AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

NET NEUTRALITY: IS ANTITRUST LAW MORE EFFECTIVE THAN REGULATION IN PROTECTING CONSUMERS AND INNOVATION?

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

JUNE 20, 2014

Serial No. 113–111

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

88–377 PDF WASHINGTON : 2014

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

BOB GOODLATTE, Virginia, *Chairman*

F. JAMES SENSENBRENNER, JR., Wisconsin
HOWARD COBLE, North Carolina
LAMAR SMITH, Texas
STEVE CHABOT, Ohio
SPENCER BACHUS, Alabama
DARRELL E. ISSA, California
J. RANDY FORBES, Virginia
STEVE KING, Iowa
TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas
JIM JORDAN, Ohio
TED POE, Texas
JASON CHAFFETZ, Utah
TOM MARINO, Pennsylvania
TREY GOWDY, South Carolina
RAÚL LABRADOR, Idaho
BLAKE FARENTHOLD, Texas
GEORGE HOLDING, North Carolina
DOUG COLLINS, Georgia
RON DeSANTIS, Florida
JASON T. SMITH, Missouri
[Vacant]

JOHN CONYERS, JR., Michigan
JERROLD NADLER, New York
ROBERT C. "BOBBY" SCOTT, Virginia
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
STEVE COHEN, Tennessee
HENRY C. "HANK" JOHNSON, JR., Georgia
PEDRO R. PIERLUISI, Puerto Rico
JUDY CHU, California
TED DEUTCH, Florida
LUIS V. GUTIERREZ, Illinois
KAREN BASS, California
CEDRIC RICHMOND, Louisiana
SUZAN DelBENE, Washington
JOE GARCIA, Florida
HAKEEM JEFFRIES, New York
DAVID N. CICILLINE, Rhode Island

SHELLEY HUSBAND, *Chief of Staff & General Counsel*
PERRY APELBAUM, *Minority Staff Director & Chief Counsel*

SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

SPENCER BACHUS, Alabama, *Chairman*
BLAKE FARENTHOLD, Texas, *Vice-Chairman*

DARRELL E. ISSA, California
TOM MARINO, Pennsylvania
GEORGE HOLDING, North Carolina
DOUG COLLINS, Georgia
JASON T. SMITH, Missouri

HENRY C. "HANK" JOHNSON, JR., Georgia
SUZAN DelBENE, Washington
JOE GARCIA, Florida
HAKEEM JEFFRIES, New York
DAVID N. CICILLINE, Rhode Island

DANIEL FLORES, *Chief Counsel*

CONTENTS

JUNE 20, 2014

Page

OPENING STATEMENTS

The Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary 1
The Honorable Henry C. "Hank" Johnson, Jr., a Representative in Congress from the State of Georgia, and Ranking Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law 2
The Honorable Spencer Bachus, a Representative in Congress from the State of Alabama, and Chairman, Subcommittee on Regulatory Reform, Commercial and Antitrust Law 4
The Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary 5

WITNESSES

The Honorable Joshua D. Wright, Commissioner, Federal Trade Commission
Oral Testimony 9
Prepared Statement 11
The Honorable Robert M. McDowell, former FCC Commissioner, and Visiting Fellow, Hudson Institute, Inc., Center for the Economics of the Internet
Oral Testimony 17
Prepared Statement 19
Bruce M. Owen, Morris M. Doyle Centennial Professor in Public Policy, and Director, Stanford Public Policy Program, Stanford University
Oral Testimony 42
Prepared Statement 44
Tim Wu, Professor of Law, Columbia Law School
Oral Testimony 70
Prepared Statement 72

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Material submitted by the Honorable Henry C. "Hank" Johnson, Jr., a Representative in Congress from the State of Georgia, and Ranking Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law 78
Material submitted by the Honorable Suzan DelBene, a Representative in Congress from the State of Washington, and Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law 90

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Supplemental Material submitted by the Honorable Robert M. McDowell, former FCC Commissioner, and Visiting Fellow, Hudson Institute, Inc., Center for the Economics of the Internet 98
Supplemental Prepared Statement submitted by Bruce M. Owen, Morris M. Doyle Centennial Professor in Public Policy, and Director, Stanford Public Policy Program, Stanford University 141
Letter from The American Antitrust Institute (AAI) 155

NET NEUTRALITY: IS ANTITRUST LAW MORE EFFECTIVE THAN REGULATION IN PROTECTING CONSUMERS AND INNOVATION?

