask Commissioner Baker, had we done a cost-benefit analysis, if we would have done a cost-benefit analysis on net neutrality job creation, do you think that would be something we want to get an answer to? What do you think we would have come up with?

Ms. BAKER. It is a good question. I think had we done a market analysis, certainly every government—every other government that has looked at this has come up with the fact that the hypothetical problem of net neutrality would be better served—if we are worried about on ramps to the Internet, the best way to solve that is to create more on ramps. So aside from the actual authority question, I think the policy would come up that the market benefit analysis would come out not in favor of this.

Mr. SHIMKUS. This is just an interesting debate because we even heard Chairman Waxman make the statement, and I heard it yesterday in my Environment and Economy hearing, that regulations create jobs, and they really believe it, that regulations create jobs. I guess he also said—I am not sure. But in a hearing yesterday, the EPA also in their statement said we are not going to look at job creation, we are not going to look at effects on the economy. So that is why we think there should always be at least an analysis of cost-benefit analysis, and had this been done prior to promulgation of movement toward net neutrality through the Commission, maybe there would be more certainty and their side would be pointing out to your analysis and we would be looking at that analysis and saying yes, it is legit or—but nothing. Commission Chairman, do you want to respond?

Mr. GENACHOWSKI. As I said before, we did do a market analysis, and I disagree with my colleague very strongly. I think the pro-job, pro-investment outcomes of this balanced framework that we adopted very much outweigh the burdens which people either say are very small indeed or highly speculative.

Mr. SHIMKUS. Let me just chime in because I have been on the committee for a long time and just like Mr. Markey can talk about going back to the breakup of the Bells, I can talk about when the cell phone was a mini brick when I got elected and you had to change the roaming when you got here to now really voice is really the throwaway service. It has been an unregulated environment that has moved faster than we can even get there now. And again, our concern is, if we are not doing cost-benefit analysis on regulations, the regulations may be important but the public needs to be able to make the decision based upon the impact on jobs versus benefits received, and that is our frustration.

Let me ask one more question on this net neutrality debate, and it is not to pick on the chairman but recently you are offering applications to kind of spy on—“spy” is not a good word but to patrol the Internet to see if there is abuse of net neutrality, and prepare to fly the winner out here. Do you think that is a good use of taxpayers’ dollars?

Mr. GENACHOWSKI. Promoting transparency, opening up, giving to consumers and early-stage innovators better information about how the networks work, I think promoting transparency is a very important part of this.

Mr. WALDEN. The gentleman's time is expired. I now turn to the gentleman from Pennsylvania, Mr. Doyle, for 5 minutes.

Mr. DOYLE. Thank you, Mr. Chairman.

Boy, I will tell you, there is probably not two words that have been more misused and confused than the words net neutrality, and I would venture to say if you asked the 435 Members of Congress what their definition of net neutrality is, you would probably get 435 different answers. But let me tell you what it means to me. I have four kids. Now, my three boys, they were the first three kids we had all went to Penn State, my alma mater, but our youngest, who came 7 years after our youngest son, Ali, she is a free spirit and she decided to break tradition and go to the University of Dayton, where she is now finishing up her final semester. But one thing, you know, Ali growing up with three brothers, it was just obvious she was going to be a sports fan and she loves the Pittsburgh Steelers and she loves the Pittsburgh Penguins. Well, one of the things she discovered right away when she went to the University of Dayton is that she was being subjected to watching Cincinnati Bengal football and the Columbus Blue Jackets hockey team. I felt very badly for her.

She came home one weekend and she had this little device in her hand, and she said "Dad, we have to hook up this device in the house," and I said "what is it," and she said, "it is called a Slingbox." I didn't know what a Slingbox was so I said, you have to be careful, your kids bring things home and you don't know what they are bringing home, and I said, "Ali, what is it," and her eyes lit up. She says, "you are not going to believe this, you hook this to your cable and then you hook it to the Internet connection and then I can watch Pittsburgh Steelers and Pittsburgh Penguin games in Dayton, Ohio." And so we hooked it up and she gets to watch Pittsburgh Steelers and Pittsburgh Penguin games in Dayton, Ohio.

So this is when I decided, this is what open Internet means to me. It means that one, my family can use any service on the Internet using any device we choose to use; two, we give innovators the ability to create new things for us so that we can use our Internet connections and new gadgets for us to use that we never dreamed possible; and then three, we provide a cop on the beat to make sure that all these promises of an open Internet are kept for us.

Now, Mr. Chairman, that seems to me to roughly be what the FCC order is. Is that right?

Mr. GENACHOWSKI. Well, in fact, Sling was one application that had been blocked and was an issue that gave rise to the concerns that led to our order.

Mr. DOYLE. So it seems to me that the rules that you promulgated, they are aimed to protect me, they are aimed to protect innovation, and I could quote from the companies, and I think we have heard them before, AT&T or Wall Street analysts from Bank of America, Merrill Lynch, Citi, Wells Fargo, Raymond James, who all called the ruling balanced or a light touch and no undue impact on carriers.

I noticed that some of my friends on the other side of the aisle and I think also Commissioner Baker spoke to this, that they said that they believed the FCC should only issue rules when there is

a market failure. I have to tell you, I think that is a bad model. That is like saying you can only create rules for mortgages when housing prices plummet or that you can't ensure new investors aren't being bilked until millions have lost their nest eggs.

Mr. Chairman, do you think the FCC should only create rules when the Internet ceases to be useful as it is today or only when it won't do the things that our constituents expect it to do?

Mr. GENACHOWSKI. No, of course not, and we heard from people who have been building all the content and services on the Internet that given the history, if we didn't adopt a sensible framework, we would see a decline in investment, a decline in new businesses starting, a decline in jobs being created. What I am proud of is that we were able to find a way to provide certainty and confidence to the entrepreneurs and companies building new businesses on the Internet and also give certainty and confidence to the infrastructure companies to increase their level of investment. I am proud of that. It took a lot of work.

Mr. DOYLE. Thank you.

Commissioner Copps and Commissioner McDowell, and these are just some quick yes or no answers. One of the biggest areas of controversy in this Open Internet Order is the citation of FCC authority, but rather than debating whether a specific provisions of the Communications Act grants FCC direct or indirect authority to regulate broadband providers, which is now going to be up to the courts to decide, I want to ask you a few questions about the way Congress has approached broadband.

In the 2008 Farm Bill, Congress directed the FCC to submit a comprehensive rural broadband strategy with recommendations for the rapid build-out of broadband in rural areas. Are you both familiar with that legislation?

Mr. COPPS. I was the acting chairman of the Commission at the time that helped produce the report.

Mr. DOYLE. Thank you. In that same year, Congress also passed the Broadband Data Improvement Act to improve FCC's data collection process and promote the deployment of affordable broadband services to all parts of the Nation. Have you both heard of that bill?

Mr. COPPS. Yes.

Mr. MCDOWELL. Yes.

Mr. DOYLE. And in 2009, Congress passed the Recovery and Reinvestment Act directing the FCC to produce a National Broadband Plan with a detailed strategy for achieving affordability of such service and maximum utilization of broadband infrastructure and service by the public. I know you are both familiar with that legislation. So given the number of laws that Congress has passed on broadband that directly involve the FCC, doesn't it seem logical to you that Congress assumed the agency would have the ability and the authority to implement and oversee our Nation's broadband policies?

Mr. WALDEN. The gentleman's time has expired here. I want them to have an answer, but if we have a 5-minute answer, we could have issues.

Mr. COPPS. How about yes?

Mr. DOYLE. Thank you.

Mr. MCDOWELL. Congressman, you make a good point, which is Congress had a chance during each of those times to pass net neutrality legislation, and it did not.

Mr. DOYLE. Mr. Chairman?

Mr. GENACHOWSKI. I would say yes as well. Congress has clearly given FCC the authority to look at competition issues involving voice and video. It is well accepted that the FCC has authority over Internet access providers, so I am quite confident in the legal basis of the decision and its constraints on the FCC.

Mr. DOYLE. Thank you, Mr. Chairman. I would yield back.

Mr. WALDEN. Ms. Baker?

Ms. BAKER. Thank you. I have two quick points.

Mr. WALDEN. Very quickly.

Ms. BAKER. The first is that the Slingbox, I am a big fan. I was one of the first adopters. The problem with Slingbox when it was blocked was because it was taking so much capacity on the wireless network that we needed to make it more efficient, which is why I promote entities like the BTAG, which is a non-governmental group of engineers who can work to make more efficient a lot of these problems that are coming up much faster than the government process can be.

And the other point I would like to say is that certainly you gave us the broadband plan job to do, which was very important and a terrific landmark of our tenure at the FCC. Two hundred of those recommendations came forward. Sixty are those are within the FCC's jurisdiction. I think this is something that is going to be multi-jurisdictional and we need to all work together.

Mr. WALDEN. Ms. Clyburn, do you have any quick additions?

Ms. CLYBURN. My colleagues have amply—

Mr. WALDEN. Yes, they have. Thank you.

The gentlelady from Tennessee is recognized.

Ms. BLACKBURN. Thank you, Mr. Chairman. Thank you all for being here. We indeed have looked forward to this.

Chairman Genachowski, I want to start with you. We have tried to get together and visit on a few things, and I do have a couple of questions. Let us go to the Comcast/NBCU merger which I think was an overreach of power and a mismanagement of resources and it should have been a very simple straightforward vertically integrated merger, and it ended up becoming a forum for groups with complaints and grievances and then regulations and conditions and open Internet and net neutrality attachments to that merger. So I have got about three questions, and of course, you know we need to move quickly on this. Is this how you are going to approach mergers in the future?

Mr. GENACHOWSKI. The Comcast/NBCU transaction was one of the biggest and most complex that ever came to the agency and we handled it in a way that was I think the most professional review process. Completing the process at about the time that people thought were on the earlier end and making sure that consumers and competition were protected.

Ms. BLACKBURN. OK. Do you expect or is it the goal of the FCC as currently configured to legislate policy for every merger that comes before the Commission?

Mr. GENACHOWSKI. We will continue to exercise the responsibilities that Congress gave us under the Communications Act to review mergers and determine that they are in the public interest.

Ms. BLACKBURN. OK. Do you think that the review should have lasted for over a year?

Mr. GENACHOWSKI. That was what the companies expected when they announced their decision. It was on the fast end for transactions of that size. It was done—

Ms. BLACKBURN. See, I think it was on the slow end because you get in the way of jobs creation. We are all about making certain—the interactive technology sector is one of the few sectors creating jobs.

Commissioner McDowell, in light of how long the merger took, have we reached the point that we need to initiate a stop clock, put that in place to prevent needless dragging on which hampers job creation?

Mr. MCDOWELL. Of course, the FCC has an 180-day shot clock but enforcement of that would be helpful.

Ms. BLACKBURN. Thank you.

Commissioner Baker, what would you like to have seen done differently in the merger reviews and what would you do differently in the future when you look at this merger?

Ms. BAKER. Well, I think it is clear that we need a comprehensive review but I agree that it can be timely, and our internal shot clock of 180 days is a good target and a good time frame that should be enforced. I think that the breadth, scope and duration of the restrictions placed on the merging companies shows sort of the extraordinary leverage that we held over the parties in front of us merging. I would like to see the merger conditions have a nexus to the actual merger.

Ms. BLACKBURN. Excellent. Thank you.

OK. Let us talk about peering and interconnectivity. We know that these arrangements have never been regulated, and the FCC net neutrality order says that the rules do not cover peering. So Mr. Chairman, do you believe the Commission's new net neutrality order and its underlying rules govern the level 3 Comcast dispute?

Mr. GENACHOWSKI. Well, you said the order says that it doesn't change anything with respect to existing peering arrangements. It applies to Internet access service provided to consumers and small businesses. You are referring to a dispute that is occurring outside the Commission, a commercial dispute. I hope those parties settle it and resolve it but it is not something that we have facts and data on. I do think the order speaks for itself in the way that you suggest.

Ms. BLACKBURN. All right. Commissioner McDowell, do you believe the FCC has the authority it is claim to govern interconnectivity agreements?

Mr. MCDOWELL. Peering?

Ms. BLACKBURN. Yes.

Mr. MCDOWELL. No, ma'am.

Ms. BLACKBURN. Thank you, sir. I appreciate that.

Commissioner Clyburn, thank you for coming in and visiting with me a few weeks ago. You and I discussed a little bit about market failure at that point, and you believe there has been, I be-

lieve there has not been. So why don't you tell me where you think the market failure lies and why the Internet is broken and why we need to look at these burdensome regulations? Because I am hearing every single day from innovators that are very concerned about the overreach that they see, what this might do and open the door for your Commission to regulate everything from set-top boxes to privacy to you name it.

Ms. CLYBURN. There have in fact been formal and informal complaints lodged at the Commission. There have been persons who have come to my office, who have called, who have e-mailed, when I go to different meetings and public forums, you know, they mention that there are issues, that these issues cause uncertainty in the market and cause them to have problems with financing. So there are issues. There have been formal complaints and a lot of these companies do not have the ability and technical know-how to come forward.

Ms. BLACKBURN. My time is expired. Mr. Chairman, I look forward to the second round.

Mr. WALDEN. We will now go to the gentlewoman from California, Ms. Matsui, for 5 minutes.

Ms. MATSUI. Thank you, Mr. Chairman, and I thank the commissioners and chairman for being with us today. I support the FCC's Open Internet Order because it lays a foundation to create market certainty that both protects consumers and spurs innovation and investment in our economy, and I believe that any attempt to repeal this order should be characterized as stifling innovation and discouraging job growth in the technology sectors of our economy.

Now, I am co-chair of the High Tech Caucus, and one of my priorities is to new innovative sectors like smart grid and health IT that offer great economic and job growth opportunities for our Nation. Technology companies are poised to deploy a range of new technologies to businesses and residential customers alike to ensure and increase energy efficiency efforts and modernize our health care system.

Mr. Chairman, I believe broadband will play a key role in advancing smart grid technologies and health IT. How does the Open Internet Order promote the advancement of these sectors?

Mr. GENACHOWSKI. Well, I agree that those are very important areas for dramatic private investment in the years ahead for the United States to build industries that provide real benefits to the public and devices and products and applications we can export to the rest of the world. What the Open Internet Order does is give entrepreneurs, companies thinking about innovating in that space the confidence that if they invest the resources and the time to innovate, they will have access to a free and open market, be able to reach customers and let consumers and the market pick winners and losers and so it is a great opportunity for those segments.

Ms. MATSUI. OK. Thank you. And I believe one important way to move our economy forward is to increase access to affordable broadband service to more Americans, and that is why in the coming weeks I plan to reintroduce the Broadband Affordability Act to expand the Universal Service Fund lifeline linkup services for universal broadband adoption.

Mr. Chairman, do you believe your Open Internet Order will further lay a foundation that helps increase broadband adoption rates in this country and further bridge our Nation's digital divide?

Mr. GENACHOWSKI. I do, because it promotes a virtuous cycle of private investment throughout the broadband economy that will accelerate the opportunities and benefits of the Internet for all Americans.

Ms. MATSUI. Now, I want to follow up on Ranking Member Waxman's question earlier on market certainty because I believe this is an important point. Over the course of this debate, we kept hearing that industry wanted certainty so they could move forward with investment and their businesses. Now, it is widely known that a number of leading economists and financial institutions have stated that on balance, these rules represent a light touch that provides regulatory certainty that broadband providers and our tech community need to attract new investments and grow so that my sense is that any attempts to repeal in any form would create uncertainty for investors and the market, which puts American innovation investment and growth at risk. So again, what gives here? I mean, we need certainty, and this is sort of a light regulation and yet we are saying, the other side is saying that this is going to put a stranglehold on innovation. So any comments here?

Mr. GENACHOWSKI. I am concerned about that. For years there has been a war in this space between the infrastructure companies on one side and the innovation technology companies on the other side. What we worked very hard to do over this process is to say hey, look, the gap isn't that large, let us resolve this in a sensible way with light-touch rules, move forward because we need all the companies in the broadband economy to work together to grow the broadband economy and to deal with the global competitive threats that we face. I believe we achieved that. I believe that injecting new uncertainty into it now will create more harm than good.

Ms. MATSUI. OK. Any other comments on that?

Ms. BAKER. All of us would love, we would all love certainty. Unfortunately, I think the only certainty would actually be is if Congress would act to give us authority. I think unfortunately—well, I think the courts will turn this around. I think we have a complaint process set up in our rules, that we also have a declaratory ruling process set up in our rules. I think all of these leave inroads for changes, and I also think we have a 2-year review that is also set up to change the rules that exist. So I think that the certainty is actually more uncertainty with the rule we adopted.

Ms. MATSUI. Well, my time is running out but I would just like to say that this is a debate that continues to go on, and we understand we must have some regulations. We understand that. And we are hopeful that in this case, this light touch will spur innovation which I believe it will. So thank you very much.

Mr. WALDEN. The gentlelady's time is now expired, and I will turn to the gentleman from Georgia, Mr. Gingrey.

Dr. GINGREY. Mr. Chairman, thank you, and let me thank the chairman and the other four commissioners for being here today. I associate myself with Mr. Barton's comments earlier, the gentleman from Texas, in regard to the level of expertise that you bring.

Obviously we spent a lot of time talking about this, and I would say that the members on this side of the aisle feel like this net neutrality ruling, this 3-2 spilt decision, was really unnecessary, a hammer in search of a nail, if you will, and our colleagues on the other side of the aisle feel like it is very much necessary. In fact, my good friend from Pennsylvania talked about the necessity, I think he put it as the need for a cop on the beat. I would suggest that if there is no history of crime on the beat, is it cost effective to put a cop there? In fact, he went on to talk about his daughter using the Slingbox. I never heard of the Slingbox but it sounded like a heck of a good innovation, and I guess that certainly came online at a time before this 3-2 ruling.

So with that in mind, I am going to ask my first question to the chairman. Chairman Genachowski, in the National Broadband Plan that was released by the Commission last March, page 5 stated that, and I quote "The role of government is and should remain limited," yet I find the order delivered in the 3-2 vote by the Commission to contradict this very statement. You say in your testimony that the so-called open Internet rules will promote innovation, and maybe you can give me a yes or no answer on this. Has there been a lacking of innovation in the absence of government regulation over the Internet during the past decade?

Mr. GENACHOWSKI. As I mentioned, there have been Internet protections in place since at least 2005, and so in the space people were operating on the assumption that Internet freedom was assured.

Dr. GINGREY. Well, the question again, yes or no, has there been a lack of innovation?

Mr. GENACHOWSKI. Let me see. There has not been a lack of innovation because there has been—

Dr. GINGREY. I will take that as a no. And if there has not been a problem with innovation, then why, why is it necessary to promulgate regulations that may well stifle innovation at least according to a December 31, 2010, report from Anna-Marie Kovacs?

Mr. GENACHOWSKI. What we heard from the innovator community was that in the absence of sensible rules of the road, they wouldn't have the confidence and certainty they need to invest their time and resources to raise capital in order to continue to innovate, and they felt very strongly about it.

Dr. GINGREY. But yet, you know, the innovation that we hear about like the example of the Slingbox and other things, I mean, you know, this is sort of speculative, it would seem to me, and as a result of this order, despite the assurance of your testimony, will there not be a subsequent drop-off in innovation due to this unnecessary, as we see it, government regulation?

Mr. GENACHOWSKI. I think this is a spur to innovation both at the edge and in the infrastructure, and I think the statements from most of the companies in the space analysts in the space are consistent with that.

Dr. GINGREY. I don't see how then you can make that sort of assurance without the proper market analysis which the Commission today has admitted did not occur.

Mr. GENACHOWSKI. With respect, we did do a market analysis in our order.

Dr. GINGREY. Is my time expired?

Mr. WALDEN. No, but you might want to ask the chairman if it is an OIRA standard market analysis as recommended by OMB, and if so, if you can make it available.

Mr. GENACHOWSKI. We will obviously make it available. It is in the order, and we will get back to you on whether it is specifically OIRA compliant.

Dr. GINGREY. Mr. Chairman, if I have—

Mr. WALDEN. You actually have another minute.

Dr. GINGREY. Thank you.

I want to ask Commissioner McDowell, Commissioner, isn't this order full of double-speak? To me, certainly it is. It says to keep the Internet free, we need to regulate it. To ensure no one needs permission to innovate, everyone will need to ask the FCC for permission to innovate. And it goes on to say to create certainty, as few as three commissioners now can decide what types of business arrangements and traffic management techniques are reasonable. Does that make sense?

Mr. MCDOWELL. It doesn't make sense, and I think what we are hearing today from the chairman as well as in the order is that innovation only happens at the edge, and he has referred to several times about innovators and the technology companies at the edge and there is just infrastructure on the other side, the network operators. We want to have innovators everywhere. You have companies like Microsoft and Google as well as Verizon and AT&T who have thousands of miles of fiber, have servers and soft switches. They offer voice, video and data services of all kinds and all sorts of applications, and you don't want government tilting the scales while putting its thumb on the scale to try to distort that market. You want innovation at all layers, all levels of that environment.

Mr. WALDEN. The gentleman's time has expired. I will recognize the gentleman from New Jersey, Mr. Pallone, for 5 minutes.

Mr. PALLONE. Thank you, Chairman Walden. I do want to say I am pleased to see the FCC commissioners here today, and I want to touch on two topics with Chairman Genachowski, and again, I have to apologize because I know that some of this is repetitive. I will try not to be.

The first is the follow-up to a letter I wrote to you last spring regarding the Title II framework you initially laid out regarding the Internet principles, and I wanted to reiterate my concerns regarding agency action. I was the chairman of the Subcommittee on Health, and I am still the ranking member, and in that capacity, I am increasingly sensitive about the tendency of government agencies and in particular independent agencies to arrogate to themselves policymaking authority that is properly exercised solely by Congress, in my opinion. Now, while questions involving an agency exceeding the authority granted to it by Congress are decided in the courts, I think an agency ought to be mindful of the limits on its authority. So far, two companies have questioned your authority and brought suit against you. Can you tell me—this is sort of repetitive, so I wanted to ask if you could tell me why you believe the agency has legal authority to implement network neutrality rules or provisions of the National Broadband Plan in the order being examined today? But let me say specifically, because you

have gone into this, where you believe you have the authority, what would you cite, and why you think you are going to win in the court. I will say it that way.

Mr. GENACHOWSKI. I am glad you asked the question because it allows me to try to clear up one issue. There were many Members of Congress who in the course of our proceeding urged us not to rely on Title II as a basis for any decision in the area, and after a lot of discussion and input, we listened to that, we heard that, and in fact we didn't rely on Title II in adopting a final decision, and instead we adopted a framework that is consistent with the framework that historically has had consensus in this space, the light-touch Title I framework tied to specific provisions in the Communications Act like those instructing us to promote competition. And so I do remember getting your letter and it was something that we paid careful attention to and that we believe we responded directly to in how we ultimately ruled in this matter.

Mr. PALLONE. And why do you think you are going to win?

Mr. GENACHOWSKI. Well, we think we are going to win because we think that the theory we have laid out is very consistent with Supreme Court precedent in this area, and it is consistent with the D.C. Circuit decision. The D.C. Circuit was asked to rule that the FCC had no authority at all with respect to broadband, and it didn't do that. It set a standard that the FCC has to reach in order to adopt sensible rules in this area, and we believe we met that standard. It is in litigation now. Almost everything that the FCC does ends up in litigation. There are some areas in which the D.C. Circuit is in tension with the Supreme Court but we believe we meet the standard of the D.C. Circuit case and we are certain that we meet the standards set out by the Supreme Court in this area and that we are operating well within our authority under the Communications Act.

Mr. PALLONE. All right. Let me get to my second issue. This was an issue I raised last summer, or I should say last May. Congress learned that Google had gained access to personal WiFi and collected information about consumers' Internet activities and at the time I called on the FCC and the FTC to investigate out of concern for consumers' privacy. Now, the FTC investigation was dropped in October without providing sufficient answers, in my opinion, to how the privacy breach was allowed to take place and who was affected, but I understand that the FCC is also investigating. So could you comment on any progress with that investigation, whether the FCC is examining the data for itself, what steps are being taken to avoid situations like this in the future in today's technology age?

Mr. GENACHOWSKI. I can't comment on an open investigation but I will say that we certainly heard you in that letter, and any uses of spectrum or technologies that are within the FCC's purview that violate the privacy statute and the FCC's privacy rules are actions that we would take very seriously.

Mr. PALLONE. OK. As far as you can go, in other words. All right. Thank you.

I yield back, Mr. Chairman. Thank you.

Mr. WALDEN. I thank the gentleman for yielding back. I now go to the gentleman from Louisiana, Mr. Scalise, for 5 minutes.

Mr. SCALISE. Thank you, Mr. Chairman. I appreciate you hosting this hearing. I appreciate all of the FCC commissioners coming to talk about this important issue of net neutrality and its impact especially on the economy and our ability to continue to encourage the innovation and the job creation that I think has been one of the hallmarks of the Internet. I would actually agree with the commissioner back in 1999, Commissioner Kennard, who had talked about the innovations and also encouraged against the dangers of regulating the Internet, and this was President Clinton's FCC commissioner that talked about the dangers of regulating the Internet, especially in ways that it would stifle innovation. When I look at what has been happening in the industry, I think one of the few real positive signs in a struggling economy that we have today has been the technology sector, especially the companies that do operate and innovate using the Internet and its capabilities to allow commerce, to allow connectivity of people, of ideas. They are even talking about what is happening in Egypt being something that really in many ways came out of Facebook, and of course, these great innovations happened without net neutrality. These great innovations happened because there was a certainty and an ability for industry to go out there and invest, as I think it was Commissioner Baker who pointed out over \$500 billion of private investment—this isn't Federal Government with stimulus but private investment coming out over the last 10 years of the private sector to encourage this innovation. This was again without net neutrality, without the big hand of the Federal Government or the big hammer, as you might want to call it.

And so you can see why there is a big concern by many of us about this imposition of net neutrality, and this is not just a Republican issue. I know some on the other side have kind of inferred that this is the way it should be. I was a little bit surprised to hear the three Democrat commissioners saying that they don't think that this Congress should pass a resolution of disapproval because when I go back to the Constitution, which is of course our overarching document that lays out the structure, it is article 1, section 1 that talks about the legislative branch deciding policy, with all due respect, not the FCC, not the EPA, not all of these bureaucratic agencies that seem to think that their will is better than those of us who were actually elected by the people.

And so with that, I want to at least try to get into this a little bit more, and Chairman Genachowski, starting with you. When we look at the private sector innovation that has come with the ability to innovate and then of course the business models that are built around the things that encourage private investment, do you have any concern that by changing the rules, by imposing net neutrality and in some cases opening the door for retroactive changes, that you are going to discourage that kind of innovation and investment?

Mr. GENACHOWSKI. Well, I actually agree with what Commissioner McDowell said a few minutes ago about the importance of the investment and innovation throughout the broadband economy, both early stage and technology companies and also our infrastructure companies, wireless and wired. It is a full broadband economy where innovation and investment in any part of it fuels investment

throughout. We paid very careful attention to this as we worked on this item, and I believe this will be a spur to investment and innovation throughout the broadband economy and overwhelmingly the analysts who looked at what we did characterized it that way, as a light-touch action that increases certainty and will unleash investment.

Mr. SCALISE. And I guess we will disagree about whether it is a light touch and whether it increases certainty versus what many of us think that it actually decreases certainty.

I will ask Commissioner Baker, because you did make those comments about the \$500 billion of private investment, if you can just answer that same question and what effects it would have on future investments.

Ms. BAKER. So I think it is important what has brought us here but I also think what it is important to take us to the new generation, so updating the networks by 2015, the number is going to be \$182 billion. I think the network providers are going to have to have a return on that investment. It is a very tight capital market. I think things like network management, prioritization, specialized services have been turned into bad words as opposed to engineering marvels, and I think that we need to allow—I think the term is called wealth transfer and so what we are doing is taking away revenue streams from the providers how are building these networks. They need to have as much incentive as possible to have a return on their investment, which will then in turn allow all of the edge applications to innovate and continue this terrific ecosystem.

Mr. SCALISE. And we heard some concerns in a previous hearing last week about that in relation to the stimulus bill where the federal government was using taxpayer money to in essence other companies to compete against private companies who already made an investment of billions of dollars, hiring thousands of people, creating good jobs that now will not have that same ability to make those investments in the future.

So again, we have seen those regulations killing jobs and that is a big concern. I know we will get into more of it in the second round. I appreciate it, and I yield back.

Mr. WALDEN. The gentleman's time is expired. The Chair now recognizes the gentleman from Illinois, Mr. Rush, for 5 minutes.

Mr. RUSH. Thank you, Mr. Chairman, and I want to welcome the commissioners here again. I want to begin by saying I agree with you, Chairman Genachowski. I think in essence you said, your statement was that regulations don't create incentives, they create certainty, and certainty is a catalyst for investment and innovation, and I certainly concur with those sentiments. When the FCC decided to issue a balanced set of open Internet rules, I for one urged industry not to challenge these rules in court. These rules largely track an agreement that this committee helped to negotiate among parties on all sides of the issue. Now that some of these companies have decided to take the court route, the question of the FCC's authority to adopt rules affecting broadband service providers will unfortunately be left in the hands of the federal appellate court, and to me, I would have liked to avoid that. And I would sincerely hope that after today that we in Congress will move on and move ahead to help you, the FCC, and our Nation tackle more immediate prob-

lems including our looming spectrum crunch and financing the build-out of and national interoperable public safety network, reforming universal service and designing all auctions and licensing opportunities to ensure that minority and small businesses have just as good a chance as the large fat cats, the large corporations, the big boys to become real participants and players in the communications and technology sector.

As you know, Mr. Chairman, Chairman Genachowski, the President recently announced that he supports reallocation of the 700 megahertz D block to public safety. Further, both Senator Rockefeller and Representative King have reintroduced bills this year that will reallocate the D block to public safety. Last year, you testified in front of this subcommittee that you believe the plan to auction the D block recommended by the National Broadband Plan provides the best strategy going forward.

Now, I want to ask each one of you, and I only have a few more minutes, so if you would quickly answer this question with a yes or no answer. Do you still support the recommendations auctioning the D block as laid out by the National Broadband Plan?

Mr. GENACHOWSKI. Yes, and we need to get a mobile broadband public safety network built and funded.

Mr. RUSH. Commissioner Copps?

Mr. COPPS. Well, I think that is a viable proposal. I think we also need to hear from Congress. The central question to me is which of the options out there are going to provide money to actually build this infrastructure, and we need to identify where that is, and I think that will be the route to go.

Mr. MCDOWELL. I think this issue is more one of public safety needing more money rather than more spectrum. I would like to see the D block auctioned off cleanly but we need Congress's help to fund that build-out.

Ms. CLYBURN. I look forward to a Congressional engagement. At the bottom of this, at the core of all this is, we need the pathway for a truly interoperable public safety network. I think that is what we all want, and the best way to get that. I look forward to engagement from you.

Ms. BAKER. I think I agree with all my fellow commissioners and chairman. Last year we testified that an auction was a terrific way forward. It seems to me that some other ideas have surfaced from other places, and I think if we are going to look at reallocation too as a viable alternative, I think the important is to get the public safety interoperability network built as soon as possible and we will look to you as to how to do that best.

Mr. RUSH. My next question, when FCC auctioned 52 megahertz of spectrum in 2008, one of your predecessors, Chairman Genachowski, said it is also appalling that women and minorities were virtually shut out of this auction with women-owned bidders winning no licenses and minority-owned businesses winning less than 1 percent. We clearly failed to meet our statutory obligations in 309(j) to expand diversity and the provision of special base services. In 2008, we raised about \$20 million for the U.S. Treasury. Much of that spectrum has been now deployed to make 4G services a reality, giving subscribers faster broadband speeds, supporting more and more apps and more and more video. Many critics of the

auction contend, however, that the FCC's auction design did not do enough to allow women, minority and rural phone companies to women any of the spectrum licenses. If you decide to auction the D block, what design improvements can FCC make to ensure that these types of bidders are more successful this time around?

Mr. GENACHOWSKI. Well, you raise an important issue, and we would look at all possibilities to address those issues in any auction design that we take up our next auction design, and in connection with the topic of the day, I will say that one of the challenges in that area is the amount of capital that is required to build and launch a wireless business is very high and it is what makes the issue difficult. On the online area, the capital requirements to start a business are much lower and so the new opportunities for new entrants, diverse entrants on the Internet is something that I think is a promising opportunity.

Mr. WALDEN. The gentleman's time has expired. Now I would like to go the gentleman from Ohio, Mr. Latta, for 5 minutes.

Mr. LATTA. Well, thank you, Mr. Chairman. I appreciate the opportunity. I want to also thank all of you for being here with us today. It is very, very enlightening, and what I would like to kind of do is maybe just kind of start off with, I really believe that we have got to keep government out as much as we possibly can because if we want to see an invasion of growth, it is not going to happen.

One of the things, Mr. Chairman, I would like to submit for the record is a letter from a company doing business in my district from Amplex Internet, if I could ask unanimous consent that that be included in the record.

Mr. WALDEN. Without objection.

[The information appears at the conclusion of the hearing.]

Mr. LATTA. I appreciate that, Mr. Chairman.

And one of the things that—and just real quickly about this company. It is in a village in my district and they have 2,100 household and businesses they supply service to and they employ eight people and they have added three new employees in the last year, which is how we grow things in America, small businesses and they grow large.

But in his letter, it is interesting because he states a couple of things that I think that he might have been in your own meeting rooms because this letter is dated December 15th of last year, and he says in the letter, "The Internet has grown incredibly rapidly without significant government regulation and continues to do so. There is no pressing reason for the government to act at this time." He goes on to say, "In the limited number of cases to date involving questionable behavior, the existing consumer protection laws have been sufficient to address the issue," and I find that interesting because a lot of times I think we—I would like to ask this question. You know, we have been kind of talking at the 30,000-foot level here today. What we need to do is talk to the people back home on main Street. These are the folks that have got to do this.

And starting with Commissioner McDowell, I think that he must have been in your computer because when I am looking at your statement, you said it on December 21, 2010. You state on page 6, "And my dissent is based on four primary concerns. Nothing is bro-

ken in the Internet access market that needs fixing, and existing law and Internet governance structure provide ample consumer protection in the event a systematic market failure occurs.” Those two letters are just 6 days off but this is somebody from Main Street, again, somebody that is out there trying to live with this.

And I guess I would like to read something that Commissioner Baker, you have written in your testimony, saying again that—you are pretty much saying that our surveys revealed that 93 percent of subscribers are happy with their broadband service, and you go into that we need broadband competition, we need private capital and that the Internet is open without the need of affirmative government regulation.

So I guess if I could just start with Commissioner McDowell, what do I tell the folks back home? How do I explain what we do here in Washington that affects them right off the bat? Again, we are looking at—you know, we do things at 30,000 feet but we are talking about people right at ground level, ground zero.

Mr. MCDOWELL. Well, I think you have touched on an important point which is that we have had wonderful innovation at the edge. The Twitters, the Facebooks, the eBays, the Amazons have all developed under the current environment, that there is no systemic market failure, that nothing is broken, and when you look around the globe it is not private sector mischief with the Internet that is the problem, it is state control of the Internet, and that is the concern here.

But also I would like to sort of take issue with the notion that has been aired several times, that the December 21st order was somehow some active consensus because Comcast and AT&T and NCTA, Comcast Trade Association signed onto it. Comcast was very vulnerable, had a large merger before the Commission at that time. AT&T, it ended up was being on Qualcomm 700 megahertz spectrum and was going to need FCC approval of that. And of course, those two entities are going to want to comply as best as possible. When you read their statements, they aren't ringing endorsements, and as we have seen debate over this peering issue as to whether or not the FCC is going to claim jurisdiction to regulate peering, NCTA and AT&T have submitted a joint letter to the Commission expressing grave doubts and feeling there is a bit of a bait and switch here.

So, you know, there is not great consensus here, and Wall Street analysts aren't part of that as well. Back in October, October 1, 2009, we convened a workshop at the FCC on investment and broadband, and back when Title I was being discussed and not just Title II, and we had analyst after analyst and investor after investor of various stripes and sizes cautioning us against net neutrality regulation. Then Title II, the specter of Title II was aired last year in the middle of the year. I think what you saw from Wall Street in December was more of a sign of relief that it was not an overt or an explicit Title II reclassification. In reality, what it is, it is Title II with a Title I disguise, as I have said in my dissent. So that sign of relief doesn't necessarily equate to Wall Street's endorsement of what the FCC did.

Mr. WALDEN. The gentleman's time is expired.

Mr. LATTI. I thank you, and yield back.

Mr. WALDEN. The chair now recognizes the gentlewoman from California, Ms. Harman, for 5 minutes.

Ms. HARMAN. Thank you, Mr. Chairman, and thank you to the subcommittee for years of friendship and partnership. I will miss this subcommittee very much and had been looking forward to my return here. I will also miss this Commission very much. Rob McDowell, thank you for your comments. Others of you, thank you for your notes, some of them quite blunt and humorous, which I shall treasure. But I want you to know that the set of issues that we are addressing this morning are a centerpiece for what will or won't keep our country safe, innovative and free—I do like that word—in the future.

And so let me just turn to my top priority for this subcommittee and the Commission, and I have decided that since you all want to give me a parting gift, you will act on my top priority, which Michael Copps said he wanted to act on this year, that is, to build out in some efficient way a national interoperable communications network for first responders, and oh, by the way, while you are at it, I hope you will also consider some brilliant legislation that Mr. Shimkus and I introduced last year and that I hope he will take the lead on reintroducing this year called the Next Generation Public Safety Device Act, the point of which is to create a real competition for devices to use in this emergency space that will provide the users with much better performance at a much more competitive price.

So having said that, I would like to ask the commissioners each of you whether you are ready to give me these wonderful and important national gifts as I depart the Congress.

Mr. GENACHOWSKI. Well, we are—if I may, we really are going to miss your leadership on this committee and in Congress, particularly on these issues. Getting a mobile broadband public safety network built, it should be one of the country's top priorities. Now, it will require funding to build it and so we are ready as a Commission, I think this is true of all of us, to work on a bipartisan basis with everyone to support whatever legislation is necessary to move forward. We have begun to move forward on the interoperability piece. We want to be ready. But you are absolutely right that this is a major challenge for the country.

Ms. HARMAN. Well, let me just add, Mr. Chairman, that I tend to favor the auction concept because I think it will generate funding and it will also push innovation. I think that the private sector has marvelous ideas to offer the public safety sector.

Mr. GENACHOWSKI. I would just say, there are several different ideas that are now in circulation, in debate. They should be discussed, resolved quickly—

Ms. HARMAN. Hear, hear.

Mr. GENACHOWSKI [continuing]. So we can focus on what gets a mobile broadband public safety built quickly.

Ms. HARMAN. Mr. Copps?

Mr. COPPS. Well, first of all, thank you very much for the opportunity to respond. Your leadership on this—you and I go back a long way in fighting for this issue, and I think maybe the time is nigh when we are actually going to get something done. I just sense that there is a willingness to move ahead. We have to be

practical and pragmatic how we do that, but I think this is the year in a bipartisan because it is not a bipartisan issue to get done. As my old boss, Senator Fritz Hollings, reminded me many, many times, the safety of the people is always the first obligation of the public servant, and you have certainly met that obligation often and well, and I certainly will miss your leadership on this and a whole range of other issues but certainly look forward to the great work you will do at the Wilson Center and to continuing our friendship after you leave these hallowed halls.

Ms. HARMAN. Thank you so much.

Mr. McDowell?

Mr. MCDOWELL. I think an auction is the best way to raise the maximum amount of revenue for the Treasury to help fund this. In the meantime, the FCC has granted waivers to 20 jurisdiction so the L.A. area, the D.C. area, for instance, are covered in that regard but great swaths of the country are not.

Ms. HARMAN. Well, let me just, if I might, on those waivers, while I favor that and thank you very much, I worry that we may be building regional interoperable networks that will not be interoperable nationally and so it is critical, I think, to have some common rules of the road and also to focus on the devices that are used in these regions.

Mr. GENACHOWSKI. And if I may, we share that concern and it is why we are working together on interoperability and why we are moving in that proceeding to make sure that we don't end up with that problem.

Ms. HARMAN. Thank you.

Mr. Chairman, can the last two witnesses answer my question?

Mr. WALDEN. Absolutely, yes. Of course.

Ms. CLYBURN. Again, thank you for your service and I look forward to more and better to come in your new capacity.

I too, you know, being from a State that is very vulnerable from a weather perspective, I too think that this is way overdue, long time coming. While I know you have some concerns about those waivers, those waivers give us a better pathway forward. They let us know in very small, relatively small footprint some of the challenges that will lie ahead. So that type of flexibility does have its advantages and I am looking forward to a better and more robust interoperable system.

Ms. BAKER. I agree with all my colleagues about the comments on your leadership and your advocacy, and I very much hope that your legacy is that we will get this done in the window of opportunity that we have right now while 4G networks are being built out, so thank you.

Ms. HARMAN. Thank you very much. I yield back, Mr. Chairman, but I will look forward to this giant gift of a national interoperable network and a competitive system to develop devices all wrapped up with a bow by December 2011. Would that be all right with you?

Mr. WALDEN. As long as you stay here on the committee. I appreciate your service on the committee, Ms. Harman, and your service on the Intelligence Committee too. You have been a real leader and we will miss you.

Ms. ESHOO. If I might, I hope it will be by the anniversary and not December but by September 2011.

Mr. WALDEN. We will have some further discussion about D block and broadband plans and money and the access and where we go from there before this committee at some point in the not too distant future but we are going to try and stay on net neutrality today for the most part.

Mr. Kinzinger, we recognize you now for 5 minutes.

Mr. KINZINGER. Thank you, Mr. Chairman, and thanks for coming out to see us and all the patience you are having to put in. I know it is not always overly enjoyable to sit there for 2½ hours or more and answer questions. Some of them are the same.

Let me just ask a few, kind of express a few concerns I have, ask a couple of questions and then we will move because I don't want to rehash a lot of the old stuff. But let me just say, in 2003 I think it was 15 percent of Americans had access to broadband technology. As of 2010, it is 95 percent. So as I look over the stretch of just 7 years, I see an extreme flourishing of what we see in technology today in just one decade. I mean, when you even look through history, you are going to see that this—I mean, this is a relatively short period of time. I am glad—you know, I often wonder if I could go back 15 years or 10 years or whatever to the FCC commissioners and ask them what do you foresee as challenges and how can you respond to that right now because of these potential challenges that are coming. I actually fear what they might come up with as solutions for what they could potentially see as a challenge that doesn't fully exist yet.

That is what I see when I look at the net neutrality issue is, OK, well, we see potentially what could happen so let us preemptively pass this law without really not passing a law because Congress isn't even approving of this, and it is that. I mean, look, I am a pilot. That was my job before this. I still love flying airplanes. I love the idea that some day we may have flying cars. I think that would be great. We could get around all this traffic. But I don't think it is appropriate for the transportation department to now take a look at when we have flying cars and go ahead and implement rules for when that is going to happen. That is a concern I have.

And, you know, beyond the issue, beyond the merits of the issue and all that, where we have a lot of heartburn and where again a supermajority of Congressmen in the last Congress, the 111th, not even this one, which significantly looks different now, but when a supermajority basically stand up and say we don't want this or we have concerns about this, where I think the heartburn is not so much in the rule, we can talk about the rule, you know, I disagree and all that, but is the fact that three of the five commissioners felt that you had the authority to go around Congress implementing this rule, knowing very well if you think it exists on its merits, there can be an effort to talk to all of us about the importance of net neutrality and we will be sold on these great merits and we may pass it out of the House of Representatives and you can do whatever you want, but that didn't happen. In fact, I have heard from a few concerned that well, we think it is going to hold up in court. OK. You ought to be real sure. "We are pretty sure we

have the authority to do this.” You ought to be real sure you have the authority, and if you don’t have the authority to do it or you are even questioning whether you have the authority, why not come to the people’s house and ask for it? If it can stand on its merits, we will give it to you. So that is my thoughts.

Let me ask, and this will be basically my final question so I may give you all mercy and not to have to stay here the whole 5 minutes of my questioning. But as I look through these concerns, and right now on the Floor of the House of Representatives and for a few weeks going forward we are going to talk about—actually a few years going forward we are going to talk about budget issues. We are going to talk about how much money this government spent that it doesn’t have. You are seeing amendments talking about where we can’t spend money and all this. That is a very big concern.

My question is, how much money—and, Chairman, I will ask you this. You may not have the number. I would love to get it if you do eventually. How much money has this already broke government spent in the Comcast v. FCC case and how much do you see that you will potentially spend in defending the Verizon appeal? I will just ask that, if you have a number of how much money that the government spent that we don’t have in defending something that frankly has been implemented without the authority of Congress.

Mr. GENACHOWSKI. I don’t have a number but we will work on answering your question, and to your larger point, which I completely respect, we continue to be available as a resource to work with Congress on legislation that would provide certainty and address issues around broadband, and so that is our job and we look forward to being a resource to Congress.

Mr. KINZINGER. And I hope as new issues come up and new concerns you have, if you are questioning whether or not you really do have the explicit authority that you would take that route, and I think all of us on this subcommittee would be happy to work with you in discussing the pros and cons.

So at that, I will yield back and I thank you for your time.

Mr. WALDEN. The gentleman yields back his time. We go now to Mr. Towns for 5 minutes.

Mr. TOWNS. Thank you very much, Mr. Chairman and the ranking member, for holding this hearing.

Also, let me say to my colleague, Ms. Harman, we are definitely going to miss her, and I have taken this sort of somewhat personal because I returned to the committee and you leave the committee, but we will miss you, and it has been great working with you over the years.

Let me say first of all, Commissioner Genachowski, I heard your opening statement and you mentioned jobs, and I think that one thing today more than anything else is that we need to focus on jobs. I mean, people are unemployed. Many of them attended the most prestigious universities in this country but now have no jobs. So let me ask you, how can we bridge the digital divide and encourage greater access to technology in economically disadvantaged areas where it is lacking? With the speed in which technology is developing, what action has the agency taken or planned to take

in the future to make sure those left behind by our economy are part of this innovation generation?

Mr. GENACHOWSKI. This is a very significant issue. There are 24 million Americans who don't have any broadband infrastructure at all and then there are hundred million Americans, about 33 percent of the population, who haven't adopted broadband and the number of Americans who don't have basic digital tools and skills and literacy to participate in a digital economy is way too high. There is no silver bullet to solve this. We are working on a series of initiatives, some together with other agencies, some looking at our programs that have addressed similar issues in the telephone era. It is an area where I think there is great opportunity for public-private partnerships because every new subscriber benefits these broadband goals and also benefits the infrastructure companies that are signing people up, so I acknowledge the importance of this issue and look forward to working with you on it.

Mr. TOWNS. Thank you very much, because when we leave people behind, it does not make us more competitive.

Commissioner Copps?

Mr. COPPS. Thank you very much for your question. You know, there was a time, historically speaking, when one-third of the Nation was ill-housed and ill-clad and ill-nourished when Franklin D. Roosevelt was President of the United States and we all were very concerned about that. Now we have a situation where one-third of the country are not having access or to being able to take advantage of access to this liberating technology. That should certainly put this whole problem at the top of our list or close to the top of our list of national priorities and making sure it goes to every American no matter who they are, where they live, the particular circumstances of their individual lives, white or black, rich or poor, city or country. That has got to be the policy. That the universal service policy we need to design.

Mr. TOWNS. Thank you very much.

Mr. McDowell, Commissioner McDowell?

Mr. MCDOWELL. Yes, sir. Actually in our work since the chairmanship of Michael Powell on the unlicensed use of the television white space is one area where this can be particularly helpful, and Chairman Genachowski deserves great credit for continuing to move that ball down the field. But unlicensed use of this fabulous spectrum will really speed deployment and make things more affordable. Also, it will help, a release valve should there ever be sort of anticompetitive behavior in the last mile, and this is an antidote to the concerns that net neutrality proponents have.

But as with WiFi, nobody had heard of WiFi on Friday but Monday it was everywhere practically. So I think with white spaces, that is going to help tremendously for affordability, access and adoption.

Mr. TOWNS. Is there anything here we need to do on this side of the aisle, as Members of Congress to help move this forward?

Mr. MCDOWELL. White spaces in particular?

Mr. TOWNS. Yes.

Mr. MCDOWELL. Well, I think we are good on that as long as we can move forward. I think the spectrum reallocation legislation is causing some concern. I was just telling Congresswoman Eshoo, I

was just in Silicon Valley in her district a few weeks ago and until we know whether or not the incentive auction legislation is going to pass and become law, chip makers and software designers are withholding their work until they can know how to innovate and how the spectrum is actually going to be used. So the sooner Congress can have resolution one way or the other on the incentive auction idea, I think that would be fabulously helpful.

Mr. TOWNS. Commissioner Clyburn?

Ms. CLYBURN. Thank you, Congressman. I think about this. I wrote down three things that came to mind: affordability, availability and education. You touched on those. One thing that was great about the National Broadband Plan is that it has forced us to concentrate on those challenges, the challenge of that 5 percent was mentioned that is not served right now, the challenge of literacy issues which translate into digital literacy issues that you asked how possibly Congress could help. When things get better—I know things are a little tight budgetarily now—we put forward—well, the National Broadband Plan talked about a digital literacy core. That is something that these digital navigators could come in these communities to help educate and augment the experiences of people. Availability and affordability—I know time is short. Those go hand and hand, and there are a number of things happening. We talked about a major transaction that just took place. There are a couple of things that are being offered that I hope are replicated: affordable, under \$10 a month, high-speed Internet access. That is coming, that is possible, can be replicated. Support for equipment, which is another barrier to entry, that is an important barrier to entry, affordability from that perspective. That is coming. That can be replicated. And availability in terms of the infrastructure, the things that we could put forward to encourage infrastructure development, that is here now and we look forward to working more with you to encourage that to continue.

Mr. TOWNS. I know my time is expired, but being I am new to the committee, can Ms. Baker answer as well?

Mr. WALDEN. We will go ahead and do that.

Ms. BAKER. I agree with everything that my fellow commissioners have said. We have done relatively well in deployment. We want faster, broader, bigger, better networks to be built but some of the focus we really need to do is on adoption. The only thing I would add is that we figured how to reach consumers for the first time during the digital television transition, and I think if we could revisit some of those public-private partnerships to focus since it is not a one-size-fits-all problem that we can really use those partnerships to focus on bringing more people to the Internet as it becomes very much critical infrastructure.

Mr. TOWNS. Thank you, Mr. Chairman, for your generosity.

Mr. WALDEN. You are welcome, Mr. Towns.

Now we go to Mr. Rogers from Michigan for 5 minutes.

Mr. ROGERS. Thank you, Mr. Chairman. Good morning, and thank you for your time today.

Mr. Chairman, we all know that the Internet regulation in your order regulates Internet service providers, but how does this impact content providers from discriminatory actions?

Mr. GENACHOWSKI. Are you asking about intellectual property issues?

Mr. ROGERS. Well, companies like Google and Skype and other companies are not impacted by your order. I am just curious if you believe that the ISPs are conducting some discriminatory action, which you claim they are not. Is that correct?

Mr. GENACHOWSKI. There have been instances of discriminatory conduct.

Mr. ROGERS. OK. So how do you prevent in this order discriminatory conduct for content providers?

Mr. GENACHOWSKI. Historically, this issue, the open Internet protections that have been in place since 2005 have been focused on the Internet service providers, and that is good reason. That is fundamentally where the Communications Act points us to companies that—

Mr. ROGERS. I understand, but this particular order does not impact content providers.

Mr. GENACHOWSKI. Correct.

Mr. ROGERS. Yes? That is correct?

Mr. GENACHOWSKI. Yes.

Mr. ROGERS. In your December 21st press release, you describe, and I quote, “The Internet has thrived because of its freedom and openness, the absence of any gatekeeper blocking lawful uses of the network or picking winners and losers online.” But I am curious. When I read the order, aren’t you merely making the government the gatekeeper in this particular case?

Mr. GENACHOWSKI. Not at all. With respect, I don’t think that is what we are doing. We are simply saying that certain conduct by the companies that do control access to the Internet aren’t consistent with Internet freedom and shouldn’t be permitted, and companies have—

Mr. ROGERS. Which means you are the gatekeeper because you are the sole determinant of that.

Mr. McDowell, you wrote a dissenting opinion that basically, I don’t think you used the word “gatekeeper” but can you help me understand? I clearly believe the government is going to make those decisions about who is and who is not on access.

Mr. MCDOWELL. It all boils down to the word “reasonable” and how three FCC commissioners will define that term on a case-by-case basis. So when we talk about price tiering, for instance, there are some advocacy groups who have pushed for net neutrality rules who are worried about price tiering as somehow being discriminatory, and it is discriminatory but not in a bad sense. What this actually does, it allows low-income users, for instance, to have a price they can afford for, let us say, wireless services provided by Metro PCS. But is that reasonable? That is going to be determined by three FCC commissioners.

Mr. ROGERS. It certainly opens the standard. They were talking about applications and the next generation of Facebook, but just because nobody wants to buy my particular product or app, I find it unreasonable that I don’t have some unusual access to the Internet. Could I bring a case like that to the Commission?

Mr. MCDOWELL. I think under the logic put forward in the order, the Commission has boundless authority and you could bring such

cases. The Commission basically says it has authority for direct economic and indirect economic regulation but is choosing not to go to certain places, but it could, it said in the order.

Mr. ROGERS. I have met no inventor of any application that didn't think that this was the one that should make it. That is why we have thousands and thousands of applications, and I am stunned by these very polite terms of "light touch," of regulation, but what we are doing is creating the government as the gatekeeper for the Internet for the first time in its history after it has exploded with innovation, and you use Facebook as your term for the future but Facebook was there before you got there and so was Netscape and so was Google and so was YouTube and it explodes and it is fantastic, and for the government to step in and get the keys to the gate scares me to death.

I will ask you this, Mr. McDowell. Was this a controversial order, I mean, given the sense that 300 Members of Congress, yes or no?

Mr. MCDOWELL. Yes.

Mr. ROGERS. Have you ever seen in your time—well, actually I am going to ask Mr. Copps. You have been there 10 years. Have you ever done such a controversial order the week before Christmas at the change of a Congress where there was going to be a power switch in the body? I mean, a lot going on, a lot of chaos. This is major. It is controversial. Have you ever seen that in your 10 years on the Commission?

Mr. COPPS. Yes, I have.

Mr. ROGERS. Oh, really?

Mr. COPPS. I have seen it a couple of times with regard to media ownership, the newspaper broadcast cross-ownership, a number of other things where—

Mr. ROGERS. Where we were in such a hurry that you didn't feel you needed a full market survey?

Mr. COPPS. Yes, sir.

Mr. ROGERS. Wow. Interesting.

Ms. Baker, you described that the market surveys before, the European Union, not known for its bashfulness about regulating anything if it moves, what was their determination on regulation of the Internet in relation to this?

Ms. BAKER. The European Union took a look at this and actually said what we need to do is have a transparency, a very consumer-friendly transparency approach so that if there is a problem there, we would be able to address it. So in some regards, we took a much more regulatory approach than the European Union.

Mr. ROGERS. So the French even argued that we have gone too far. Interesting.

Mr. WALDEN. The gentleman's—

Mr. ROGERS. I see my time is expired. I look forward to another round of questions, Mr. Chairman.

Mr. WALDEN. I now turn to the gentleman from Washington, Mr. Inslee, for 5 minutes.

Mr. INSLEE. Thank you, and thank you, Mr. Chair and Ranking Member Eshoo, to allow me to participate in this. I think this is very important and I appreciate the Commission's work on this effort because I really do believe the Internet does run a risk of becoming the Outernet if we don't protect Americans' access to it, and

I say "Outernet" because you will be out of luck if your service provider decides that they want you to go to their content provider that they have struck a deal with or they have struck a merger with rather than what you want to go to on the Internet. And anyone who doesn't understand that threat doesn't understand the enormous commercial interests in cornering lanes of this freeway.

Now, everyone has a metaphor. I will just tell you how I look at it, and that this is a freeway, and the risk we face is that individual entrepreneurs out of commercial instinct will and do the control the on lanes to the freeway. Now, I don't know how my Republican colleagues think about it but I will tell you, if some commercial entity today put down gates on I-5 on the Mercer Street entrance to Interstate 5 in Seattle, Washington, and said you couldn't go past that gate unless you agreed to go to my favorite shopping center, I will just pick Walmart for a minute, not that there is anything bad about Walmart, instead of Costco, which my competitor has a deal with, and that is the risk we face. We face people putting gates on this freeway if you don't go to my favorite shopping center that I have struck a deal with as a service provider.

And I want to thank you for your work on this, but I do want to ask you about some concerns because I think there are some things we need to continue to explore, and one of them I have a principal interest in is how we prevent this from happening in the wireless space because we know so much is going to the wireless space, and I guess I do have a concern that we have acted in the wired space which you can think of a little bit as yesterday but not in the wireless space, which I think of as tomorrow, which is going to be the future of this thing. I hate to think we did the right thing in the wired space but not in the wireless. I just wondered, Mr. Copps and Mr. Chairman, and if you could both address that concern, what the options may be for us, I would appreciate it.

Mr. COPPS. Well, for my part, I would agree and express some concern about that because in many ways I think wireless is now too where lots of people are cutting their lines and taking the wireless and accessing broadband that way too. I understand that there are differences, and when you implement a network neutrality rule, you have to be cognizant and sensitive to those differences in how you proceed but I think the principle should apply and the rule generally should have applied.

If I can just say one more thing real quickly, I really appreciated your illustration of the I-5 example that you used because I was sitting here thinking during much of the discussion, the last great infrastructure build-out that this country was the interstate highway system, and we made darn sure there were on ramps and they were open, and all this talk about oh, it is prospective and all, we put safety precautions on there prospectively. We put speed limits on there prospectively. There is nothing wrong with doing things prospectively, particularly when you are talking about safeguarding such a transformative infrastructure as we are talking about here.

Mr. GENACHOWSKI. Well, I would just add that I agree that the importance of mobile access to the Internet is growing every day. In the order we adopted, we did take steps to promote Internet freedom, the transparency provisions, no blocking. We also wanted

to be cognizant about some of the differences between wireless and fixed and it is something that we will continue to pay attention to and do what we can to make sure that Internet freedom is protected on mobile Internet access as well as fixed.

Mr. INSLEE. Well, there may be some challenges in wireless but I hope you all will consider them because we hate to create a safety system for the horse-and-buggy day but not for the car day, and I think that is kind of the transition we are in.

Any of the other commissioners, if you would like to comment, feel free.

Ms. CLYBURN. Yes, Congressman. I too do not want the development of two separate worlds, one wired and one wireless. Increasingly, individuals cutting the cord, as my colleague said, is approaching 30 percent, especially in communities that might have economic challenges that have to choose which direction to go, and interestingly enough, certain communities only access the Internet because this is the only affordable means with these mobile devices. So it is important that their experience is as robust as those in the wired world, and I share your concerns and again, there is no presumption that these open Internet rules do not apply. They do apply in this space.

Mr. WALDEN. The gentleman's time is—go ahead and finish.

Ms. BAKER. I was going to say that this isn't really a question of politics or philosophy, it is actually a question of physics, and then there are actual technical parameters that justify this decision. None of us want—you know, consumers are the ones that don't benefit if their phones don't work. I got into a cab the other day. He was streaming CNN on his iPhone, which I thought was really great, and then I thought actually you are the reason why I can't make a phone call. So I think there are technical parameters that we need to work with that actually exist in the wireless world that justify this distinction.

Mr. INSLEE. Thank you.

Mr. WALDEN. The gentleman's time is expired. We will now go to the gentleman from New Hampshire, Mr. Bass, for 5 minutes.

Mr. BASS. Thank you very much, Mr. Chairman. I had the honor of serving in this body for 12 years, and on this committee for six, and now as a returning Member of Congress, I am learning a lot as a new freshman. One thing I learned today is don't be late to the beginning of a subcommittee hearing. We are hitting exactly 3 hours now, and to the credit of the chair of the committee and the subcommittee chair, that is without opening statements.

It is a very interesting debate that we are having here today. My ancestors lived in southern New Hampshire for many, many generations. We have correspondence between my great-grandmother and the Keene Coal Company trying to figure out a way to run an electric line and a phone line actually later from Keene over to Peterborough. There was nothing there. And so when we developed the utilities that we have today, they were done because there was no other way for that build-out to occur. We did not get rotary dial in my hometown until 1964, and you had to sneak another phone into your house hoping that somehow Ma Bell wouldn't be able to tell that you were doing this. This was a world of enormous regulation and there was good justification for that.

And I understand that the nature of this debate basically surrounds the issue of free markets and differing definitions of what freedom is and what context it belongs, and I am solidly on the side of those who believe that is a dangerous precedent to begin a whole new round of regulation for very different reasons, in my opinion, from those which we had in early days when the utility business was just getting established: rail, electricity and telecommunications.

Now, having said that, Mr. Chairman, if I could ask for unanimous consent to add to the record a paper I have here by former Solicitor General Seth Waxman stating that Internet access service was never regulated as a telecommunications service.

Mr. WALDEN. Without objection.

Mr. BASS. Thank you.

[The information appears at the conclusion of the hearing.]

Mr. BASS. Commissioner McDowell, by the way, thank you for coming to visit me, and also Commissioner Clyburn, and I believe one of the other ones if you came as well but I was not here and I am most apologetic for that, and I welcome you all to come.

Commissioner McDowell, some individuals continue to claim that the retail provision of Internet access service was once regulated as a telecommunications service. My understanding is that the FCC has never regulated such service. Wasn't this the genius that led to the explosive growth in the Internet as Chairman Kennard pointed out when he led the Commission?

Mr. MCDOWELL. Absolutely. In fact, if you look at the back of my dissent, you will see a letter that I filed with this committee last spring outlining sort of the history of the regulation of Internet access services and broadband in particular, and it has never been regulated as a phone company under Title II.

Mr. BASS. Commissioner McDowell, the order that we have been debating this morning claims that network neutrality is needed to protect small upstart Internet companies, but aren't smart upstarts precisely the companies that might want to enter into specialized business arrangements with broadband providers so that they can compete against the great content providers—we know who they are—and ironically, is it possible that this order might protect the web incumbents in the end?

Mr. MCDOWELL. It could. I think this order creates a lot of confusion in the marketplace and we are seeing the market respond in a lot of confusing ways.

Mr. BASS. And lastly, Commissioner McDowell, the Commission's jurisdiction seems to be evolving. While the Commission has deregulated in certain areas—unbundling, cam armus reporting, cable price regulation—the agency has at least proposed regulations in new areas which we debated this morning—network neutrality, all vid, data roaming. What do you view as the Commission's core responsibilities? And I know this is a leading question. Has in your view the Commission strayed from those core responsibilities?

Mr. MCDOWELL. Well, our core responsibility by statute is given to us by Congress, and that is to protect the public interest, and I think the public interest is best served through competition, so as Commissioner Baker pointed out earlier, the best antidote to

regulation is to have more competition for broadband services, and in my 4½ years on the Commission, that is what I have worked toward, whether it is making easier to get competitive fiber on the ground, freeing up more of the airwaves for either licensed or unlicensed use, etc., let us have more competition and that obviates the need for regulation.

Mr. BASS. Thank you. I yield back, Mr. Chairman.

Mr. WALDEN. The gentleman's time is expired. We will go into round two now, and I will lead with that.

Chairman Genachowski, did you or any of your staff or any senior FCC officials explicitly or implicitly indicate to any members of industry that if they opposed your order, the FCC might move back to Title II approach or decide other proceedings of interest to them differently?

Mr. GENACHOWSKI. No.

Mr. WALDEN. OK. Chairman, have you adopted industry-wide—you have adopted industry-wide net neutrality rules. Why was it appropriate to add network neutrality conditions to the Comcast/NBC Universal order, and if you are so confident of your authority, which we question obviously, why was it necessary to make those conditions continue to apply even if the network neutrality decision is overturned in court?

Mr. GENACHOWSKI. All the conditions in the Comcast case, particularly that one, were transaction-specific. That particular transaction involved the country's largest Internet service provider combining with a very large content company. We certainly had a lot of information in the record of that transaction about the incentives to favor their own online content and disfavor others, and so having a condition relating to open Internet was a transaction-specific condition that I personally felt was very important.

Mr. WALDEN. So I go back to something that the chairman emeritus, Mr. Dingell, referenced, his words, speaking of bank holdup methods. Look, I was a licensee for 22 years. The last thing you ever want to do is poke any of you in the eye because you might have another proceeding coming, and I have spoken to most of you directly about my concern about agencies that use that opportunity to effect policy over which they don't have, we believe, authority, and I find it interesting too that on the D block discussion, you have chosen to back off on doing what the law explicitly calls on you to do, which is auction the D block, because Senator Rockefeller and others have expressed concern. In this area, roughly 300 Members of the House said we don't think you have the authority but you chose move forward on that rather expeditiously at the closure of the year, so that is a subject that will continue to be of concern and focus on.

I want to go back to the section 706 issue upon which is my understanding you based the decision to move forward with the net neutrality rules, and in 706(b) in the inquiry portion of that, the question arises, if the Commission shall determine whether advanced telecommunication capability is being deployed to all Americans in a reasonable and timely fashion, and I suppose the debate here is, what is reasonable and what is timely. In the FCC broadband plan that you put forward, you indicate that 95 percent of Americans have access to the Internet. The President now calls

for 98 percent. And two-thirds of Americans choose to subscribe, and we have gone from 8 million subscribers to 200 million subscribers in 10 years. I can't think of a service in America that has ever exploded with growth quite like that, and that would seem to be both timely and reasonable to me. Why isn't it timely and reasonable to you all?

Mr. GENACHOWSKI. Well, I think this is an important question. I am glad you asked it. There are 24 million Americans who don't have any access to Internet because there is no infrastructure in their areas, and as you mentioned, there are about 100 million Americans who don't subscribe for various reasons. Our rankings internationally are not where they should be. There is debate about what exactly the number—

Mr. WALDEN. Right, but we are building out wireless and we are ahead of some countries on that.

Mr. GENACHOWSKI. But I would say I respectfully disagree on this. I don't think the country is where it should be when it comes to broadband, and we have a lot of work to do to make sure our broadband infrastructure and adoption is globally competitive.

Mr. WALDEN. But the issue that arises as a result of making that finding that we are not moving reasonably and in a timely manner, that is the predicate then that allowed you to trigger 706 and use that as the crutch to get the authority to move forward with the regulation of net neutrality in part.

Mr. GENACHOWSKI. Yes. There are other provisions that we relied on that I would be happy to address.

Mr. WALDEN. But then it leads to the discussion because in 706(a) it does talk about allowing State commissions to actually set price caps and all that. Now, I have heard today, I believe—correct me if I am wrong—that your order does not get into setting rates or controlling rates on the Internet.

Mr. GENACHOWSKI. Right.

Mr. WALDEN. And yet on page 39, number 67, and on page 43, number 76, you do contemplate rate control by saying that you can't pay for priority. Isn't that a form of rate control?

Mr. GENACHOWSKI. I don't see it that way and I don't think that is how people in the industry see it, but it is the case that that kind of prioritization is something that the order said was disfavored.

Mr. WALDEN. So if you say it is disfavored, that says you believe you have the authority to control rates on the Internet, correct?

Mr. GENACHOWSKI. I really don't see it that way.

Mr. WALDEN. Then how could you find that it is—

Mr. GENACHOWSKI. I think it is fair to say that any order in this area that finds certain conduct inconsistent with Internet freedom principles would have the effect of saying particular transactions aren't permitted, and one could look at that and say well, you are saying that transaction—

Mr. WALDEN. But you are saying a rate of zero. A rate of zero is the rate.

Mr. GENACHOWSKI. Yes. That has been the history of Internet.

Mr. WALDEN. And another commission could come back and say well, we think because all this has been found in part linked to

706(b) that indeed you have 706(a) authority to set caps, couldn't they? I mean, you don't have that plan, you tell us, but——

Mr. GENACHOWSKI. If I could make a couple points, one is, the basis for this decision was both in 706, other sections of the statute working together and so we didn't address the question of whether 706 alone would be sufficient authority, and we didn't address some of the questions that you are raising because we didn't have to in the context of this proceeding.

Mr. WALDEN. And the ranking member explained to me I am over my time, so I will stop with that even though I have let other members go over their time to get your responses. I will now turn to the ranking member, my friend from California.

Ms. ESHOO. You are a gentleman, and I think that I am going to have to really stay within my time for having whispered that to you.

First of all, the term "cops on the beat" has been used several times, and I think the best cop on the best is Commissioner Copps. He has been there for the American people and the consumer and in the deepest, broadest way understanding the democratization of the Internet and protecting the American people from forces that would chip away at it, so I salute you, sir.

I want to make a couple of observations because now we have just about concluded the hearing. There are some curious things that have been advanced during this hearing. My Republican friends are questioning having any kind of framework. I think it is a light framework. That has been questioned, but that is my view. I think it is a light touch. And they don't want any of that, in fact, I think are going to be introducing the Congressional Review Act so that there is nothing so that it is just a flat earth without any on it whatsoever. But they are in denial about the past. There is a record from the past. There is a record from the past, and there is a timeline. It goes from 2005 to this year, to 2011, starting with the Madison River Communications blocking VoIP on its DSL network, settled by FCC consent decree that included a \$15,000 payment, to 2006 where Cingular blocked PayPal, 2007–2008, Comcast actually denied imbedded midst after FCC complaint filed that it blocked peer-to-peer traffic, 2008, issues in a study finding significant blocking of BitTorrent in the United States including across Comcast and Cox.

So you can go through the record. These things actually occurred. This is not in the ether. This is not something that has been fabricated. There is a record of violations, and you know who those violations against? All of us. All of us and our constituents. So our first obligation is to the public, and if there is some misplay including any company that is in my district, you know what? There has to be a cop on the beat, not someone that takes out their stick and clubs someone but there has to be rules to the road. Now, if you ignore the past, then you don't have a roadmap for the future, and I think that it is very important to have these rules.

Now, another curiosity of mine is about our—and you know how respect and regard I have for you, Commissioners McDowell and Baker, had the opportunity to remove the open Internet conditions on the Comcast merger before they voted but they chose not to dissent or object as far as I know.

Mr. MCDOWELL. Can I clarify that?

Ms. ESHOO. Just a minute. Let me finish. I am going to use my time. So you essentially voted against them before voting for them, which is a real curiosity to me.

Now, there is a lot of talk about markets and companies and whatever here today. A good number of them are my constituents. I want to ask for a unanimous consent request that all of these letters representing the companies, the interests, the very interest that are a part of this decision that have weighed in and support these rules, and they are also opposed to the CRA, and in this packet, which I love, the first one is from the United States Conference of Catholic Bishops. They even quote the pope. So I might for the record say I think we are on the side of the angels here. So Mr. Chairman, with all seriousness, I would really like to ask for a unanimous consent request that all of these letters be placed in the record. They are Internet companies, they are small, they are large, they are in between, and they have weighed in. No one has forced them to come forward and express any given view. They have offered this, and I think it is an eloquent statement about how they view it and that this is something that they agree with, so if you would grant that request?

Mr. WALDEN. Without objection.

Ms. ESHOO. And then I have—I think I have run out of time, so I can't ask any questions, but—

Mr. WALDEN. But if you want to allow Mr. McDowell to respond—

Ms. ESHOO [continuing]. Comments remain for the record, and I am so glad that we are on the side of the angels, and I thank the Catholic Conference of Bishops along with all the companies. Thank you.

Mr. WALDEN. Do you want to allow Mr. McDowell to respond?

Ms. ESHOO. Sure.

Mr. MCDOWELL. Thank you, Congresswoman.

Ms. ESHOO. Why did you vote that way?

Mr. MCDOWELL. We didn't vote for the conditions. Actually net neutrality is not a condition in the merger. They are part of a side agreement. They are commitments in the side agreement between the chairman's office—

Ms. ESHOO. Well, aren't there open Internet rules as part of the merger?

Mr. MCDOWELL. They are not merger conditions, no, ma'am.

Ms. ESHOO. But they were voluntary. You could have objected to them—

Ms. BAKER. There is a—

Ms. ESHOO [continuing]. If you thought they were so onerous.

Mr. MCDOWELL. They are in a separate side agreement between Comcast and the FCC.

Ms. ESHOO. Did you ever ask them why they would, since you find them to be onerous, why they would find the to be acceptable? Did you ever question it?

Mr. MCDOWELL. Absolutely. I think they were desperate to get their merger done and they would have agreed to almost anything.

Ms. ESHOO. But did you ask them—

Mr. MCDOWELL. Yes.

Ms. ESHOO [continuing]. Why they were—and are you quoting them?

Mr. MCDOWELL. That is pretty much the answer I got. They were desperate to get their merger done.

Ms. ESHOO. Are you quoting them?

Mr. MCDOWELL. That is a paraphrase.

Ms. ESHOO. Well, I think there is a difference, with all due respect, because I don't think that—that is not the way it was presented to me. Yes, Commissioner Baker?

Ms. BAKER. I think that there are—well, there are absolutely serious legal differences between conditions to the merger and voluntary commitments that a company can make. There is a package of voluntary commitments. Some of them have to do with diversity. This one is a voluntary commitment that a company can make without regard to what the FCC has jurisdiction over so by their commitment, it doesn't imply anything to our statutory authority over net neutrality.

Mr. WALDEN. I am going to have to—

Ms. ESHOO. Thank you.

Mr. WALDEN. Well, we are 2½ minutes over. Let us go now to the chairman of the oversight committee and the former chairman of this committee, Mr. Stearns.

Mr. STEARNS. Thank you, Mr. Chairman, and I regret I was prevented from being here. We were chairing an Oversight Committee looking into Obamacare, and so I just have a question. I would like to start with the chairman and just go down the line, if I could.

Mr. Chairman, you obviously succeeded in putting net neutrality into Title I, but as I understand, the proceedings are still open for Title II. Is that correct?

Mr. GENACHOWSKI. There is a proceeding that is open that looks at the effect of the Comcast decision on our authority.

Mr. STEARNS. OK. But I think in the industry, the perception is that the proceedings to do this in Title II is still there, and so my question is, do you think it should be closed down, this proceeding that you have open in Title II? Just yes or no.

Mr. GENACHOWSKI. I don't think there is any confusion about where we are. It is Title I—

Mr. STEARNS. No, I mean in your opinion do you want to—do you think it should remain open or not?

Mr. GENACHOWSKI. I think a proceeding to continue to have input our authority is a healthy thing and could benefit—

Mr. STEARNS. Mr. Copps, Commissioner Copps, do you think it should be continued to have the proceedings open for Title II?

Mr. COPPS. Yes, I do.

Mr. STEARNS. OK. Mr. McDowell?

Mr. MCDOWELL. I think it should be closed because I think the fact that it is open creates some certainty and shows that perhaps the Commission wants to move to a full explicit Title II reclassification.

Mr. STEARNS. Commissioner Clyburn?

Ms. CLYBURN. I think that we should stay on this pathway and that there is certainty with the decision that we made.

Mr. STEARNS. Commissioner Baker?

Ms. BAKER. If the chairman is serious that we are going to stay with Title I, then he should close Title II proceedings.

Mr. STEARNS. Well, I think that is my point, Mr. Chairman. I think, as you will agree with me, by keeping this open, it is sort of a veiled threat for industry and creates uncertainty and gives angst to them because, you know, things could change in this proceeding and still open. So I think certainly my position is, if you have made your case for Title I, then the proceedings should be closed for Title II, and I just think a lot of us are a little concerned that it is creating angst in the business environment.

Commissioner McDowell, I think in terms of when they were talking about issuing it in Title I, there was some language that we don't want to get involved with regulating coffee shops and bookstores. But if you actually implement a net neutrality, aren't you in effect regulating the Internet in Starbucks by doing that?

Mr. MCDOWELL. Well, as I said before earlier today, there doesn't seem to be any limiting principle to the FCC's authority under its rule, under its order from December 21st. So if there is no limit to its authority, there is no limit to its authority.

Mr. STEARNS. So they could be in bookstores, they could be in coffee shops, anywhere there is WiFi. Wouldn't you agree?

So let me just go back to this Title II. The chairman has indicated that this D.C. Circuit ruling in the Comcast case. Mr. Chairman, is it possible—I mean, you have indicated that you want to keep it open because of the Comcast case ruling. You might want to elaborate. I will give you a chance to elaborate on that to give it more justification because you see the two Republicans that say we should close it down. In my opinion, you are creating uncertainty. If you went ahead and did it in Title I, there is no reason to continue to go forward. In fact, I think the chairman of this committee would like you to let this committee have the jurisdiction instead of you unilaterally doing it, and I think you have indicated to me you would like to see us provide that direction. Is that true?

Mr. GENACHOWSKI. Yes. The single best way to have clarity and certainty here would be for Congress to look at the statute, update it in a way that was appropriate. There are issues that have been raised. We certainly would be a resource to that. We were supportive of efforts that have occurred over time to cause that to happen, and I would continue to work with that.

Mr. STEARNS. So under what circumstances would you close down the open proceedings under Title II?

Mr. GENACHOWSKI. I have to think about that and get back to you, but let me explain. It is not a Title II proceeding. It was a neutral proceeding that was launched after the Comcast decision to ask questions about our authority and different directions that could be gone, all presented in a neutral way. As the authority issue continues to be debated, having a proceeding open that is a vehicle for comment seems to me to make sense. I would be happy to agree to stop debating the authority issue and put that off to one side. But again, I think we have made our position very clear. I made my position very clear in the order in this case that our basis for moving forward under Title I is strong and that is a preferable way to proceed.

Mr. STEARNS. Would any of the other commissioners like to comment on this? Mr. Copps?

Mr. COPPS. Yes. I would like to keep that proceeding open while there is uncertainty and there is uncertainty right now with how the courts are going to decide, so I don't see any reason why that should be closed. I want to keep it open because I think there is probably a more solid foundation which you and I would disagree you on Title II.

The third thing I want to say is, address this issue that a bunch of bureaucrats has end-run the wishes of the Congress. I worked in the United States Senate for 15 years. I am kind of a creature of the Congress. I take great pride in the service that I had here. I voted as I did on all these things because I think I am upholding and implementing the laws that Congress passed, and I passionately believe in what I have said here today, but I don't want to leave any impression that I am at odds with the wishes to Congress or at least how I see the wishes of Congress.

Mr. WALDEN. The gentleman's time—

Mr. STEARNS. Thank you, Mr. Chairman. Unless any one of the commissioners wants to add something, I am done. Thank you for your time.

Mr. McDOWELL. I would just like to add that I think the Title II docket, call it what you will, given the context of when it was opened in June of last year in the wake of the Comcast court case and given the so-called, the announcement of the so-called third wave proposal, which was a Title II proposal, that it remains open, it seems, as a contingency plan should the courts, or in my view, when the courts strike down the FCC's December 21st order under Title I. And so there was plenty of certainty in this marketplace until the FCC started examining regulating it.

Mr. WALDEN. The gentleman's time is expired. Let us go now to the gentleman from Pennsylvania, Mr. Doyle, for 5 minutes.

Mr. DOYLE. Thanks, Mr. Chairman.

Commissioner McDowell, I just wanted to revisit something that you said at the end of your comment when we talked about the stimulus bill and you said if Congress wanted us to implement these rules, we should have acted, and you know, in fact, we did in the Recovery Act actually require that. I just wanted to read a section from it. It says that "pursuant to this section, the Assistant Secretary shall in coordination with the Commission publish non-discrimination and network interconnection obligations that shall be contractual conditions of the grants awarded under this section including at a minimum adherence to the principles contained in the Commission's broadband policy statement." So I think at some point Congress did indicate that we wanted you to move in that direction.

But I want to ask Chairman Genachowski, now, we have heard a lot of our colleagues on the Republican side of the aisle suggest that the process that you used in the merger and also in this open Internet proceeding were unusual and perhaps inappropriate, and I want to give you the opportunity to share your thoughts on those suggestions. How did the process you used differ from past proceedings?

Mr. GENACHOWSKI. Well, I think in both of those proceedings, we met or exceeded best practices in the area, and so to start with our open Internet proceeding, we launched with a notice last year that published the rules, which was a positive departure from prior precedent. We received over 200,000 commenters. We held public workshops available offline and online that a number of commissioners, including those who disagreed with the direction participated in to make it open. We issued requests for further comment as we drilled down on particular issues and ultimately we exercised our judgment and interpreted the will of Congress and made a decision.

With respect to the Comcast order, we inherited a situation where in past transactions there were just enormous complaints about length of time far longer than this took about a proceeding that was, well, let me just say it in a positive way. We ran a proceeding that was professional, that was focused, that specified the issues that we were concerned about coming out of a complex and large transaction, and for those who say that the parties acted a certain way in advance, which I don't believe, and they participated in proceedings up here in Congress and said similar things and so did other parties. After the transaction was over and they could have said anything they wanted, they praised the proceeding as fair, timely and thorough.

Mr. DOYLE. And we heard that two of the commissioners didn't get the order until 24 hours before. Tell me, how does a typical FCC order move forward? Are dissenting commissioners part of the negotiation process and when did Commissioners McDowell and Baker tell you they would dissent?

Mr. GENACHOWSKI. Well, consistent with our practice, which is also a best practice, 3 weeks in advance of a Commission meeting, we circulate a draft of an order to be voted on, and that kicks off a process of deliberation among commissioners, and certainly it is my hope in that setting that everyone will reserve judgment until there was a chance for full discussion. In this case, unfortunately, I think two of the commissioners decided within 12 hours that there was nothing to deliberate about or talk about and announced that they would dissent. But there continued to be ongoing discussions. There were further drafts circulated. As we got closer to the meeting, obviously we needed to circulate a draft that had the support of three members. I would have been happy, as I think all of us would have been, to circulate that as soon as there was agreement of at least three members. That agreement occurred on the Monday, the day before the meeting, and as quickly as possible after that, we circulated that to the full Commission. We took steps to make sure that if there were any prejudice from that, perfecting a dissent, for example, that the commissioners would have the time that they needed to address any issues that came up, but there weren't material differences between what was circulated then and what had been circulated earlier.

Mr. DOYLE. Thank you. I don't have any other questions, Mr. Chairman. Thank you.

Mr. WALDEN. I would go then to the gentleman from Texas, the chairman emeritus, Mr. Barton, for 5 minutes.

Mr. BARTON. Thank you. I said earlier I was impressed with the intellect of the Commission. I must also add too, I am impressed with their bladders. I think you all have been here for 3-1/2 hours continuously, so that is quite a compliment.

I want to look at the Title II issue a little bit in this round. My understanding is that Title II regulates hard-line, monopolistic phone services like we had back in the 1930s through the 1960s. I am puzzled why we think that that model would be applied to the Internet where we have multiple providers. We obviously have a market that functions. We have multiple options for individuals to choose. The courts have ruled that it is an information service. I just don't see the connection.

Commissioner Baker, can you enlighten me on how I am wrong when I look at Title II and I see a different system entirely than what we have in terms of the Internet?

Ms. BAKER. No, Mr. Chairman, I think you are entirely right. I think it was a contrived way to construe that we might have greater authority, which we don't have.

Mr. BARTON. What about you, Mr. McDowell, or Commissioner McDowell, I should say?

Mr. MCDOWELL. As you point out, this was created in 1934 with the old circuit switched analog voice Ma Bell monopoly, and actually those rules were taken from the 19th century railroad monopoly regulations. So I don't think it fits the architecture of the Internet which really defies top-down authoritarian control, so I think it would be a mismatch.

Mr. BARTON. Well, to be fair, I should give the chairman an opportunity here. Chairman Genachowski, what is wrong with my analysis of Title II?

Mr. GENACHOWSKI. Well, as you know, we decided, and I believe that proceeding under Title I was the right way to go. The only note that I would make in this discussion is that no one at the Commission had suggested a full-blown Title II approach. There was an approach—

Mr. BARTON. The gentleman to your left said—

Mr. GENACHOWSKI. Let me—some suggested that the Title II mechanism that was used and is used for mobile voice could make sense but we listened, we looked at the record, we got input from Congress and others and decided to pursue a Title I direction.

Mr. BARTON. And I am not going to ask Commissioner Copps because he has already pointed out, he spent 15 years in the Senate and he could certainly filibuster that question for the next 2 minutes of my time but I will give him an opportunity in writing to respond.

I want to go to Commissioner Baker for my last question. This is a question that the staff has prepared. It just goes to show that sometimes I can take direction here. Commissioner Baker, the order that we are discussing today, the net neutrality order, relies on section 706 for authority. Isn't section 706 about removing barriers to infrastructure investment and won't network neutrality rules deter investment, and hasn't the FCC in the past said that section 706 is not an independent grant of authority?

Ms. BAKER. Well done. Yes, Mr. Chairman—

Mr. BARTON. I can read.

Ms. BAKER. Yes. I think that this is an attempt to twist a 14-year-old deregulatory policy statement into a direct grant of authority, and 706 does not constitute an independent grant of authority. Section 706 is about broadband deployment, and the FCC has no authority to erect obstacles in the name of removing them, so I think that we have completely misguided basing our authority here on 706. You have to keep in mind that section 706 is really the centerpiece of all broadband and Internet regulation going forward. It was actually a footnote in the 1996 Act. So this is an odd place for us to hang our hat on such an important and intrusive regulatory change.