FRIDAY, JUNE 20, 2014

HOUSE OF REPRESENTATIVES,

SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

COMMITTEE ON THE JUDICIARY,

Washington, DC.

The Subcommittee met, pursuant to call, at 9:03 a.m., in room 2141, Rayburn Office Building, the Honorable Spencer Bachus, (Chairman of the Subcommittee) presiding.

Present: Representatives Bachus, Goodlatte, Farenthold, Issa, Marino, Collins, Smith, Johnson, Conyers, DelBene, Jeffries, and Cicilline.

Staff Present: (Majority) Anthony Grossi, Counsel; Ashley Lewis, Clerk; Christine Bealer, Law Clerk; (Minority) Slade Bond, Counsel; James Park, Counsel; and Rosalind Jackson, Professional Staff Member.

Mr. BACHUS. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law hearing will come to order.

Without objection, the Chair is authorized to declare a recess at any time.

At this time, we will have our opening statements.

Would the Chairman of the full Committee like to go first?

Mr. GOODLATTE. If you like, Mr. Chairman, I would be happy to.

Mr. Chairman, thank you for holding this hearing.

Regulation and antitrust law have long had an uneasy relationship. Antitrust law serves to protect a competitive process by prosecuting anticompetitive conduct if and when it occurs. Regulation typically dilutes or casts aside reliance on antitrust enforcement and attempts to constrain or direct market forces by imposing new rules of conduct.

These approaches generally are at odds with each other and a natural tension has arisen between the two.

There are few more important issues that will impact the future of the Internet than the question of whether to apply antitrust law or regulation to protect the Internet from anticompetitive and discriminatory conduct.

I want to thank Chairman Bachus for holding today's hearing on this critical question.

Proponents of imposing additional regulation on the Internet marketplace argue that it is needed to encourage competition and promote innovation. I am deeply skeptical of these claims.

In my experience, regulation generally stifles rather than facilitates competition and innovation. In fact, it is my belief that the Internet has flourished precisely because it is a deregulated market.

That is not to say that we should stand by and allow companies to engage in discriminatory or anticompetitive activities.

I believe that vigorous application of the antitrust laws can prevent dominant Internet service providers from discriminating against competitors' content or engaging in anticompetitive pricing practices.

Furthermore, antitrust laws can be applied uniformly to all market participants, not just to Internet service providers, to ensure that improper behavior is prevented and prosecuted.

In 2007, the Department of Justice expressed its preference for antitrust enforcement over regulation when it warned that, "The FCC should be highly skeptical of calls to substitute special economic regulation of the Internet for free and open competition enforced by the antitrust laws."

DOJ further stated that regulation "could in fact prevent, rather than promote, optimal investment and innovation in the Internet, with significant negative effects for the economy and consumers."

I understand that the nature of the Internet and the speed at which the market evolves could present challenges to enforcing the existing antitrust laws in the Internet context. We may need to consider amending the current antitrust laws to ensure that they can be applied promptly and effectively to protect the competitive nature of the Internet marketplace.

The Judiciary Committee has long played a role in ensuring that antitrust laws are properly equipped and can be applied effectively in the telecommunications industry. This Committee will continue to play a key role advocating for strong antitrust enforcement and, certainly, will examine these issues closely to the extent telecommunications laws are rewritten over the coming years.

I look forward to hearing from today's witnesses on this important debate, and I yield back the balance of my time.

Mr. BACHUS. I thank the Chairman of the full Committee, Mr. Goodlatte.

Now I recognize the Ranking Member, Mr. Hank Johnson of Georgia, for his opening statement

Mr. JOHNSON. Thank you, Mr. Chairman.

The modern Internet is a powerful engine for social enrichment and, I would argue, for basic freedom in America and perhaps in other locations throughout the world, where the culture has attained this degree of intellect and innovation.

Whether it is educational opportunities like the Khan Academy channel on YouTube, Starbucks' recent announcement to offer its employees a free college education online through Arizona State University, or online hackathons that equip young minorities with tools to thrive in the innovation economy, consumers everywhere benefit from content services that educate, enrich, and connect us together.

It is no mystery why the United Nations lists Internet penetration as a key metric in reducing poverty. We all succeed when more members of society have access to such important tools online for productivity, education, and, indeed, personal well-being.

That is why today's hearing is such an important opportunity to discuss the best path forward to advance an open Internet. I strongly and unequivocally believe in an open Internet.