Mr. WALDEN. Mr. Chairman?

Mr. BARTON. I am going to yield the time to the distinguished—

Mr. WALDEN. You are kind. I don't know if this even requires unanimous consent but I will ask for it. We have a vote on the Floor, and what I was thinking was, if we did two, two and two, we have three members here, we could get everyone in who has stayed around. If you can do less than that, do it.

Mr. TERRY. One minute for a question and one minute for an answer, I was thinking.

Mr. WALDEN. Make it 20 seconds on the question. I recognize the vice chair.

Mr. TERRY. All right. And I am going to read it, but I actually wrote this question.

Today, the broadband provider's business model offers tiers based on speed and size, for example, 7 megabits is less costly than the 10-, 15- or 20-megabit package or tier. So the question is, is a tiered system of size and speed unreasonable discrimination?

Mr. GENACHOWSKI. The answer is no. We said so in the order and it was one of the ways that we brought certainty to the area and will boost investment in infrastructure.

Mr. TERRY. Does anyone else want to comment on that?

Mr. MCDOWELL. I think it is contradicted in the order by the ban on paid prioritization, so if you are consumer and you want a burst of speed to download a movie, you don't want to pay 24 by 7 for a big, fat broadband pipe, right? It is not cost-effective. Would that order prohibit that? Is that a form of tiering, paid prioritization? It gets confusing very quickly.

Mr. TERRY. OK. Thank you.

Ms. BAKER. I would agree. Our regulation was kind of clear as mud on that, so why don't you bring a declaratory ruling proceed to the FCC and we can decide. I am being sarcastic but—

Mr. TERRY. Micro Trend—

Ms. BAKER [continuing]. An awful lot of applications, what is the Kindle, what is the Garmin, what is Google voice and the next generation of the Facebook, what are these items, are they OK. I think the answer from our ruling is that you can either bring a complaint process or you can bring a declaratory ruling and we can tell you whether it is OK.

Mr. WALDEN. We are going down to the gentlewoman from Tennessee for no more than 2 minutes.

Ms. BLACKBURN. Thank you, Mr. Chairman.

And I just want to go back to where I was with Ms. Clyburn in the first round. It is frustrating to us when you all mention that you have done market analysis but then there is not market analysis that would meet the OMB standards. You cannot point to a market failure. And that is frustrating, so if there is analysis that you want to submit to show how you came to these conclusions, I think that it would be important to do so.

Chairman Genachowski—

Ms. CLYBURN. The chairman has committed to do that.

Ms. BLACKBURN. OK. Thank you.

And I apologize. We have had multiple hearings going on this morning. Mr. Chairman, you and I were out at CES last month, and I know you walked the same floor I walked. You talked to a lot of those innovators and a lot of those guys were out of Tennessee. They are working on health IT. They are working on digital music platforms. They are working on content distribution. AOL is moving their content headquarters into Nashville. Now, what I am hearing from a lot of these innovators at home and when I am out and about is hey, what is this business about having to seek permission from the FCC, are we going to have to go to them before we innovate, what is the chairman expecting us to do, are they going to tie our hands, what is this about anybody can object, they can go file a complaint while we are in the innovative process. This is the type uncertainty that stifle job creation.

And Mr. Chairman, I don't know if anybody has submitted this Phoenix study for the record but I think it is excellent. When we talk about—

Mr. WALDEN. Without objection.

[The information appears at the conclusion of the hearing.]

Mrs. BLACKBURN [continuing]. Models that show how many jobs are created, indirect job losses, 327,600 jobs. This is serious because we want to get busy with jobs.

I would like for you, Mr. Chairman, to outline for me and submit for the record what do our innovators expect? What is this asking permission process going to be? Are they going to have to file? You can submit it in writing. I know we are short on time.

Mr. WALDEN. Yes, we want to get to—

Ms. BLACKBURN. And just submit it for the record as a written statement, and I appreciate that you all have come and come prepared.

Mr. GENACHOWSKI. Thank you. May I have 10 seconds to reply to that?

Mr. WALDEN. Yes.

Mr. GENACHOWSKI. Very quickly, just to be clear to the audience, the purpose of the order is to protect innovation without permission, and so no one has to come to the FCC for permission, and the Consumer Electronics Association supported open Internet and supported our order, and I look forward to continuing this dialog with you because it is very important.

Mr. WALDEN. Now we go to Mr. Scalise for no more than two.

Mr. SCALISE. Thank you, Mr. Chairman. We will hit the lighting round.

Chairman Genachowski, on the Open Internet Order, the FCC stated for a number of reasons these rules apply only to the provi-

sion of broadband Internet access service and not to edge provider activities. Are there no concerns about search engines or online video provider contents that they are doing anything improperly?

Mr. GENACHOWSKI. Well, the history of this issue has been focused on Internet service providers, and that makes sense, particularly given the Communications Act, which focuses our authority on companies that are providing communication services by wire or spectrum.

Mr. SCALISE. Right, but we have seen, you know, there are real examples that have been reported widely in the media, for example, Google Street View where major privacy violations occurred, and yet they are exempted from this, and you know, it gives the impression that people feel like you all are picking winners and losers, and that is another whole set of problems that—

Mr. GENACHOWSKI. I would say that with respect to any company like that that uses spectrum or infrastructure that is in our oversight purview, we will investigate, we will act regardless of company. The point of the proceeding was to make sure that the market and consumers pick winners and losers.

Mr. SCALISE. Commissioner McDowell, when it comes to these language provisions that were put in prohibiting providers from taking “reasonable efforts” to address things like—or nothing prohibits providers from taking reasonable efforts to address copyright infringements or other unlawful activity. A lot of people are expressing concern that there is no real definition of reasonable effort and there may be some concern that as these broadband providers try to protect their network from things like cyber attacks that they might also be concerned that the FCC is going to come behind and fine them because this reasonable effort is undescribed. Can you address that?

Mr. MCDOWELL. Again, that would have to be addressed through litigation, and that is part of the concern. The word “reasonable” is perhaps the most litigated word in American history, so that will be determined by three votes.

Mr. SCALISE. And I know that creates a lot of uncertainty, and as we talk about the things that we want to see to encourage investment, to encourage job creation, it is those exact types of uncertainty that make it hard for people to make that investment.

And Mr. Chairman, if I can close on this. I know a lot of us have conversations about whether or not network neutrality is good. I think if you at the American people, a bipartisan majority of Congress has said that they don’t want this government intrusion and government takeover of the Internet and so I would hope you all would go back and look at that because ultimately innovation—

Mr. WALDEN. The gentleman’s—

Mr. SCALISE [continuing]. Is the great equalizer, and you know, when you look at today’s college dropout can be tomorrow’s billionaire and the dropout of today is able to compete and in many cases—

Mr. WALDEN. The gentleman’s time has expired.

Mr. SCALISE [continuing]. The big phone company or that other big company that out there that you all seem to have some concern about. So I would just—

Mr. WALDEN. The gentleman’s time—

Mr. SCALISE [continuing]. Ask that you keep that in mind, and I would yield back the balance of my time—

Mr. WALDEN [continuing]. Is expired.

Mr. SCALISE [continuing]. Whatever that balance is.

Ms. BLACKBURN. I seek unanimous consent to enter into the record an editorial by David J. Farber, grandfather of the Internet, arguing the Internet neutrality rules are bad because everyone would game the regulations rather than innovate. We have a couple of other documents that have been pre-cleared with the minority to also enter those in the record without objection.

Mr. WALDEN. Without objection.

[The information appears at the conclusion of the hearing.]

Ms. ESHOO. I think the pope trumps it myself.

Mr. WALDEN. I would also say as a final closing comment, at least speaking for some of us on this side of the aisle, the only entity more skeptical than our side of the aisle on these net neutrality rules may indeed be the D.C. Circuit Court.

And finally in conclusion, I would like to thank all the witnesses and members that participated in today's hearing. I remind members they have 10 business days to submit questions for the record, and I ask that the witnesses all agree to respond promptly to these questions, which I know you will

With that, we do appreciate your counsel, your insight and your hard work, and this hearing stands adjourned.

[Whereupon, at 1:12 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

Congress of the United States  
Washington, DC 20515

May 28, 2010

The Honorable Julius Genachowski  
Chairman  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Dear Chairman Genachowski:

We write to encourage you not to proceed down your announced path to reclassify broadband service as a phone service under Title II of the Communications Act. Such a significant interpretive change to the Communications Act should be made by Congress.

The Act defines a Title II “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public,” and defines “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” By contrast, the Act defines an “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”

Based on these definitions, the FCC concluded on a number of occasions, under both Democrat- and Republican-led Commissions, that broadband is not a telecommunications service but an information service outside the reach of the Title II common carrier rules. The U.S. Supreme Court affirmed that view in its 2005 *Brand X* decision. Moreover, the policy consequences of reclassifying broadband and regulating it under Title II could be severe: reduced broadband investment, less economic stimulation, and fewer jobs.

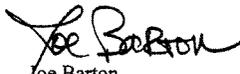
In the Comcast-BitTorrent case, the D.C. Circuit explained that “statements of congressional policy can help delineate the contours of statutory authority.” Congress issued just such a policy statement in 1996 when it added section 230 to the Communications Act. That section makes it the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” Whether the country should stray from that legislated posture—

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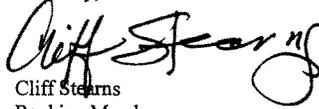
which has produced 200 million broadband subscribers in the last ten years—is a matter best left to Congress.

Please include a copy of this letter in GN Docket No. 09-191 and WC Docket No. 07-52.

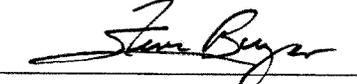
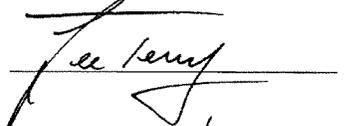
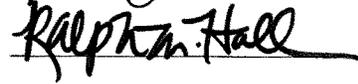
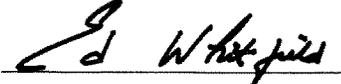
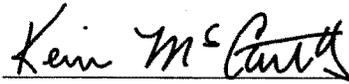
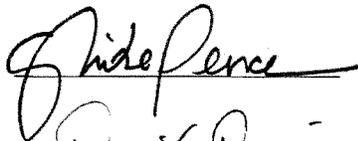
Sincerely,



Joe Barton  
Ranking Member  
Committee on Energy and Commerce



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



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Phil Kingrey

Mary Bono Mack

Tim Murphy

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Mr Bennett

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Bill Cassidy      Cedric Belfrage

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Federal Communications Commission

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Ranking Member  
Committee on Energy and Commerce

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

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J. Randy Forbes

**Congress of the United States**  
**Washington, DC 20515**

1

May 24, 2010

The Honorable Julius Genachowski  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

Dear Chairman Genachowski:

We are writing to reinforce the strong bipartisan consensus among policymakers, industry participants, and analysts that the success of the broadband marketplace stems from policies that encourage competition, private investment, and legal certainty. The regulatory framework first adopted in 1998 by the Clinton Administration's FCC has resulted in broadband industry infrastructure investment of approximately \$60 billion per year. In the last decade, multiple providers and the hundreds of thousands of workers they employ have brought high speed connections to 95 percent of U.S. households where two-thirds of Americans now access the Internet through broadband at home.

Still, much work remains to be done. According to the National Broadband Plan, 14 million Americans lack broadband access altogether, many underserved areas need more robust broadband facilities, and both wired and wireless broadband services require increasing speeds. As the Plan notes, that work will require as much as \$350 billion in additional private investment. Generating those enormous sums from industry, and the good-paying jobs they produce, will require a continued commitment to the stable regulatory environment that has existed for the last dozen years.

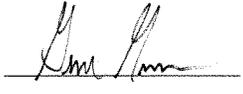
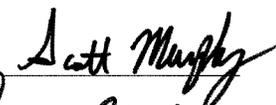
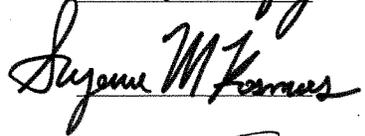
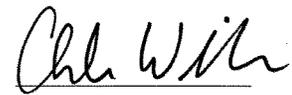
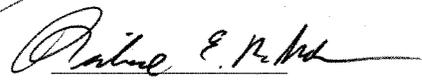
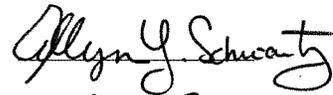
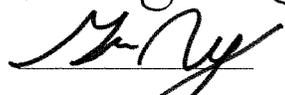
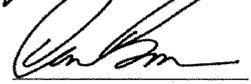
Because of this, we have serious concerns about the proposed new regulatory framework for broadband and the Internet. The expanded FCC jurisdiction over broadband that has been proposed and the manner in which it would be implemented are unprecedented and create regulatory uncertainty. The controversy surrounding that approach will likely serve as a distraction from what should be our Nation's foremost communications priority: bringing broadband to every corner of America, getting every American online, and providing the high speed connections needed to realize the promises of telemedicine, distance learning, and other forms of consumer empowerment.

The continued deployment and adoption of broadband, the growing importance of the Internet to our constituents, and the significant contributions this will make to our economy should be the FCC's primary focus right now. 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.

Thank you for your attention to this letter, and we look forward to working with you in a constructive way to address these matters.

Sincerely,

Ray J  
Kathy Dallyn  
Aunice Jais

[Signature]  
[Signature]  
G.K. Butterfield Jr.

Chloe P. Carg

[Signature]

Yvette D. Clarke

[Signature]

Loretta Jankov

[Signature]

Allen Boyd

[Signature]

Ann Turner

[Signature]

Bobby Bright

[Signature]

Guss Comahan

Jerry W. Childers

Dan Pappi

Walt [Signature]

<u>Wm. Halverson</u>	<u>Kurt Dehner</u>
<u>Frank E. Jones</u>	<u>Bob P. Cut</u>
<u>Walt Allen</u>	<u>Harry Teague</u>
<u>A. Kilpatrick</u>	<u>Marion Lodge</u>
<u>Samuel Beckwith</u>	<u>Devin Mee</u>
<u>G. Giffords</u>	<u>Joe Brown</u>
<u>Elyse E. Cummings</u>	<u>Ed Fournier</u>
<u>Gregory L. Muth</u>	<u>Alce L. Hastings</u>
<u>Carl D. Dudgeon</u>	<u>Chris Farrow</u>
<u>Nick Cahall</u>	<u>James [unclear]</u>
<u>Rubin Ferguson</u>	<u>W. J. Factor</u>
<u>C.A. Dutch Ruppel</u>	<u>Walter [unclear]</u>

Bennie F. Thompson

Samuel D. B. Ross Jr.

Wm. Lacy Clay

T. H. H. H.

Al. J. J.

Neil Lamm

Eddie Benjamin Johnson

Bob. M. H.

Bill Aug

Carine Brown

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**Congress of the United States**  
Washington, DC 20515

December 16, 2010

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

Dear Chairman Genachowski:

We ask that you release the full text of your draft order regulating the Internet. You have said that you want to make the FCC more transparent and data-driven, and we commend you for your efforts. The unique history and character of this proceeding, however, demands an extra level of transparency that can only be accomplished by allowing the American people, public interest groups, and industry to review the item itself prior to adoption. Despite the reams of paper filed and scores of meetings held – or perhaps because of them – the public has not had a realistic and fulsome chance to analyze and comment on the proposal as it now stands. A theoretical opportunity to participate in this proceeding is not the same thing as transparency, especially with such a moving target. We also understand that close to two thousand pages of material have been added to the FCC record in this proceeding in just the last few days.

Your proposal to adopt network neutrality rules is likely the most controversial item the FCC has had before it in at least a decade. It holds huge implications for the future of the Internet, investment, innovation, and jobs. And even apart from the debate over the merits, the legal analysis underpinning the item will have huge implications for FCC jurisdiction, agency legitimacy, and the proper role of Congress as the original source of regulatory authority in a representative democracy. The stakes are high enough that you should go the extra mile.

You have said that you are simply proposing rules of the road that everyone supports and you have invoked the names of many companies and public interests groups as endorsing the draft. Yet many of these same entities have stressed that they have not seen the item and will reserve judgment until they can examine the text. It is only fair to allow those you say support the proposal to see what it is you say they are supporting.

The serpentine path we have travelled to reach these crossroads also argues for full disclosure. We began with Internet freedoms articulated by then-Chairman Michael Powell that he said were not intended to be rules. When the FCC modified and adopted the freedoms in 2005 as a policy statement, then-Chairman Kevin Martin said the statement did not establish rules and was not an enforceable document. Then, in 2008, he sought to enforce them. Not long after becoming chairman, you announced in 2009 your intentions to expand and codify the principles as rules. Much to your credit, in October of that year you released for comment an initial set of proposed regulations, consistent with requests by the Republican members of this Committee.

In April 2010, however, the D.C. Circuit's Comcast opinion vacated the Martin-era decision and called into question the authority you were likely to cite in support of your own initial proposal. You pivoted, expressing a lack of confidence in the Title I analysis your general counsel had

relied on in court and announced a Title II approach as your new "third way." Concerns over this approach led first to negotiations between the FCC and a limited set of interested parties. It culminated in negotiations with a similar subset of interested parties over potential legislation advocated by Energy and Commerce Committee Chairman Henry Waxman. That legislative approach fell through for lack of bipartisan support. Since then, we have had an election, and a new Republican majority will lead the House next Congress.

You have now announced efforts to regulatorily impose something similar, although not identical, to Chairman Waxman's proposal, and to abandon the third-way approach. But because Chairman Waxman's proposal was a non-public draft officially shared with only a small group, and because multiple prior drafts leaked, Chairman Waxman felt compelled to take the extraordinary step of making the last draft available on his Committee web site for all to see.

In light of all this, we ask that you – like Chairman Waxman – now make the latest version of your proposal available for all to see. The best course of action would be to put the item out for a short comment cycle or to at least give parties an opportunity to meet with the agency and submit feedback on the text of the draft through the ex parte process.

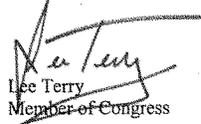
Sincerely,



Fred Upton  
Member of Congress



Greg Walden  
Member of Congress



Lee Terry  
Member of Congress

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

Trend Micro  
Trend Micro Consumer Newsletter

## What Net Neutrality Means for You

**Net neutrality has been in the news for some years now, but the Federal Communications Commission (FCC) just released some important new rules on the topic.** "Net neutrality" refers to the principle that Internet service providers and the government shouldn't restrict content or service levels for different users. In other words, supporters of net neutrality think that ISPs shouldn't favor one user over another when it comes to Internet access.

Net neutrality opponents argue that intentional content blocking and performance degradation is more of a theoretical problem than a real one. They also argue that less regulation, not more, is what's required to create greater competition among ISPs and better service levels for everyone.

**For consumers,** deregulation of the Internet could mean higher Internet access prices as ISPs institute tiered models that offer speedier downloads to higher-paying customers. Some people also worry that allowing businesses to choose what content or sites they'll offer to whom will result in the commoditization of a formerly free and open environment, akin to the evolution of television from an essentially free service to a highly fragmented and fairly expensive one.

**The FCC's new rules appear to favor net neutrality proponents.** They require ISPs to be more transparent about network performance and management; they prevent fixed (as opposed to wireless) service providers from blocking content (for example, sites owned by their competition), and they don't allow ISPs to discriminate against specific applications (such as Netflix, BitTorrent, or Hulu). In other words, you can expect things to pretty much remain as they have been—for now, anyway.

27800 Lemoyne Rd  
Suite F  
Millbury, OH 43447

Dale B. Beckmann  
PRESIDENT

Amplex Internet

Phone: 419-833-3635  
Fax: 419-837-1083  
Toll-Free: 888-419-3635

Mark R. Radabaugh  
VICE PRESIDENT

December 15, 2010

The Honorable Bob Latta  
1045 N. Main Street, Suite 6  
Bowling Green, Ohio 43402

Congressman Latta,

Amplex is an Internet Service Provider located in Millbury, Ohio. Our service area covers approximately 1000 square miles in the central portion of the Ohio 5<sup>th</sup> district. I requested a meeting with you both to introduce myself and the company and to bring to your attention concerns I have regarding the Federal Communications Commission.

Amplex provides broadband Internet service to residential and business consumers in the district, primarily using microwave radio technology. Amplex currently serves slightly over 2100 households and businesses. We currently employ 8 people and have added 3 full time employees in the last year. We have seen significant growth in the last few years and expect that 2011 will continue that trend.

The service Amplex provides is broadband Internet. The currently deployed equipment provides sustained speeds of 3.5Mbps with peak speeds of 10Mbps. The next generation equipment we are deploying can offer sustained speeds above 10Mbps. The technology we use is referred to as "fixed position wireless" to differentiate it from cellular networks.

Fixed position wireless is a widely used access method in rural areas. The FCC has made attempts to determine the number of customers served by fixed position wireless but has been largely unsuccessful. The Wireless Internet Service Providers Association (WISPA) estimates that there are over 2000 wireless Internet companies in the US providing service to over 2 million customers<sup>1</sup>. Fixed Position Wireless is a small portion of the overall access market but in rural areas it is the predominant means of access.

We are concerned with the direction of the FCC under Chairman Genachowski. The FCC has decided it has the authority and a need to regulate the operation of the Internet. The Chairman will be presenting to the governing board today a plan to regulate the operation of Internet Service Providers.

The contents of the FCC plan have not been made public. How an agency writing regulations for the purpose of "preserving Internet Freedom and Openness"<sup>2</sup> thinks it's appropriate to write regulations in secret is beyond me. I do not see any legitimate reason at this time for the FCC to create new regulations. The Internet has grown incredibly rapidly without significant government regulation and continues to do so. The legal authority of the FCC to even issue regulations governing the Internet is

<sup>1</sup> <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020351145>

<sup>2</sup> [http://www.fcc.gov/Daily\\_Releases/Daily\\_Business/2010/db1201/DOC-303136A1.pdf](http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1201/DOC-303136A1.pdf)

doubtful given that nothing has changed since the Federal court threw out the FCC's last attempt at enforcing 'Network Neutrality'<sup>3</sup>.

The vast majority of the noise currently being made regarding net neutrality is related to the conflicting interest of network operators vs. content providers. The Internet is very disruptive to many existing business models and has radically changed the newspaper and music industries. As network speeds continue to increase video delivery over the Internet will have an increasing effect on the cable, broadcast, and satellite TV industries. Existing business models are changing and where the dust will settle has yet to be determined. There is no pressing reason for the government to act at this time. In the limited number of cases to date involving questionable behavior the existing consumer protection laws have been sufficient to address the issues.

What would we like to see from the FCC? Responsible access to additional radio spectrum would be the biggest help in expanding and increasing speeds to our customers. The FCC's current method of auctioning off available spectrum over large coverage areas is not serving the public interest. While it brings in large amounts of money it limits spectrum to large companies. These companies then either build out and use the spectrum only in highly populated areas or sit on it to keep other companies from using it. WISPA's proposal for Spectrum Homesteading<sup>4</sup> is a reasonable idea and should be seriously considered by the FCC.

Thank you for taking the time to meet with me.

Sincerely,



Mark Radabaugh  
VP, Amplex

<sup>3</sup> <http://thehill.com/blogs/hillcon-valley/technology/90747-fcc-dealt-major-blow-in-net-neutrality-ruling-favoring-comcast>

<sup>4</sup> <http://www.wispa.org/wp-content/uploads/2009/06/DOC060809-009.pdf>

WILMERHALE

April 28, 2010

Seth P. Waxman

Julius Genachowski, Chairman  
Federal Communications Commission  
445 Twelfth St., SW  
Washington, DC 20554

+1 202 663 6800(t)  
+1 202 663 6363(f)  
seth.waxman@wilmerhale.com

Re: *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *Preserving the Open Internet*, GN 09-191; *Broadband Industry Practices*, WC Docket No. 07-52

Dear Chairman Genachowski:

I submit these views in response to reports that the Commission is considering a “reclassification” of broadband Internet access services within Title II of the Communications Act of 1934.

Five years ago, the federal government represented to the United States Supreme Court that treating cable modem broadband Internet access as a Title II “telecommunications service” subject to traditional common carrier regulation would be “impossible to square with the deregulatory purposes of the Telecommunications Act of 1996.”<sup>1</sup> That statement reflected both the factual realities of how broadband access is provided and the Federal Communications Commission’s long-held interpretation of the 1996 Act. The Commission has *never* classified any form of broadband Internet access as a Title II “telecommunications service” in whole or in part, and it has classified all forms of that retail service as integrated “information services” subject only to a light-touch regulatory approach under Title I. These statutory determinations are one reason why the Clinton Administration rejected proposals to impose “open access” obligations on cable companies when they began providing broadband Internet access in the late 1990s, even though they then held a commanding share of the market.<sup>2</sup> The Internet has thrived under this approach.<sup>3</sup>

Recently, some have encouraged the Commission to reverse this settled view and treat broadband Internet access providers as offering both an “information service” and a “telecommunications service” subject to Title II regulation. Embarking on that course would bring an enormous sector of the economy within the ambit of public-utility-style common carrier

<sup>1</sup> FCC Reply Br. 3-4, *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (Nos. 04-277, 04-281).

<sup>2</sup> See William Kennard, *The Road Not Taken: Building a Broadband Future for America*, FCC (June 15, 1999), <http://www.fcc.gov/Speeches/Kennard/spwek921.html> (explaining reasons for the Commission’s decision not to regulate cable broadband service).

<sup>3</sup> The National Broadband Plan observes: “Fueled primarily by private sector investment and innovation, the American broadband ecosystem has evolved rapidly. The number of Americans with broadband at home has grown from eight million in 2000 to 200 million last year.” FCC, *Connecting America: The National Broadband Plan*, at XI (Mar. 2010) (“*Broadband Plan*”), available at <http://www.broadband.gov>.

Chairman Julius Genachowski  
 April 28, 2010  
 Page 2

WILMERHALE

regulation. Yet these transformative proposals are not driven by any relevant changes in either the law or the facts bearing on the relevant statutory definitions. Rather, advocates of this shift are motivated by doubts about the extent of the Commission's "ancillary" authority to regulate broadband service providers under Title I in light of the D.C. Circuit's recent *Comcast* decision, which rejected some (but not all) of the potential Title I rationales the Commission could attempt to invoke to regulate network management practices.<sup>4</sup> These advocates have cited that decision as a basis for urging the Commission to advance an industry-transforming regulatory agenda. Title II classification, if adopted, could thus revolutionize government regulation of a vast sector of the economy without any warrant from Congress, all for the evident purpose of evading the consequences of a court decision limiting the Commission's authority. In the words of the *Washington Post* editorial staff, it would be perceived as "a legal sleight of hand" and "a naked power grab."<sup>5</sup>

Given the obviousness of these motives and the absence of any change in circumstances to justify the results, the Commission's assertion of authority to regulate broadband Internet access as a "telecommunications service" under Title II would be fundamentally at odds with principled agency decisionmaking and with the proper role of administrative agencies within our constitutional system. It would surely be met with skepticism by a reviewing court, and the odds of appellate reversal would be high—particularly given significant industry reliance on the Commission's prior, deregulatory interpretation of the same statutory scheme. Administrative agencies are charged with implementing the law, not with assuming for themselves the legislative authority that the Constitution vests in Congress. Unlike the local competition rules that the Commission enacted on the heels of the 1996 Act and that I defended in the Supreme Court,<sup>6</sup> this is not a case where the Commission would simply be responding to a major legislative innovation by Congress or engaging in a mere gap-filling exercise. Instead, the Commission would be—for the first time ever and with no action by Congress—extending a common carrier regime, designed for the monopolist telephone market of the early twentieth century, to a dynamic Internet marketplace that you recently called "the foundation for our new economy."<sup>7</sup> Such a significant and consequential policy choice should be made, if at all, by Congress.

#### **I. Agencies Have Discretion To Fill Gaps Left By Congress, Not To Create Law Beyond What Congress Has Enacted**

Administrative agencies authorized to exercise substantial power are an accepted and necessary feature of modern governance. But as Justice Kennedy recently reminded us, "the amorphous character of the administrative agency in the constitutional system" requires that

<sup>4</sup> See *Comcast Corp. v. FCC*, \_\_\_ F.3d \_\_\_, No. 08-1291, 2010 WL 1286658 (D.C. Cir. Apr. 6, 2010). The D.C. Circuit declined to consider the merits of several Title I arguments that the Commission had developed on appeal but not in the underlying administrative order. See *id.*, slip op. at 33-36 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943)).

<sup>5</sup> Editorial, *Internet oversight is needed, but not in the form of FCC regulation*, Wash. Post, Apr. 17, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/16/AR2010041604610.html>.

<sup>6</sup> See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

<sup>7</sup> Video, "Announcing the National Broadband Plan," at 0:24, available at <http://www.broadband.gov/plan/>.

agency discretion cannot be unbounded.<sup>8</sup> Hence, agency action must reasonably heed the statutory boundaries enacted by Congress, and agency decisionmaking must also be adequately justified in light of the relevant facts. These limitations and procedural requirements leave agencies with significant authority, yet they are meaningful: along with other principles of constitutional and administrative law, observance of these limits serves to secure the legitimacy of administrative agency power within the constitutional order.<sup>9</sup> Federal courts play an important role in enforcing these constraints on agency action, but the members of this Commission also carry an independent obligation to observe these limits on their discretion.

Under the *Chevron* doctrine, ambiguity in a federal statute is understood as an implicit delegation by Congress to the administering agency of authority to make a policy choice within the bounds of that ambiguity, and courts will defer to that choice so long as it is reasonable.<sup>10</sup> Where Congress leaves ambiguity in statutory meaning, it is the agency—armed with unique experience, expertise, and fact-finding ability—that has the right and the responsibility to interpret that ambiguity in a rational manner. In exercising that discretion, it may be appropriate for an agency to reconsider the wisdom of its existing policies or to reverse those policies or undertake new regulation when circumstances change.<sup>11</sup>

But this rationale only goes so far. The *Chevron* doctrine protects normal exercises of agency discretion to fill gaps—to make policy in the interstices that Congress has left in its legislation.<sup>12</sup> Because, as Justice Breyer once wrote, “Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration,” it is generally plausible that gaps created by

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<sup>8</sup> *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1823 (2009) (Kennedy, J., concurring in part and concurring in the judgment).

<sup>9</sup> Acknowledging the “significant antidemocratic implications” of governance by administrative action, Judge Friendly observed that enforcement of procedural requirements is “necessary” if administrative action “is to be consistent with the democratic process.” Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 863, 880 (1962). Professor Jaffe similarly suggested that while judicial doctrines disfavoring delegation of legislative power to agencies threatened to hamper the administrative state, enforcement of procedural requirements and limits on legislative delegations could both improve the operation of administrative authority and “safeguard ... its legitimate exercise.” Louis L. Jaffe, *Judicial Control of Administrative Action* 85-86 (1965). Jaffe thus wrote that while delegations of power to administrative agencies “may be exceptionally broad and may, indeed should, be taken to grant enormous room for the improvisation and consolidation of policy,” a delegation nonetheless necessarily “implies some limit.” *Id.* at 320. “Action beyond that limit is not legitimate.” *Id.*

<sup>10</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-844 (1984); see also, e.g., *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005); *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 740-741 (1996).

<sup>11</sup> See, e.g., *Brand X*, 545 U.S. at 981-982; *Smiley*, 517 U.S. at 742; *Chevron*, 467 U.S. at 863-864.

<sup>12</sup> See *Chevron*, 467 U.S. at 843 (“The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.” (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974))).

ambiguity in statutory terms should be construed as a delegation of authority for the agency to make policy—particularly given the agency’s comparative advantages in doing so.<sup>13</sup>

The *Chevron* doctrine is rooted in *and delimited by* this presumption about Congress’s delegatory intent. Where an agency takes action that tests these boundaries, the Supreme Court has cautioned that “there may be reason to hesitate before concluding that Congress has intended ... an implicit delegation.”<sup>14</sup> Particularly where an agency asserts broad new authority in an important area without a clear statutory basis, or makes a fundamental change in its implementation of a statute that upsets settled practices and reliance interests, the agency should not assume that its determinations will enjoy the ordinary degree of deference. Rather, as Professor Sunstein has observed, “it would be a major error to treat all ambiguities as delegations,” and deference may be reduced where an “agency is seeking to extend its legal power to an entire category of cases, rather than disposing of certain cases in a certain way or acting in one or a few cases.”<sup>15</sup> Courts properly show *less* deference to such actions due to the strain they place on the checks and balances that otherwise make the role of administrative agencies reconcilable with our constitutional system.<sup>16</sup>

Of particular relevance here, where agencies cite supposed “ambiguities” in a statute to effectuate major shifts in federal policy or assert aggressive new regulatory authority over broad subject areas, courts have refused deference on the ground that the cited ambiguity cannot plausibly be thought to delegate such enormous discretion. One instructive case is *FDA v. Brown & Williamson Tobacco Corp.*<sup>17</sup> In that case, after many years of proceeding otherwise, the FDA undertook an exhaustive rulemaking and concluded that cigarettes were subject to regulation under the federal Food, Drug, and Cosmetic Act. Although the literal statutory language supported the agency’s conclusion, the Supreme Court rejected the FDA’s interpretation. The Court expressed doubt that the rationale of *Chevron* should apply where, as in that case, the “breadth of the authority” the agency had asserted made it less plausible that Congress would have intended an implicit delegation of such broad discretion.<sup>18</sup> However pliable the relevant statutory terms might be, the Court was “confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”<sup>19</sup>

<sup>13</sup> Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986).

<sup>14</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

<sup>15</sup> Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2090, 2100 (1990).

<sup>16</sup> See Breyer, *supra* note 13, at 370 (degree of deference may vary depending on “whether the legal question is an important one”); see also Sunstein, *supra* note 15, at 2100; Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 231-242 (2006) (discussing cases in which the Supreme Court has shown less deference to agency resolutions of major questions).

<sup>17</sup> 529 U.S. 120 (2000).

<sup>18</sup> See *id.* at 159-160.

<sup>19</sup> *Id.* at 160. The FDA was similarly rebuffed when the Supreme Court rejected the FDA’s position that state tort suits against drug manufacturers alleging failure to warn should be preempted because they interfere with the purposes and administration of the federal drug regulatory regime. See *Wyeth v. Levine*, 129 S. Ct. 1187 (2009). The Court held that the FDA’s position merited no deference in part because it “reverse[d] the FDA’s own longstanding

The Supreme Court's decision in *Gonzales v. Oregon* reflects a similar principle.<sup>20</sup> There, the Attorney General had asserted authority to define legitimate medical practice and prohibit doctors from participating in medically assisted suicide in accordance with state law. Although the Attorney General asserted this authority under the guise of enforcing the federal Controlled Substances Act, the Court again rejected the notion that ambiguity in that statute could be read as a broad delegation of the "extraordinary authority" claimed by the Attorney General: "The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation ... is not sustainable. 'Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'"<sup>21</sup>

Decisions of the federal appeals courts provide similar examples. For instance, in *American Bar Association v. FTC*,<sup>22</sup> the FTC had cited an ambiguity in a statutory definition as a basis for asserting authority to regulate attorneys engaged in the practice of law as "financial institutions" subject to the privacy provisions of the Gramm-Leach-Bliley Act. But the D.C. Circuit invalidated that decision on the ground that the existence of ambiguity alone did not support the conclusion that Congress *intended* to delegate authority of the nature the FTC had asserted. In light of other features of the statute, the court found it "difficult to believe that Congress, by any remaining ambiguity, intended to undertake the regulation of the profession of law" when that profession was not mentioned in the statute and had never before been seen to fall within the statute's reach.<sup>23</sup> Similar considerations drove the court of appeals to invalidate this Commission's action in *American Library Association v. FCC*, in which the court criticized the Commission for attempting to justify a claim of "sweeping authority" it had "never before asserted."<sup>24</sup>

## II. Classifying Broadband Internet Access As A Common Carrier Telecommunications Service Would Be An Extraordinary Assertion Of Broad New Authority, Not A Gap-Filling Measure

Whether resolved on the ground that the agency had acted outside its delegated authority, that Congress had spoken directly to the issue, or that the agency's position was unreasonable,

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position without providing a reasoned explanation," *id.* at 1201, and "represent[ed] a dramatic change in position" that was inconsistent with Congress's evident intent, *id.* at 1203.

<sup>20</sup> See 546 U.S. 243 (2006).

<sup>21</sup> *Id.* at 267 (quoting *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001)).

<sup>22</sup> 430 F.3d 457, 469 (D.C. Cir. 2005).

<sup>23</sup> *Id.*

<sup>24</sup> See 406 F.3d 689, 691, 704, 708 (D.C. Cir. 2005). While this and the other examples discussed each involved judicial disapproval of agency *assertions* of regulatory authority, similar reluctance to construe statutory ambiguity as license for agencies to undertake a fundamental shift in a regulatory scheme also influenced the Supreme Court to reject this Commission's *surrender* of regulatory authority in *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994). There, the Court held that the Commission's authority to "modify" any tariffing requirement of 47 U.S.C. § 203 did not authorize the Commission to make tariff filing optional for all nondominant long-distance carriers. The Court found it "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion." *Id.* at 231.

these cases illustrate courts' appropriate reluctance to infer from statutory ambiguity a delegation of agency discretion to assert broad regulatory authority over a whole new category of issues. A decision by the Commission to extend common carrier regulation to broadband Internet services, based on nothing more than alleged ambiguity in the definitional terms of the Act, would fall in the same category. It would be just another case in which an agency had reversed itself and seized broad new authority to pursue a favored regulatory agenda despite the absence of any clear congressional authority—indeed, despite the agency's own prior conclusion that Congress had affirmatively *withheld* such authority.

According to many of its proponents, authority for Title II classification would supposedly derive from alleged ambiguities in the statutory definitions of “telecommunications service” and “information service.” But as history makes clear, Title II classification would require far more than an interstitial implementation of these terms. Broadband Internet access service has never been regulated under Title II. From the advent of the Internet, the Commission has instead treated broadband Internet access as an “information service” without a separate “telecommunications service” component, subject only to the Commission's ancillary authority under Title I.

The Commission's 1998 *Report to Congress* articulated the key interpretations of the 1996 Act that have formed the basis of that consistent treatment of broadband Internet access.<sup>25</sup> The Commission determined there that Congress specifically intended that “telecommunications services” and “information services” be construed as mutually exclusive categories, and that application of these statutory terms required examination of how service is “offer[ed]” to the end user.<sup>26</sup> Thus, the Commission explained that an “information service” offered to end users as a functionally integrated whole should not simultaneously be treated as a “telecommunications service,” even though by definition it includes a telecommunications component.<sup>27</sup>

These conclusions in turn built upon a framework that pre-dated the 1996 Act. In the *Computer Inquiry* proceedings, as traditional communications common carriers moved into the nascent field of computer data processing, the Commission distinguished between “basic services” (defined as the offering of “a pure transmission capability”) and “enhanced services,” which combined basic services with computer processing applications.<sup>28</sup> Critically, the Commission determined that “enhanced services” were not within the scope of its Title II jurisdiction, but rather were subject only to the Commission's ancillary authority under Title I.<sup>29</sup>

<sup>25</sup> See Report to Congress, *Federal-State Joint Board on Universal Service*, 13 F.C.C. Rcd. 11,501 (1998).

<sup>26</sup> *Id.* at 11,507 ¶ 13, 11,520 ¶ 39, 11,522-11,523 ¶ 43, 11,529-11,530 ¶¶ 58-59.

<sup>27</sup> *Id.* at 11,520 ¶ 39.

<sup>28</sup> See *id.* at 11,512-11,514 ¶¶ 23-28, 11,520 ¶ 39 (discussing Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 F.C.C. 2d 384 (1980) (“*Computer I*”)); see also Order, *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 F.C.C. Rcd. 14,853, 14,866-14,868 ¶¶ 21-24 (2005) (“*Wireline Broadband Order*”) (discussing *Computer II*).

<sup>29</sup> See *Wireline Broadband Order*, 30 F.C.C. Rcd. at 14,867-14,868 ¶ 23. Some have cited the so-called “unbundling” requirement of the *Computer Inquiry* regime as a basis for claiming that the proposed Title II classification of broadband service would be consistent with past (pre-2002) practice. But that argument confuses

In its 1998 *Report to Congress*, the Commission concluded that Congress intended the terms “telecommunications service” and “information service” in the 1996 Act to build upon the “basic” and “enhanced” service distinction the Commission had previously drawn, and it construed the terms to be mutually exclusive in light of Congress’s evident intent to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services “via telecommunications.”<sup>30</sup> The Commission thus concluded that “when an entity offers transmission incorporating the ‘capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,’ it does not offer telecommunications. Rather, it offers an ‘information service’ even though it uses telecommunications to do so.”<sup>31</sup>

In later orders classifying various broadband Internet access technologies, the Commission straightforwardly applied this same statutory framework it had adopted in 1998. In the 2002 *Cable Modem Declaratory Ruling*, for example, the Commission concluded that cable modem service is provided to the end user as a single, integrated service, with a telecommunications component that is not separable from the computer processing, information provision, and computer interactivity functions.<sup>32</sup> Applying the approach articulated in the 1998 *Report to Congress*, the Commission found, and the Supreme Court later agreed, that the service does not include an offering of telecommunications service.<sup>33</sup> Since 2002—and as recently as 2007—the Commission has repeatedly applied the same approach to find that even though it includes a transmission component, broadband Internet access service as provided through other technologies likewise constitutes an “information service” without a stand-alone offering of telecommunications service, and thus is subject only to the Commission’s ancillary authority under Title I.<sup>34</sup>

In short, from their inception in the 1990s, broadband Internet access services have always been “information services” with no separate “telecommunications service” component,

two quite different issues: the threshold statutory classification of a service (the issue here), versus whatever regulatory consequences might follow from that classification (not the issue here). Under the so-called “unbundling” obligation, the Commission used to require wireline telephone companies (but not cable companies or wireless providers) to strip out the transmission component of any information (“enhanced”) service, tariff it, and sell it as a stand-alone telecommunications service to any willing buyer. See *Wireline Broadband Order*, 20 F.C.C. Rcd. at 14,867-14,868 ¶¶ 23-24. But the Commission never found that the finished Internet access services that those companies sold to end users were (or contained) Title II “telecommunications services.”

<sup>30</sup> *Report to Congress*, 13 F.C.C. Rcd. at 11,507-11,508 ¶ 13, 11,520 ¶ 39.

<sup>31</sup> *Report to Congress*, 13 F.C.C. Rcd. at 11,520 ¶ 39.

<sup>32</sup> See Declaratory Ruling, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C. Rcd. 4798, 4802 ¶ 7 (2002) (“*Cable Modem Declaratory Ruling*”), *aff’d*, *Brand X*, 545 U.S. 967 (2005) (intermediate history omitted).

<sup>33</sup> See *id.*, 17 F.C.C. Rcd. at 4820-4824 ¶¶ 34-41; see also *Brand X*, 545 U.S. 967.

<sup>34</sup> See *Wireline Broadband Order*, 20 F.C.C. Rcd. 14,853 (2005); Memorandum Opinion and Order, *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, 21 F.C.C. Rcd. 13,281 (2006); Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 F.C.C. Rcd. 5901 (2007) (“*Wireless Broadband Order*”).

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and they have never been subject to regulation under Title II. The Commission has applied this position consistently, defended it successfully in litigation all the way to the Supreme Court, and repeatedly professed that it best reflects Congress's intent and the broad objectives of federal Internet policy.<sup>35</sup>

Against this backdrop, any decision to reclassify broadband as a "telecommunications service" under Title II would be a startling about-face. After years of concluding that Congress wished to insulate broadband Internet access services from common carrier regulation in order to protect the healthy and competitive development of the Internet,<sup>36</sup> the Commission would abruptly reverse itself—and contradict its own account of congressional intent—by saddling those services with the burdens of a regulatory model that was developed for the monopoly public utilities of the last century. As in other cases, it would be irrational to presume that Congress wished to delegate authority to make a "decision of such economic and political significance"<sup>37</sup> and "alter the fundamental details of [the] regulatory scheme"<sup>38</sup> that had long applied in the industry, merely by including a supposed definitional ambiguity in the terms "telecommunications service" or "information service."

Proponents of Title II classification of broadband Internet access have cited the Supreme Court's decision in *Brand X* as providing carte blanche authority for the Commission to reverse itself and assert unprecedented authority to regulate the Internet, but that decision does not support any such presumption. The Court was not faced in that case with a seizure of broad new authority or a major policy shift of the type that is contemplated here; indeed, as discussed above, just the opposite was true. The Court's decision thus does not endorse the kind of anything-goes discretion the Commission would have to invoke to classify broadband Internet access as a Title II "telecommunications service." Moreover, the only question before the Court was whether the Commission's position that cable modem broadband Internet access service constituted an "information service" without a separate "telecommunications service" was "at least reasonable."<sup>39</sup> The Court held that it was, and that the statute did not "unambiguously require" the conclusion that cable modem broadband service providers "offer[ed]" telecommunications.<sup>40</sup> In doing so, the Court had no occasion to go further and decide whether, in addition, the statute might *compel* the Commission's interpretation and preclude the opposite outcome that the challengers had proposed there and that the advocates of reclassification

<sup>35</sup> See, e.g., *Report to Congress*, 13 F.C.C. Rcd. at 11,507-11,508 ¶ 13, 11,511 ¶ 21, 11,520-11,526 ¶¶ 40-48, 11,540 ¶ 82, 11,546-11,548 ¶¶ 95-97; *Cable Modem Declaratory Ruling*, 17 F.C.C. Rcd. at 4801-4802 ¶¶ 4-6; FCC Br. 8, 16, 29-31, *Brand X* (2005); FCC Reply Br. 3-4, *Brand X* (2005); *Wireline Broadband Order*, 20 F.C.C. Rcd. at 14,877-14,878 ¶ 44; *Wireless Broadband Order*, 22 F.C.C. Rcd. at 5902 ¶ 2.

<sup>36</sup> See *supra* note 35.

<sup>37</sup> *Brown & Williamson*, 529 U.S. at 160.

<sup>38</sup> *Gonzales*, 546 U.S. at 267.

<sup>39</sup> 545 U.S. at 990 (emphasis added).

<sup>40</sup> *Id.* at 989-990.

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propose now. The opinion, however, suggests that the Court would not readily accept a reversal by the Commission on the regulatory classification of broadband service providers.<sup>41</sup>

Nor does the legislative record support an inference that Congress intended any statutory ambiguity to authorize a reversal of this magnitude. Indeed, to the extent the statutory scheme addresses the topic of Internet regulation, it indicates a strong congressional preference for keeping the Internet *unregulated*.<sup>42</sup> When an agency adheres consistently to a particular view of statutory meaning, and Congress is aware of the agency's interpretation and takes no action to correct it, Congress's inaction is persuasive evidence that the interpretation is the one intended by Congress.<sup>43</sup> Here, Congress has known of the Commission's approach since the Commission presented it in the 1998 *Report to Congress*, applied it in the 2002 *Cable Modem Order*, and showcased it in the Government's *Brand X* arguments to the Supreme Court. During the ensuing years, Congress has never signaled disapproval of the Commission's current statutory interpretation or taken any action to overturn it—a strong indicator that the Commission's approach thus far has been the one intended by Congress. Indeed, while Congress has taken up several bills designed to authorize the Commission to regulate some aspects of broadband Internet access, it has not sought to accomplish this by redefining that service as (or as containing) a Title II telecommunications service.<sup>44</sup>

Thus, rather than filling a gap in a manner consistent with congressional intent, the proposed Title II classification would occur solely on the Commission's say-so. Citing the Supreme Court's recent decision in *Fox Television*, some advocates of Title II classification have suggested that this say-so is all that is required, so long as the Commission cites a good reason.<sup>45</sup> That assertion is incorrect. To the contrary, *Fox Television* reaffirmed that when an agency changes course, it must provide a "more detailed justification [for the change] than what would suffice for a new policy created on a blank slate" if—as would be true in this case—its "new policy rests upon factual findings that contradict those which underlay its prior policy" or its

<sup>41</sup> See, e.g., *id.* at 990 ("it would, in fact, be odd" to adopt a reading of the statute under which cable modem providers "offer" the discrete transmission components of the "integrated finished product" offered to consumers); *id.* at 989, 990 (Commission's interpretation of "offer" best reflected "common" and "ordinary" usage); *id.* at 995 (expressing "doubt" that Congress intended the "abrupt shift in Commission policy" that would be required under the statutory interpretation offered by the advocates of Title II regulation). Cf. *Cuomo v. The Clearing House Ass'n L.L.C.*, 129 S. Ct. 2710, 2715 (2009) (presence of "some ambiguity as to the meaning" of relevant statutory terms "does not expand *Chevron* deference to cover virtually any interpretation").

<sup>42</sup> See 47 U.S.C. §§ 230(a)(4), (b)(2), 1302(a).

<sup>43</sup> See *CBS, Inc. v. FCC*, 453 U.S. 367, 382-385 (1981); see also *United States v. Rutherford*, 442 U.S. 544, 553-554 & n.10 (1979). Cf. *Brown & Williamson*, 529 U.S. at 143-159.

<sup>44</sup> See, e.g., Internet Freedom Preservation Act of 2008, H.R. 5353, 110th Cong. (2008) (bill would have charged Commission to undertake study and report to Congress on issues pertaining to broadband Internet access service); Internet Non-Discrimination Act of 2006, S. 2360, 109th Cong. (2006) (bill would have imposed obligations on network operators without reference to Title II and authorized Commission to adjudicate violations).

<sup>45</sup> See, e.g., Reply Comments – NBP Public Notice # 30, Comments of Public Knowledge, GN Docket No. 09-47, 09-51, 09-137, at 4 (filed Jan. 26, 2010) (citing *Fox Television* as license for the Commission to declare broadband Internet access a "telecommunications service" so long as the Commission concludes that doing so would better serve the Commission's policy goals).

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“prior policy has engendered serious reliance interests that must be taken into account.”<sup>46</sup>  
 Failure to do so, the Court reaffirmed, requires judicial invalidation.<sup>47</sup>

Here, there is no reasoned explanation the Commission could give for rejecting the considerations that underlay its own longstanding treatment of broadband service. Rather, Title II classification would appear to come as a direct and obvious response to the D.C. Circuit’s recent *Comcast* decision limiting the Commission’s authority to regulate the Internet under Title I. That this assertion of significant new regulatory authority would serve solely as a means to an end—as an effort to “provide a sounder legal basis” for a particular regulatory agenda in the wake of a court loss<sup>48</sup>—would not satisfy *Fox Television’s* requirements for reasoned decisionmaking and would lessen the case for judicial deference further still. In short, this is not gap-filling of the sort *Chevron* contemplated, and it is not an appropriate undertaking for this Commission.

\* \* \*

By classifying broadband Internet access as a “telecommunications service” under Title II, the Commission would essentially be making new law for a major sector of the economy. It would do so not to accommodate an improved understanding of statutory meaning or to account for new factual circumstances bearing on the relevant legal criteria, but solely in reaction to a court decision rejecting its prior assertion of regulatory power. As stewards of a critical national industry and of the Commission’s proper place in the governmental structure, the members of this Commission should pause before embarking on that course. The Commission’s discretion to tailor federal telecommunications policy to fit the changing needs of an evolving industry is cabined by the boundaries set by Congress and by the requirements of reasoned decisionmaking, and the proposed reversal on Title II falls outside those limits. Any sea change in the Commission’s overall regulatory framework should come from Congress, not from the Commission itself.

Sincerely yours,

/s/ Seth P. Waxman

Seth P. Waxman  
 Counsel for the United States  
 Telecom Association

<sup>46</sup> *Fox Television*, 129 S. Ct. at 1811.

<sup>47</sup> *Id.*; see also *id.* at 1811 (Kennedy, J., concurring in part and concurring in the judgment) (an “agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past”).

<sup>48</sup> *Broadband Plan 337*; see also, e.g., Notice of Oral *Ex Parte* Communication of Free Press, GN Docket No. 09-51, GN 09-191, WC Docket No. 07-52 (Apr. 9, 2010) (urging reclassification of broadband Internet access service under Title II in direct response to *Comcast v. FCC*).

## PHOENIX CENTER POLICY BULLETIN NO. 25

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C E N T E R PUBLIC POLICY STUDIES  
www.phoenix-center.orgT. Randolph Beard, Ph.D.  
George S. Ford, Ph.D.  
Hyeongwoo Kim, Ph.D.

October 2010

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**JOBS, JOBS, JOBS:****COMMUNICATIONS POLICY AND EMPLOYMENT EFFECTS IN THE INFORMATION  
SECTOR**

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*Abstract:* The Federal Communications Commission has recently proposed a wide assortment of regulations for both wireline and wireless providers that may affect the investment decisions of firms. A number of recent studies conclude that employment, both in and outside the communications industry, is highly responsive to capital expenditures by communications firms. Consequently, it is argued that, depending on the response of firms to regulatory interventions, public policy may have significant positive—or negative—employment effects. In this BULLETIN, we present a new approach to measuring employment effects by estimating an “employment multiplier” using advanced time-series econometrics. Statistical testing indicates a causal relationship between capital expenditures and jobs in the Information sector. A 10% negative shock to expenditures in the Information sector results in an average loss of about 130,000 information-sector jobs per year in the ensuing five years. Including indirect jobs, these job losses could be as high as 327,600 jobs. Our econometrically-estimated employment effects are 40% greater than many earlier studies on this topic. The estimated employment multiplier is 10 Information sector jobs for each million in expenditure, and perhaps 24 jobs per-million across the entire economy. Lost earnings over a five-year period are estimated to be \$100 billion. Moreover, we demonstrate that communications jobs are not typical jobs—these jobs (i) have median earnings 45% higher than the typical private-sector job; (ii) have proven relatively resilient to recessionary forces; and (iii) have a union membership rate over twice the national average, a statistic some policymakers will consider significant when evaluating regulatory policies that threaten investment incentives.

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## I. Introduction

Due to a moribund economy and a persistent unemployment rate of about 10%, almost all public policy discussion in the U.S. today focuses on stimulating job growth.<sup>1</sup> Central to that goal is the need to create an environment that fosters investment and risk capital. Yet, as prior research has amply demonstrated, the Federal Communications Commission—particularly over the last two years—has proposed a wide assortment of regulations for both wireline and wireless firms that may adversely affect the prospect for additional investment and job creation.<sup>2</sup>

In this BULLETIN, we estimate the effect of changes in capital expenditures on employment by developing an “employment multiplier” using advanced time-series econometrics. This multiplier can be used to size the potential employment effects arising from regulatory-induced changes to capital expenditures. In large part, our econometric model indicates that the size of the employment effects found in several recent studies are plausible, even when one ignores the impact on jobs outside of the Information sector that is directly impacted by sector capital

<sup>1</sup> Analysis of the recession is available at: <http://www.nber.org/cycles/main.html>. Unemployment data is available at: <http://www.bls.gov/chs/fhcharacteristics.htm#unemp>.

<sup>2</sup> See, e.g., G. S. Ford and L. J. Spiwak, *The Broadband Credibility Gap*, PHOENIX CENTER POLICY PAPER NO. 40 (June 2010)(available at <http://www.phoenix-center.org/pcpp/PCPP40Final.pdf>) and to be reprinted in 19 COMM.LAW CONSPICUOUS (forthcoming Fall 2010); G. S. Ford and L. J. Spiwak, PHOENIX CENTER PERSPECTIVE NO. 10-03: *Non-Discrimination or Just Non-Sense: A Law and Economics Review of the FCC’s New Net Neutrality Principle* (March 24, 2010) (available at: <http://www.phoenix-center.org/perspectives/Perspective10-03Final.pdf>); G. S. Ford and M.L. Stern, PHOENIX CENTER PERSPECTIVE NO. 10-02: *Subotaging Content Competition: Do Proposed Net Neutrality Regulations Promote Exclusion?* (March 4, 2010)(available at: <http://www.phoenix-center.org/perspectives/Perspective10-02Final.pdf>); T. R. Beard, G.S. Ford and L.J. Spiwak, *Market Definition and the Economic Effects of Special Access Price Regulation*, PHOENIX CENTER POLICY PAPER NO. 37 (October 2009) (available at: <http://www.phoenix-center.org/pcpp/PCPP37Final.pdf>); G.S. Ford, L.J. Spiwak and M.L. Stern, *Expanding the Digital Divide: Network Management Regulations and the Size of Providers*, PHOENIX CENTER POLICY BULLETIN NO. 23 (October 2009) (available at: <http://www.phoenix-center.org/PolicyBulletin/PCPB23Final.pdf>); G. S. Ford, T. M. Koutsky and L. J. Spiwak, *Using Auction Results to Forecast the Impact of Wireless Carterfone Regulation on Wireless Networks*, PHOENIX CENTER POLICY BULLETIN NO. 20 (May 2008) (available at: <http://www.phoenix-center.org/PolicyBulletin/PCPB20Final2ndEdition.pdf>); R. Crandall and H. Singer, *The Economic Impact of Broadband Investment, Study Sponsored by Broadband for America* (2010) (available at: <http://www.broadbandforamerica.com/press-releases/broadband-america-study-shows-importance-investment-0>); C. Davidson and B. Swanson, *Net Neutrality, Investment & Jobs: Assessing the Potential Impacts of the FCC’s Proposed Net Neutrality Rules on the Broadband Ecosystem*, Advanced Communications Law & Policy Institute, New York Law School (2010) (available at: [http://www.nyls.edu/user\\_files/1/3/4/30/83/Davidson%20&%20Swanson%20-%20NN%20Economic%20Impact%20Paper%20-%20FINAL.pdf](http://www.nyls.edu/user_files/1/3/4/30/83/Davidson%20&%20Swanson%20-%20NN%20Economic%20Impact%20Paper%20-%20FINAL.pdf)); C. Bazelon, *The Employment and Economic Impacts of Network Neutrality Regulation: An Empirical Analysis*, Consulting Report by The Brattle Group (2010) (available at: [http://mobfut3.cdn.net/8f96484e2f356e7751\\_f4m6bxvvg.pdf](http://mobfut3.cdn.net/8f96484e2f356e7751_f4m6bxvvg.pdf)); R. Crandall, C. Jackson, and H. Singer, *The Effects of Ubiquitous Broadband Adoption on Investment, Jobs and the U.S. Economy*, Consulting Report by Criterion Economics, L.L.C. (2003)(available at: [http://www.newmillenniumresearch.org/archive/bbstudyreport\\_091703.pdf](http://www.newmillenniumresearch.org/archive/bbstudyreport_091703.pdf)).

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investments. Simulations based on our econometric model indicate that a 10% negative shock to capital expenditures in the Information sector (perhaps arising from new regulatory interventions) results in an average loss of about 130,000 information-sector jobs per year in the ensuing five years. Including indirect jobs, these job losses could be as high as 327,600 jobs. Lost earnings over a five-year period could be \$36 billion in the Information sector alone and \$100 billion for all affected jobs across the economy. Our calculated employment reductions are consistent with, for example, the estimates from Crandall and Singer (2010) and Davidson and Swanson (2010), both of which assume about 16.5 jobs lost per million in capital expenditure cuts. Per million of investment, we find 10 jobs are affected in the Information sector and perhaps 24 jobs across the entire economy. Accepting Davidson and Swanson's (2010) assumption of a \$9.12 billion reduction in investment, we estimate an economy-wide job loss could be 220,000 jobs per year.<sup>3</sup> This job loss is 40% larger than that found in Davidson and Swanson (2010).

We also demonstrate that communications jobs are not typical jobs. The average earnings of a communications sector employee are about 45% higher than the typical U.S. private-sector job. Thus, each job lost or gained in communications is equivalent to about 1.5 average jobs lost or gained (in income terms). The telecommunications sector has proven relatively resilient to recessionary forces as well, with unemployment rates well below the national average. Further, about 17.7% of communications sector jobs are union jobs, versus 7.2% in private industry. For some policymakers, this higher union employment may be a significant consideration. In addition, capital expenditures in the communications sector are not typical capital expenditures. A reduction in investment in one sector may simply shift much of that investment to another sector, presumably having employment impacts there as well. As a matter of policy, the communications sector is unique in many respects, such as its role as a general-purpose technology and its potential for significant spillovers. Thus, capital in the Information sector may have a higher social payoff than capital in other sectors; a jobs analysis fails to consider this, understating the social payoffs of good communications policy (and the costs of bad policy).

## II. A New Way to Look at the Problem

To date, numerous studies, including Communications Workers of America ("CWA") (2009),<sup>4</sup> Crandall and Singer (2003; 2010),<sup>5</sup> and most recently Davidson and Swanson (2010),<sup>6</sup>

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<sup>3</sup> Assuming \$9.12 billion in expenditure change and a multiplier of 24.

<sup>4</sup> Communications Workers of America, *Proposals to Stimulate Broadband Investment* (2009) (available at: [http://files.cwa-union.org/speedmatters/CWA\\_Proposals\\_Broadband\\_Investment\\_20081209.pdf](http://files.cwa-union.org/speedmatters/CWA_Proposals_Broadband_Investment_20081209.pdf)).

<sup>5</sup> Crandall, Jackson, and Singer (2003), *supra* n. 2; Crandall and Singer (2010), *supra* n. 2.

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have attempted to quantify the employment effects of changes in communications policy. All of these studies conclude that employment, both in and outside the communications industry, is highly responsive to capital expenditures by communications firms. Consequently, it is argued that, depending on the response of firms to regulatory interventions, public policy may have significant positive—or negative—employment effects.

In calculating employment effects, these studies rely heavily or exclusively on employment multipliers calculated by the U.S. Bureau of Economic Analysis' ("BEA") Regional Input-Output Modeling System ("RIMS II").<sup>7</sup> RIMS is a general equilibrium model of the economy sponsored by a federal government agency; and, unlike some private-sector models, its output is available at low cost to the research community. For these reasons, RIMS is a popular tool for the estimation of regional jobs impacts. Since RIMS has been extensively used, we attempt in this BULLETIN to provide evidence on employment effects using an entirely different methodology. Specifically, we estimate a type of "employment multiplier" directly using advanced time-series econometrics.<sup>8</sup>

This econometric approach has numerous benefits. For example, the Input-Output models provide annual employment effects.<sup>9</sup> In the econometric approach, however, we can estimate the immediate and lingering effects of a shock over time. Second, the causal connection between jobs and expenditures (at the margin) can be tested statistically. Third, the estimated multipliers can be compared to the multipliers used in prior studies, perhaps providing corroborate evidence.

Our approach, however, is not without important limitations. For example, our analysis is limited to "Information" sector capital expenditures and jobs. Clearly, capital expenditures in

<sup>6</sup> Davidson and Swanson (2010), *supra* n. 2.

<sup>7</sup> <http://www.bea.gov/regional/rims/index.cfm>. Use of the RIMS multipliers to size employment gains and losses is attractive for many reasons: (a) RIMS is a general equilibrium model of the economy, so it can estimate employment effects for the entire economy of expenditures in just one sector; (b) the multipliers are calculated by a government agency and thereby are unaffected by any alleged researcher bias; and (c) these numbers can be looked up rather than calculated or estimated directly, thereby making it easier for researchers to produce estimates of employment effects.

<sup>8</sup> H. S. Rosen and V. K. Mathur *An Econometric Technique Versus Traditional Techniques for Obtaining Regional Employment Multipliers: A Comparative Study*, 5 ENVIRONMENT AND PLANNING 273-282 (1973).

<sup>9</sup> E. Ehrlich, *Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System (RIMS II)*, U.S. Department of Commerce, Economics and Statistics Administration (1997) (available at: <http://www.bea.gov/scb/pdf/regional/perinc/meth/rims2.pdf>) ("RIMS II, like all I-O models, is a 'static equilibrium' model, so impacts calculated with RIMS II have no specific time dimension. However, because the model is based on annual data, it is customary to assume that the impacts occur in 1 year. For many situations, this assumption is reasonable (at 8).")

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communications will create employment opportunities outside of the Information sector, so we suspect our “multipliers” could be smaller than those found using RIMS or other Input-Output models. Consequently, our directly-estimated (Information sector) multipliers are probably conservative estimates relative to those found in these prior studies.<sup>10</sup> We look to other studies, such as Bivens (2003),<sup>11</sup> for factors to extend our employment multipliers to the entire economy. Also, data on the Information sector used here includes more than just telecommunications industry expenditures and employment (e.g., broadcasting and publishing). We make some effort to assess the impacts of such limitations, but the reader should keep these caveats in mind.

### III. The Multiplier Method

The standard procedure in “jobs studies,” including those mentioned above, is to assume that policy affects jobs *indirectly* via capital expenditures.<sup>12</sup> That is, a policy change leads to either more or less investment by firms and, in turn, this change in expenditure is what leads to more or fewer jobs.<sup>13</sup> More formally, let the number of jobs of interest be  $J$ , and let capital expenditures be  $E$  (which we measure in millions of constant-value dollars).<sup>14</sup> For some assumed change in policy, we have a change in expenditures ( $\Delta E$ ), and then a subsequent (and implied) change in jobs ( $\Delta J$ ):

$$\Delta Policy \rightarrow \Delta E \rightarrow \Delta J, \quad (1)$$

In most cases, the relationship between jobs and expenditures is measured by the RIMS multipliers (or multipliers from some other Input-Output model such as IMPLAN), so that

$$\Delta J = m \cdot \Delta E, \quad (2)$$

where  $m$  is a “multiplier” that relates changes in jobs to changes in capital (or other) expenditures (where  $m \geq 0$ ). From Expressions (1) and (2), we see that estimating a “jobs delta”

<sup>10</sup> Some multipliers measure the number of “indirect” jobs associated with the number of “direct” jobs. See J. Bivens, *Updated Employment Multipliers for the U.S. Economy*, Economic Policy Institute Working Paper (2003) (available at: [http://www.epi.org/page/-/old/workingpapers/epi\\_wp\\_268.pdf](http://www.epi.org/page/-/old/workingpapers/epi_wp_268.pdf)).

<sup>11</sup> Bivens, *id.*

<sup>12</sup> Some Input-Output models derive employment effects from changes in industry revenues. See, e.g., Bazelon, *supra* n. 2.

<sup>13</sup> The jobs effect of spending is not limited to capital expenditures, though these studies focus only on investments rather than total spending. Public policy can certainly impact operating expenses, so the focus on capital expenses is too narrow.

<sup>14</sup> Bazelon, *supra* n. 2.

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involves two key inputs: (1) how big is the expenditure change?, and (2) what is the relationship between jobs and expenditures? On the first, it is impossible to size the investment effect before specific rules are written, litigated, and “digested” by the industry.<sup>15</sup> As such, researchers typically consider a range of expenditure changes. In some cases, *ex post* analysis may be used to size potential investment consequences of particular types of regulatory intervention. This tact was employed, for example, in the Phoenix Center paper, *Using Auction Results to Forecast the Impact of Wireless Carterfone Regulation on Wireless Networks*.<sup>16</sup> In that paper, results from the 700MHz auction conducted in 2008, were exploited to estimate the effect of the network neutrality obligations imposed on the C Block of that spectrum. Then, using theory and empirics, the significantly reduced auction price for that block was used to size potential investment reductions from an expansion of that policy to the entire wireless industry. The predicted investment effects were sizeable, reducing wireless investment by some \$50 billion over a decade.

On the latter, the multiplier “*m*” is typically taken from Input-Output models. In Davidson and Swanson (2010), for example, it is reported that a change of 100,600 jobs would result from a change in capital expenditures of \$6.08 billion. The jobs impact is derived by using a RIMS multiplier that is equal to about 16.5 jobs per million in expenditures ( $\Delta J / \Delta E = 100600 / 60800 \approx 16.5$ ). The multipliers from a number of recent studies are summarized in Table 1. Crandall et al. (2003; 2010), CWA (2009), and Davidson and Swanson (2010) all rely exclusively on RIMS (Type II) multipliers. The difference between Crandall et al. (2003) and (2010) is driven by an increased variety of industry-specific multipliers that were updated subsequent to the earlier study. Davidson and Swanson (2010) rely on Crandall and Singer (2010) for the size of the multipliers so, by implication, uses RIMS. CWA (2009) expressly uses RIMS multipliers. Bazelon (2010) uses the IMPLAN Input-Output model for the computation of employment effects.

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<sup>15</sup> Empirically, sizing the investment effect requires establishing the counter-factual investment level. G. S. Ford, *Finding the Bottom: A Review of Free Press’s Analysis of Network Neutrality and Investment*, PHOENIX CENTER PERSPECTIVE No. 09-04 (October 29, 2009) (available at: <http://www.phoenix-center.org/perspectives/Perspective09-04Final.pdf>).

<sup>16</sup> *Supra* n. 2.

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**Table 1. Multipliers from Recent Studies**

Study <sup>17</sup>	$\Delta E$	$\Delta J$	$m$
Crandall ... (2003)	\$3.20B	58,043	18.1
CWA (2009)	\$5.00B	97,500	19.5
Bazon (2010)	\$20.2	275,358	13.6
Crandall ... (2010)	\$30.4B	509,000	16.7
Davidson ... (2010) A	\$6.08B	100,600	16.5
Davidson ... (2010) B	\$48.5B	960,081	19.8

Notes: Bazon based on 5-year average.

The multiplier approach indicates very large employment effects from the expenditures of communications firms, with the takeaway being that public policy must seriously evaluate the likely investment, and thus employment, effects of regulatory policies. Since all of these earlier studies rely, almost exclusively, on Input-Output multipliers, there is little to gain from applying that approach again. Therefore, in this BULLETIN we present an alternative method for sizing employment effects. We make no claims about the legitimacy of the Input-Output multiplier approach, but simply offer an alternative.

#### IV. Econometric Approach

Looking back to Expression (2), it seems, given data on  $J$  and  $E$ , that it should be possible to get an estimate of  $m$  (for some sectors) directly from historical data. We do so here. It is also possible not only to size  $m$ , but to test statistically whether or not changes in expenditures ( $\Delta E$ ) can be said to “cause” changes in employment ( $\Delta J$ ). Moreover, with appropriate time series techniques, it is possible to estimate the capital expenditure and employment effects over extended periods of time of a shock, and to evaluate a shock of interest, such as a change in regulation. We view this econometric analysis as an alternative to, and potentially corroborative procedure for, the Input-Output multipliers as a means by which to size employment effects from capital expenditures in the communications industry.

##### A. Data

To begin, we build a sample from the available data. First, we considered the availability of employment data. The Bureau of Labor Statistics (“BLS”) provides industry-specific employment data, but the availability of historical data depends on the industry of interest. Data on the “Information” sector (NAICS 51), which includes telecommunications, cable, broadcasting, publishing, and data processing, is available annually back to 1939. More narrow industry classifications only have about twenty years of data. Consequently, we use data on the

<sup>17</sup> Crandall and Singer (2003), *supra* n. 2 at Table 5, Year 2010; CWA (2009), *supra* n. 4 at 1; Crandall and Singer (2010), *supra* n. 2 at 3; Davidson and Swanson (2010), *supra* n. 2 at 46-8; Bazon (2010), *supra* n. 2 at Table 4.

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Information sector more broadly to maintain a larger sample. Investment data ( $E$ ) is provided in the BEA's Fixed Assets Tables.<sup>18</sup> We match the investment figures to the employment data, thereby including BEA Industry Codes 5110, 5120, 5130, and 5140. The investment data is available through year 2008. In 2007, total investment in this sector was \$126.5 billion. Telecommunications and broadcasting firms (BEA Code 5130) accounted for about \$100 billion (80%) of this total, so, despite the broad definition of the Information sector, most of the expenditures are from traditional telephone and cable companies. We convert the *nominal* "Investment" data to *real* values using the Producer Price Index ("PPI") as provided by BLS.<sup>19</sup> All values are expressed in 2009 dollars to aid in interpreting the results. While we have data going back to 1939, we restrict our analysis to the last forty years to help support the assumption of parameter stability. The time frame covered is 1969 through 2008.<sup>20</sup>

#### B. Data Issues

We are dealing with time series data, so standard least squares econometric approaches are unlikely to be valid. Some preliminary evaluation of the properties of the data is required prior to choosing the estimation approach. First, we need to evaluate whether the two series are stationary. We do so using the Augmented Dickey-Fuller Test ("ADF"). The results, including a test version with a constant term ("ADFC") and a constant term and trend ("ADFT"), are summarized in Table 2. The two variables are found to be stationary in first differences.<sup>21</sup>

Second, we evaluate whether the two series have a cointegrating relationship. If so, then a long-run relationship exists between the two. This long-run dependency is important for evaluating the employment effects through time. As shown in Table 2, the Engle-Granger, Hausman-Type (Choi et al., 2008), and  $H(p, q)$  tests proposed by Park (1992) indicate that the two series are, in fact, cointegrated.<sup>22</sup>

<sup>18</sup> <http://www.bea.gov/national/index.htm#fixed>.

<sup>19</sup> <http://www.bls.gov/ppi>.

<sup>20</sup> We also estimated the model with a shorter sample covering the last thirty years to evaluate the robustness of our findings. The results were very similar.

<sup>21</sup> This is also true for a shorter sample of thirty years.

<sup>22</sup> R. F. Engle and C. W. J. Granger, *Co-integration and Error Correction: Representation, Estimation, and Testing*, 55 *ECONOMETRICA* 251-276 (1987). Critical values (5%) are generated for 40 observation case by 100,000 Monte Carlo simulations; C. Choi, L. Hu, and M. Ogaki, *Robust Estimation for Structural Spurious Regressions and a Hausman-type Cointegration Test*, 142 *JOURNAL OF ECONOMETRICS* 327-351 (2008); J.Y. Park, *Canonical Cointegrating Regressions*, 60 *ECONOMETRICA* 119-143 (1992).

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Aug. Dickey-Fuller Tests		ADFe	ADF <sub>r</sub>
Investment	Level	-1.342	-3.155
	Differenced	-4.002*	-4.034*
Employment	Level	-1.512	-2.395
	Differenced	-3.434*	-3.490*
Cointegration Tests		Statistic	Cointegrated?
Engle-Granger Test		-4.1824	Yes
Hausman-Type Test		1054.4	Yes
$H(p,q)$ Test	H(0,1)	0.0875	Yes
	H(1,2)	0.3694	Yes
	H(1,3)	2.8988	Yes

\* Statistically significant at the 5% level.

Given the results summarized in Table 2, we conclude that the employment and expenditure series are difference stationary random variables (that is, they are individually I(1)) and are cointegrated. Our estimation strategy proceeds accordingly.

### C. Estimation Details

The details of the econometric estimation strategy are as follows. Let  $y_t = [y_{1,t} \ y_{2,t}]'$  be a vector of difference stationary random variables where  $y_{1,t}$  and  $y_{2,t}$  denote the number of information industry jobs ( $J$ ) and real capital expenditures ( $E$ ) in the same industry at time  $t$ , respectively. All variables are measured in natural logarithms. We assume that  $y_{1,t}$  and  $y_{2,t}$  are cointegrated with a cointegrating vector  $\gamma = [1 \ -\beta]'$ ; that is, jobs ( $J$ ) and expenditures ( $E$ ) share a stable long-run relationship. For instance, if  $\beta$  equals 0.5, a 10% decrease in expenditures results in a 5% decrease in jobs in the long-run. Then, jobs and expenditures have the following triangular representation (Phillips, 1991):<sup>23</sup>

$$y_{1,t} = \alpha + \beta y_{2,t} + \varepsilon_t \quad (3)$$

$$\Delta y_{2,t} = \delta + u_t, \quad (4)$$

where  $\Delta$  is the difference operator,  $\alpha$  is an intercept,  $\delta$  denotes a drift,  $\varepsilon_t$  and  $u_t$  are mean-zero white noise processes. The cointegrating parameter  $\beta$  can be estimated by the (static) least squares estimation ("SOLS"). However, the least squares estimator  $\hat{\beta}_{LS}$  is asymptotically biased and inefficient. Furthermore, its asymptotic distribution is non-normal.<sup>24</sup> Therefore,

<sup>23</sup> P. Phillips, *Optimal Inference in Cointegrated Systems*, 59 *ECONOMETRICA* 283-306 (1991).

<sup>24</sup> See J. Stock, *Asymptotic Properties of Least-Squares Estimators of Cointegrating Vectors*, 55 *ECONOMETRICA* 1035-1056 (1987) and Phillips (1991), *id.*, for details.

statistical inference based on the least squares estimator may not be reliable. Recognizing these potential problems, we employ two alternative estimators for the cointegrating vector: (i) Park's (1992) CCR method and (ii) Stock and Watson's (1993) dynamic Ordinary Least Squares ("DOLS") estimator.<sup>25</sup> These estimators are more efficient and perform better than the least squares estimator in finite samples.

Given the cointegrating vector estimate for  $\gamma = [1 - \beta]'$  from (3) and (4), we construct the following bivariate vector error correction model ("VECM"). Abstracting from deterministic components,

$$\Delta y_t = \rho' y_{t-1} + \sum_{j=1}^k \theta_j \Delta y_{t-j} + C e_t \quad (5)$$

where  $\rho = [\rho_1 \ \rho_2]'$  is a  $2 \times 1$  speed of convergence parameter vector,  $C$  is a matrix that defines the contemporaneous structural relationship among employment and investment expenditures, and  $e_t = [e_{1,t} \ e_{2,t}]'$  is a vector of mutually orthogonal structural shocks to these variables. We interpret  $e_{2,t}$  as a structural shock that is caused by some external events that disturb investment expenditures but not employment. However, we allow  $e_{2,t}$  to have an immediate effect on jobs.<sup>26</sup> For example,  $e_{2,t}$  may be interpreted as a policy change that may result in a decrease in firms' capital expenditures, which may result in a job loss in that industry as firms re-optimize their production with reduced capital expenditures.

To study the effect of  $e_{2,t}$  on jobs and investment expenditures in the short- and long-run, we employ the generalized impulse-response analysis based on our bivariate VECM described in Equation (3).<sup>27</sup> For this purpose, we rewrite Equation (5) as the following state-space representation:

$$z_t = F z_{t-1} + \xi_t \quad (6)$$

where

$$z_t = [y_t \ y_{t-1} \ \dots \ y_{t-k}]' \quad (7)$$

<sup>25</sup> Park (1992), *supra* n. 22; J. H. Stock and M. W. Watson, *A Simple Estimator of Cointegrating Vectors in Higher Order Integrated Systems*, 61 *ECONOMETRICA* 783-820 (1993).

<sup>26</sup> This happens when the (1,2)<sup>th</sup> element of  $C$  has a non-zero value.

<sup>27</sup> H. Pesaran and Y. Shin, *Generalized Impulse Response Analysis in Linear Multivariate Models*, 58 *ECONOMIC LETTERS* 17-29 (1998).

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$$F = \begin{bmatrix} \vartheta_1 & \vartheta_2 & \dots & \vartheta_{k+1} \\ & & & 0 \\ & I_{2k} & & \vdots \\ & & & 0 \end{bmatrix}, \quad (8)$$

$$\xi_t = [C\epsilon_t \ 0 \ \dots \ 0]', \quad (9)$$

and

$$\vartheta_1 = I_2 + \rho\gamma' + \theta_1, \quad (10)$$

$$\vartheta_j = \theta_{j+1} - \theta_j, \quad j = 2, \dots, k, \quad (11)$$

$$\vartheta_{k+1} = -\theta_k, \quad (12)$$

and  $I_p$  is the  $p$ -dimension identity matrix. The  $r^{\text{th}}$  period impulse-response functions, then, are obtained by,

$$(S'F'S)C \quad (13)$$

where  $S = [I_2 \ 0 \ \dots \ 0]'$  is a  $2(k+1) \times 3$  selection matrix and the contemporaneous matrix  $C$  can be obtained by the Choleski factor of the least squares variance-covariance matrix of Expression (5).<sup>28</sup> Our forecast of the information job changes due to the real capital expenditure shock and other estimates is mostly obtained from the estimates for Expression (13).

## V. Results

Our analysis was conducted using a purpose-built program written in the GAUSS language, although many of our estimations are supported by popular statistical packages.<sup>29</sup> Once the relevant parameters are estimated, it is possible to simulate the effects on jobs of a shock to capital expenditures. We do so here, but first we address the question of causality between expenditures and jobs, or vice versa, using the standard Granger Causality test.<sup>30</sup> Note,

<sup>28</sup> With regards to the responses of employment to a capital expenditure shock, the generalized impulse-response function coincides with the orthogonalized impulse-response function with expenditures the first in the ordering. For details, see H. Kim, *Generalized Impulse Response Analysis: General or Extreme?* MUNICH PERSONAL REPEC ARCHIVE WORKING PAPER No. 17014 (2009)(available at: <http://mpra.ub.uni-muenchen.de/17014/1/gircheck09.pdf>).

<sup>29</sup> Our code is available on request.

<sup>30</sup> It should be noted that Granger causality does not mean actual causality. When  $x$  Granger causes  $y$ , it means that  $x$  provides additionally useful information other than the past values of  $y$  to predict  $y$ .

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however, that the Granger test is short-run in nature and our cointegration analysis indicates that the two series do have a long-run relationship.

#### A. Short-Run Granger Causality

In order to evaluate short-run causality, we apply the standard approach of bivariate Vector Autoregression ("VAR"). Given that our series are I(1), we use first-differenced data and estimate the following general equations

$$\text{Expenditure Granger causes Jobs: } \Delta J_t = f(\Delta J_{t-1}, \Delta E_{t-1}), \quad (14)$$

$$\text{Jobs Granger Cause Expenditure: } \Delta E_t = f(\Delta J_{t-1}, \Delta E_{t-1}), \quad (15)$$

where the one-period lag is based on minimizing the Bayesian Information Criterion ("BIC"). The F-statistic on the null hypothesis that *Expenditures does not cause Jobs* is 7.36, which is statistically significant at the 5% level (the null is rejected). Therefore, the evidence suggests that there is a causal relationship flowing from changes in capital expenditures to employment. In contrast, we cannot reject the null hypothesis that *Jobs does not cause Expenditure*, with an F-statistic of only 0.51. As such, we have a one-way causal relationship, in a Granger causality sense, flowing from changes in capital expenditures to jobs. We find these results sensible, but note this analysis ignores the cointegrating relationship between the two series.

#### B. Vector Error Correction Model ("VECM")

We begin our examination of the VECM results by looking at Table 3, which provides our speed-of-convergence estimates. This information provides measures of the degree to which each variable (jobs and investment) contribute to the adjustment process to the underlying, long-run equilibrium relationship. To interpret these results, recall that there exists a long-run equilibrium relationship between investments and Information sector jobs. When an external shock of some kind disturbs this balance, a process of adjustment occurs in which both investments and job levels change over time until the equilibrium relationship is restored.

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Table 3. Speed of Convergence Estimates

	Estimates	Standard Error
$E(\rho_1)$	1.3323*	0.5550
$J(\rho_2)$	-0.1614	0.1522

Notes: (i) The point estimates for  $\rho$  and associated standard errors are reported; (ii) The superscript \* denotes a rejection of the unit-root null hypothesis at the 5% significance level; (iii) Each estimate has a correct sign that implies that both  $E$  and  $J$  contribute to the adjustment process toward the long-run equilibrium. However,  $E$  plays a more dominant role than that of  $J$ , because its speed of adjustment parameter is relatively bigger and significant at the 5% level.

However, the speed at which these two variables change is quite different. Table 3 shows that the primary source of such adjustments is changes in capital investment expenditures. This is unsurprising: capital investment is volatile and flexible, when compared to employment, especially for sectors that offer higher pay and skilled employment.

Table 4. Cointegrating Vector Estimation Results

	Constant ( $\alpha$ )	CAPEX ( $\beta$ )
SOLS	9.9478 (0.1829)	0.4259 (0.0161)
DOLS	9.8409 (0.0344)	0.4361 (0.0344)
CCR	9.6897 (0.1461)	0.4478 (0.0129)

Notes: (i) SOLS denotes a static ordinary least squares estimator; (ii) DOLS is the dynamic ordinary least square estimator proposed by Stock and Watson (1993); (iii) CCR is Park's (1992) canonical cointegrating regression estimator; (iv) The quadratic spectral kernel with automatic bandwidth selection was used to obtain the long-run variance matrix; (v) Standard errors are reported in parentheses. All variables are significant at the 5% level.

Next, we turn to our primary findings and focus: the cointegrating vector estimation results reported in Table 4. We offer three different estimates based on three statistical criteria: ordinary least squares (SOLS), dynamic ordinary least squares (DOLS) (Stock and Watson, 1993),<sup>31</sup> and canonical cointegrating regression (CCR) (Park, 2002).<sup>32</sup> The point estimates all appear quite similar, although this must be regarded as primarily a fortuitous result: SOLS is not statistically appropriate. These coefficients provide estimates of the long-run effects of shocks on the equilibrium values of the variables. In particular, referring to the CCR finding for example, our analysis indicates that a 10% reduction in capital expenditures leads, in equilibrium, to an approximately 4.5% reduction in Information sector jobs, when all feedbacks

<sup>31</sup> Stock and Watson (1993), *supra* n. 25.