Openness goes beyond economic concerns like growth and competition. Openness embraces our very core value as Americans, equality of opportunity. If our ideas are good enough, they should have a chance.

Openness also separates us from closed, autocratic societies that limit the educational and social opportunities of their people.

Look no further than the Great Firewall of China, which has established barriers to free expression, education, and cultural enrichment, and stunted the opportunity and growth of China's people.

Undoubtedly, antitrust agencies have certain advantages—like a prosecutorial mindset and a removal from political influence—that make them attractive as regulatory watchdogs.

But as Tim Wu will testify later in today's hearing, the current framework for antitrust law is designed for every kind of business in the world, but is a poor fit for noneconomic values like openness, freedom of expression, and, indeed, equality and freedom.

It is also abundantly clear that the remarkable success stories of the first large Internet startups—Google, Amazon, and Yahoo—were not written in a regulatory vacuum. Rather, these companies all benefited from a regulatory ecosystem that encouraged the widespread deployment and adoption of broadband Internet.

As an expert agency with 80 years of expertise over telecommunication services and, more recently, information services like the Internet, the Federal Communications Commission has been at the forefront of crafting regulations that not only encourage growth and competition, but also advance noneconomic values like equality of opportunity and fairness.

Indeed, as the D.C. Circuit recognized earlier this year in *Verizon v. FCC*, regulations that ensure Internet openness have fostered a "virtuous circle" of both social and economic fruit. Although the court ultimately vacated the open Internet order in Verizon, the D.C. Circuit strongly upheld the commission's basis for promulgating net neutrality rules under Section 706 of the Telecommunications Act of 1996, precisely because Congress mandated the commission to encourage broadband deployment to advance this virtuous cycle of social and economic growth.

There is little doubt in my mind that the D.C. Circuit blueprint in Verizon aptly demonstrates the commission's authority to promulgate rules to protect the open Internet through its Section 706 mandate.

But the commission shouldn't have to rely on this authority alone to uphold a common goal that countless Americans share. There is wide bipartisan agreement that updating the Telecommunications Act of 1996 is long overdue.

Yes, we all enjoyed the thrill of logging on to AOL or other Internet service providers over our dial-up modems in the 1990's, but the Internet has changed since then. So should our laws.

In closing, I thank the Chair for holding today's hearing. As the sole Committee with jurisdiction over antitrust law, I look forward to working together with my Republican colleagues to ensure that the next great communications act upholds the common principles of competition and opportunity and equality and freedom, these being things that we all share.

I look forward to today's testimony, and I yield back.

Mr. BACHUS. I thank the gentleman from Georgia.

I want to welcome you to the hearing today. The hearing today is entitled "Net Neutrality: Is Antitrust Law More Effective than Regulation in Protecting Consumers and Innovation?"

So we are not dealing with the whole subject of net neutrality or some time maybe more descriptive "network neutrality." A lot of people don't know what the "net" is, but I think it refers to the network.

Let me say from the onset that our focus of the hearing is not on any specific agency proposals or any regulatory proposals, although they will undoubtedly be referred to during the hearing.

Rather, the interest of the Judiciary Committee is whether the application of antitrust laws would be a more effective approach to protecting consumers and promoting innovation in this arena than the long, frequently contentious, and sometimes arbitrary, Federal regulatory process.

It is becoming increasingly hard to recall when the Internet was not an integral part of our lives. It spurred new technologies, created jobs, established dynamic marketplace for goods and ideas. It is a wonderful educational tool.

Fast-spreading technologies have always attracted significant interest because of public policy issues they raise. As a railroad attorney, I have studied the history of the railroads, and that was always a struggle between development of rails and regulation.

And many of you who know that industry, overregulation almost killed the industry before the Staggers Act. It revived itself only because of the scaling down of regulation. But even today, there are tremendous issues in that industry, as well as this industry, public interest, public safety, et cetera.

And these issues with the network deal with issues including access, competitive balance, and the tension between the private interest and public interest, between regulation and innovation. So it is always a balancing act.

On May 15, the Federal Communications Commission proposed a rule, marking its third attempt to address the issue of net neutrality. Its two previous attempts were struck down by the courts.

As regulatory proceedings continue to stretch on, a question I have is whether there may be a more efficient and more effective way to safeguard against potential discriminatory behavior than Federal rulemaking. That is where antitrust law comes in.