<sup>32</sup> Park (1992), *supra* n. 22.

between these variables are taken into account. This is a very significant effect. The reason for the large effect is that a shock to capital expenditures in one period affects employment and capital spending in the next period, which in turn affects these variables going forward, and so on. This complex interdependence over time is precisely the kind of information that is potentially useful, but is never available from ordinary multiplier analysis.

### C. Simulating the Employment Effects

Using the estimates from the VECM, we can conduct a variety of simulations to measure the effect on jobs from a change in capital expenditures. Our simulations assume a negative shock to capital expenditures (in 2009 dollars) ranging from 1% to 30%. In Table 5, the simulated reductions in capital expenditures are provided. Note that the assumption in the simulation is a one-time shock (a shift in the expenditure-time curve), but this reduction persists over time. Since each series is I(1) with drift, each series eventually recovers from the initial decline over time. When the shock is large, both expenditures and jobs decline for more than one period, after which they start to recover, following their stochastic trends in line with their cointegrating relation. Thus, a negative expenditure shock actually causes the level of jobs to fall in the short run. This employment shock is persistent despite the fact that over time secular growth in the economy raises employment. In other words, the economy exhibits lower levels of sector employment, compared to the no-shock case, indefinitely.

Shock Size	1 Year	5 Year	10 Year	20 Year	30 Year
1%	1,148	1,207	1,428	1,682	2,036
5%	5,626	5,914	6,985	8,231	9,965
10%	10,978	11,530	13,595	16,031	19,409
15%	16,068	16,862	19,850	23,420	28,360
20%	20,911	21,925	25,771	30,432	36,844
30%	29,899	31,298	36,676	43,368	52,505

The effects on jobs from these reductions in capital expenditures are summarized in Table 6. As expected, as the size of the shock increases, so does the magnitude of the job loss. For a 5% negative shock, job loss is estimated to be 31,537 jobs, whereas a 10% shock reduces employment by 62,741 jobs in the first year. In five years, that same 10% shock has reduced sector employment by 156,187 jobs (in the fifth year). Over the first five years, the average annual job loss is 128,628 jobs. (See the Appendix for annual changes.) It is important to remember these are Information sector jobs only; our estimates do not capture the employment (or capital expenditure) effects on other sectors. As such, the job-loss estimates here do not include the full extent of the expected job loss.

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**Table 6. Annual Employment Change from Shocks ( $\Delta$ )**  
(Information Sector Jobs Only)

Shock Size	1 Year	5 Year	10 Year	20 Year	30 Year
1%	6,334	15,991	15,265	16,654	18,134
5%	31,537	79,119	75,599	82,478	89,802
10%	62,741	156,189	149,404	162,994	177,477
15%	93,615	231,256	221,463	241,601	263,070
20%	124,163	304,381	291,815	318,343	346,629
30%	184,294	444,987	427,554	466,399	507,848

With the estimates of investment and employment changes, we can compute the jobs multipliers implied by the VECM. These multipliers are summarized in Table 7. To understand this table, one should note that the multipliers given refer to actual numbers of jobs lost per one million dollars in lost investments in the base year. Thus, for example, a 10% negative shock will, after say 5 years, result in an observed loss of 13.5 jobs per million dollars in lost investment. The non-monotonicity of these values, as can be observed in the Table, is a consequence of the relatively rich dynamic process of adjustment described earlier. Importantly, the most severe consequences of the loss in investment are seen to occur in the "middle term" – i.e., in the 3-5 year time horizon. However, the effects are persistent for a very long time.

**Table 7. Annual Employment Multipliers**  
(Information Jobs Only)

Shock Size	1 Year	2 Year	3 Year	4 Year	5 Year	10 Year	20 Year	30 Year
1%	5.5	7.0	9.3	11.7	13.2	10.7	9.9	8.9
5%	5.6	7.2	9.5	11.9	13.4	10.8	10.0	9.0
10%	5.7	7.4	9.7	12.1	13.5	11.0	10.2	9.1
15%	5.8	7.6	9.9	12.3	13.7	11.2	10.3	9.3
20%	5.9	7.8	10.1	12.5	13.9	11.3	10.5	9.4
30%	6.2	8.2	10.6	12.9	14.2	11.7	10.8	9.7

#### D. Indirect Job Impacts

By nature of the data, the econometric analysis above estimates only the relationship between expenditures and employment in the Information sector of the economy. Surely, however, expansion in the information industries leads to employment in other sectors, including directly related industries such as manufacturing and construction, and indirectly in other industries benefitting from the higher incomes of employees. Using econometric methods

to derive these additional jobs can be difficult, since we cannot simply change the employment data and assume that jobs in all sectors are driven by capital expenditures in the Information sector. We can offer, however, some evidence on employment effects in other sectors.

#### 1. *Employment Multiplier Approach*

One option for sizing indirect jobs effects is to use the multiplier approach of Bivens (2003), where every job in the communications sector is associated with 2.52 indirect jobs.<sup>33</sup> In the previous section, we calculated a five-year multiplier of about 9.5. Given Bivens' (2003) estimate of 2.54 jobs per communications job, the total effect on employment from a shock is about 24 jobs per million of investment.<sup>34</sup> Comparing this value to those in Table 1, we see that the multipliers used in some recent studies are, if anything, conservative. Table 8 adjusts our multipliers to account for these indirect effects.

**Table 8. Annual Employment Multipliers**  
(Information and Other Jobs)

Shock Size	1 Year	2 Year	3 Year	4 Year	5 Year	10 Year	20 Year	30 Year
1%	13.9	17.6	23.4	29.5	33.3	27.0	24.9	22.4
5%	14.1	18.1	23.9	30.0	33.8	27.2	25.2	22.7
10%	14.4	18.6	24.4	30.5	34.0	27.7	25.7	22.9
15%	14.6	19.2	24.9	31.0	34.5	28.2	26.0	23.4
20%	14.9	19.7	25.5	31.5	35.0	28.5	26.5	23.7
30%	15.6	20.7	26.7	32.5	35.8	29.5	27.2	24.4

Note: Multiplies multipliers from Table 7 by 2.52 based on Bivens (2003).

In Table 9, we provide the employment changes from the expenditure shocks including these indirect effects. The values in Table 9 are computed simply by scaling the employment effects from Table 6 by the Bivens (2003) factor of 2.52. Comparing Table 9 to Table 6, we see that including indirect job loss results in significantly larger employment effects from expenditure shocks.

<sup>33</sup> Bivens (2003), *supra* n. 10.

<sup>34</sup> *Id.*

**Table 9. Annual Employment Change from Shocks ( $\Delta J$ )**  
(Information Sector and Indirect Jobs)

Shock Size	1 Year	5 Year	10 Year	20 Year	30 Year
1%	15,962	40,297	38,468	41,968	45,698
5%	79,473	199,380	190,507	207,842	226,306
10%	158,107	393,591	376,501	410,747	447,245
15%	235,910	582,765	558,087	608,835	662,936
20%	312,891	767,035	735,371	802,219	873,510
30%	464,421	1,121,365	1,077,436	1,175,325	1,279,782

We note, however, that this calculation depends on the accuracy and continued relevance of the values provided in Bivens (2003). Bivens (2003) notes a number of conceptual problems with multipliers.<sup>35</sup> Nevertheless, the calculations in that paper are rather straightforward and may serve as a reasonable, albeit crude, estimate of economy-wide employment effects. Assuming Bivens (2003) overstates the multiplier by 40%, our estimates still support a multiplier of about 16.5 jobs per million in expenditure, as assumed by Davidson and Swanson (2010). So, even if Bivens (2003) is only remotely correct, the implied employment effects from our analysis will equal or exceed those from prior, multiplier-based studies.

## 2. Econometric Analysis of Indirect Effects

As stated above, given our underlying assumptions and approach, we cannot simply extend the VECM to all employment sectors. We can, however, selectively look at a few other industries with strong ties to telecommunications. For example, the BLS provides employment data on "Power and communication system construction (NAICS 23713)," though this series is available only since year 1990 (we label this jobs series as  $\Delta J^{PCSC}$ ). Applying a simple VAR to the limited available data (17 periods), we find

$$\Delta J_t^{PCSC} = 0.04 - 0.35\Delta J_{t-1}^{PCSC} + 0.40\Delta E_{t-1} + e_t, \quad (16)$$

where the coefficient on  $\Delta E_{t-1}$  is statistically significant at the 5% level ( $t = 3.2$ ), indicating a causal connection between capital expenditures in the Information sector and employment in the "power and communications system construction" sector (which is a component of the Construction Industry). Similarly, we can look at employment in "Communications Equipment (NAICS 3342)," which again is limited to data from 1990 through 2009. The estimated relationship is

<sup>35</sup> *Id.* at 5-6.

$$\Delta J_t^{CE} = 0.04 + 0.11\Delta J_{t-1}^{CE} + 0.31\Delta E_{t-1} + e_t, \quad (17)$$

Where, again, the null hypothesis of “no Granger causality” between  $\Delta E$  and  $\Delta J$  is rejected (asymptotically).<sup>36</sup> These simple regressions are suggestive of employment effects outside the industry (which is hardly questionable to begin with), but we note that the data is very limited and this analysis should be viewed as exploratory in nature. The validity of the asymptotic statistical tests is questionable in such small samples. As we observed with the Information sector data, employment and capital expenditures have a long-run relationship and the econometric procedures should account for that fact. With such limited data, however, we do not apply the VECM to these series.

Moreover, we emphasize that our approach is *not* a general equilibrium one. By looking at one, or a few, sectors in isolation, one cannot make economy-wide forecasts. Over time, many resources do become employed somewhere, so job losses in one sector presumably trigger employment reallocation into other sectors. However, this process is by no means instantaneous, and the current high rates of unemployment in the U.S. illustrate the practical difficulty such reallocations entail.

#### VI. Corroboration with Prior Studies

Part of the motivation for this study was to compare our estimates of employment effects with those calculated using multipliers from Input-Output models. The multipliers from a few of the more recent studies are summarized in Table 1. Consider, for example, the study by Davidson and Swanson (2010). While numerous scenarios are provided in that study, one such scenario estimates that 152,400 jobs are lost per year (over the 2010-2015 period) for a \$9.12 billion reduction in capital expenditures (implying a multiplier of 16.7, commensurate with the BEA Type II multiplier).<sup>37</sup> We choose this example because our multipliers vary by year and Davidson and Swanson (2010) provide a five-year average effect. Using the VECM to simulate the jobs reduction from the same \$9.12 billion shock, we estimate about an 87,000 average annual job loss (over the five-year period) for the Information sector, implying a five-year average multiplier of 9.58. Adding in indirect jobs based on Bivens (2003), this multiplier increases to about 24.

Comparing these multipliers with those used in Davidson and Swanson (2010) (about 16.5), we see that the information-sector specific multiplier is smaller (about 9.5) but the total multiplier (about 24) is larger. Even if the total multiplier (based on Bivens (2003)) is overstated

<sup>36</sup> The t-statistic is 1.92 (Prob = 0.076).

<sup>37</sup> Davidson and Swanson, *supra* n. 2 at 60.

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by a significant amount, it appears that the findings of Davidson and Swanson (2010), and by reference Crandall and Singer (2010), are plausible if not conservative. This correspondence is encouraging, since our estimates are based on an entirely different methodology.

#### VII. Information Sector Jobs are Not Average Jobs

In the typical study of employment effects, jobs are discussed as if they were all alike. This is certainly not true across industries, even on average. In Table 10 below, communications industry jobs are compared to the typical private industry jobs in a number of policy-relevant dimensions. Communications jobs are divided into Information sector jobs, as defined for the analysis above, and telecommunications industry jobs, which is a subset of the Information sector. Most of the data is made available by the BLS.

	Median Weekly Earnings (2009)	Union Membership (2009)	Unemployment (April 2010)
Telecommunications	\$1,096	17.7%	8.7%
Information	\$1,073	10.0%	9.4%
Private Industry	\$753	7.2%	9.9%

Sources: [www.bls.gov](http://www.bls.gov); [www.unionstats.gsu.edu](http://www.unionstats.gsu.edu).

As shown in the first column of the table, median weekly earnings for Information sector employees are 42% higher than typical private sector jobs (\$1,073 versus \$753). Earnings in the more narrow telecommunications sector are slightly higher still, being 45% above the typical private sector job. This large difference is important when considering employment effects from either multiplier or econometric calculation. One telecommunications job lost is, in income terms, the equivalent of nearly 1.5 typical jobs. Our analysis above indicates a change of 10 telecommunications jobs per million in capital expenditures, but these jobs are equivalent, in income terms, to 15 average private sector jobs.

Given the income information in Table 10, it is possible to construct an “earnings effect” using the econometric simulations. If we assume the changes in jobs from Table 7 are typical jobs, then we can multiply the median earnings from Table 10 to get this earnings effect from the shock. (Since income is typically found to be log-normal, our calculation is a conservative one since the median is below the mean.)<sup>38</sup> Table 11 summarizes this calculation. The jobs numbers in Table 7 should be considered annual positions, but in Table 11 we accumulate the lost earnings over time. A 10% *negative* shock reduces employee income by \$3.5 billion in the

<sup>38</sup> A. Chatterjee, S. Sinha, and B. Chakrabarti, *Economic Inequality: Is it Natural?*, 92 CURRENT SCIENCE 1383-1389 (2007); C. Kleiber and S. Kotz, *STATISTICAL SIZE DISTRIBUTIONS IN ECONOMICS AND ACTUARIAL SCIENCES* (2003).

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first year, \$36 billion by the fifth year, and \$76.6 billion by the tenth year. Over the thirty-year horizon, Americans have lost \$260 billion in income from the Information sector jobs as a result of the shock.<sup>39</sup>

**Table 11. Accumulated Income Change from Shocks ( $\Delta$ )**  
(Billions, Information Sector Jobs Only)

Shock Size	1 Year	5 Year	10 Year	20 Year	30 Year
5%	\$1.8	\$18.2	\$38.8	\$83.2	\$137
10%	3.5	36.0	76.6	164	260
20%	6.9	70.3	150	321	508
30%	10.3	103	219	471	744

In Table 12, we include the income lost from the indirect jobs. For this calculation, we add to the numbers in Table 11 the income lost from the indirect jobs, which we assume to be rated at the median earnings of all private sector jobs from Table 10. (Again, this approach is designed to render a conservative estimate of income loss.) From the table we see that a 10% income shock results in lost earnings of \$99.6 billion over a five-year period. Thus, the indirect jobs increase lost income by about 177%.

**Table 12. Accumulated Income Change from Shocks ( $\Delta$ )**  
(Billions, Information Sector and Indirect Jobs)

Shock Size	1 Year	5 Year	10 Year	20 Year	30 Year
5%	\$4.89	\$50.4	\$107	\$230	\$364
10%	9.7	99.6	212	455	720
20%	19.1	195	414	890	1,406
30%	28.5	285	608	1,303	2,061

Information sector jobs differ from typical private-sector employment in other ways. In the final column of Table 10, the data show that employment in telecommunications has proven significantly more resilient to the business cycle than have other sectors, with unemployment well below the national average (8.7% versus 9.9%). Furthermore, union membership is much higher in telecommunications, with 17.7% of the workforce being unionized. This high rate

<sup>39</sup> These calculations are based on 2009 dollars. We simply multiply weekly earnings by 52 and then multiply by the number of jobs lost (for Information sector jobs the annual income is \$55,796). In some regards, this approach is likely to be conservative, but it is admittedly simplistic. See N. Rytina, *Comparing Annual and Weekly Earnings from the Current Population Survey*, 4 MONTHLY LABOR REVIEW 32-36 (1983)(available at: <http://www.bls.gov/opub/mlr/1983/04/rpt2full.pdf>).

compares with only 7.2% of private sector employees who are classified as union members. These differences may have significant public policy relevance.

#### VIII. Caveats

There are a number of important caveats, some mentioned above, to work of this type. Foremost is the obvious (though sometimes lost) point that while increasing capital expenditures and jobs in a bad economy are certainly worthy social goals of public policy, such goals nonetheless must be accomplished in an economically efficient manner. For example, we could increase employment in the telecommunications sector by prohibiting the use of the digital switch and return to the days of operator-based switching, or we could forbid the use of heavy machinery to dig trenches, thereby creating many jobs for shoveling dirt. Indeed, it is quite possible for regulation or legislation to promote inefficiently high levels of capital expenditures and/or labor, thus reducing overall welfare.<sup>40</sup> For example, rate-of-return regulation has been criticized for its tendency to promote excess capital investment and inefficient capital-to-labor ratios.<sup>41</sup>

Consider a very simple example on this point. Say there are two mutually exclusive investment options (so only one is needed). The first generates 100 units of social benefit, 50 units of private benefit, and requires an investment of 10 units. The second has 80 in social benefit, 40 in private benefit, and the required investment is 20 units. The private payoff for both projects is positive (40 for the first, 20 for the second), and the social benefit is larger for the first than it is the second (90 versus 60). The firm would do either project since both have positive returns, but of course the firm prefers the first project with its larger payoff. As such, if regulation precludes the first option, then the firm undertakes the second project with its lower payoff and by doing so incurs twice the capital expenditure as was privately and socially desirable (20 versus 10). By capital expenditures standards, the regulation appears desirable and has a "good" outcome. Yet, the regulation has instead forced a less socially desirable project. As shown by this example, regulation that increases capital expenditures need not be socially beneficial, demonstrating the basic fact that great care should be exercised when discussing the relationship between regulation and capital expenditures and, in turn, labor.

<sup>40</sup> See, e.g., G. S. Ford, T. M. Koutsky and L. J. Spiwak, *The Efficiency Risk of Network Neutrality Rules*, PHOENIX CENTER POLICY BULLETIN No. 16 (May 2006)(available at: <http://www.phoenix-center.org/PolicyBulletin/PCPB16Final.pdf>); R. Clarke, *Costs of Neutral/Unmanaged IP Networks*, 8 REVIEW OF NETWORK ECONOMICS, Article 5 (2009) (available at: <http://www.bepress.com/rne/vol8/iss1/5>).

<sup>41</sup> H. Averch and L. Johnson, *Behavior of the Firm Under Regulatory Constraint*, 52 AMERICAN ECONOMIC REVIEW, 1052-70 (1962); W. Baumol and A. Klevorick, *Input Choices and Rate-of-Return Regulation: An Overview of the Discussion*, 1 BELL JOURNAL OF ECONOMICS AND MANAGEMENT SCIENCE 162-190 (1970); E. Zajac, *Note on "Gold Plating" or "Rate Base Padding"*, 3 BELL JOURNAL OF ECONOMICS AND MANAGEMENT SCIENCE 311-315 (1972); C. Needy, *The Gold-Plating Controversy: A Reconciliation*, 45 SOUTHERN ECONOMIC JOURNAL 576-582 (1978).

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Furthermore, capital is portable, so a reduction in investment in one sector may simply shift much of that investment to another sector, presumably having employment impacts there as well. As a matter of policy, the relevant question may be the net effect on capital and employment, not just the partial effects in a single industry or sector. The communications sector is unique in many respects, such as its role as a general-purpose technology and its potential for significant spillovers. Thus, capital in the Information sector may have a higher social payoff than capital in other sectors, but a simple jobs analysis fails to take this into account.

Finally, all our estimates are based on the available data, which may be argued to be imperfect in some way. This caveat is inescapable when doing empirical work, but still worthy of mention.

#### IX. Conclusion

In this BULLETIN, we estimate the relationship between investment and employment in the Information sector. Earlier studies addressing this same topic typically rely on multipliers from Input-Output models such as the Regional Input-Output Modeling System ("RIMS"), which is often sensible since these models are designed for the purpose of measuring regional output and employment impacts. As an alternative, we use econometrics and historical data to quantify the effect on jobs of changes in investment in the sector. Our findings largely corroborate the multiplier approach in that we find information-sector multipliers of about 10. Adding in indirect employment effects could more than double this figure, suggesting the RIMS multipliers may be conservative.

We also demonstrate that jobs in the information sector are not typical. Median earnings in the sector are 45% higher than the typical private sector job, so a single information job gained or lost is equal to about 1.5 average jobs gained or lost. In the telecommunications sector, unemployment is well below the national average, suggesting sector employment is robust to the business cycle. Also, union employment in telecommunications is more than twice the rate for the economy generally.

In all, we concur with earlier studies that policy-induced shocks to capital spending may have sizeable and long-term employment effects. If jobs are viewed as a legitimate public policy concern, then policymakers should seek to encourage the expansion of the sector and avoid interventions that threaten to reduce investment.

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**Appendix: Annual Employment Change from Shocks**

Year	Forecast	Reduction in Jobs from Forecast Trend			
		$\Delta E = -5\%$	$\Delta E = -10\%$	$\Delta E = -20\%$	$\Delta E = -30\%$
1	2,983,999	-31,537	-62,741	-124,163	-184,293
2	3,005,835	-57,875	-114,636	-224,899	-330,961
3	3,020,944	-75,468	-149,054	-290,754	-425,462
4	3,033,692	-81,351	-160,521	-312,545	-456,529
5	3,051,375	-79,119	-156,189	-304,381	-444,987
6	3,075,903	-74,621	-147,432	-287,800	-421,437
7	3,104,791	-71,881	-142,096	-277,688	-407,075
8	3,134,581	-71,894	-142,140	-277,837	-407,378
9	3,163,204	-73,623	-145,536	-284,378	-416,830
10	3,190,423	-75,599	-149,404	-291,815	-427,554
11	3,217,030	-76,952	-152,064	-296,940	-434,967
12	3,243,894	-77,611	-153,368	-299,484	-438,692
13	3,271,431	-77,931	-154,002	-300,758	-440,602
14	3,299,604	-78,274	-154,690	-302,125	-442,652
15	3,328,176	-78,812	-155,757	-304,228	-445,747
16	3,356,942	-79,526	-157,167	-306,976	-449,768
17	3,385,828	-80,306	-158,710	-309,980	-454,163
18	3,414,873	-81,075	-160,221	-312,925	-458,467
19	3,444,144	-81,793	-161,640	-315,695	-462,519
20	3,473,687	-82,478	-162,994	-318,343	-466,399
21	3,503,517	-83,159	-164,344	-320,978	-470,262
22	3,533,622	-83,856	-165,722	-323,672	-474,214
23	3,563,989	-84,573	-167,139	-326,440	-478,274
24	3,594,610	-85,303	-168,586	-329,268	-482,414
25	3,625,486	-86,047	-170,051	-332,123	-486,596
26	3,656,624	-86,789	-171,519	-334,988	-490,794
27	3,688,026	-87,535	-172,988	-337,865	-495,005
28	3,719,702	-88,283	-174,470	-340,757	-499,247
29	3,751,653	-89,041	-175,965	-343,680	-503,526
30	3,783,878	-89,802	-177,477	-346,629	-507,848

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## Net Neutrality: No One Will Be Satisfied, Everyone Will Complain

David J. Farber & Gerald R. Faulhaber | Dec 21, 2010

Chairman Julius Genachowski of the Federal Communications Commission is set to introduce a proposed Order at the FCC's meeting today on the highly contentious Network Neutrality issue.

The proposal seeks a middle ground among broadband ISPs (such as Comcast, Verizon and AT&T), content providers (such as Google, Microsoft, Yahoo and Amazon), and public interest groups (such as Free Press and Public Knowledge), a difficult if not impossible task on this supercharged issue. One thing is sure; no one will be satisfied, everyone will complain.



The focus of debate has been upon what rules will be embedded in the order. Transparency is sure to be included (we strongly agree) as well as a non-discrimination rule (sounds good, but what happens when the first spam factory complains an ISP is blocking their traffic?), both of which would apply to wireline and wireless broadband. We have argued before that wireless is a quite competitive industry with special technical and capacity issues and the FCC should back off. They have indeed backed off somewhat from earlier proposals, but certainly not all the way.

Apparently, the FCC will signal that permitting usage-based pricing to customers will be OK (which is true today, but few wireline ISPs do it). Charging content providers for superior service, however, will not be OK. Seems the Post Office can offer express service and first-class service without attracting negative comment, but ISPs will not be able to offer such services to content providers. Incidentally, such "paid priority" services (in the form of third-party caching services, such as offered by Akamai) have been in use since 1998; many content providers who value speedy delivery of content are Akamai customers. So why can't ISPs be in the same business?

But is this focus on the rules in the Order appropriate? We think not. Those of us who have spent time at the FCC and have worked in this area understand that the bigger problem is that this order will sweep broadband ISPs, and potentially the entire Internet, into the Big Tent of Regulation. What does this mean?

Customer needs take second place and a previously innovative and vibrant industry becomes a creature of government rule-making.

When the FCC asserts regulatory jurisdiction over an area of telecommunications, the dynamic of the industry changes. No longer are customer needs and desires at the forefront of firms' competitive strategies; rather firms take their competitive battles to the FCC, hoping for a favorable ruling that will translate into a marketplace advantage. Customer needs take second place; regulatory "rent-seeking" becomes the rule of the day, and a previously innovative and vibrant industry becomes a creature of government rule-making. Advocates of government-mandated network neutrality have argued this is necessary to permit new and resource-poor innovators to bring their products to market; in fact, it will have exactly the opposite effect: innovators are better at fighting it out in the market with better products rather than fighting it out in front of the FCC with high-priced lawyers; they will lose out. The best example: since the inception of the Internet, backbone networks, regional networks, and content delivery networks have exchanged traffic under privately negotiated contracts (call "peering" and "transit" contracts) with no "help" from regulators. Recently, Level 3, a backbone and now content delivery network, has complained to the FCC that Comcast is renegotiating their contract in ways that violate network neutrality. Level 3 discerned that the FCC was now willing to inject itself into contracts that were previously privately negotiated, and that Level 3 could gain a negotiating advantage over Comcast. Unfortunately, the FCC has just agreed to "investigate" Level 3's allegations. And so it goes; market negotiations are trumped by a regulator too willing to inject itself into what has always been private transactions.

The real tragedy of the Chairman's Network Neutrality proposal is not the rules; it is that we are finally bringing "the Dead Hand of Regulation" (to quote James Q. Wilson) to the Internet, with all its attendant legal wrangling, rent-seeking and special pleading. Goodbye, innovation. Hello, government regulation.

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*Department of Communications*

3211 FOURTH STREET NE · WASHINGTON DC 20017 · 202-541-3320 · FAX 202-541-3129

February 14, 2011

Dear Senators and Members of the House of Representatives:

The United States Conference of Catholic Bishops (“USCCB”) is committed to the concept that the Internet continue as it has developed, that is, as an open Internet. The Internet is an indispensable medium for Catholics – and others with principled values – to convey views on matters of public concern and religious teachings.<sup>1</sup> USCCB is concerned that Congress is contemplating eliminating the Federal Communications Commission’s authority to regulate how the companies controlling the infrastructure connecting people to the Internet will offer those connections. Without the FCC, the public has no effective recourse against those companies’ interference with accessibility to content, and there will be uncertainty about how and whether those companies can block, speed up or slow down Internet content. Since public interest, noncommercial (including religious) programming is a low priority for broadcasters and cable companies, the Internet is one of the few mediums available to churches and religious groups to communicate their messages and the values fundamental to the fabric of our communities.

Without protections to prohibit Internet providers from tampering with content delivery on the Internet, the fundamental attributes of the Internet, in which users have unfettered access to content and capacity to provide content to others, are jeopardized. Those protections have particular importance for individuals and organizations committed to religious principles who must rely on the Internet to convey information on matters of faith and on the services they provide to the public. The Internet was constructed as a unique medium without the editorial control functions of broadcast television, radio or cable television. The Internet is open to any speaker, commercial or noncommercial, whether or not the speech is connected financially to the company providing Internet access or whether it is popular or prophetic<sup>2</sup>. These characteristics make the Internet

<sup>1</sup> Pope John Paul II, in one of his last public statements, recognized the value of the Internet for religion; “[n]ew technologies, in particular, create further opportunities for communication understood as a service to the pastoral government and organization of the Christian community. On clear example today is how the Internet not only provides resources for more information but habituates person to interactive communication.” (Apostolic Letter of Pope John Paul II, The Rapid Development to Those Responsible for Communications, Jan. 24, 2005).

<sup>2</sup> By supporting the goal of continuing the Internet as it has developed, that is, an “open” Internet, USCCB also supports the rights of parents to protect their children from pornography. The means of protecting children from such material is available to parents

critical to noncommercial religious speakers. Just as importantly, the Internet is increasingly the preferred method for the disenfranchised and vulnerable – the poor that the Church professes a fundamental preference toward – to access services, including educational and vocational opportunities to improve their lives and their children’s lives. It is immoral for for-profit organizations to banish these individuals and the institutions who serve them to a second-class status on the Internet.

His Holiness, Pope Benedict XVI, has warned against the

“distortion that occur[s] when the media industry becomes self-serving or solely profit-driven, losing the sense of accountability to the common good .... As a public service, social communication requires a spirit of cooperation and co-responsibility with vigorous accountability of the use of public resources and the performance of roles of public trust ...., including recourse to regulatory standards and other measures or structures designed to affect this goal.”

(Message of the Holy Father Benedict XVI for the 40<sup>th</sup> World Communications Day, The Media: A Network for Communication, Communion and Cooperation, Jan. 24, 2006).

Lastly, Pope Benedict XVI, recently stated, “Believers who bear witness to their most profound convictions greatly help prevent the web from becoming an instrument which ... allows those who are powerful to monopolize the opinions of others.” (Message of His Holiness Pope Benedict XVI for the 45<sup>th</sup> World Communications Day, January 24, 2011).

USCCB urges Congress not to use the Congressional Review Act to overturn the FCC’s open Internet rules.

Sincerely,



Helen Osman  
Secretary of Communications

---

without ceding it to companies providing Internet access, but removing the FCC’s authority over how companies provide Internet access creates uncertainty regarding these issues as well.



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EDUCAUSE

February 16, 2011

The Honorable Fred Upton  
Chairman  
House Energy and Commerce Committee

The Honorable Henry Waxman  
Ranking Member  
House Energy and Commerce Committee

The Honorable Greg Walden  
Chairman  
Subcommittee on Communications and Technology

The Honorable Anna Eshoo  
Ranking Member  
Subcommittee on Communications and Technology

Dear Chairman Upton, Ranking Member Waxman, Chairman Walden, Ranking Member Eshoo,  
and Members of the Energy and Commerce Committee,

The American Library Association (ALA), the Association of Research Libraries (ARL), and  
EDUCAUSE respectfully ask you to oppose using the Congressional Review Act or any other  
legislation to overturn or undermine the recent "net neutrality" decision adopted by the Federal  
Communications Commission (FCC).

ALA, ARL and EDUCAUSE believe that preserving an open Internet is essential to our nation's  
educational achievement, freedom of speech, and economic growth. The Internet has become a  
cornerstone of the educational, academic, and computer services that libraries and higher  
education offer to students, teachers, and the general public. Libraries and higher education  
institutions are prolific generators of Internet content. We rely upon the public availability of  
open, affordable Internet access for school homework assignments, distance learning classes, e-  
government services, licensed databases, job-training videos, medical and scientific research, and  
many other essential services. It is essential that the Internet remains a network neutral  
environment so that libraries and higher education institutions have the freedom to create and

provide innovative information services that are central to the growth and development of our democratic culture.

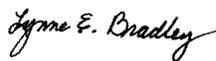
The attachment to this letter lists several examples of critical Internet-based applications that our communities have developed to serve students, teachers, the elderly, the disabled and other members of the public. As these examples demonstrate, libraries and higher education increasingly depend on the open Internet to fulfill our missions to serve the general public.

Without an open and neutral Internet, there is great risk that *prioritized* delivery to end users will be available only to content, application and service providers who pay extra fees, an enormous disadvantage to libraries, education, and other non-profit institutions. In short, Internet Service Providers (ISPs) should allow users the same priority of access to educational content as to entertainment and other commercial offerings.

The FCC's decision made significant progress in enforcing these principles by adopting a non-discrimination standard for wireline Internet services, and in limiting the opportunities for paid prioritization. The FCC's decision also explicitly protects the rights of libraries, schools, and other Internet users. While the FCC's decision falls short in some other areas, particularly with regard to mobile wireless services, the decision sends a strong statement to ISPs that they must keep the Internet open to educational and library content.

For these reasons, ALA, ARL and EDUCAUSE believe that the FCC's decision should be upheld and should not be overturned by Congressional action. While the FCC's decision can certainly be improved, we strongly believe that the FCC should have the authority to oversee the broadband marketplace and respond to any efforts by ISPs to skew the Internet in favor of any particular party or user. The Internet functions best when it is open to everyone, without interference by the broadband provider. We urge you to uphold the FCC's authority to preserve the openness of the Internet and to oppose any proposal to overturn or undermine the FCC's net neutrality decision.

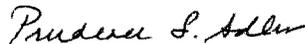
Respectfully Submitted,



Lynne Bradley  
American Library Association (ALA)



Greg Jackson  
EDUCAUSE



Prudence S. Adler  
Association of Research Libraries (ARL)

## ATTACHMENT

**Network Neutrality is Essential for Libraries and Higher Education Institutions****Libraries, Colleges and Universities Depend Upon the Intellectual Freedom Afforded by the Open Internet to Develop Content and Applications that Serve the Public Interest**

The following provides specific examples of how libraries and higher education rely upon an open, neutral Internet in serving the public:

**1. Libraries and Higher Education Institutions are Prolific Providers of Content, Services and Applications on the Open Internet**

- a. **Implementation of Distance Learning Services:** Educational institutions provide distance learning services and online course instruction over the Internet to reach a growing population of off-campus students.
  - i. Ninety-seven percent of 2-year public colleges offer a distance education program, and more than 12 million students enrolled in a college-level distance-learning course between 2006-2007, according to the U.S. Department of Education's National Center for Education Statistics.
  - ii. K-12 schools have also long relied upon distance learning and have only increased the use of these programs through Internet technology. For example, over 60% of the school districts in Wisconsin belong to the state's BadgerNet network. This began as a distance learning program in the 1980s via teleconferencing and today offers over 1500 interactive online courses in a typical school year over the Internet.
  - iii. "*World Campus*," created and maintained by Penn State, is essentially "Penn State Online." It delivers more than 50 distance education programs to learners around the world and promotes flexibility in learning by allowing students to participate in classes directly through a home, work, or public Internet connection.
  - iv. MIT's "*OpenCourseWare*" offers online video lectures taught by MIT professors and digital copies of class notes to members of the general public, free of charge. This online database goes to the heart of creating a more informed citizenry via the open Internet, but it depends on the ability to stream multimedia content without interruption from ISPs.

- v. *English For All (EFA)*, developed by the National Internet2 K20 Initiative, is a free, multimedia system for older adolescents and adults seeking to learn English as a Second Language (ESL). Because learning to speak English is a complex process, EFA utilizes online streaming video, digitized at a high frame rate, so that learners can see mouth formation and important body language.
- b. Development of New Applications and Services: Colleges and universities conduct research and experiment with new network applications to develop services that can ultimately be made available over the public Internet.
  - i. *Muse* is a new social utility tool that enables educators and practitioners to collaborate, comment, and create online educational services and applications relevant to the “Internet2 K20 community”—institutions and innovators from primary and secondary schools, colleges and universities, libraries, and museums.
  - ii. *The Digital Corinth Synchronized Database Project*, an Internet2 project, connects two separate online databases, one in Philadelphia and one in Athens, Greece, so that applications may be built for K20 education and tools developed for archaeological research. A user can connect to the database from the public Internet presuming, however, that ISPs allocate the bandwidth necessary for the transmission of content and services.
- c. Creation of Digital Data Collections: Libraries and higher education institutions maintain digital data collections to preserve research and scholarly content and to make resources more accessible to off-campus students and faculty, as well as the general public.
  - i. Institutional repositories, such as Harvard’s *DASH Project* and University of Michigan’s *Deep Blue*, collect and make available online data sets, scholarly publications, streaming videos and multimedia collections, free of charge, in order to promote access to research and scholarly communication.
  - ii. Libraries also create digital versions of content for the purposes of preservation and historical reference. The San Francisco Public Library, for example, digitized a collection of over 250,000 historical photographs and provides access to over 10,000 popular songs from the Dorothy Starr Sheet Music Collection through the library’s website.
- d. Incorporation of Mobile Wireless Applications and Services: Libraries and higher education institutions increasingly offer resources via mobile wireless platforms to reach

a broad range of demographic groups and to ensure that users can access content and services at any time, from any location.

- i. Many university and research libraries now offer mobile online public access catalogs (OPACs), mobile versions of library websites, and text-messaging services to correspond with patrons. For example, Duke University has a free iPhone application that allows patrons to browse the library's digital photo archive, presuming their wireless connection is not throttled or slowed from a network provider.
- ii. Public libraries also provide online library environments in order to improve community access to resources. In Wisconsin, the Outagamie Waupaca regional library system allows both its website and online catalog to be viewed via mobile devices. Similarly, the Orange County (Fla.) Library System utilizes a free mobile application that creates a virtual "shelf browse" for material selection. Using a randomized "shake" feature, users can receive material recommendations for books, audio books, and DVDs. When a match result is displayed, the user touches the material title to be taken to the mobile catalog. From there they have access to the title's availability, ratings, and library location, as well as the ability to place the title on hold.
- iii. Through the adoption of mobile wireless technology, libraries, colleges and universities can more effectively deliver content and services to traditionally underserved groups. While ethnic minority populations are connected to broadband at home less than are other demographic groups, they access the Internet via the mobile platform at higher rates than whites. For example, according to 2010 study by John Horrigan, "for African-Americans, home broadband adoption trails the national average by six percentage points; for mobile Internet use, African-Americans outpace the national average by nine percentage points."<sup>1</sup>
- iv. In particular, minority Americans lead the way when it comes to mobile access using a hand-held device. A 2010 study by the Pew Research Center notes that "[n]early two-thirds of African-Americans (64%) and Latinos (63%) are wireless internet users, and minority Americans are significantly more likely to own a cell phone than are their white counterparts (87% of blacks and Hispanics own a cell phone, compared with 80% of whites). Additionally, black and Latino cell phone owners take advantage of a much wider array of their phones' data functions

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<sup>1</sup> John B. Horrigan, "Broadband Adoption and Use in America," FCC, OBI Working Paper Series No. 1, February 2010, pp. 35-37, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-296442A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296442A1.pdf).

compared to white cell phone owners.”<sup>2</sup> The ability of these groups to access higher education and library resources over the Internet depends on successful transmission via mobile wireless platforms.

**2. Research Libraries and Institutions Rely on the Open Internet as End-Users in Order to Collaborate with and Obtain Content and Services from Outside Sources**

- a. Access to Outside Resources: Research libraries dedicate significant funds to licensing electronic resources that they make available to students, and faculty, and other off-campus users. For example, the *MESL* Project—the Getty’s Museum Education Site Licensing Project—provided access to over 4,500 digital images of paintings, photos, textiles, ceremonial objects, and other cultural artifacts through a collaborative effort of the Getty Information Institute, several museums, the U.S. Library of Congress, and seven universities. More than 45 state libraries now provide their states’ residents with access to thousands of online magazines, newspapers and other reference resources. Without net neutrality, libraries will need to judge the brokers of this content not based on the quality of their online resources but based on whether they have paid to ensure their resources are accessible in a timely manner.
- b. Use of Online Communication Services: Universities rely on Internet access to communicate with students and faculty. Currently, more than 750 colleges and universities subscribe to *e2Campus*, a web-based application that simultaneously broadcasts alerts to school websites, student email-accounts, wireless PDA’s, Facebook, and many other devices that rely on Internet access.
- c. Collaboration with Outside Institutions: The Smithsonian Institute has partnered with Arizona State University to implement a wireless connection in Barro Colorado—an island in the middle of the Panama Canal’s Gatun Lake where the Smithsonian manages its Institute for Tropical Research—that transmits images and data back to the University and K-12 classrooms in Arizona.

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<sup>2</sup> Aaron Smith, “Mobile Access 2010,” Pew Research Center, Pew Internet and American Life Project, July 2010, pp. 3, <http://pewresearch.org/pubs/1654/wireless-internet-users-cell-phone-mobile-data-applications>.



American Association  
of Independent Music

February 14, 2011

The Honorable Fred Upton  
Chairman  
House Energy & Commerce Committee  
2161 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Henry Waxman  
Ranking Member  
House E&C Committee  
2204 Rayburn HOB  
Washington, D.C. 20515

The Honorable Greg Walden  
Chairman  
Subcommittee on Communications & Technology  
2182 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Anna G. Eshoo  
Ranking Member  
Subcommittee on Comm. & Tech.  
205 Cannon Building  
Washington, D.C. 20515

The Honorable Lamar Smith  
Chairman  
Committee on the Judiciary  
2409 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable John Conyers, Jr.  
Ranking Member  
Committee on the Judiciary  
2426 Rayburn HOB  
Washington, D.C. 20515

The Honorable Robert Goodlatte  
Chairman  
Subcommittee on IP, Competition & the Internet  
2240 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Melvin Watt  
Ranking Member  
Subcomm. on IP, Competition & Int.  
2304 Rayburn HOB  
Washington, D.C. 20515

Dear Representatives,

The American Association of Independent Music (A2IM) is a non-profit organization representing a broad coalition of independently owned music labels from a sector that comprises more than 30 percent of the music industry's U.S. market, nearly 40 percent of digital sales, and well over 80 percent of all music released by music labels in the U.S. A2IM's label community includes music companies of all sizes throughout United States, from Hawaii to Florida and all across our country, representing musical genres as diverse as our membership.

Unfortunately, economic reward has not always followed critical success due to barriers to entry for independents in both promotion and commerce. A2IM members share the core conviction that the independent music community plays a vital role in the continued advancement of cultural diversity and innovation in music at home and abroad, but we need your help.

Of all the technological developments in recent history, the Internet represents the most potent platform for entrepreneurship and expression our community has witnessed. Despite the many unresolved questions surrounding the protection of intellectual property online, we remain optimistic that open Internet structures are our best means through which to do business, reach listeners and innovate in the digital realm.

Independent labels would not fare well under any regime that allows Internet traffic to be prioritized based on business arrangements between ISPs and the largest corporate entities, as our sector is not capable of competing economically. This is why we have consistently gone on record in favor of clear, enforceable rules of the road for the Internet, whether accessed on personal computers or mobile devices.

American Association of Independent Music - 853 Broadway, Suite 1406, NY, NY 10003 - Ph 212 999 6113 - [www.a2im.org](http://www.a2im.org)

We are not convinced that the FCC's recent Order goes far enough to preserve the dynamics that make the Internet such a unique and promising marketplace for creative commerce. We are particularly concerned about the lack of clarity in the mobile space, as well as the possibility of our sector being priced out of the most desirable online delivery mechanisms.

Nonetheless, it seems shortsighted for Congress to seek to eliminate the FCC's ability to oversee this vital space, as it is an essential part of a free market driven by enterprise, ingenuity and competition. We therefore urge Congress to forego any attempt to stymie the FCC's authority to preserve the underlying dynamic of the Internet.

Sincerely,

The American Association of Independent Music (A2IM)

cc:

The Honorable John Boehner  
The Honorable Eric Cantor  
The Honorable Kevin McCarthy

The Honorable Nancy Pelosi  
The Honorable Steny Hoyer  
The Honorable James Clyburn



February 15, 2011

The Honorable Fred Upton  
Chairman  
The Honorable Henry Waxman  
Ranking Member  
Committee on Energy & Commerce  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Greg Walden  
Chairman  
The Honorable Anna Eshoo  
Ranking Member  
Subcommittee on Communications,  
Technology & the Internet  
U.S. House of Representatives  
Washington, DC 20515

Re.: Opposition to Overturning FCC Open Internet Order

Dear Chairman Upton, Ranking Member Waxman, Chairman Walden, and Ranking Member Eshoo:

On behalf of the Asian American Justice Center (AAJC), we urge you not to overturn the order of the Federal Communications Commission in Preserving the Open Internet: Broadband Industry Practices (rel. Dec. 23, 2010) ("Open Internet Order") by way of the Congressional Review Act, a rider to appropriations measures or any other means available to Congress.

The publicly stated objective of AAJC and many of its coalitional partners throughout the long debate that led to the Open Internet Order was to reach a decision that balances competing interests in a way that provides clarity for businesses to invest in network infrastructure that is necessary for building out and upgrading our nation's broadband infrastructure, and for private sector driven job creation. Proving regulatory certainty for private investment and job creation is one of our key goals. The Open Internet Order achieves a balance that is reasonable. That is why we strongly urge Congress to not take any steps to overturn the Open Internet Order.

The Open Internet Order is now before the U.S. Court of Appeals for the District of Columbia Circuit and we anticipate that judicial review will be expeditious. We urge Congress to allow the judicial process to run its course. After the courts resolve this matter, we trust that Congress will not hesitate to exercise its oversight powers with wisdom and dispatch.

**ASIAN AMERICAN JUSTICE CENTER**  
1140 Connecticut Ave., N.W., Suite 1200, Washington, D.C. 20036  
T (202) 296-2300 F (202) 296-2318  
[www.aajc.advancingjustice.org](http://www.aajc.advancingjustice.org)

Member Affiliates: Asian American Institute in Chicago, Asian Law Caucus in San Francisco and Asian Pacific American Legal Center in Los Angeles

Rather than risk disrupting the regulatory certainty that has been crystallizing since the Open Internet Order was issued, we urge Congress to focus on the critical goals of the National Broadband Plan. These include promoting broadband adoption through targeted and efficient programs, fixing the nearly-broken Universal Service Fund, and advancing the participation of minority business enterprises in the broadband economy. We strongly believe that creative, efficient and bipartisan solutions to these practical problems are what the communities that we represent and Americans everywhere expect from Congress.

Thank you for taking our views into consideration and we look forward to working with you to advance innovation, growth and prosperity for all Americans.

Sincerely,



Karen K. Narasaki  
President and Executive Director



900 17th Street, N.W.  
Suite 1100  
Washington, DC 20006  
Phone: 202.783.0070  
Fax: 202.783.0534  
Web: www.cci-net.org

**Computer & Communications Industry Association**

February 14, 2011

The Honorable Fred Upton  
Chairman  
House Commerce and Energy Committee  
U. S. House of Representatives  
Washington, DC 20515

The Honorable Henry Waxman  
Ranking Member  
House Commerce Energy Committee  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Greg Walden  
Chairman  
Subcommittee on Communications  
and Technology  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Anna Eshoo  
Ranking Member  
Subcommittee on Communications  
and Technology  
U.S. House of Representatives  
Washington, DC 20515

Re: Open Internet

Dear Chairman Upton, Chairman Walden, Ranking Member Waxman, and  
Ranking Member Eshoo:

We write to urge your support for the FCC's open Internet rule and rejection of a resolution of disapproval under the Congressional Review Act. Americans have come to depend on reliable open Internet access for their daily life and work. Yet without a light touch FCC rule, households, students and small businesses lack any recourse at all if their Internet Access Provider (IAP) decides to follow its natural economic incentive and technical ability to prioritize its own content and affiliated services or even block other end user choices.

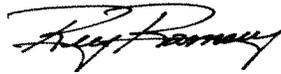
The FCC's December 2010 decision was adopted after several lengthy proceedings and unprecedented public input. The result is a very modest rule designed to preserve open non-discriminatory Internet access. In deference to the wishes of IAPs, the FCC completely avoided Title II common carrier regulation. The rule allows flexible network management and does nothing to inhibit broadband network deployment, while it affirmatively facilitates innovation and investment in new online services, content, applications and access devices by providing some minimal assurance they will not be blocked arbitrarily.

CRA repeal would actually leave the American public worse off than with no open Internet rule, as it would also rescind FCC authority in this area. Congress has repeatedly entrusted the FCC with a duty to protect the public interest in nationwide communications by wire and radio. No other agency can help your constituents with Internet access abuses if FCC authority is terminated.

Sincerely,



Ed Black  
President & CEO  
CCIA



Rey Ramsey,  
President & CEO  
Tech Net

**THE FREE COMMUNITY PAPER INDUSTRY**

The Honorable Fred Upton  
Chairman  
House Energy and Commerce Committee  
Committee  
2161 Rayburn HOB  
Washington, D.C. 20515

The Honorable Henry Waxman  
Ranking Member  
House Energy and Commerce  
  
2204 Rayburn HOB  
Washington, D.C. 20515

The Honorable Greg Walden  
Chairman  
Subcommittee on Communications  
and Technology  
2182 Rayburn HOB  
Washington, D.C. 20515

The Honorable Anna Eshoo  
Ranking Member  
Subcommittee on Communications  
and Technology  
205 Cannon HOB  
Washington, D.C. 20515

February 16, 2011

**Re: Preserving an Open, Nondiscriminatory Internet**

Dear Representatives:

On behalf of the united Free Community Paper Industry, we write to express our strong support for the Open Internet and oppose repeal of the Federal Communication Commission's (FCC) Open Internet rules through the Congressional Review Act. Using the Congressional Review Act would eliminate the current FCC rules and would prevent the FCC from preserving the Open Internet in the future.

Community Papers firmly believe that an open and nondiscriminatory Internet is critical to fair competition and the survival of the local media ecosystem.

The free community paper industry has been providing truly local news and information to our readers for over half a century. Collectively, we've served nearly every community in America long before the "pay to read" model of dissemination began to erode. For us, "hyper-local" is not the latest buzzword or strategic bandwagon; rather instead it is our enduring business model.

No shortage of major players, from legacy media to data aggregators, are just now "discovering" the untapped promise of our neighborhoods, real or imagined. In the competition for advertising dollars with our own phone service providers, we rest assured that inbound calls to our sales departments will not be met with artificial busy signals or rerouted to our carrier's Yellow Book representatives. But today, our internet-based communications would receive no such treatment under force of law if these fair competition rules are repealed.

It's no secret that print advertising revenues are shifting online. The future of our industry's collective enterprise depends on our readership having uncompromised access to our websites. Fair and robust competition in the digital age can only be achieved by equal access and neutral treatment of traffic across platforms and devices.

Sincerely,

Association of Free Community Papers  
Mid-Atlantic Community Papers Association  
Free Community Papers of New York  
Midwest Free Community Papers  
Community Papers of Ohio and West Virginia  
Community Papers of Florida  
Community Papers of Michigan  
Southeastern Advertising Publishers Association  
Texas Community Newspaper Association  
Wisconsin Community Papers



## **Future of Music Coalition**

1615 I Street NW, Suite 520, Washington, DC 20036 • 202.822.2051

February 14, 2011

The Honorable Fred Upton  
Chairman  
House Energy & Commerce Committee  
2161 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Henry Waxman  
Ranking Member  
House E&C Committee  
2204 Rayburn HOB  
Washington, D.C. 20515

The Honorable Greg Walden  
Chairman  
Subcommittee on Communications & Technology  
2182 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Anna G. Eshoo  
Ranking Member  
Subcommittee on Comm. & Tech.  
205 Cannon Building  
Washington, D.C. 20515

The Honorable Lamar Smith  
Chairman  
Committee on the Judiciary  
2409 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable John Conyers, Jr.  
Ranking Member  
Committee on the Judiciary  
2426 Rayburn HOB  
Washington, D.C. 20515

The Honorable Robert Goodlatte  
Chairman  
Subcommittee on IP, Competition & the Internet  
2240 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Melvin Watt  
Ranking Member  
Subcomm. on IP, Competition & Int.  
2304 Rayburn HOB  
Washington, D.C. 20515

Dear Representatives,

Since its inception, the internet has represented a powerful tool for the exchange of information and ideas. In recent years, it has also contributed greatly to the emergence of novel platforms for the dissemination of creative content. It is as members of the arts community who have come to depend on these structures that we write to you today.

Creators, in particular, depend on open internet structures to engage in a variety of ways, including direct interaction with audiences, fans and patrons, as well as collaboration with

other artists. From musicians to filmmakers to writers to independent labels to arts and service organizations, today's creative community depends on the internet to conduct business and contribute to the rich tapestry that is American culture.

Today's creators are taking advantage of technologies fostered by the internet to deliver a diverse array of content to consumers, while creating efficient new ways to "do for ourselves" in terms of infrastructure. The access and innovation inspired by the web helps us meet the challenges of the 21st century as we contribute to local economies and help America compete globally.

It hasn't always been so. Traditionally, the media landscape relied heavily on hierarchical chains of ownership and distribution, controlled by powerful gatekeepers such as large TV and movie studios, commercial radio conglomerates, major labels and so forth. It would be tremendously disadvantageous to creative entrepreneurship if the internet were to become an environment in which innovation and creativity face tremendous barriers to entry due to business arrangements between a select few industry players.

This is why we support clear, enforceable and transparent rules to ensure that competition and free expression can continue to flourish online. Although many of us feel strongly that the recent FCC Order does not go far enough in its protections (particularly with regard to mobile broadband access), we recognize the importance of having a process in place by which concerns can be addressed and transparency pursued.

We believe that Congress has a role to play in establishing guidelines that preserve a competitive, accessible internet where free expression and entrepreneurship can continue to flourish. We also believe that stripping the FCC's ability to enforce these core principles runs counter the values shared by members on both sides of the aisle, as well as prior and current FCC leadership. Therefore, we strongly urge against a broad repudiation of the Commission's Order.

Sincerely,

Fractured Atlas  
Future of Music Coalition  
National Alliance for Media Arts and Culture

cc:

The Honorable John Boehner  
The Honorable Eric Cantor  
The Honorable Kevin McCarthy

The Honorable Nancy Pelosi  
The Honorable Steny Hoyer  
The Honorable James Clyburn

**The Leadership Conference  
on Civil and Human Rights**

1629 K Street, NW 202.466.3311 voice  
10th Floor 202.466.3435 fax  
Washington, DC www.civilrights.org  
20006



**Officers**  
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Educational Fund, Inc.  
Dennis Van Roekel  
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Anthony Romero  
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Thomas A. Saenz  
Mexican American Legal Defense  
& Educational Fund  
David Saperstein  
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Joe Solomonese  
Human Rights Campaign  
Randi Weingarten  
American Federation of Teachers  
Mary G. Wilson  
League of Women Voters  
Sara Nagai Wilson  
American Arab Anti-  
Discrimination Committee

**Compliance/Enforcement  
Committee Chairperson**  
Karen K. Narasaki  
Asian American Justice Center  
**President & CEO**  
Wade J. Henderson  
**Executive Vice President & COO**  
Karen McGill Lawson

**Oppose Use of the Congressional Review Act to Repeal the FCC's Open Internet Rules**

February 15, 2011

The Honorable Fred Upton  
Chairman  
The Honorable Henry Waxman  
Ranking Member  
Committee on Energy & Commerce  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Greg Walden  
Chairman  
The Honorable Anna Eshoo  
Ranking Member  
Subcommittee on Communications,  
Technology & the Internet  
U.S. House of Representatives  
Washington, DC 20515

Dear Chairman Upton, Ranking Member Waxman, Chairman Walden, and Ranking Member Eshoo:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the rights of all persons in the United States, along with the undersigned organizations, we write to urge you to vote against any attempt to use the Congressional Review Act (CRA) to repeal the Federal Communication Commission's (FCC) Open Internet rules. Though the organizations represented by this letter have taken different views on the Open Internet rules, we are united in the view that congressional plans to overturn these rules using the CRA would cause significant harm, particularly to the constituencies represented by our organizations, and divert attention from other critical media and telecommunications issues that are so vital to our nation's economic and civic life.

The CRA, 5 U.S.C. §§ 801-808, is a blunt instrument. The terms of the Act require complete repeal of the agency action in question in a simple "yes or no" vote. For this reason, use of the CRA would mean that critical long-established protections will be repealed along with newer proposals adopted for the first time in December. Use of the CRA would eliminate the FCC's authority to enforce its reasonable Open Internet principles, including those that prevent private blocking of constitutionally-protected speech.

A free and open Internet is of particular concern to civil rights organizations because the Internet is a critical platform for free speech. It is also a tool for organizing members and for civic engagement; a chance for online education and advancement which is essential to economic development and job creation; a means by which to produce and distribute diverse content; and an opportunity for small entrepreneurs from diverse communities who might not otherwise have a chance to compete in the marketplace.

February 15, 2011  
Page 2 of 2



As you know, the FCC adopted Open Internet rules in December after an extensive and detailed process. As a result, the Commission for the first time adopted a set of enforceable rules that many diverse parties agree will protect against severe abuse, promote free expression on the Internet, and encourage job-creating investment in broadband networks. These rules include a number of non-controversial common-sense policies, such as the right of a consumer to reach any lawful content via the Internet while preserving network providers' ability to manage their networks. The rules adopted in December will help get all Americans online: for example, consumers with low incomes will be better able to select a service at a price they can afford under the Commission's new transparency rules.

We also urge Congress and the Commission to move forward on other critical media and telecommunications policy initiatives. As we explained to the FCC last fall, we believe it is critical for the Commission to renew its focus on expanding broadband adoption among people of color; closing the digital divide; extending universal service support to broadband services; adopting provisions to protect consumer privacy; and implementing the 21st Century Communications & Video Accessibility Act of 2010.

In closing, we strongly urge you to oppose use of the Congressional Review Act to repeal the Federal Communications Commission's Open Internet rules. We also hope that Congress and the Commission will move forward expeditiously to implement the National Broadband Plan to expand deployment and adoption of new technologies and high-speed Internet for all Americans. Should you require further information or have any questions regarding this issue, please contact The Leadership Conference Media/Telecommunications Task Force Co-Chairs, Cheryl Leanza 202-904-2168, Christopher Calabrese, 202-715-0839, or Corrine Yu, Leadership Conference Senior Counsel and Managing Policy Director, at 202-466-5670.

Sincerely,

AFL-CIO  
American Civil Liberties Union  
American Federation of Teachers  
Campaign for Community Change  
Communications Workers of America  
NAACP  
The Leadership Conference on Civil and Human Rights  
National Organization for Women  
United Church of Christ, Office of Communication, Inc.



February 15, 2011

Hon. Fred Upton, Chairman  
Hon. Henry A. Waxman  
Hon. Anna G. Eshoo  
Hon. Greg Walden  
Committee on Energy and Commerce  
U.S. House of Representatives  
2125 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Upton,

On behalf of One Economy Corporation, a non-profit corporation dedicated to connecting underserved populations across the United States, we urge you not to overturn the order of the Federal Communications Commission in Preserving the Open Internet: Broadband Industry Practices (rel. Dec. 23, 2010) ("Open Internet Order") by way of the Congressional Review Act, a rider to appropriations measures or any other means available to Congress.

Our publicly stated objective throughout the long debate that led to the Open Internet Order was to reach a decision that balances competing interests in a way that provides clarity for businesses to invest in network infrastructure that is necessary for building out and upgrading our nation's broadband infrastructure, and for private sector driven job creation. Proving regulatory certainty for private investment and job creation is our key goal. We strongly believe that the Open Internet Order achieves a balance that is reasonable. That is why we strongly urge Congress to not take any steps to overturn the Open Internet Order.

The Open Internet Order is now before the U.S. Court of Appeals for the District of Columbia Circuit and we anticipate that judicial review will be expeditious. We urge Congress to allow the judicial process to run its course. After the courts resolve this matter, we trust that Congress will not hesitate to exercise its oversight powers with wisdom and dispatch to protect the public from regulatory excesses.

Rather than risk disrupting the regulatory certainty that has been crystallizing since the Open Internet Order was issued, we urge Congress to focus on the critical goals of the National Broadband Plan. These include promoting broadband adoption through targeted and efficient programs, fixing the nearly-broken Universal Service Fund, and advancing the participation of minority business enterprises in the broadband economy. We strongly believe that creative, efficient and bipartisan solutions to these practical problems are what the communities that we represent and Americans everywhere expect from Congress.

We thank you for taking our views into consideration. We congratulate you on your election as Chairman and look forward to working with you to advance innovation, growth and prosperity for all Americans.

Sincerely,

A handwritten signature in black ink that reads 'Rey Ramsey'.

Rey Ramsey  
Chairman of the Board  
One Economy Corporation

February 14, 2011

The Honorable Fred Upton  
Chairman  
House Energy & Commerce Committee  
2161 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Henry Waxman  
Ranking Member  
House E&C Committee  
2204 Rayburn HOB  
Washington, D.C. 20515

The Honorable Greg Walden  
Chairman  
Subcommittee on Communications & Technology  
2182 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Anna G. Eshoo  
Ranking Member  
Subcommittee on Comm. & Tech.  
205 Cannon Building  
Washington, D.C. 20515

The Honorable Lamar Smith  
Chairman  
Committee on the Judiciary  
2409 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable John Conyers, Jr.  
Ranking Member  
Committee on the Judiciary  
2426 Rayburn HOB  
Washington, D.C. 20515

The Honorable Robert Goodlatte  
Chairman  
Subcommittee on IP, Competition & the Internet  
2240 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Melvin Watt  
Ranking Member  
Subcomm. on IP, Competition & Int.  
2304 Rayburn HOB  
Washington, D.C. 20515

Dear Representatives,

We write to you today as members of the music community, and also as beneficiaries of the tremendous innovations made possible by the internet. Like so many Americans, we rely on the web for everything from keeping in touch with family and friends to watching cute animal videos on YouTube. Yet it is as creators that we experience the internet's greatest benefits.

It used to be that reaching audiences was a laborious and expensive proposition. To do much of anything as a musician, you needed the backing of big companies with considerable resources at their disposal. Then you had to navigate a complex system of gatekeepers before anyone even had a chance to hear your music. This meant that a lot of vital music — including uniquely American expressions like blues, bluegrass, jazz, gospel and rhythm & blues — fell by the wayside. By contrast, the internet lets artists from folk to rock to hip-hop and beyond pursue their entrepreneurial ambitions right alongside the larger players. We think this is great.

The story of the internet is filled with stories of enterprise and innovation, some of it disruptive. At the beginning of the last decade, many in the historic music industry

struggled to respond to these changes while failing to comprehend opportunities created by a networked world. As artists, we welcomed the chance to reach our fans directly and participate in what we hoped would become a legitimate digital music marketplace fueled by discovery and enterprise.

Although the transition hasn't been entirely smooth, we're starting to see what this marketplace looks like. This is in no small part due to policymakers on both sides of the aisle who understood that an environment of access and competition would result in truly amazing things. Who could have predicted the power of Twitter? The ubiquity of Facebook? The popularity of Pandora? We love these sites and services, and we know a lot of members of Congress do, too. It's safe to say that none of them would exist without an accessible platform for innovation.

Yet there is the very real possibility that without clear, enforceable and transparent rules, Internet Service Providers will favor their own products at the expense of other entrepreneurial activity — not to mention free expression. This is why we've gone on record in support of such clear, enforceable and transparent rules. There is a range of opinions about exactly what those rules should look like, but it is pretty clear to those of us who depend on the internet to manage our businesses that some basic rules are needed.

We think that Congress should take steps to preserve the internet remains as an engine for innovation and growth. We also believe that the FCC has a role to play in this time of tremendous technological development. For this reason, we strongly feel that eliminating the FCC's ability to issue basic rules is not in the best interest of America or its creative entrepreneurs.

Sincerely,

R.E.M.  
Rebecca Gates  
Kronos Quartet  
Jill Sobule  
Erin McKeown  
Thao Nguyen  
Alex Shapiro  
Charles Bissell

cc:

The Honorable John Boehner  
The Honorable Eric Cantor  
The Honorable Kevin McCarthy

The Honorable Nancy Pelosi  
The Honorable Steny Hoyer  
The Honorable James Clyburn



**Marc H. Morial**  
President and CEO

120 Wall Street  
New York NY 10005

P 212 558 5300  
F 212 344 5188

www.nul.org  
presidentoffice@nul.org

*Empowering Communities.  
Changing Lives.*

February 15, 2011

Hon. Fred Upton  
Chairman  
Committee on Energy and Commerce  
U.S. House of Representatives  
2125 Rayburn House Office Building  
Washington, DC 20515

cc: Hon. Henry Waxman  
Ranking Member  
Committee on Energy and Commerce  
U.S. House of Representatives  
2322A Rayburn House Office Building  
Washington, DC, 20515

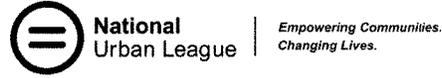
Dear Chairman Upton,

As one of the nation's largest and oldest civil rights organizations with 100 local affiliates in 36 states and the District of Columbia that provide direct services to more than 2 million people a year, we urge you to not take any steps to review or overturn by way of the Congressional Review Act, a rider to appropriations measures or any other means, the December 23, 2011 orders of the Federal Communications Commission relating to the open internet.

Our publicly stated objective throughout the long debates that led to the open internet orders was to reach a decision that balanced competing interests in a way that provides clarity for businesses to invest in much needed network infrastructure and for private sector driven job creation. We believe that the open internet orders achieve a reasonable balance. Providing regulatory certainty for private investment and job creation is our key goal. That is why we urge the U.S. Congress to not take any steps to review or overturn the open internet orders.

The open internet orders are now before the U.S. Court of Appeals for judicial review. That is part of the process by which regulatory certainty will be crystallized. To review or overturn the open internet orders while that process is





occurring, after it took a long time to get to that point, will reintroduce regulatory uncertainty. That will cause significant disruptions to private investments and job creation. The U.S. Congress should allow for the proper judicial process to work through expeditiously and then act, as and when the court has ruled.

Rather than risk disrupting the regulatory certainty that has been crystallizing, we urge the U.S. Congress to focus on the critical goals of the National Broadband Plan. These include promoting broadband adoption through targeted and efficient programs, reforming the Universal Service Fund, and advancing the participation of minority businesses in the broadband economy. We believe that creative, efficient and bipartisan solutions to these practical problems are what the communities that we represent and Americans everywhere expect from all of us.

We thank you for taking our views into consideration and we hope that you will act in accordance with them. We congratulate you on your election as Chairman and look forward to working with you to advance innovation, growth and prosperity for all Americans.

Sincerely,

A handwritten signature in black ink, appearing to read "Morial", with a long horizontal line extending to the right.

Marc H. Morial  
President and Chief Executive Officer  
National Urban League

February 16, 2011

Dear Chairman Upton, Ranking Member Waxman, Chairman Walden, and Ranking Member Eshoo:

The below signed organizations support the Open Internet and oppose any attempt to repeal the Federal Communication Commission's (FCC) Open Internet rules through the Congressional Review Act. Utilizing the Congressional Review Act would not only eliminate the current FCC rules, it would eliminate the FCC's ability to protect innovation, speech, and commerce on broadband platforms on behalf of the American people.

The Internet has been and must remain an open platform. Regardless of political or social values, an Open Internet increases opportunities for all persons and communities, increases diversity of opinions and thought, and ensures that consumers and entrepreneurs alike can engage in and benefit from the opportunities afforded by access to the Internet. An Open Internet is also an engine for economic growth, innovation, and job creation.

The FCC has adopted a framework that the agency believes will preserve the Open Internet. We wholeheartedly support preservation of the FCC's authority to implement such rules. This framework was adopted in a proceeding in which broadband service providers, Internet companies, civil rights groups, labor organizations, and public interest groups all participated.

We urge Congress not to utilize the Congressional Review Act, given the negative consequences of its enactment. Instead, we hope that Congress will work to preserve openness online and to move forward expeditiously in implementation of the National Broadband Plan. Undertaking such initiatives would improve broadband deployment and adoption opportunities for all Americans, including individuals in typically rural and other underserved populations and in communities of color too often denied a meaningful opportunity to participate in the new economy.

For these reasons, we urge you to ensure that all your constituents can continue to benefit from an Open Internet, and we stand ready to work with Congress to preserve an Open Internet.

Respectfully submitted,

Access Humboldt  
 AFL-CIO  
 Alliance for Community Media  
 Alliance for Digital Equality  
 Alliance for Justice  
 Alliance for Retired Americans  
 American Civil Liberties Union  
 Amnesty International USA  
 Applied Research Center  
 Arizona Progress Action  
 Berkeley Community Media  
 Blue Green Alliance  
 Bold Nebraska  
 CCTV Center for Media and Democracy  
 Center for Democracy and Technology  
 Center for Media Justice  
 Center for Rural Strategies  
 Center for Social Inclusion  
 Coalition of Black Trade Unionists  
 Coalition of Labor Union Women  
 Common Cause  
 Communications Workers of America  
 Community Media Workshop  
 Consumer Federation of America  
 Consumers Union  
 Creative Coworking  
 Esperanza Peace and Justice Center  
 Evanston Community Media Center  
 First Voice Media  
 Free Press  
 Future of Music Coalition  
 Houston Interfaith Worker Justice  
 iarte design  
 Instituto de Educacion Popular del Sur de  
 California  
 International Brotherhood of Electrical  
 Workers  
 Keystone Progress  
 KUMN Youth Radio  
 Latinos for Internet Freedom  
 Latino Print Network  
 League of United Latin American Citizens  
 Main Street Project  
 Media Access Project  
 Media Alliance  
 Media Justice League  
 Media Literacy Project  
 Media Mobilizing Project  
 National Alliance for Media, Art, and  
 Culture  
 National Association of Hispanic  
 Journalists  
 National Congress of American Indians  
 National Consumers League  
 National Hispanic Media Coalition  
 National Latino Farmers & Ranchers  
 Trade Association  
 National Network for Immigrant and  
 Refugee Rights  
 New America Foundation  
 New York Community Media Alliance  
 Ohio Valley Environmental Coalition  
 One Wisconsin Now  
 onShore Networks  
 Open Access Connections  
 Pineros Y Campesinos Unidos del  
 Noroeste, Oregon's Farmworker  
 Union  
 People Organizing to Demand  
 Environmental and Economic Rights  
 People's Production House  
 People's Channel  
 Praxis Project  
 Presente.org  
 Progressive Tech Project  
 Progress Michigan  
 ProgressNow Nevada Action  
 ProgressOhio  
 Prometheus Radio Project  
 Public Knowledge  
 Quote/Unquote, Inc.  
 Reclaim the Media  
 Sierra Club  
 Southwest Organizing Project  
 Southwest Workers Union  
 SpiritHouse  
 The Highlander Research and Education  
 Center  
 Thousand Kites  
 Transmission Project  
 United Auto Workers  
 United Church of Christ, Office of  
 Communication, Inc.  
 UNITY: Journalists of Color  
 Writers Guild of America, West

February 15, 2011

The Honorable Fred Upton  
Chairman  
House Energy and Commerce  
Committee  
2161 Rayburn HOB  
Washington, D.C. 20515

The Honorable Henry Waxman  
Ranking Member  
House Energy and Commerce  
Committee  
2204 Rayburn HOB  
Washington, D.C. 20515

The Honorable Greg Walden  
Chairman  
Subcommittee on Communications  
& Technology  
2182 Rayburn HOB  
Washington, D.C. 20515

The Honorable Anna Eshoo  
Ranking Member  
Subcommittee on Communications  
& Technology  
205 Cannon HOB  
Washington, D.C. 20515

Dear Representatives:

The below signed businesses support the Open Internet and oppose repeal of the Federal Communication Commission's (FCC) Open Internet rules through the Congressional Review Act. Using the Congressional Review Act would eliminate the current FCC rules and would prevent the FCC from preserving the Open Internet in the future.

The Open Internet allowed our businesses to open. As we grow we rely on the Internet as an open platform to expand. Each one of us is proof that the Open Internet increases opportunities for businesses large and small to compete and grow regardless of origin, location, or corporate affiliation. An Open Internet allows us to reach our customers at any place and at any time, and to grow rapidly as demand increases. We can do all of this without asking permission from gatekeepers or incumbent competitors. An Open Internet is an engine for economic growth, innovation, and job creation.

The FCC has adopted a framework that takes steps to preserve the Open Internet. Without such protection our businesses will be forced to rely on the largess of Internet Service Providers, not the support of our customers, to flourish. That will inevitably harm competition and reduce our ability to grow and create much-needed jobs. We use our resources to compete to bring the best products and services to our customers, not seek out the blessings of a few large gatekeepers.

In light of the critical importance of an Open Internet, we urge Congress not to utilize the Congressional Review Act to repeal the FCC's framework. Such a repeal would have a profoundly negative impact on our ability to compete freely in the marketplace, reach new consumers, and offer competitive alternatives to incumbents. We hope that Congress will continue to work on promoting policies that increase our ability to expand our businesses, reach new customers, and create new jobs.

For these reasons, we urge you to vote no on a Congressional Review Act repeal of the FCC's Open Internet rules.

Respectfully submitted,

Jesse von Doom  
Executive Director  
CASH Music

Michael Machado  
CEO  
SageTV LLC

Jane Litte  
Owner  
Dear Author Media Network

Steve Young  
Marketing and Business Development  
Syabas Technology Inc.

Shane Neman  
CEO  
Ez Texting

Ian Rogers  
Chief Executive Officer  
Topspin Media, Inc

Josh Greenberg  
Chief Technology Officer and Co-  
Founder  
Grooveshark

Johnny Russell  
President  
UltiMachine Co.

Happy Mutants LLC

Bre Pettis  
Co-Founder  
Makerbot Industries

Jeff Lawrence  
PlayOn CEO  
MediaMall Technologies, Inc.

Brian Jamison  
CEO  
OpenSourcery

Jim Louderback  
CEO  
Revision3

John Sundman  
CEO  
Rosalita Associates

March 1, 2011

The Honorable Fred Upton, Chairman  
 The Honorable Henry Waxman, Ranking Member  
 Committee on Energy & Commerce  
 U.S. House of Representatives  
 Washington, DC 20515

The Honorable Greg Walden, Chairman  
 The Honorable Anna Eshoo, Ranking Member  
 Subcommittee on Communications,  
 Technology & the Internet  
 U.S. House of Representatives  
 Washington, DC 20515

Dear Chairman Upton, Ranking Member Waxman, Chairman Walden, and Ranking Member Eshoo:

As the world watches how the Internet has fueled pro-democratic uprisings across the Middle East, we, as leaders and communicators representing many diverse religious traditions, write to share our strong support for Internet freedom here at home. Specifically, we support the Federal Communication Commission's Open Internet rules and urge you to oppose any attempt to repeal these rules through the Congressional Review Act. These rules are important for underserved communities as well as the faith community.

The Internet is a critical tool for nonprofits and other institutions nationwide. In particular, institutional networks such as health care providers and institutions of higher learning, as well as social service agencies and community organizations use the Internet for communication, organizing, and learning. The Internet is an increasingly important tool that helps needy persons access the education and services they need to improve their lives and the lives of their families. In these difficult economic times, the Internet is an essential tool for those seeking to get back on their feet.

Not only are the open Internet rules important for those the faith community serves, it is important for the religious community itself. As the National Council of Churches Communications Commission recently stated, Internet communication is "vital" to faith groups to enable them to communicate with members, share religious and spiritual teachings, promote activities on-line, and engage people—particularly younger persons—in their ministries. As the resolution noted, "Faith communities have experienced uneven access to and coverage by mainstream media, and wish to keep open the opportunity to create their own material describing their faith traditions." Without robust open Internet protections, our essential connection to our members and the general public could be impaired. Communication is an essential element of religious freedom: we fear the day might come when religious individuals and institutions would have no recourse if we were prevented from sharing a forceful message or a call to activism using the Internet.

We are particularly concerned about the way Congress has chosen to address this issue. Members of Congress have already initiated action under the Congressional Review Act to eliminate all open Internet protections. Even for legislators who might not agree with every aspect of the FCC's new rules, the proposed use of the Review Act is extreme.

After many months of public hearings and reviewing thousands of public comments, the FCC last December sought to strike a balance between the needs of Internet providers and the general public. The agency's compromise rules were designed to guard against the most severe forms of abuse. The result

was a set of regulations that competing parties in the industry and public sector were able to support. A number of the new rules are critical to ensuring that all citizens can gain access to high speed Internet. Among other things, the new disclosure rules will make it easier for low-income families to choose an Internet provider at a price they can afford.

In addition to new policies, the rules adopted in December reestablished a number of non-controversial common-sense FCC policies, including protecting the right of an Internet user to access any lawful Internet content. *If the Review Act is used to void the FCC regulations, not only would it restrict the FCC's ability to protect Internet users in the future, it would also dismantle even these limited and essential protections put in place during the Bush Administration.*

We hope that the House and Senate will reject the use of the Congressional Review Act to overturn these important rules. We hope that Congress will instead work to preserve openness online, and to ensure that all people, particularly people of faith, are able to take full advantage of the power of the Internet.

Sincerely,

Andrea Cano  
Chair, United Church of Christ, OC Inc.

Rev. Robert Chase  
Founding Director, Intersections International

Jodi L. Deike  
Director of Grassroots Advocacy and  
Communication  
Evangelical Lutheran Church in America

Rev. J. Bennett Guess  
United Church of Christ, Publishing, Identity,  
and Communication

Rev. Dr. Ken Brooker Langston  
Director, Disciples Justice Action Network

Reverend Peter B. Panagore  
First Radio Parish Church of America

Wesley M. "Pat" Pattillo  
Associate General Secretary for Justice &  
Advocacy and Communication  
National Council of Churches USA  
Gradye Parsons

Stated Clerk  
Office of the General Assembly, PC(USA)

Dr. Riess Potterveld  
President, Pacific School of Religion

The Rev. Eric C. Shafer  
Senior Vice President, Odyssey Networks

Mr. Nick Stuart  
President & CEO, Odyssey Networks

Dr. Sayyid M. Syeed,  
National Director, Office for Interfaith &  
Community Alliances  
Islamic Society of North America

Jerry Van Marter  
Director, Presbyterian News Service,  
Presbyterian Church  
Chair, Communications Commission, National  
Council of Churches

Linda Walter  
Director, The AMS Agency  
Seventh-day Adventist Church

**Resolution on Network Neutrality and Internet Freedom  
by the Communication Commission, National Council of Churches USA**

**Whereas**, the people of our communities of faith rely heavily on the Internet as a means to communicate, share experiences, and build community;

**Whereas**, many of our faith communities, which also are nonprofit organizations with relatively small budgets, rely on the Internet as a public platform for free speech, equal opportunity, outreach to their members, and ministry and social service to local communities in need,

**Whereas**, faith communities have experienced uneven access to and coverage by the mainstream media, and wish to keep open the opportunity to create their own material describing their faith and traditions.

**Whereas**, as faith communicators, we see every day the vital connection between a free and fair communications system and the achievement of important social justice goals;

**Whereas**, if vital net neutrality protections are not assured by the FCC, large for-profit companies providing Internet services may have a commercial incentive to favor their own content over others and as a result could limit the activity and equal access of members of faith communities and other non-commercial organizations online;

**Whereas**, we believe the only way to carry out this mandate is for the FCC to ensure that the National Broadband Plan guarantee network neutrality applicable to all types of technology used by citizens to access Internet communications services, both wired and wireless, and equally applicable to the Internet services provided by telecommunications providers, cable providers, wireless mobile Internet access providers, and any other type of technological access to Internet services;

**Whereas**, network neutrality principles will allow the full diversity of voices to flourish and will be the principle that will make broadband access a meaningful self-empowerment tool driving achievement of these broad social goals;

**Therefore, we jointly urge the Federal Communications Commission to take any and all action to adopt network neutrality, including reclassification of broadband services as a telecommunications service, as a fundamental and necessary part of the framework for all forms of broadband Internet service that will protect the freedom of every individual and group to see and hear and send any information they desire.**

<http://www.nccusa.org/news/101018netneutrality.html>

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*Since its founding in 1950, the National Council of the Churches of Christ in the USA has been the leading force for ecumenical cooperation among Christians in the United States. The NCC's 36 member faith groups -- from a wide spectrum of Protestant, Anglican, Orthodox, Evangelical, historic African American and Living Peace churches -- include 45 million persons in more than 100,000 local congregations in communities across the nation. NCC News contact: Philip E. Jenks, 212-870-2228 (office), 646-853-4212 (cell), [pjenks@nccusa.org](mailto:pjenks@nccusa.org)*



April 6, 2011

The Honorable Fred Upton  
 Chairman  
 Committee on Energy and Commerce  
 2125 Rayburn House Office Building  
 Washington, DC 20515

The Honorable Henry A. Waxman  
 Ranking Member  
 Committee on Energy and Commerce  
 2125 Rayburn House Office Building  
 Washington, DC 20515

Dear Chairman Upton and Ranking Member Waxman:

On behalf of Netflix, Inc., the world's leading Internet subscription service for enjoying movies and TV shows, I write to express our concern with the House of Representative's proposal to utilize the Congressional Review Act (the "CRA") to vacate the Federal Communications Commission's Open Internet order.

We do not believe that the CRA is the appropriate vehicle to address concerns Congress may have with the FCC's actions as utilizing the CRA would, in essence, strip the FCC of any power to preserve an open Internet. Instead, we would support the Committee working on comprehensive legislation that provides a common-sense structure for our 21<sup>st</sup> Century media and communications platforms -- legislation that assures consumer choice and innovation while preserving incentives for broadband network operators to continue to invest in their infrastructure.

We have been supportive of open access to the Internet and believe that the FCC's Open Internet order was a step in the right direction. Its focus, however, was on fair play *within* an ISP's network. The order did not expressly deal with *entry* into an ISP's network.

Today, some ISPs charge to let bits onto their networks, despite these bits having been requested by their own consumers. As long as we pay for getting the bits to the regional interchanges of the ISPs' choosing, we don't think ISPs should be able to use their exclusive control of their residential customers to force us to pay them to let in the data their customers desire. The ISPs' customers already pay the ISPs to deliver the bits on their network, and requiring us to pay even though we deliver the bits to their network is an inappropriate reflection of their last mile exclusive control of their residential customers.

Netflix also believes that access to high speed Internet will be very important to our society on a number of levels - from political discourse to commercial activity. Moves by wired ISPs to shift consumers to pay-per-gigabyte models instead of the current unlimited-up-to-a-large-cap approach, threatens to stifle the Internet. We hope this doesn't happen, and will do what we can to promote the unlimited-up-to-a-large-cap model. Wired ISPs have large fixed costs of building and maintaining their last mile network of residential cable and fiber. The ISPs' costs, however, to deliver a marginal gigabyte from one of our regional interchange points over their last mile wired network to the consumer is less than a penny, and falling, so there is no

reason that pay-per-gigabyte is economically necessary. Moreover, at \$1 per gigabyte over wired networks, it would be grossly overpriced.

While we certainly aren't in favor of legislation or regulation in all of the foregoing, we do think it is important for the Committee to examine all the issues associated with preserving an open, vibrant and high speed Internet. Transparency into costs, the competitive landscape, and technological changes will help the Committee chart a wise course. We don't believe that using the CRA to throw out the FCC's actions, thereby creating a legal vacuum, meaningfully advances discussion over these very important issues.

Thank you for considering our views. We look forward to working with you and the rest of the Committee.

Sincerely,

A handwritten signature in black ink, appearing to be 'RH', written in a cursive style.

Reed Hastings  
Chief Executive Officer,  
President & Co-founder

230



OFFICE OF  
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON

April 1, 2011

The Honorable Greg Walden  
Chairman  
Subcommittee on Communications and Technology  
Committee on Energy and Commerce  
2125 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Walden:

Attached please find my responses to the additional post-hearing questions from my appearance before the Committee on February 16, 2011. Please let me know if I can be of further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Julius Genachowski", written over a horizontal line.

Julius Genachowski

**The Honorable Greg Walden**

1. For what reason did the FCC exclude companies like Google and Skype from the net neutrality rules? They are no less capable of potential discrimination. After all, Skype blocks access to competing application providers like Fring. Google and Facebook have been blocking consumers' access to their contacts across the two services. Given recent unilateral action by Google to change the ranking prioritization of some retailers, wouldn't that actual threat to openness be of more concern than the speculative harms mentioned in your order?

**Response:** Reflecting the focus of the Communications Act, the Commission's longstanding, bipartisan initiatives to protect a free and open Internet have focused on providers of broadband Internet access services. As discussed in the *Open Internet Order*, that focus is appropriate because broadband providers control access to the Internet for their subscribers and for anyone wishing to reach those subscribers. That rationale does not apply to edge providers.

2. Did the FCC do any analysis to show that this order would create jobs, or at least not hurt them? If so, please provide such analysis to this Committee.

**Response:** The record demonstrates that the *Open Internet Order* will foster job creation in the Internet ecosystem. Numerous commenters in the public record in the proceeding emphasized that preserving an open Internet was essential to continued job creation at the edge of the network. Based on the evidence in the record, there is no reason to believe that the *Order* would harm job creation in any way, and indeed that the framework in the *Order*, and the certainty and predictability it provides, will enhance job creation.

3. In paragraphs 165 and 166 of the order, the Commission says that it has met its obligations under the Paperwork Reduction Act by assessing the effects of the Open Internet rules and determining that "any burden on small businesses will be minimal." What analysis did the Commission conduct to make this determination, and where in the order or the record is any such analysis discussed?

**Response:** As discussed the *Open Internet Order*, the costs of compliance with the adopted rules will be small, as they are generally consistent with current industry practices. Although some commenters asserted that a disclosure rule would impose significant burdens on broadband providers, no commenter cited any particular source of increased costs, or attempted to estimate costs of compliance. See *Open Internet Order*, ¶ 59. Furthermore, various aspects of the rules we adopted substantially mitigate the burden on small businesses. For example, the rules require only that providers post disclosure 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. The impact of the rules on small businesses is discussed at length in the Final Regulatory Flexibility Analysis that is appended to the *Order*.