Antitrust law has a number of benefits to consider. Antitrust law and the standards applied by the courts have developed, evolved, and been refined over decades. This stands in contrast to newly proposed regulations that include untested definitions and ap-

proaches, which would be interpreted and enforced by a constantly rotating commission. And the courts, on many occasions, would be dealing with cases of first impression, as opposed to established case law.

Antitrust law uniformly applies to all participants in the Internet marketplace. Recent FCC regulations, by comparison, would only apply to a smaller group of Internet service providers. Antitrust law prosecutes conduct once it occurs, and determines on a case-by-case basis whether a violation has occurred. Regulation is a one-size-fits-all approach, and imposes a burden on all regulated parties, regardless of whether the parties actually engaged in improper conduct. These regulations could also stifle legitimate and necessary innovation before it happens.

And then you have the different approaches that different countries take, although the network or the Internet is a worldwide system.

Antitrust law violations may be brought by both private actors and enforcement agencies equipped with lawyers, economists, technicians who have decades of experience policing anticompetitive conduct. Regulatory violations typically may be pursued only by a select group of defined parties and the regulatory agency.

Notably, the FCC only has one single administrative law judge, and that is something that I was even not aware of before this hearing.

These are only some of the factors that should be considered when determining whether an antitrust or regulatory approach should be taken to protect Internet users from anticompetitive conduct.

Today's witnesses are very distinguished and have perspectives from each of the relevant agencies, the FCC, the Federal Trade Commission, and the Department of Justice.

And I noticed Commissioner Wright is here, so we actually have one of our sitting commissioners. We are glad you are joining.

I look forward to hearing their testimony on the benefits and limitations of using antitrust law to protect consumers and innovation.

At this time, I recognize the gentleman from Michigan, Mr. Conyers, the Ranking Member of the full Committee, former Chairman, for his opening statement.

Mr. CONYERS. Thank you so much, Chairman Spencer Bachus, for holding what I consider an important hearing on net neutrality and the role of antitrust in ensuring a free and open Internet. This should be a very interesting hearing, to say the least.

This Committee has a central role in studying the issue of net neutrality, and more generally, competition on the Internet, and I appreciate the Chairman's decision to assert our jurisdiction.

Turning to the specific question of whether antitrust is more effective than regulation in addressing net neutrality, we should keep in mind that we need a regulatory solution to address potential threats to net neutrality, and must allow the Federal Communications Commission to do its job.

Congress created the FCC to develop expertise so that it could properly regulate the complex telecommunications industry. Any FCC rules to address net neutrality would have the benefit of addressing some potential threats to net neutrality before they fully

materialize. And it could do so in a manner that would be more comprehensive than the piecemeal approach of antitrust enforcement.

Additionally, having a set of best practices enshrined in rules would provide certainty for the industry. The FCC's efforts, therefore, must be given the opportunity to develop.

And in developing its rules to ensure a free and open Internet, the FCC should incorporate the following principles.

Broadband network providers should be prohibited from failing to provide access to its broadband network for any provider of content applications or services on reasonable and nondiscriminatory terms.

Broadband network providers should be prohibited from blocking, impairing, or discriminating against or otherwise interfering with the ability of anyone to use a broadband service to use or access lawful content applications or services on the Internet.

And there should be strong transparency requirements regarding clear disclosure to users of information concerning any terms, conditions, or limitations on the broadband network service.

The FCC began its latest rulemaking process only a month ago, and so we must give time to allow this process to proceed.

To the extent that we do look to antitrust law as a way of ensuring net neutrality enforcement of existing antitrust law, it would be insufficient. Under current antitrust law, there is relatively little that antitrust enforcers can do outside the merger review context to address the conduct of a regulated industry like broadband Internet service with respect to enforcing net neutrality principles.

Through a series of decisions, the Supreme Court has limited the potential to successfully pursue claims under the Sherman Antitrust Act arising in the net neutrality context. Moreover, exclusive reliance on antitrust enforcement, while having the benefit of a more nuanced and fact-specific approach to the problem, would also be a cumbersome, more limited, more resource-intensive, and after-the-fact way to develop a regulatory regime for net neutrality.

Another potential approach would be for the Federal Trade Commission to use its authority under Section 5 of the Federal Trade Commission Act to stop unfair methods of competition.

While I hold an expansive view of Section 5, to the extent that this approach goes beyond the scope of the Sherman Act or other antitrust laws, it would be very controversial, as some of my friends on the other side of the aisle would be the first to note. Moreover, antitrust law is not sufficiently broad in scope, as it does not address the noneconomic goals of net neutrality, including the protection of free speech and political debate.