4. Your order claims that section 706 authorizes the FCC to regulate network management because doing so will promote broadband. How is this consistent with past FCC statements that section 706 is not a grant of authority?

**Response:** Part IV. A. of the *Open Internet Order* discusses at length the Commission's authority under section 706 of the Telecommunications Act of 1996. That discussion explains, for example, that the U.S. Court of Appeals for the District of Columbia Circuit stated in the *Comcast/BitTorrent* case that Section 706(a) "does contain a direct mandate" to the FCC. See *Comcast v. FCC*, 600 F.3d 642, 658 (D.C. Cir. 2010); 47 U.S.C. §1302(a) (The Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.") (emphasis added). The *Open Internet Order* further explains that the earlier Commission decision to which you refer reached a conclusion consistent with our present understanding that Section 706(a) authorizes the Commission to take actions, within its subject matter jurisdiction and not inconsistent with other provisions of law, that encourage the deployment of advanced telecommunications capability by any of the means listed in Section 706(a). Notably, that earlier order specifically stated that Section 706(a) "gives this Commission an affirmative obligation to encourage the deployment of advanced services," and stressed that "this obligation has substance." *Advanced Services Order*, 13 FCC Rcd 24012, 24046, para. 74 (1998).

5. Under this theory, wouldn't section 706 also authorize the FCC to regulate Internet privacy, since the broadband plan concludes that consumer concerns over privacy are one of the main impediments to broadband adoption, and thus also limits demand for further deployment? Under your theory of the scope of section 706, what limits are there on your perceived authority over broadband?

**Response:** As noted in paragraph 121 of the *Open Internet Order*, any action taken by the Commission under Section 706(a), involving privacy or other issues, must: (1) be within the Commission's subject matter jurisdiction under the Communications Act, which is limited to "interstate and foreign commerce in communication by wire and radio"; (2) encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans; and (3) utilize one of the methods specified in Section 706(a).

6. The courts have said that while statutory statements of policy do not create authority, they can delineate the contours of authority. Can the FCC's theory of authority by "bank shot" possibly be accurate in light of Section 230, which makes it the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the internet and another interactive computer service, unfettered by federal or State regulations"?

**Response:** As noted in paragraph 116 of the *Open Internet Order*, "the policy of the United States" articulated in Section 230 includes "promot[ing] the continued development of the Internet" and "encourag[ing] the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet," while also "preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services" and avoiding unnecessary regulation. 47 U.S.C. § 230(b). As the *Order* also explains, the open Internet rules adopted by the Commission promote the Internet's development; protect consumers' control over the information they can receive when using the Internet; and preserve the free market for content, applications, and services on the Internet, while taking a light-touch approach with respect to providers' broadband Internet access service offerings.

7. Assuming *arguendo* that the FCC's interpretation of the scope of section 706 is accepted, section 706 discusses removing barriers to infrastructure investment to promote broadband? How will network neutrality rules promote investment?

**Response:** In paragraphs 14, 40, and 53 the *Open Internet Order* describes how the open Internet rules remove barriers to investment in broadband infrastructure by removing uncertainty regarding appropriate network management practices and continued Internet openness, and preventing conduct that would limit Internet openness, thereby increasing the value of the Internet for broadband providers, edge providers, online businesses, and consumers. AT&T's Senior Executive Vice President Jim Cicconi stated before the House Energy and Commerce Subcommittee on Communications and the Internet on March 9, 2011, "The rule is consistent with AT&T's current Open Internet policies, and would not require us to change any of our business practices or plans assuming it is applied in a reasonable, narrowly tailored way. And as our Chairman has said, it provides a path for continued investment by removing much of the uncertainty this issue has caused."

8. The order claims that section 706 authorizes the FCC to adopt network neutrality rules. But section 706 also states that "each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." Does this mean that every state commission can also adopt its own network neutrality rules?

**Response:** The *Open Internet Order* explained that "Section 706(a) [of the 1996 Act] authorizes the Commission (along with state commissions) to take actions, within their subject matter jurisdiction and not inconsistent with other provisions of law, that encourage the deployment of advanced telecommunications capability by any of the means listed in the provision." *Open Internet Order* ¶ 119. The *Order* further explained that the FCC has "recognized that services carrying Internet traffic are jurisdictionally mixed, but generally subject to federal regulation," and "[w]here . . . it is not possible to separate the interstate and intrastate aspects of the service, the Commission may preempt state regulation where federal regulation is necessary to further a valid federal regulatory objective, i.e., state regulation would conflict with federal regulatory policies." *Open Internet Order* ¶ 121 n. 374 (citations and internal quotation marks omitted). Nothing in the OI order changes the authority of states with respect to broadband.

9. The Commission cites its licensing authority as its jurisdictional basis for applying these rules to wireless. In your response to the D.C. Circuit on the Verizon appeal, however, the Commission is disputing that this is a licensing issue. Which is it?

**Response:** The question presented by the FCC's motion to dismiss the appeal filed by Verizon in the D.C. Circuit is whether the appeal is premature. The *Open Internet Order* is a rulemaking order, and Commission Rule 1.4(b)(1) specifies that the time for review of such orders begins on publication in the Federal Register, which has not yet occurred. Therefore, as the Commission has argued, the appeals are incurably premature.

10. You have said that what you adopted were modest rules of the road and that you were particularly sensitive to the unique needs of wireless service. Does that mean you do not believe your rules prohibit MetroPCS from offering its low-cost option for consumers that are happy to receive only basic access to Internet content in return for paying less?

**Response:** The FCC staff will review any complaints that may be filed pursuant to its *Open Internet Order* once it has taken effect. I can assure you that I have not prejudged any issue that might arise under the *Order*.

11. Now that the net neutrality rules have been adopted, why have you not terminated the proceedings on regulation of net neutrality under Title II?

**Response:** Less than a year ago, the Commission issued a *Notice of Inquiry* in its proceeding entitled *Framework for Broadband Internet Service*. The first sentence of that *Notice* explains that that document began "an open, public process to consider the adequacy of the current legal framework within which the Commission promotes investment and innovation in, and protects consumers of, broadband Internet service." The *Notice* broadly seeks public comment on many questions about legal and policy issues relating to broadband, without proposing any particular agency action.

The Broadband Framework record remains open to collect information that may be helpful for the Commission's work and that could serve as a resource for an update of the Communications Act, as many in Congress and the private sector have suggested is needed.

12. You stopped all action to auction the D-block because Senator Rockefeller opposed it and now you say you will wait for congressional action, even though current law requires you to auction the block. Why did you not similarly halt your network neutrality proceeding when more than 100 members of the House and Senate have said they oppose it under any theory of FCC authority?

**Response:** In the summer of 2010, the Commission indicated that it would delay action as a Congressional effort, led by then-Chairman Waxman, was underway. When it became clear that the effort would fail to produce legislation, we moved forward to a final *Order* with the urging of Industry representatives and consumers groups.

13. The FCC's NPRM doesn't mention items that appear in the final order, such as broadband speed reporting and early termination fees. Also, the Commission's Sunshine Notice didn't place on sunshine the dockets for those issues. Is that consistent with the Administrative Procedure Act and FCC practice?

**Response:** The *Open Internet NPRM* gave the public detailed notice that a transparency rule for broadband Internet access service was under consideration. In discussing that transparency requirement, the Commission stated at paragraph 56 of the *Order*: "We believe that at this time the best approach is to allow flexibility in implementation of the transparency rule, while providing guidance regarding effective disclosure models. We expect that effective disclosures will likely include some or all of the following types of information . . .," which included speeds and early termination fees, among many others. Specifically with respect to disclosure of broadband speeds, the *Open Internet NPRM* had asked commenters to address whether consumers "need information concerning actual (as opposed to advertised) transmission rates." 24 FCC Rcd 13064, 13110, ¶ 125 (2009). With respect to disclosure of pricing and fees, the *NPRM* noted "evidence of service providers concealing information that consumers would consider relevant in choosing a service

provider or a particular service option,” and proposed that broadband providers be required to disclose practices (such as early termination fees) “that may reasonably affect the ability of users to . . . enjoy the competitive offerings of their choice.” *Id.* at ¶¶ 121, 123; *see also id.* ¶ 35 (noting that comment had been sought on “whether providers disclose their [network management and pricing] practices to their customers”).

14. The day before the sunshine period began for this item more than 2,000 pages of documents were placed in the record by FCC staff. Even if consistent with the Administrative Procedure Act, nobody would have had time to review the documents to ensure what your staff had done was legal before the sunshine period prevented comment. Moreover, there would be even less time to analyze and comment on the documents in the record. Is this consistent with an open and transparent FCC rulemaking process?

**Response:** The open, public process leading to adoption of the *Open Internet Order* was consistent with the best practices of administrative agencies and far exceeded the notice-and-comment requirements of the Administrative Procedure Act. Exemplifying the openness and transparency of this proceeding, the Commission published its proposed open Internet rules in a Notice of Proposed Rulemaking, conducted public workshops, met with dozens of stakeholders, and received over 200,000 comments from interested parties (including, as an innovation, comments submitted via the FCC’s blog). As you note, the FCC also went beyond legal requirements by itself collecting and including in the public record thousands of pages of material of which the Commission staff had become aware, comprised of newspaper articles, analyst reports, web pages, and journal articles. The vast majority of these materials already were available to the public in scattered locations. Indeed, roughly half of them already had been cited or filed in the open Internet docket by other commenters, and the staff’s submission simply made them more conveniently accessible.

15. With respect to the transparency and disclosure rules, the FCC estimates an average burden of 10 hours per response, a total industry burden of 15,646 hours, and yet the order concludes that there will be *no* annual costs associated with compliance. How can the Commission estimate that there are no annual costs associated with these obligations?

**Response:** The *Open Internet Order* explicitly weighed the expected costs of compliance against the benefits of enforceable open Internet guidelines. In paragraph 4, for example, we stated that “[w]e expect the costs of compliance with our prophylactic rules to be small . . . . Conversely, the harms of open Internet violations may be substantial, costly, and in some cases potentially irreversible.” In paragraph 39, we explicitly addressed the potential costs of disclosure, stating that “Even to the extent rules require some additional disclosure of broadband providers practices, the costs of compliance should be modest.” In paragraph 59 we set forth a number of policy choices that were made to minimize the cost of compliance:

“First, we require only that providers post disclosures on their websites and provide disclosure 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 some 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 its mandatory

approval of the information collection requirements contained in the rules, we give broadband providers adequate time to develop cost effective methods of compliance.”

16. The order specifies approximately 30 discrete topics, "some or all" of which "likely" must be addressed in order for a broadband provider's disclosures to be deemed "effective." Setting aside that the order neither specifies which obligations must be met nor offers a "safe harbor," complying with these obligations will impose significant burdens, especially on small providers. What evaluation did the Commission conduct to conclude that compliance with these obligations will not be a burden to broadband providers?

**Response:** As discussed above, in paragraph 59 of the *Open Internet Order* the Commission analyzed the potential burdens of the transparency rule, and concluded that the costs of compliance would be minimal. The rules require only that broadband providers disclose basic features of their service, including their network management practices. Broadband providers, including small providers, currently disclose nearly all of the suggested six categories of information the Order identifies, and many currently disclose all of the information discussed.

**The Honorable Mary Bono Mack**

1. Not a week goes by without an announcement about a new service or device that enables customers to access video in new ways. These announcements underscore that the marketplace today is characterized by increasing innovation, consumer choice, and competition. What market failure is the Commission's AllVid initiative intended to address?

**Response:** Last April, the Commission unanimously approved a Notice of Inquiry seeking specific steps it can take to unleash competition in the retail market for smart, set-top video devices that are compatible with all multichannel video programming distributor ("MVPD") services. Our goal is to better effectuate the intent of Congress as set forth in Section 629 of the Communications Act.

Unfortunately, the Commission's efforts to date have not led to a robustly competitive retail market for navigation devices that connect to subscription video services. We are therefore exploring the potential for allowing electronics manufacturers to offer smart video devices at retail that can be used with the services of any MVPD without the need to coordinate or negotiate with MVPDs. Our aim is to foster a competitive retail market in smart video devices, to spur investment and innovation, increase consumer choice, allow unfettered innovation in MVPD delivery platforms, and encourage wider broadband use and adoption.

2. Today, there are more than 15 over-the-top video services - including Netflix, iTunes, Amazon OnDemand, PlayStation Network, You Tube, and Vudu - delivering movies, television programming, and other video to consumers outside the traditional multichannel video platform. Why does the Commission need to dictate what the delivery of video programming should look like when so many innovators are competing to shape the market?

**Response:** See response above. Our goal in pursuing a Notice of Inquiry is to ensure we are meeting our statutory obligation under Section 629 of the Communications Act.

3. Over 40 million Internet-connected TVs are expected to ship this year, and that number is forecast to grow to over 118 million in 2014. Numerous other devices, including game consoles and Blue-ray players, enable consumers to access Internet video content. Why does the FCC need to regulate how consumers access Internet video when an increasing number of televisions and other devices are providing such access in the absence of government regulation?

**Response:** See response above. Our goal in pursuing a Notice of Inquiry is to ensure we are meeting our statutory obligation under Section 629 of the Communications Act.

4. Is it true that, as currently proposed, the FCC's AllVid initiative would actually require consumers, at least those with existing televisions, to purchase two devices - an AllVid adapter and a separate AllVid-compatible device - just to watch television? How would such a requirement benefit consumers?

**Response:** The Commission has yet to propose rules in this area. In the *AllVid Notice of Inquiry*, the Commission introduced the concept of an adapter that could act either as a small "set-back" device for connection to a single smart video device or as a gateway allowing all consumer electronics devices in the home to access multichannel video programming services. Unlike the existing cable-centric CableCARD technology, this concept is designed to make possible the development and marketing of smart video devices that attach to any MVPD service anywhere in the United States, which could greatly enhance the incentives for manufacturers to enter the retail market. The *Notice of Inquiry* also seeks any alternative proposals that would achieve the same objective of eliminating barriers to entry in the retail market for smart video devices that are compatible with all MVPD services. The goal of the inquiry is to meet the Commission's obligation under Section 629 of the Communications Act and to provide consumers with meaningful options in the set-top video device marketplace

5. Do you think that there is an existing impediment to the convergence of television and the Internet that requires government intervention?

**Response:** During the Commission's Omnibus Broadband Initiative, the Commission issued a public notice soliciting comment on issues related to the ability of manufacturers to compete and innovate in the video device market. In response to the public notice, commenters generally agreed that there are serious obstacles that hinder convergence of Internet and MVPD-provided video, most notably divergent delivery technologies and content protection methods. We launched our *Notice of Inquiry* to further explore these and related issues, and are currently reviewing the extensive comments filed in response to the *Notice*.

6. If I remember correctly, you attended last month's Consumer Electronics Show in Las Vegas. Did you see a lack of innovation in the development of devices and services for the delivery of Internet video to televisions?

**Response:** There is tremendous innovation going on in many areas throughout the Internet ecosystem. As I noted above, one issue of concern raised during the development of the National Broadband Plan was that there are serious obstacles that hinder convergence of Internet and MVPD-provided video. We are looking closely at this and other related issues as part of our AllVid proceeding.

7. The FCC's "integration ban" requires cable operators (including telco TV providers such as Verizon) to use CableCARDS in their own boxes which they lease to consumers rather than providing consumers with boxes with security functions "integrated." CableCARDS provide no additional functionality to the boxes leased from cable operators and, by one estimate, imposing this requirement has cost cable operators and consumers more than \$1 billion since it went into effect in 2007. Since cable operators are obligated by law to support CableCARDS in boxes bought at retail outlets and there are already over 25 million operator leased boxes deployed with CableCARDS in them, continuing the "integration ban" only forces consumers to bear additional costs for no additional benefit. Isn't it time to revisit and repeal this outdated tech mandate?

**Response:** The Commission recognizes the costs related to common reliance and recently reduced the financial burden associated with it. On October 14, 2010, the Commission adopted a *Third Report and Order on Reconsideration* that exempts all one-way, non-recording boxes from the integration ban. However, CableCARD currently is the only technology that allows subscribers to access cable video content on a device purchased at retail, which is consistent with the Congressional directive under Section 629. Requiring cable operators to commonly rely on CableCARDS in their own devices is necessary to ensure the economies of scale required to adequately support a commercial market for retail devices.

8. I wrote you a letter dated September 9, 2009, drawing your attention to the unnecessary delay many satellite providers have in processing various satellite applications before the FCC's International Bureau. Even for simple requests with no opposition, many satellite applications have taken numerous months to process. In the FCC's 2008 Annual Report, the International Bureau noted that the average processing time for a satellite application in the period between 2005-2008 was 227 days (or a little more than 7 months). Has that improved?

**Response:** Yes. As part of my overarching goal to promote regulatory reform within the Commission, I am happy to report that there has been a 45% reduction in the median space station application processing time. Since November 4, 2009, the International Bureau has acted on 380 applications with a median processing time of only 38 days, compared to the 69-day median processing time between 2005 and 2008. Average (mean) processing time also declined, by 12.8%, to 198 days, but that average is significantly skewed upward by 18 applications in the satellite digital radio service (SDARS) that had been on file for over 1,000 days each. We were able to take action on all pending SDARS applications in the last year after completion of a long-standing rulemaking resolving controversial interference issues between SDARS and terrestrial services. Excluding the 18 SDARS applications, we reduced the average (mean) processing time by 50%, to 113 days.

9. In your response to my September 9, 2009 letter, you responded on November 9, 2009 that you would "do what is necessary to reduce this (227 days) time period even further." Can you please detail what you have done as Chairman to do so? Have you been successful? If not, what are your immediate plans this year to rectify these unnecessary delays?

**Response:** See previous answer. In addition, since November 2009, the number of backlogged space station applications (applications pending more than 270 days) has been reduced by over 43% -- from 53 applications to the current 30 applications.

In addition to this progress, we expect to move forward in the next year with three initiatives that should further facilitate the licensing process:

- o A Report and Order is currently on circulation that will resolve certain technical issues that will facilitate licensing of space stations in the 17/24 GHz Broadcasting Satellite Service.
  - o The Satellite Industry Association (SIA) informally filed proposed comprehensive revisions to the rules governing satellite space and earth station applications. While the proposal does not necessarily represent an industry consensus on all matters, it is a good starting point. The International Bureau's Satellite Division has reviewed the proposal and intends to set up a series of technical working groups with the SIA to discuss and refine the proposals. The goal is to achieve an updated and more streamlined process.
  - o The Commission has asked for comment on a proposal by the SIA to waive certain orbital debris requirements for certain classes of satellites on a blanket basis. Modifying the orbital debris rules regarding venting excess propellant and relieving pressure vessels will eliminate both the need for applicants to request and justify waivers of this requirement and the time required for Commission staff to evaluate these waiver requests.
10. You also note in your response letter that "U.S. and foreign licensees are on equal footing when they submit applications to provide service to the United States." That was not really my concern Mr. Chairman. My concern is that the satellite application process in other nations is much more simple and expedited, while the FCC's International Bureau continues to pursue an overly burdensome application process that actually discourages satellite operators from filing in the U.S. and instead encourages them to file elsewhere. In particular, has the Commission looked at the satellite licensing requirements of other nations to examine whether the FCC's satellite licensing requirements could be lessened?

**Response:** The Commission regularly evaluates its satellite application information requirements to determine whether any requirements are no longer needed. Further, interested parties may file requests to change the rules, pursuant to the FCC's rulemaking procedures.

With regard to other countries, there could be many reasons why a country adopts a particular licensing process – with several countries using auctions to award satellite licenses. In the United States, we are required by statute to have an open and transparent process, something many other countries do not follow. The United States has the most successful satellite industry in the world, with the largest number of in-orbit commercial satellites – which have closer orbital spacings than many other countries in order to maximize licenses. Closer spacings increase the potential for harmful interference into adjacent satellites, which could adversely impact the quality of service provided to consumers. For this reason, applicants are required to file specified technical information designed to ensure that our satellites can operate in an interference-free environment. In addition, to ensure space stations do not pose a physical hazard to other spacecraft or to persons or property on the ground once they have reached their end-of-life, the FCC requires applicants to provide orbital debris mitigation plans in each application. The technical information in these plans is consistent with standard practices used by other U.S. government agencies and reflects international best practices. I note that many other countries have adopted, or are in the process of adopting, similar orbital debris requirements.

11. You also note in your response letter that you have initiated a Commission-wide reform process to improve the performance of the Commission. I would like to know what reforms you have proposed or implemented regarding satellite licensing?

**Response:** See answer to question 9.

The Honorable Steve Scalise

1. The film industry is very important to Louisiana. While in the state legislature, I led the fight to establish incentives to bring production of movies to our states. According to a recent economic report, Louisiana's film industry created 6,000 jobs and generated \$763 million in economic activity in 2007. The verdict is in: protecting intellectual property creates jobs. And recent studies demonstrate the magnitude of the online intellectual property theft issue here in the US and around the world. A study released in February by Envisional- an independent Internet consulting company - found that almost a quarter of all global Internet traffic is infringing. Specifically, over 23% of global Internet traffic is estimated to be copyright infringing and over 17% of U.S. Internet traffic is estimated to be copyright infringing.

Clearly, this deluge of infringing Internet traffic both threatens legitimate online commerce and wastes precious bandwidth. I understand that the Open Internet Order at least acknowledges this problem by stating that it allows ISPs to proactively address illegal activity online without running afoul of the order. However, some have expressed concern that this language doesn't provide ISPs with sufficient clarity, and thus they will remain unwilling to deploy effective intellectual property protection measures.

Please clarify further the types of measures you do, and do not, consider allowable under the Order? Also, please clarify whether ISPs and rights-holders will be able to deploy such measures without seeking pre-approval from the FCC or judicial authorities?"

**Response:** During my tenure as Chairman, I have consistently expressed my support for efforts to combat copyright infringement. Consistent with this position, the Commission's *Open Internet Order* states that open Internet rules do not protect copyright infringement and are not intended to prohibit or discourage voluntary practices undertaken to address or mitigate the occurrence of copyright infringement. The *Order* clearly allows cooperative efforts by broadband Internet access service providers and other service providers that are designed to curtail infringement in response to information provided by rights holders in a manner that is timely, effective, and accommodates the legitimate interests of providers, rights holders, and end users. The *Order* contains no requirement that broadband providers obtain preapproval before deploying network management practices, or before making reasonable efforts to address copyright infringement or other unlawful activity.

The Honorable Brett Guthrie

1. I come from a small business, manufacturing background and strongly support private-sector innovation. I am concerned by the FCC's idea to move forward with AllVid. Please explain how a government device can provide a greater level of innovation than what is being done by the private sector. Also, who will bear the monetary burden of compliance? Will the consumer be forced to purchase an additional piece of equipment?

**Response:** Last April, the Commission unanimously approved a Notice of Inquiry seeking specific steps it can take to unleash competition in the retail market for smart, set-top video devices that are compatible with all multichannel video programming distributor ("MVPD") services. Our goal is to better effectuate the intent of Congress as set forth in Section 629 of the Communications Act.

Unfortunately, the Commission's efforts to date have not led to a robustly competitive retail market for navigation devices that connect to subscription video services. We are therefore exploring the potential for allowing electronics manufacturers to offer smart video devices at retail that can be used

with the services of any MVPD without the need to coordinate or negotiate with MVPDs. Our aim is to foster a competitive retail market in smart video devices, to spur investment and innovation, increase consumer choice, allow unfettered innovation in MVPD delivery platforms, and encourage wider broadband use and adoption.

With regard to consumer equipment, in the Commission's ongoing *AllVid Notice of Inquiry* requested public comment on, but did not propose any rules regarding, an adapter-based concept. At the same time, the Commission sought comment on how to avoid the need for duplicative devices, and we continue to refine our thinking in this regard based on the very helpful input we have received from all the affected stakeholders. In any event, any rules that the Commission adopts will allow consumers to choose the equipment they wish to use to access multichannel video programming, including the existing model of leased equipment from their cable or satellite provider.

The Honorable Michael F. Doyle

1. In the All-Vid proceeding promoting competition for set-top boxes, who does it contemplate that Joe Consumer will call for customer service? Would it be their pay-TV provider or competitive box maker, or whoever manufactures the actual All-Vid box?

**Response:** As part of our *AllVid Notice of Inquiry* launched last April, we sought comment on the claim made by MVPDs that multiple graphical user interfaces would create customer confusion with regard to whom subscribers should call with questions about problems associated with the user interface, service, and hardware compatibility. Specifically, we asked what steps should be taken to minimize any potential for confusion with regard to the appropriate provider of customer service for retail device product performance, warranty, and service-related issues. We are currently reviewing the extensive comments filed in response to the *Notice* and will take seriously any concerns regarding consumer welfare.

2. I've long thought that special access should be called "critical access" because it's a critical input for providers of competitive telecommunications services. The National Broadband Plan urged swift action from the FCC on this issue. Now that providers have submitted data, when will the Commission act on the failures in the special access market?

**Response:** Special access is a critical input to broadband availability, particularly for wireless and competitive broadband providers that need to purchase these services at reasonable wholesale rates in order to serve their end users. The Commission has a proceeding underway to determine whether our special access rules are ensuring that the rates, terms and conditions for special access are just and reasonable. As you note, the National Broadband Plan recommended that the "FCC should ensure that special access rates, terms and conditions are just and reasonable." We've made real progress on this issue since it was raised during my confirmation and since the National Broadband Plan was issued in March 2010:

- o In November 2009, we issued a public notice seeking comment on what analytical framework the Commission should use to determine whether the Commission's rules governing the market for special access circuits ensure just and reasonable rates, terms and conditions.
- o In July 2010, we held a workshop, led by expert economists inside and outside the Commission, to evaluate the analytical framework proposals raised in the record and any associated data collection that would be required to implement those proposals.

- o In October 2010, we issued a public notice asking carriers to submit data on the nature and location of their facilities to help us determine how to assess the amount of actual and potential competition in the special access market. Over 20 companies provided data in response to that request just last month, and the Commission staff is analyzing it right now.
- o We also anticipate issuing another public notice requesting additional data to help us answer other questions raised in the special access proceeding.

There are a number of difficult issues in the special access proceeding and there are no quick fixes. But the data we have collected so far will help us to understand how best to move forward, and we will continue to work to fulfill our mandate under the statute to ensure that the rates charged for those services are just and reasonable.

3. Do you believe that data roaming is a reasonable condition on a wireless license, similar to interoperability requirements that the FCC has long imposed on wireless providers, including private mobile radio services, to ensure seamless service from one area to the next?

**Response:** I agree that data roaming is important. To promote consumer access to nationwide mobile broadband service, I have recently circulated a draft *Order* that would adopt a data roaming rule that requires facilities-based providers of commercial mobile data services to offer data roaming arrangements to other such providers on commercially reasonable terms and conditions, subject to certain limitations.

#### **The Honorable Edolphus Towns**

1. In its Sixth Broadband Deployment Report released last summer, the Commission found that 24 million Americans lacked access to 4/1 Mbps broadband ~ the speed most Americans enjoy ~ and that one-sixth of these individuals live in Puerto Rico. In fact, the Report found that no one in Puerto Rico has access to broadband. Yet, I understand that the Commission recently acted to deny universal service funding to Puerto Rico that would have been used for broadband build-out. Mr. Chairman, I would like to hear what steps the Commission is taking that will result in the build-out of broadband infrastructure in Puerto Rico in the near term and what the FCC should do within the next 6 months to have a meaningful and swift impact on broadband availability in Puerto Rico.

**Response:** Previous FCC reports, including the Commission's Sixth Broadband Deployment Report, indicated that there was little to no broadband availability in Puerto Rico. More recent data suggests that there has been significant progress in deployment. A survey done on behalf of Puerto Rico, and recently provided to the FCC by Puerto Rico's CIO, indicates that 91% of Puerto Ricans have access to high speed Internet of at least 768 kbps down, 200 kbps up. Data sources suggest that roughly two-thirds to three-quarters of Puerto Ricans have access to fixed high speed Internet connections, yet survey results indicate that only 31% of Puerto Ricans subscribe to fixed 768 kbps down, 200 kbps up service.

The Commission has recently proposed measures to increase the build out and adoption of broadband in areas like Puerto Rico. First, in our February 2011 Universal Service/Intercarrier Compensation Transformation rulemaking, we sought comment on whether universal service funds should be "specifically targeted to insular areas that trail national broadband coverage rates." We also proposed in the March 2011 Lifeline and Link Up Modernization rulemaking to set aside universal service funds for a pilot program that will evaluate whether and how the Lifeline and Link Up programs can

support broadband adoption by low income households. We look forward to receiving public input on these issues.

In addition, the Commission's Wireline Competition Bureau recently provided a waiver of a rule for one carrier serving Puerto Rico that resulted in significant cost savings. It allowed the company to retire a redundant switch (a one-time benefit of \$2.5 million and annual savings of \$250,000), streamline its financial paperwork (annual savings of about \$100,000), and reduce its local taxes (a one-time \$14 million benefit). These savings should enable further broadband deployment.

**The Honorable John D. Dingell**

1. I understand the Commission is completing a spectrum inventory. Is that true? Yes or no.

**Response:** Yes. The Commission has conducted a baseline spectrum inventory to better understand the overall spectrum landscape. Although conducting a spectrum inventory is inherently an iterative process, we can take a detailed snapshot of who holds spectrum licenses, current use of spectrum bands, and where spectrum may be available. Thus, in conjunction with the National Telecommunications and Information Administration (NTIA), we have been working diligently over the past year to understand the range of non-Federal and Federal uses of spectrum.

One result of this effort is the Commission's now-completed baseline spectrum inventory. This baseline inventory is one of the most substantial and comprehensive evaluations of spectrum in the Commission's history. Through our systematic process, we have developed two tools - LicenseView and the Spectrum Dashboard - that reflect our understanding of where the most significant spectrum opportunities lie. The recently-unveiled LicenseView is a comprehensive online portal to information about each spectrum license; it presents data from multiple FCC systems in a searchable, user-friendly manner. The Spectrum Dashboard, released last year, identifies how non-Federal spectrum is currently being used, who holds spectrum licenses, and where spectrum is available. In addition, the Commission just released an upgraded version of the Spectrum Dashboard - 2.0 - which provides more granular information about spectrum holdings, including the ability to determine who holds licenses on a county-wide basis and on tribal lands and offers additional insights on the secondary market in spectrum licenses through the addition of leasing information.

2. When will the Commission have completed this inventory?

**Response:** As noted above, the Commission has been working over the last year on a baseline spectrum inventory, including two tools – the Spectrum Dashboard and LicenseView – that provide a publicly-available, user-friendly distillation of our efforts. The Commission released an upgraded version of the Spectrum Dashboard on March 14, 2011.

3. Will that inventory be as comprehensive as the one mandated last year in the House-passed Radio and Spectrum Inventory Act (H.R. 3125)?

**Response:** The baseline spectrum inventory is consistent with the general direction of the Radio Spectrum Inventory Act (H.R. 3125 – 111<sup>th</sup> Congress) in that it identifies the services authorized to operate in each spectrum band, who holds spectrum licenses, the geographic areas covered by spectrum licenses, and where spectrum is available. Other information required by H.R. 3125, such as the number of transmitters authorized to operate in each spectrum band and measurements of actual use of spectrum, is not readily available to the Commission and would require additional

financial and other resources. Compiling this information would also take, at a minimum, several years.

4. Similarly, will the results of the Commission's spectrum inventory be made available to the public? Will the Commission submit a report to the Congress concerning the inventory?

**Response:** The two main tools developed through our systematic process – LicenseView and the Spectrum Dashboard – are available to the public on the Commission's webpage.

Commission staff briefed the staff of members of the Committee on Energy and Commerce regarding the Commission's spectrum inventory activities on March 3, 2011. Commission staff continues to be available to provide any additional information requested.

5. With respect to spectrum auctions, I note the National Broadband Plan states on page 79 that "the government's ability to reclaim, clear, and re-auction spectrum [...] is the ultimate backstop against market failure and is an appropriate tool when a voluntary process stalls entirely." Does this mean the Commission will forcibly take spectrum from broadcasters if too few participate in voluntary spectrum auctions?

**Response:** An incentive auction is a market-based mechanism that enables participants to determine the amount of spectrum that can be cleared. In the case of television spectrum, our proposed plan is that broadcasters could voluntarily decide to contribute some – or all – of their spectrum and could set a minimum price for the sale of such contributions. The market will determine – through offers of willing broadcasters to sell and offers of commercial wireless providers to buy – the amount of spectrum that can be cleared. Our plan does not propose that the FCC will forcibly reclaim broadcasters' spectrum to meet an artificial target. Our proposal for voluntary broadcaster participation would also allow a broadcaster to choose to stay on the air and share a channel with one or more other broadcasters in its market, so that all stations can keep their entire programming lineups and enjoy strengthened financial positions from the infusion of auction proceeds.

6. Similarly, do you believe a broadcaster which does not participate in a voluntary incentive auction should be forced to relinquish its current channel allocation and spectrum?

**Response:** The FCC's voluntary incentive auction proposal would not force any broadcaster to relinquish its spectrum. To ensure that the spectrum that freed up in a voluntary incentive auction can be used effectively for mobile broadband, we will need to assign new frequencies to some broadcast stations through a realignment process sometimes called repacking. We intend to develop a realignment plan that minimizes the number of stations involved and fully reimburses broadcasters for any costs incurred in relocating. We do not plan to move stations from the UHF band to the VHF band, which will help minimize any loss of over-the-air TV viewers. Our goal is to limit any inconvenience to broadcasters and maintain a strong over-the-air television broadcast service. Finally, because digital technology allows stations to use virtual channel numbers, even if a station's actual channel number changes through realignment, it can continue to have its former channel number display on television screens and set-top boxes.

7. Does the Commission possess the necessary authority with which to engage in voluntary incentive auctions of spectrum? Please explain, including citation of statute where applicable.

**Response:** Section 309(j) of the Communications Act requires modification by Congress to provide the Commission with the authority to conduct voluntary incentive auctions. Since paragraph 8 of that

Section requires auction revenues to be deposited in the Treasury unless otherwise specified, Congress would need to change that paragraph to allow a portion of revenues to be provided to licensees that voluntarily return spectrum as part of the incentive auction. Commission staff can provide further technical assistance if desired.

8. What additional authorities does the Commission require from the Congress with respect to voluntary incentive auctions? Please explain, including citation of statute where applicable.

**Response:** There is no additional authority necessary to conduct incentive auctions beyond modifications to Section 309(j). Commission staff continues to be available to provide technical assistance as Congress considers legislation in this area.

9. Does the Commission's Open Internet order apply to peering and backbone arrangements between private companies?

**Response:** The *Open Internet Order* makes clear that the framework applies to Internet access by consumers and small businesses.

10. Are voluntary incentive auctions the only major initiative the FCC will utilize to reach the goal of 500 MHz of new spectrum for wireless broadband mentioned in The National Broadband Plan? If not, by what other means will the Commission seek to achieve this goal? Please also comment on whether the Commission has the necessary authority (and cite applicable statute) with which to pursue these additional means of reclaiming and/or allocating spectrum.

**Response:** A congressional grant of authority for the Commission to conduct voluntary incentive auctions is an important element to achieving the Commission's goal of freeing up 500 megahertz of new spectrum for broadband. In addition to voluntary incentive auctions, the Commission is pursuing other opportunities to make available additional mobile broadband spectrum under its current authority. Moreover, NTIA is working with Federal agencies to examine opportunities to repurpose and share Federal spectrum, in support of the 500 megahertz goal.

Since the release of the National Broadband Plan, the Commission has acted swiftly where opportunities for more productive use of spectrum have presented themselves.

- o In May 2010, the Commission removed technical impediments to mobile broadband in the Wireless Communications Service at 2.3 GHz, freeing up 25 MHz of spectrum.
- o In July 2010, we took initial steps to increase use of the Mobile Satellite Service (MSS) bands for terrestrial broadband services, where we anticipate making available another 90 MHz of spectrum.
- o In September 2010, we freed up spectrum known as "Super Wi-fi" for unlicensed use and innovation in the television white spaces.
- o In November 2010, we followed up with three proceedings, one of which would revamp our experimental licensing program to encourage investment in research and development and innovative use of spectrum. A second would advance new spectrum access models such as dynamic spectrum access and secondary markets; these new models would provide incentives for licensees to put their spectrum to more productive use where it makes economic sense. A third proceeding explores initial steps to open television spectrum to new wireless broadband services.

Each of these actions is an important element of spectrum reform. However, we will not be successful in realizing the promise of our wireless future without conducting voluntary incentive auctions.

11. With respect to the Commission's so-called "All-Vid" proceeding, please identify the specific problem the Commission seeks to address. Please explain why the Commission believes this problem cannot be solved by private industry. Does the Commission believe its All-Vid proceeding will have the effect of picking winners and losers in the set-top box marketplace?

**Response:** Last April, the Commission unanimously approved a Notice of Inquiry seeking specific steps it can take to unleash competition in the retail market for smart, set-top video devices that are compatible with all multichannel video programming distributor ("MVPD") services. Our goal is to better effectuate the intent of Congress as set forth in Section 629 of the Communications Act.

Unfortunately, the Commission's efforts to date have not led to a robustly competitive retail market for navigation devices that connect to subscription video services. We are therefore exploring the potential for allowing electronics manufacturers to offer smart video devices at retail that can be used with the services of any MVPD without the need to coordinate or negotiate with MVPDs. Our aim is to foster a competitive retail market in smart video devices, to spur investment and innovation, increase consumer choice, allow unfettered innovation in MVPD delivery platforms, and encourage wider broadband use and adoption.

**The Honorable Henry A. Waxman**

1. How does the Order serve the three priorities you mentioned: to promote consumer choice, innovation, and investment in the wired and wireless broadband network infrastructure?

**Response:** The *Open Internet Order* ensuring that consumers can make informed choices about purchasing and using broadband services, and that they have the freedom to choose to go where they want, use the services they want, and read and say what they want online.

The *Order* advances innovation by ensuring that innovators have the information they need regarding broadband performance and network management practices to effectively develop and market online offerings. The *Order* also provides a level playing field for content, application, service, and device innovators, who can be confident that their offerings will compete on a level playing field, without fear of blocking or degradation.

By providing certainty that the Internet will remain free and open and that broadband providers can reasonably manage their networks and innovate with respect to technologies and usage-based pricing, the *Order* facilitates a virtuous cycle of Internet innovation and investment, including massive investment in wired and wireless broadband infrastructure.

2. At the hearing, some argued that existing laws are sufficient to protect an open internet. In the absence of the FCC's open internet rules, do existing laws fully protect consumers?

**Response:** No. The record in the Open Internet proceeding demonstrates the need for high-level rules of the road to protect consumers from real risks to continued Internet freedom and openness, particularly in the wake of the *Comcast v. FCC* decision. Existing laws, including antitrust law, provide only after-the-fact remedies, which are inadequate to guard against significant and potentially irreversible harms from threats to Internet openness. As you noted at the markup for the disapproval resolution, the Department of Justice does not feel the antitrust laws would be able to adequately protect consumers from the harms identified in the *Open Internet Order*.

**Subcommittee on Communications and Technology**  
**Hearing on Network Neutrality and Internet Regulation: Warranted or More**  
**Economic Harm than Good?**  
**February 16, 2011**  
**Additional Questions for the Record for FCC Commissioner Michael J. Copps**

The Honorable Mary Bono Mack

1. **Do you think that there is existing impediment to the convergence of television and the Internet that requires government intervention?**

High speed broadband offers great promise as a new delivery platform for video content. However, incumbent video providers have natural incentives to create walled gardens that limit consumer choice and competition. Innovators, entrepreneurs and consumers all stand to gain from limited but clear rules of the road that promote the development of new distribution platforms and devices for video content.

The Honorable Brett Guthrie

1. **I come from a small business, manufacturing background and strongly support private-sector innovation. I am concerned by the FCC's idea to move forward with AllVid. Please explain how a government device can provide a greater level of innovation than what is being done by the private sector. Also, who will bear the burden of compliance? Will the consumers be forced to purchase an additional piece of equipment?**

The Telecom Act of 1996 very specifically charged the FCC with creating rules to ensure a competitive market for set-top boxes. But fifteen years later, two manufacturers dominate this market, and consumers have very few choices regarding these devices. I could not agree more that we must support private-sector innovation. To be clear, the Commission has not proposed to create a government device, but rather is looking at how to ensure a level playing field that will allow innovators, entrepreneurs, and new entrants to compete in this market. You raise important questions about compliance and the impact on consumers, which I believe should be fully examined as part of the AllVid rulemaking process.

The Honorable Jane Harman

1. **The Internet has greatly increased opportunities for universal participation and free expression, especially for groups like women and minorities that have been historically underrepresented in traditional media like radio and broadcasting. In your testimony, you highlight the fact that much of the news and reporting available online actually originates from such traditional media sources. What more could the FCC be doing to promote localism, diversity, and competition in our media landscape?**

Traditional media's news-gathering and reporting have been cut dangerously close to the bone. New media, despite its great promise, has not yet come close to providing a sustainable model to support the kind of journalism the country must have to ensure a

viable civic dialogue. Indeed, most of the news viewed on the Internet originates in traditional newsrooms, newspaper or broadcast—but there is so much less of it than was once the case. That’s why I have said that many of our contemporary news operations are suffering from a bad case of substance abuse. I would begin correcting this situation by emphasizing the importance of news in our broadcast station relicensing process. One way to do this might be to measure the resources going into news gathering and reporting. A broadcast license renewal system worth its salt would greatly help to promote localism, diversity and competition in the news. While these have been the pillars of media policy since the inception of the agency, too often the FCC has encouraged a bigger, more homogeneous media environment that is controlled by too few entities and in which the FCC has walked away from its public interest oversight responsibilities. We have an important role at the FCC to ensure the development of a dynamic media environment. We need to get serious about this responsibility and about upholding the central tenets of our enabling statute.

The Honorable John D. Dingell

- 1. I understand the Commission is completing a spectrum inventory. Is that true? Yes or no.**

If your question relates to a basic inventory demonstrating the need for more wireless spectrum, the answer is “yes.” If, on the other hand, you mean a comprehensive inventory along the lines envisioned by H.R. 3125, my response would be “no.” Given the importance of spectrum to our nation’s current and future communications needs, I believe we must develop as comprehensive an understanding of spectrum usage as possible.

- 2. When will the Commission have completed this inventory?**

While significant baseline information is already available through the Spectrum Dashboard and FCC License View, the Commission will, I trust, be further expanding and updating that information in the months ahead. That information should be made available immediately and transparently to Congress and the public through the Commission’s website.

- 3. Will that inventory be as comprehensive as the one mandated last year in the House-passed Radio and Spectrum Inventory Act (H.R. 3125)?**

The baseline inventory done by Commission staff in developing the Spectrum Dashboard and FCC License View is responsive to many of the provisions of the House-passed Radio and Spectrum Inventory Act (H.R. 3125) – including information about the services authorized in certain bands, licensees of that spectrum and maps of geographic coverage. Other provisions of H.R. 3125 have not yet been addressed, and I believe they can help inform further efforts the Commission should make to more extensively inventory spectrum and its use.

4. **Similarly, will the results of the Commission's spectrum inventory be made available to the public? Will the Commission submit a report to the Congress concerning the inventory?**

My understanding is that the baseline inventory, as it currently stands, is already available online through the Spectrum Dashboard and FCC License View. It is important that Congress, innovators and consumers all have access to spectrum inventory data. I would hope that the Commission will keep Congress fully briefed.

5. **With respect to the spectrum auctions, I note the National Broadband Plan states on page 79 that "the government's ability to reclaim, clear, and re-auction spectrum [. . .] is that ultimate backstop against market failure and is an appropriate tool when a voluntary process stalls entirely." Does this mean the Commission will forcibly take spectrum from broadcasters if too few participate in voluntary spectrum auctions?**

I believe that any incentive auctions conducted by the Commission, should Congress give us the necessary authority, should be done on a voluntary basis.

6. **Similarly, do you believe a broadcaster which does not participate in a voluntary incentive auction should be forced to relinquish its current channel allocation and spectrum?**

Again, I believe participation by broadcasters in the proposed incentive auctions, should they be authorized by Congress, should be voluntary. It is possible that a broadcaster might have to relinquish its current channel allocation and spectrum for technical reasons, but not because it fails voluntarily to participate in any incentive auction. It is, I suppose, conceivable that even for those stations that choose not to participate, the Commission in some spectrum circumstances might need to "re-pack" the spectrum (which could require some channel movement) to make use of the spectrum that is freed up through any incentive auction. I would hope that any such occasions would be rare, fair to all parties (including stations and consumers) and not undertaken unless as a last resort with comprehensive outreach to all stakeholders and public resources to lessen any burden on stakeholders. Broadcasting serves a hugely valuable public service and the Commission must be totally mindful that this spectrum is not subservient in importance to other spectrum preferences.

7. **Does the Commission possess the necessary authority with which to engage in voluntary incentive auctions of the spectrum? Please explain, including citation of statute where applicable.**

No, it does not possess such authority. Section 309(j) of the Communications Act currently requires that all proceeds from winning bidders be deposited to the U.S. Treasury.

- 8. What additional authorities does the Commission require from the Congress with respect to voluntary incentive auctions? Please explain, including citation of statute where applicable.**

In order for the Commission to conduct incentive auctions, the Congress would need to revise Section 309(j) of the Communications Act.

- 9. Does the Commission's Open Internet Order apply to peering and backbone arrangements between private companies?**

The Commission adopted the Open Internet Order to ensure that consumers can continue to access the legal content, applications, and services of their choosing online. As the Order stated, “[w]e recognize that there is one Internet (although it is comprised of a multitude of different networks), and that it should remain open and interconnected.” Our rules were designed to protect end-user access to the Internet and to the extent that network operators are engaging in discriminatory practices that restrict consumer access, the Commission should investigate whether that conduct is in violation of our Open Internet Order.

- 10. Are voluntary incentive auctions the only major initiative the FCC will utilize to reach the goal of 500 MHz of new spectrum for wireless broadband mentioned in the National Broadband Plan? If not, by what other means will the Commission seek to achieve this goal? Please also comment on whether the Commission has the necessary authority (and cite applicable statute) with which to pursue these additional means of reclaiming and/or allocating spectrum.**

The Commission should not, and does not plan to, rely exclusively on voluntary incentive auctions to reach its spectrum goals. We need to maximize the potential of spectrum already available—for example, through our actions to remove technical impediments to the use of the 2.3 GHz band for mobile broadband and to allow for “White Spaces” devices to be used on an unlicensed basis in the TV bands. We should also move forward with our proposals to expand flexibility and efficiency in the 90 MHz of mobile satellite spectrum, allowing ancillary mobile services to be integrated with satellite offerings. Technology advances in such things as cognitive and “smart” radios also hold great promise for extracting more capacity from currently-available spectrum resources. We already have the necessary authority to move forward with these types of spectrum management actions, pursuant to Section 301, 302, 303 and 310 of the Communications Act. Given the importance of spectrum to our nation’s current and future communications needs, I believe we should use all the tools available to help us maximize the public interest benefits of our finite spectrum resources.

- 11. With respect to the Commission's so-called “All-Vid” proceeding, please identify the specific problem the Commission seeks to address. Please explain why the Commission believes this problem cannot be solved by private industry.**

According to the National Broadband Plan, in 2008, 92% of the set top box market was controlled by two manufacturers. The Telecom Act of 1996 clearly charged the FCC to create rules to ensure a competitive market for set-top boxes. Yet consumers still face, all these years later, very limited choices. This is why the Commission has heard from so many consumer electronics manufacturers and retailers urging us to move forward with our AllVid proceeding. I believe that our goal in this proceeding must be to allow private-sector innovation to flourish and to fulfill the mandate of Telecom Act to promote competition and consumer choice in the set top box market.

Answers from Commissioner Robert M. McDowell  
March 28, 2011

**The Honorable Mary Bono Mack**

1. Do you believe that the Commission's AllVid initiatives are warranted by the existence of a market failure?

No.

2. Do you think that there is an existing impediment to the convergence of television and the Internet that requires government intervention?

No.

3. In April of last year, you made the following statement related to the Commission's AllVid proceeding: "The idea of accessing the Internet through the TV screen is certainly attractive – so attractive, in fact, that the marketplace already appears to be delivering on that vision without any help from the government. A quick Internet search revealed more than a dozen different devices available to consumers who wish to bring some or all of the Internet to their television screens, ranging from specialized web video products and software applications to elaborate home theater PCs and even online gaming consoles." Almost a year later, isn't your observation about the marketplace even more true? Based upon your own observations, why do we need for the FCC to interject itself in a marketplace that is working and still evolving?

Yes, I believe the observation I made in April 2011 is even more true today, as many of the video technology offerings unveiled at the January 2011 Consumer Electronic Show have underscored. These offerings and other marketplace developments make me skeptical of the need for Commission intervention in this area.

4. Last April, you observed that "[t]he lesson from my field trip [to your local retailer] shows us that the marketplace can and does respond to consumer demand with an array of innovative options and price points that we cannot hope to replicate through regulation. As I review the comments submitted in response to these new Notices, I will bear in mind the need to remain humble about the government's ability to predict the pace and direction of technological developments." Would an NPRM on mandating AllVid reflect an FCC remaining humble about government predicting the future convergence of the television and the Internet?

No.

**The Honorable Steve Scalise**

1. The film industry is very important to Louisiana. While in the state legislature, I led the fight to establish incentives to bring production of movies to our states. According to a recent economic report, Louisiana's film industry created 6,000 jobs and generated \$763 million in economic activity in 2007. The verdict is in: protecting intellectual property creates jobs.

And recent studies demonstrate the magnitude of the online intellectual property theft issue here in the U.S. and around the world. A study released in February by Envisional – an independent Internet consulting company – found that almost a quarter of all global Internet traffic is infringing. Specifically, over 23% of global Internet traffic is estimated to be copyright infringing and over 17% of U.S. Internet traffic is estimated to be copyright infringing.

Clearly, this deluge of infringing Internet traffic both threatens legitimate online commerce and wastes precious bandwidth. I understand that the Open Internet Order at least acknowledges this problem by stating that it allows ISPs to proactively address illegal activity online without running afoul of the order. However, some have expressed concern that this language doesn't provide ISPs with sufficient clarity, and thus they will remain unwilling to deploy effective intellectual property protection measures.

Please clarify further the types of measures you do, and do not, consider allowable under the Order? Also, please clarify whether ISPs and rights-holders will be able to deploy such measures without seeking pre-approval from the FCC or judicial authorities?"

The Order is unclear on this topic and raises far more questions than provides answers. Given that the Order was crafted and approved by only the Chairman and two other commissioners, they would probably be in a better position to answer how they intend the Order to protect against such illegal activity online.

**The Honorable Brett Guthrie**

1. I come from a small business, manufacturing background and strongly support private-sector innovation. I am concerned by the FCC's idea to move forward with AllVid. Please explain how a government device can provide a greater level of innovation than what is being done by the private sector. Also, who will bear the monetary burden of compliance? Will the consumer be forced to purchase an additional piece of equipment?

I am highly skeptical about the AllVid concept and agree with you that government action in this area is not likely to achieve the same degree of innovation – or speed the offering of those innovations to consumers – as can the vigorously competitive marketplace for advanced video devices. As I said in April 2010 when the Commission first called for comment on the AllVid idea, consumers already have options for Internet-enabled televisions and similar video devices. The pace of developments for such offerings has only increased since then, as the many displays at the January 2011 Consumer Electronics Show revealed. I also am concerned that the AllVid concept, however well intentioned, could lead to the unintended consequence of retarding the market-driven developments that are unfolding now.

With respect to the monetary burden of compliance, presumably those who operate the regulated multichannel video transmission systems – such as cable and satellite TV systems – would bear the compliance burden, but some level of the associated costs likely would be passed along to subscribers. It is not clear at this time whether implementation of the AllVid concept also would force consumers to acquire new equipment.

**The Honorable Jane Harman**

1. America's national broadband networks of today represent an investment of hundreds of billions of dollars. Those networks have been designed to be generally open and network neutral. The next generation of network is being deployed now. Without rules ensuring openness from the beginning, if major abuses are discovered, how hard would it be to put the genie back in the bottle? Wouldn't broadband providers have already invested billions into discriminatory network equipment and business arrangements?

It is difficult to predict how the imposition of network neutrality rules will affect the use of current network equipment and business arrangements. Prior to the adoption of these rules, the network equipment and arrangements attracted only a handful of consumer complaints that were quickly resolved. Now, however, there is a danger that certain business entities could improperly exploit the formal network neutrality complaint process to attack certain network equipment or arrangements with the goal of sidelining their competition rather than with the goal of protecting consumers. Ultimately, such activity will only create a disincentive for industry to innovate and invest in the future.

**The Honorable John D. Dingell**

1. I understand the Commission is completing a spectrum inventory. Is that true? Yes or no.

I am familiar with the staff's work on what has been called a "spectrum dashboard." Questions regarding a spectrum inventory are best addressed to Chairman Genachowski.

2. When will the Commission have completed this inventory?

As this question involves the timing of a possible action item, it is best addressed to Chairman Genachowski.

3. Will that inventory be as comprehensive as the one mandated last year in the House-passed Radio and Spectrum Inventory Act (H.R. 3125)?

Again, this question is best addressed to Chairman Genachowski.

4. Similarly, will the results of the Commission's spectrum inventory be made available to the public? Will the Commission submit a report to the Congress concerning the inventory?

I would certainly support making any and all Commission analyses regarding spectrum available to the public, as well as reporting the analyses to Congress.

5. With respect to spectrum auctions, I note the National Broadband Plan states on page 79 that "the government's ability to reclaim, clear, and re-auction spectrum [...] is the ultimate backstop against market failure and is an appropriate tool when a voluntary process stalls entirely." Does this mean the Commission will forcibly take spectrum from broadcasters if too few participate in voluntary spectrum auctions?

The coercive approach you describe is not one I would support. Broadcasting continues to serve important public interest goals – particularly in the provision of local news and information and dissemination of local emergency information. I would support incentive auctions provided that Congress delegates the necessary authority to the Commission and that the process is truly voluntary.

We are at the very beginning of what will surely be a lengthy process. I look forward to digging in and giving these issues the careful and thoughtful consideration that they deserve. Likewise, I look forward to consulting with Members of Congress as they consider legislation in this area. As one who was extensively involved in the DTV transition, I am confident that we are capable of working cooperatively to devise a win-win solution.

6. Similarly, do you believe a broadcaster which does not participate in a voluntary incentive auction should be forced to relinquish its current channel allocation and spectrum?

Broadcasters should not be forced to relinquish spectrum against their will.

7. Does the Commission possess the necessary authority with which to engage in voluntary incentive auctions of spectrum? Please explain, including citation of statute where applicable.

Not at the present time.

8. What additional authorities does the Commission require from the Congress with respect to voluntary incentive auctions? Please explain, including citation of statute where applicable.

As noted earlier, prior to undertaking any voluntary incentive auction, the Commission must receive the necessary authority from Congress.

9. Does the Commission's Open Internet order apply to peering and backbone arrangements between private companies?

It is my hope that peering and backbone arrangements between private companies be left to the marketplace rather than be subject to prescriptive regulation. I worry that the Open Internet order raises questions as to whether the new rules would apply to such arrangements, however. The creation of such uncertainty in this space is just one of many examples as to why I dissented from the order.

10. Are voluntary incentive auctions the only major initiative the FCC will utilize to reach the goal of 500 MHz of new spectrum for wireless broadband mentioned in The National Broadband Plan? If not, by what other means will the Commission seek to achieve this goal? Please also comment on whether the Commission has the necessary authority (and cite applicable statute) with which to pursue these additional means of reclaiming and/or allocating spectrum.

Although the National Broadband Plan (Plan) places great emphasis on long-term spectrum needs, I am hopeful that we will also encourage and consider ideas that call for more efficient use of spectrum. These include more robust deployment of enhanced antenna systems; improved development, testing and roll-out of creative technologies, where appropriate, such as cognitive radios; and enhanced consideration of, and more targeted consumer education on, the use of femto cells. Each of these technological options, already available in the marketplace, augment capacity and coverage, which are especially important for data and multimedia transmissions.

Similarly, we should explore our existing authority under Section 336 of the Communications Act to provide television broadcasters an incentive to lease their spectrum. Focusing on this statutorily permissible and voluntary mechanism for leasing parts of the airwaves may be an easier path to accelerating deployment of advanced wireless services, as opposed to the more coercive means discussed in Chapter 5 of the Plan. It is worth noting that this statutory provision mandates deposit into the Treasury a portion of the revenues recovered from these leasing arrangements.

Finally, we should bring spectrum that is lying fallow to auction as quickly as possible. I agree with the Plan's recommendation that government should strive to lead in relinquishing spectrum it does not use efficiently or, sometimes, at all. Congressional input, as well as improved interagency coordination, is vital in this pursuit.

I am pleased that the Commission unanimously supported moving forward on tapping the unused spectrum located between television channels (known as the TV "white spaces"). I also applaud NTIA efforts to identify and relinquish spectrum that government does not use efficiently or, sometimes, at all.

On the other hand, for too long the FCC has not moved forward on a number of more immediate opportunities to put the power of key slices of the airwaves into the hands of America's consumers. For instance: the 10 megahertz of spectrum located in the 700 MHz band (known as the "D Block"), which was not successfully auctioned in 2008 and remains fallow; and spectrum located in the 1.9 through 2.1 GHz bands (known as "Advanced Wireless Services" spectrum), action on which has been pending for years.

11. With respect to the Commission's so-called "All-Vid" proceeding, please identify the specific problem the Commission seeks to address. Please explain why the Commission believes this problem cannot be solved by private industry. Does the Commission believe its All-Vid proceeding will have the effect of picking winners and losers in the set-top box marketplace?

It is not clear to me what problem the proponents of the AllVid concept seek to address. To the contrary, as best I understand it, the identified goal has changed over time. When the AllVid idea was first unveiled in the Plan, much of the discussion centered on the notion that AllVid would drive broadband deployment by increasing utilization of high-speed Internet services accessed through digital television receivers. When the Commission later launched a Notice of Inquiry to seek comment on the AllVid concept, the goal seemed to pivot toward the argument that it would enhance the Commission's implementation of Section 629 of the Communications Act, a provision Congress enacted 15 years ago to foster commercial availability of navigation devices. Whatever the goal may be, I am concerned that adoption of an AllVid mandate would have the effect of picking winners and losers in the marketplace by suppressing the ability and incentives of network providers to bring innovative offerings to the marketplace while boosting the ability and incentives of those "edge" providers offering new devices and services that would connect to the networks.

**The Honorable Henry A. Waxman**

1. You noted that "there's no limiting principle in the Order" and that "the FCC's jurisdiction is boundless" when it comes to potential future regulation. Is there something unique about this Order, or could the same generalization be made of most other FCC orders?

As just one example, the Order's broad and novel use of Section 706 of the Communications Act opens the door for the FCC to have boundless jurisdiction over the Internet. 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. By using this broad interpretation of Section 706, additional regulations could be imposed on the Internet in the future, such as rate regulations. The Order's use of Section 706 as a basis for supporting "direct" authority from Congress to enact Internet network management regulations was a dramatic departure from earlier Commission interpretations of that section. Therefore, the legal arguments are, by definition, unique.

Certainly, previous Commission orders have exceeded statutory authority through creative but unsound legal arguments as well. More often than not, such FCC orders have been struck down by the courts.

2. You also expressed concern about applying the “reasonable” standard in the rules. As you know, however, the term “reasonable” is a standard used throughout the Communications Act. What is unique about the use of a “reasonable” standard in the Open Internet rules?

While the word “reasonable” is in the Communications Act, it is a subjective term the meaning of which has been litigated numerous times in different contexts. The term “reasonable,” in the net neutrality context, is created from scratch. In other words, FCC and court precedent will not apply. Rather, as the net neutrality rules go into effect and are interpreted through the complaint process, the meaning of the term will be continuously interpreted, litigated, and shaped depending on the facts of each complaint and the political whims of at least three commissioners. This situation will lead to much uncertainty in the broadband marketplace.

Additionally, I have concerns regarding the international implications of the use of the term “reasonable” in a new context. The definition of “reasonable” varies from country to country, and 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 at the end of last year, a renewed effort by representatives from countries such as China and Saudi Arabia have called 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 net neutrality rules may be fueling a global Internet regulatory pandemic. Internet freedom will not be enhanced, but instead will suffer.

3. You’ve stated that if market failure in the broadband market were to occur, America’s antitrust laws would be able to provide ample consumer protection. Yet the test applied in most antitrust cases is the “Rule of Reason,” which contains no bright lines. How is such a determination -- made by different judges and single-trial juries -- better than decisions made by a single Commission with a body of agency-specific precedent? How would it offer more certainty in predicting what conduct might be found anticompetitive and illegal and what might be found competitive and lawful?

First, the body of antitrust law has developed in the courts over many decades. In comparison, the new net neutrality rules are in their infancy and have not yet been tested at the FCC or in the courts. This “clean-slate” atmosphere will create less certainty for stakeholders to be able to predict whether certain business decisions would be in violation of the law. Second, as I have often noted, network management issues have historically been addressed through a bottom-up, non-governmental and grassroots based approach which has involved the contributions of numerous technical experts and engineers. Under that approach, the Internet has flourished, and only a handful of network management complaints have come to light and were resolved quickly under the laws of the day. But, post-adoption of net neutrality rules, Internet governance will now be in the hands of five unelected political appointees, three of whom will decide what constitutes “reasonable” behavior. Such a process could become politicized and unpredictable depending on prevailing political pressure. Third, to date, there has not been evidence of a systemic failure in the broadband marketplace. Nevertheless, in the absence of such a finding, a majority of the commissioners issued

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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>.

these net neutrality rules. As such, the adoption of these new rules seems to imply that anti-competitive findings were not even necessary to justify the promulgation of these rules.

4. You voted to support the Comcast NBCU merger, knowing that as part of the approval process, the merged company agreed to comply with the open Internet rules, regardless of the outcome in court. During your testimony, you stated that this requirement was a "side agreement" with the Chairman's office and was not a merger condition. Regardless of how it was characterized, you had an opportunity to object to the open Internet rules and dissent from that portion of the Order, but did not do so. Why is that? You also stated that Comcast agreed to abide by the open Internet rules because they were "desperate to get their merger done." Even if true, how do you reconcile your disagreements over the Open Internet Order with the voluntary agreement to comply with such rules by one of the country's largest Internet access service providers?

The December 23, 2010, circulation of the Comcast-NBCU draft order provided the first opportunity to review the many conditions and voluntary commitments enumerated in the document. That draft would have imposed Open Internet or "net neutrality" obligations as a condition on FCC approval of the transaction. Along with Commissioner Baker, I strongly objected to the imposition of that condition and made it clear to the Chairman and his staff, as well as to the applicants, that I would not vote in favor of the transaction if the order continued to impose that condition. Comcast eventually offered up the net neutrality commitment in a public letter to the Commission in a fashion similar to other concessions it made throughout the merger approval process. Accordingly, references to the Open Internet rules or net neutrality do not appear in the appendix that lists all of the merger conditions. A close reading of the order reveals that net neutrality is referred to only as a "commitment" throughout the document. In fact, the ordering clause itself distinguishes between "conditions" and "commitments" to make this point even clearer. This concession by Chairman Genachowski was essential to securing the two concurrences for the order.

Concerning Comcast's "voluntary" agreement to comply with the net neutrality rules – or, for that matter, to make private decisions about any business practice not contrary to law – I respect all marketplace participants' freedom to choose their own competitive strategies. Nonetheless, I stand by earlier statements that expressed concern over how coercive the merger review process has become at the FCC. Additionally, I applaud Commissioner Baker's recent speech on merger review reform.

5. Why do you believe that Comcast, AT&T, and Wall Street analysts including Bank of America, Merrill Lynch, Citibank, Wells Fargo, and Raymond James are all calling the ruling balanced or a light touch? Don't you think that these statements from the largest participants in the business of broadband Internet access services indicate that the Order in fact provides the certainty and confidence necessary to promote innovation, competition, and job creation?

While I cannot speak for them, it is my opinion that the analysts may have been referring to the Order as being balanced or a light touch because they may have been relieved that the FCC did not follow through with its threat to classify broadband Internet access services as Title II common carriage services. As such, the Order may have been viewed by Wall Street as the lesser of two evils. And, as for certainty, regardless of what analysts may have said immediately following the release of the Order, I am concerned that, as time passes and the Order is interpreted and shaped through the complaint and declaratory ruling process, more uncertainty will develop which could jeopardize innovation, competition and job creation.

Additionally, Comcast had a major license transfer application pending before the FCC at the time of the Internet network management regulation order. And, as it ends up, AT&T was negotiating two major purchases at the same time (the purchase of 700 MHz spectrum from Qualcomm, and its proposed purchase of T-Mobile). Although I cannot speak for them, I would be surprised if either company was eager to irritate a powerful chairman of the FCC out of fear that such resistance may somehow be punished.

**Additional Questions for the Record  
Submitted to Commissioner Mignon L. Clyburn  
From Subcommittee on Communications and Technology**

Subcommittee on Communications and Technology  
House Committee on Energy and Commerce

“Network Neutrality and Internet Regulation: Warranted or More Economic Harm than Good?”  
February 16, 2011

**The Honorable Mary Bono Mack**

- 1. Do you think that there is an existing impediment to the convergence of television and the Internet that requires government intervention?**

There is an impediment to the extent that it is not possible for consumers to fully integrate Internet content and pay-tv content using devices that are not affiliated with their pay-tv provider (as mandated by section 629). FCC staff members are currently reviewing the extensive record in this proceeding to recommend what, if any, government action makes sense to remove impediments to consumers’ desire for converged content delivery. Moreover, our Open Internet Order ensures that consumers can obtain video offerings on the Internet. The Order recognizes that online viewing of video programming content is growing rapidly and that broadband providers’ incentives do not necessarily align with consumers accessing such content. As such, our Order preserving an open Internet will ensure that consumers can continue to access video online.

**The Honorable Brett Guthrie**

- 1. I come from a small business, manufacturing background and strongly support private-sector innovation. I am concerned by the FCC's idea to move forward with AllVid. Please explain how a government device can provide a greater level of innovation than what is being done by the private sector. Also, who will bear the monetary burden of compliance? Will the consumer be forced to purchase an additional piece of equipment?**

I understand your concerns. FCC staff members are currently reviewing the extensive record in this proceeding to recommend what, if any, government action makes sense to optimize innovation and consumer benefits. If we do ultimately move to an Order – and note the next step is an NPRM – there will not be a “government device”, rather we will weigh the costs of compliance against the benefits, and consumers will not be forced to purchase anything.

**The Honorable Jane Harman**

1. **A 2010 FCC report entitled *Broadband Adoption and Use in America* states that 36% of non-adopters cited a cost-related reason as their main barrier to adoption, with 15% pointing to the monthly cost of service. A recent study by the Joint Center for Political and Economic Studies notes that 50% of black communities and 42% of Hispanic communities use cell phones for access to the Internet. Is it not true that if carriers were allowed to engage in pay-for-priority services that the cost of access to broadband for consumers would increase and have a disproportionate impact on minority communities and the poor?**

I have seen those studies, and when I was considering my vote on the Open Internet Order, it was important to me that the FCC recognize that for some members of the community, wireless access may be their only access to the Internet. As such, their ability to access an open Internet should be protected from both fixed and mobile (wireless) devices. I did have concerns about what it would mean for consumers if all of the fixed rules didn't apply to mobile. I think the Order allays some of my concerns. Specifically, we will have an Internet Advisory Committee that will be studying marketplace developments, including those in the wireless industry. Moreover, the Order makes clear that wireless companies should not presume it is okay to violate the Open Internet principles that apply to fixed providers. I believe pay-for-priority arrangements would raise very serious concerns for us whether it occurs on a fixed or mobile device. I do have concerns about Internet access costs and how those costs impact consumers who can least afford it. I have seen evidence that many consumers, no matter their income level, must have access to the Internet in order to search for a job or apply for government benefits or services.

**The Honorable John D. Dingell**

1. **I understand the Commission is completing a spectrum inventory. Is that true? Yes or no.**

The Chairman is in the best position to answer that question. I am aware that Chairman Genachowski has stated that he is "fully committed to continuing our comprehensive approach to addressing our spectrum challenge." To that end, the agency has completed a baseline inventory. Through the agency's systematic process, we have developed two tools – Spectrum Dashboard and LicenseView! - that reflect our understanding of where the most significant spectrum opportunities lie.

2. **When will the Commission have completed this inventory?**

Please see my response to question 1.

3. **Will that inventory be as comprehensive as the one mandated last year in the House-passed Radio and Spectrum Inventory Act (HR. 3125)?**

My understanding is that these baseline spectrum inventories do not have all the information set forth in the Radio and Spectrum Inventory bill that the House sent to the Senate. But, the baseline spectrum inventory is one of the most substantial and comprehensive valuations of spectrum in the Commission's history.

- 4. Similarly, will the results of the Commission's spectrum inventory be made available to the public? Will the Commission submit a report to the Congress concerning the inventory?**

The FCC's Spectrum Dashboard has been available to the public since March 2010 and staff updates it monthly. LicenseView! has been available to the public since September 2010 and staff updates it weekly.

- 5. With respect to spectrum auctions, I note the National Broadband Plan states on page 79 that "the government's ability to reclaim, clear, and re-auction spectrum [...] is the ultimate backstop against market failure and is an appropriate tool when a voluntary process stalls entirely." Does this mean the Commission will forcibly take spectrum from broadcasters if too few participate in voluntary spectrum auctions?**

I have not heard of any plan from Chairman Genachowski to consider mandatory reclaim of broadcast spectrum if too few broadcasters participate in voluntary incentive auctions.

- 6. Similarly, do you believe a broadcaster which does not participate in a voluntary incentive auction should be forced to relinquish its current channel allocation and spectrum?**

Since the FCC has not sought comment on mandatory return of broadcast spectrum, there is no record that would support a decision to force broadcasters to relinquish their current channel allocation and spectrum on the basis that they have not participated in a voluntary incentive auction.

- 7. Does the Commission possess the necessary authority with which to engage in voluntary incentive auctions of spectrum? Please explain, including citation of statute where applicable.**

The Commission does not currently have the authority to engage in voluntary incentive auctions in the manner the National Broadband Plan recommended. The FCC needs statutory authority to have the broadcasters receive proceeds from the auction of any spectrum broadcasters may voluntarily relinquish. See my answer to question 8 for a discussion about the Commission's current statutory limitations.

- 8. What additional authorities does the Commission require from the Congress with respect to voluntary incentive auctions? Please explain, including citation of statute where applicable.**

Section 309(j)(8)(a) states that all proceeds from the Commission's auctions must be deposited in the U.S. Treasury. As such, to share proceeds with a broadcaster for relinquishing its spectrum, the statute would need to be amended to permit the Commission to do so.

- 9. Does the Commission's Open Internet order apply to peering and backbone arrangements between private companies?**

The open Internet rules apply to "broadband Internet access service," which is defined as "a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part."

- 10. Are voluntary incentive auctions the only major initiative the FCC will utilize to reach the goal of 500 MHz of new spectrum for wireless broadband mentioned in The National Broadband Plan? If not, by what other means will the Commission seek to achieve this goal? Please also comment on whether the Commission has the necessary authority (and cite applicable statute) with which to pursue these additional means of reclaiming and/or allocating spectrum.**

The National Broadband Plan recommended a number of initiatives the Commission could take to help meet that 500 MHz goal. Specifically, the Plan identified one hundred and seventy megahertz that could be allocated for commercial mobile use, by 2015, through certain FCC regulatory actions in the following bands: Wireless Communications Service, Mobile Satellite Services, and Advanced Wireless Services. In my opinion, so long as the Commission's actions comply with the Administrative Procedures Act, it has authority to take the actions the Plan recommended for these bands.

- 11. With respect to the Commission's so-called "All-Vid" proceeding, please identify the specific problem the Commission seeks to address. Please explain why the Commission believes this problem cannot be solved by private industry. Does the Commission believe its All-Vid proceeding will have the effect of picking winners and losers in the set-top box marketplace?**

We are seeking to address problems such as: (1) ensuring that there is competition for third party navigation devices (as instructed by section 629 of the act); (2) driving broadband adoption and usage (as described in chapter four of the FCC's National Broadband Plan); and (3) ensuring that we don't slip back from the functionality currently enabled by CableCARDs as pay-tv distribution transitions to Internet protocol. FCC staff is determining if/where targeted intervention may be needed to solve these issues to the extent they won't be solved by private industry, and if we move to an Order it will be to set the rules for fair, market-based competition, not to pick winners and losers in the set top box marketplace.



Federal Communications Commission  
Washington, D.C. 20554

March 28, 2011

The Honorable Greg Walden, Chairman  
Subcommittee of Communications and Technology  
Committee on Energy and Commerce  
2125 Rayburn House Office Building  
Washington, DC 20515-6115

Dear Chairman Walden,

Attached please find my responses to the questions received from Committee Members in your letter dated March 14, 2011.

Please contact me with any further questions.

Sincerely,

A handwritten signature in black ink that reads "M. Baker" with a long horizontal flourish extending to the right.

Meredith Attwell Baker  
Commissioner  
Federal Communications Commission

cc: The Honorable Anna G. Eshoo, Ranking Member  
Subcommittee on Communications and Technology  
Committee on Energy and Commerce



Federal Communications Commission  
Washington, D.C. 20554

**The Honorable Mary Bono Mack**

1. **Do you believe that the Commission's AllVid initiatives are warranted by the existence of a market failure?**

I believe that the competitive market for navigation devices envisioned by Section 629 of the Communications Act would benefit consumers in terms of increased innovation, greater consumer choice, and competitive pricing. However, I remain unconvinced that FCC intervention is required at this time to ensure the development of such a market. Consumers increasingly are demanding interconnectivity among all of their devices, and I believe that the effort of industry to respond to consumer demand is more efficient than government regulation to spur the development of a competitive device marketplace.

2. **Do you think that there is an existing impediment to the convergence of television and the Internet that requires government intervention?**

The communications industry is on the brink of explosive growth and innovation in the interconnection of traditional television and the Internet. While true convergence may have taken longer than originally anticipated, I am wary of interjecting the government in mandating a technical solution just as the industry itself is discovering myriad solutions. In addition, I am concerned that government intervention in this area would fail to account for the real technical differences between platforms that industry is best positioned to take into account as the competitive marketplace for devices continues to develop.

**The Honorable Brett Guthrie**

1. **I come from a small business, manufacturing background and strongly support private-sector innovation. I am concerned by the FCC's idea to move forward with AllVid. Please explain how a government device can provide a greater level of innovation than what is being done by the private sector. Also, who will bear the monetary burden of compliance? Will the consumer be forced to purchase an additional piece of equipment?**

I share your concerns that a government-mandated "one-size-fits-all" technical solution to interconnection between television and the Internet may have the unintended effect of stifling competition and chilling innovation. Absent demonstrated evidence of a market failure, I believe that the FCC should encourage the private sector's efforts to develop innovative means of providing content to consumers over their devices of choice.



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**The Honorable Jane Harman**

1. **A 2010 FCC report entitled *Broadband Adoption and Use in America* states that 36% of non-adopters cited a cost-related reason as their main barrier to adoption, with 15% pointing to the monthly cost of service. A recent study by the Joint Center for Political and Economic Studies notes that 50% of black communities and 42% of Hispanic communities use cell phones for access to the Internet. Is it not true that if carriers were allowed to engage in pay-for-priority services that the cost of access to broadband for consumers would increase and have a disproportionate impact on minority communities and the poor?**

We do not know the effects prioritization would have on the price, form, or function of tomorrow's Internet services, which underscores the need for a far more humble approach to these issues. If broadband providers are prohibited from recovering any costs from Internet companies for enhanced or prioritized services, they may be required to recover all the costs of their next generation build-out from end-user consumers. The potential risk of increasing end-user fees runs counter to our collective efforts to ensure broadband is affordable and that more and more Americans adopt broadband services.

**The Honorable Henry A. Waxman**

1. **In your opening statement, you cited the lack of an "evidentiary record of industry wide abuses" as a basis for concluding that the FCC's Order was based on "speculative harms." Do you believe that the FCC should act if "industry wide abuses" occur?**

The threshold question for the FCC must always be "do we have the authority to the act?" In this case, Congress has never given the FCC authority over network management practices of broadband ISPs. That said, if there were widespread anti-competitive conduct, all policymakers should work proactively with Congress to address market failures and protect consumers.

2. **In response to questioning from Mr. Shimkus about what a cost-benefit analysis would have revealed on net neutrality and job creation, you noted that nearly every other government that has looked at this has concluded that problems with net neutrality would be better served by adding more on-ramps to the Internet. What other governments are you referring to, and how do their industries and regulatory systems compare to the U.S.? Indeed, The European Union amended its Telecoms Framework in 2009 to provide that, where it is not economically viable for new entrants to duplicate the incumbent's local access network, the national regulatory authorities must mandate unbundled access to the local loop or bus-loop of operators enjoying significant market power in order to facilitate**



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**market entry and increase competition. Do you support that as means of adding more on-ramps to the internet?**

There are significant differences between broadband networks and broadband regulation in Europe and the United States. The key difference is that the United States benefits from significantly greater intermodal competition from cable, wireless, and satellite services, which benefits American consumers and informs our more competition-based regulatory approach. I do not, therefore, believe that the European unbundling model—premised on a single broadband network that was often government owned—is appropriate for market conditions in the United States.

With respect to other nations, in our discussions, international regulators have expressed concern over the global consequences of aggressive U.S. action on this issue. Interestingly, Europe—which has taken a far more interventionist approach generally to Internet regulation—has taken a more wait-and-see approach to net neutrality. Neelie Kroes, a Vice President of the European Commission, has expressed a more balanced and restrained position, seeking “to avoid regulation which might deter investment and an efficient use of the available resources.”

3. **In response to a question about how the European Union addressed net neutrality, you remarked that the European Union adopted a consumer-friendly transparency approach, and that the FCC took a much more regulatory approach. However, aren't there major differences between the European Union and the U.S? Please state your view on the following tools that are available to the European Union through its Telecoms Framework to preserve the open Internet, including:**
- a. **A clear mandate on national regulatory authorities to “promote the ability of end-users to access and distribute information or run applications and services of their choice”;**
  - b. **Empowering regulators to impose minimum quality of service requirements to prevent service degradation;**
  - c. **Requiring operators with significant power in a given market to inform customers of any traffic management measures they are deploying;**
  - d. **Transparency requirements on operators with significant power in relation to interconnection and/or access;**
  - e. **Non-discrimination requirements on operators with significant power to apply equivalent conditions in equivalent circumstances to undertakings providing equivalent services;**
  - f. **Accounting separation requirements on operators with significant power in a given market to separately account for specified activities concerning interconnection and/or access;**

As stated in my response to Question 2, there are significant differences between the broadband markets in the US and European Union. European networks largely



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evolved from former government-owned monopolies with little significant competition. There, the regulatory emphasis has been on ensuring access to those networks. In the United States, our regulatory focus has been on promoting facilities-based competition. We have significantly more intermodal competition than in most European markets, and mobile broadband offers the prospect of yet another pipeline to end users.

Whether or not the tools referenced in (a-f) would be appropriate components of the U.S. regulatory structure are questions I believe best addressed by Congress, and I defer to this Committee.

The key takeaway for me is that the Telecoms Framework effectively provides the statutory framework for national regulatory authorities in Europe to address net neutrality challenges. It defines their role and confines their discretion. Congress has not established an analogous regime for the FCC to implement, and my core concern with the FCC's action in December was that we acted in a quasi-legislative manner in creating our own regime that exceeded existing statutory authority. It is also interesting that the majority of the provisions listed (c, d, e, and f) limit European authority to only those "operators with significant power." The FCC's action is not similarly limited to providers with market power. In fact, the FCC failed to even perform a market power analysis in adopting its rules.

4. **Why do you believe that Comcast, AT&T, and Wall Street analysts including Bank of America, Merrill Lynch, Citibank, Wells Fargo, and Raymond James are all calling the ruling balanced or a light touch? Don't you think that these statements from the largest participants in the business of broadband Internet access services indicate that the Order in fact provides the certainty and confidence necessary to promote innovation, competition and job creation?**

There are companies and analysts on both sides of this issue, and some of those supportive parties offered only qualified support for the FCC's action. The FCC's action was "light touch" only in comparison to the regressive alternative proposal under consideration last year to classify broadband services under Title II, the most intrusive regulatory tool available to the Commission. Indeed, one of the supportive parties referenced in the question said explicitly that the FCC's decision "removes the cloud of Title II regulation that would unquestionably have harmed innovation and investment in the Internet and broadband infrastructure."

I am hopeful that providers and investors will continue to invest in our broadband future, but I have reservations whether the legally precarious action the FCC took in December can provide the certainty needed to promote that investment. I am equally concerned that there are many open issues that may undermine the certainty we all desire. Specifically, the FCC's Order avoided definitions of key terms, questioned but did not ban practices, couched decisions as "at this time" repeatedly, and invited



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both case-by-case complaints and declaratory rulings to potentially expand the reach of the decision.

**The Honorable John D. Dingell**

1. **I understand the Commission is completing a spectrum inventory. Is that true? Yes or no.**

I have called on Chairman Genachowski to have the Commission conduct a spectrum inventory.

2. **When will the Commission have completed this inventory?**

I hope the inventory will be completed in a timely manner and we will continue to update it as additional information becomes available.

3. **Will that inventory be as comprehensive as the one mandated last year in the House-passed Radio and Spectrum Inventory Act (H.R. 3125)?**

I hope the inventory will at least be as compatible as H.R. 3125. If the problem is that additional funds are necessary to conduct such an extensive inventory, it is my hope the Chairman will request them.

4. **Similarly, will the results of the Commission's spectrum inventory be made available to the public?**

I hope that in conjunction with the NTIA, a comprehensive inventory will be made available to the public in a user-friendly format that can serve as the basis for both public and private spectrum use planning.

5. **Will the Commission submit a report to the Congress concerning the inventory?**

I hope the Chairman will submit a report to Congress.

6. **With respect to spectrum auctions, I note the National Broadband Plan states on page 79 that "the government's ability to reclaim, clear, and re-auction spectrum [...] is the ultimate backstop against market failure and is an appropriate tool when a voluntary process stalls entirely." Does this mean the Commission will forcibly take spectrum from broadcasters if too few participate in voluntary spectrum auctions?**

It would not be my approach to forcibly take spectrum from any broadcasters.



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7. **Similarly, do you believe a broadcaster which does not participate in a voluntary incentive auction should be forced to relinquish its current channel allocation and spectrum?**

I believe that we should seek to ensure that our actions do not inadvertently adversely affect broadcasters or their viewers. We should focus more attention on the operating conditions of over-the-air broadcasters that elect not to participate in incentive auction.

8. **Does the Commission possess the necessary authority with which to engage in voluntary incentive auctions of spectrum? Please explain, including citation of statute where applicable.**

Under Section 309(j) of the Communications Act, auction revenues must be deposited with the U.S. Treasury unless otherwise specified. This provision would need to be modified to enable the Commission to allow incumbents to keep a portion of auction proceeds in an incentive auction.

9. **What additional authorities does the Commission require from the Congress with respect to voluntary incentive auctions? Please explain, including citation of statute where applicable.**

Other than the change described above, the Commission would need no additional authority to conduct incentive auctions.

10. **Does the Commission's Open Internet order apply to peering and backbone arrangements between private companies?**

No. The FCC's decision in paragraph 47 explicitly carves out "Internet backbone services" from the applicable definition of broadband Internet access service. Thus, backbone and peering arrangements are beyond the scope of the FCC's Open Internet rules.

11. **Are voluntary incentive auctions the only major initiative the FCC will utilize to reach the goal of 500 MHz of new spectrum for wireless broadband mentioned in The National Broadband Plan? If not, by what other means will the Commission seek to achieve this goal? Please also comment on whether the Commission has the necessary authority (and cite applicable statute) with which to pursue these additional means of reclaiming and/or allocating spectrum.**

I hope not. I believe that the Commission must pursue a multi-level approach that includes the development, with NTIA, of a long term spectrum plan that identifies spectrum in both commercial and federal bands that might be appropriate for reallocation to mobile broadband use on either a dynamic or permanent basis. We



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have already begun this process by removing technical impediments to facilitate the deployment of broadband in 25 MHz of the 2.3 GHz band. We are taking steps to increase the use of the mobile satellite band (90 MHz), and we have taken action to enable the use of television "white spaces." I also believe that the Commission should continue the Chairman's current initiatives to encourage the use of new and innovative spectrum access and management approaches to use currently available and new spectrum most efficiently.

I believe that our current authority would permit us to conduct these activities.

- 12. With respect to the Commission's so-called "All-Vid" proceeding, please identify the specific problem the Commission seeks to address. Please explain why the Commission believes this problem cannot be solved by private industry. Does the Commission believe its All-Vid proceeding will have the effect of picking winners and losers in the set-top box marketplace?**

I believe that industry is sufficiently addressing the development of a competitive market for navigation devices, consistent with the mandate of Section 629 of the Communications Act. Absent some evidence of a market failure, I believe that the FCC should avoid mandating a particular technological solution that may have the unintended consequences of picking winners and losers and stifling innovation.