Our former Chairman of Judiciary, James Sensenbrenner, and Zoe Lofgren and I introduced bipartisan legislation in 2006 to strengthen antitrust law to address net neutrality in part because the FCC was doing too little at that time, in my view.

And I certainly am open to suggestions on how antitrust law can be better tailored to address net neutrality concerns. But if we go down that path, current law must be modified to codify net neutrality principles.

So whether one supports a more antitrust approach or a more regulatory approach, inaction by Congress and regulators is not an option, as potential threats to net neutrality remain present.

And in my opening statements in 2008 and 2011 on this very same issue, I noted that in many parts of our country, consumers have the choice of only one or two broadband Internet service providers that effectively function as monopolies or duopolies. I noted then that the market power that these broadband providers enjoy could lead to deferential treatment of content carried by the provider, depending on how much a customer pays or the financial incentives for discriminating for or against given content.

The concerns I noted may have only grown since then, particularly in light of increasing consolidation in the telecommunications industry that may result in even less choice, less innovation, higher costs, and more power in the hands of fewer broadband providers.

And having given you that impartial view of my position on this matter, I yield back the balance of my time and thank the Chairman of the Subcommittee.

Mr. FARENTHOLD [presiding]. Thank you very much.

And I have taken the Chair for Mr. Bachus, who was called away for votes in another Committee that he serves on.

Without objection, other Members' opening statements will be made part of the record.

We really have a great panel today, and I would like to begin by introducing our witnesses.

Commissioner Josh Wright is a sitting Commissioner at the Federal Trade Commission. He was sworn in January 1, 2013, to a term that expires in September 2019. Prior to joining the commission, Commissioner Wright was a professor at George Mason University School of Law and held a courtesy appointment in the Department of Economics. He is a leading scholar in antitrust law, economics, and consumer protection, and has published more than 60 articles and book chapters, coauthored a leading casebook, and edited several books and volumes focusing on these issues.

Commissioner Wright also served as coeditor of the Supreme Court Economic Review, and was a senior editor of the Antitrust Law Journal.

Commissioner Wright previously served the FTC in the Bureau of Competition as its inaugural scholar in residence from 2007 to 2008.

He is focused on enforcement matters and policy. His return to the FTC marks his fourth stint at the agency after having served both in the Bureau of Economics and Bureau of Competition from 1997 and 1998, respectively.

Prior to his tenure at George Mason, Commissioner Wright clerked for Justice James Selna of the U.S. District Court for the Central District of California. Commissioner Wright graduated with honors from the University of California, San Diego, and received his J.D. and Ph.D. from UCLA.

Mr. Robert McDowell, Commissioner McDowell, is former Commissioner of the Federal Communications Commission. He was appointed by Presidents George W. Bush in 2006 and Barack Obama in 2009, and unanimously confirmed by the U.S. Senate each time.

His second nomination made him the first Republican appointed by President Obama to an independent agency.

During his tenure at the FCC, Commissioner McDowell worked continuously to forge a bipartisan consensus in adopting policies to promote economic expansion, investment, innovation, competition, and consumer choice.

The Washington Post called him an independent force at the FCC, while Broadcasting & Cable magazine described his tenure as statesmanlike.

Commissioner McDowell has also been an official member of the U.S. diplomatic delegation working on treaty negotiations and international conferences covering global spectrum and telecom policies.

Prior to joining the FCC, Commissioner McDowell worked in a senior position in the telecommunications industry for 16 years.

He graduated cum laude from Duke University and received his law degree from the College of William and Mary School of Law.

Professor Bruce Owen is Morris M. Doyle Centennial Professor in Public Policy at Stanford University and a senior fellow in the Stanford Institute for Economic Policy Research. He directs the Stanford Public Policy Program, which offers undergraduate and graduate degrees in public policy analysis.

Professor Owen was the chief economist in the office of Telecommunications Policy at the White House under President Nixon, as well as chief economist in the Antitrust Division of the Department of Justice under President Carter.

Following his public post, he taught economics at both Duke and Stanford. Professor Owen has published numerous books and articles on mass media, economics, telecommunications, and regulatory policy, among other topics.

Professor Owen received his B.A. from Williams College and earned his Ph.D. at Stanford. Welcome.

Professor Tim Wu is a professor of law at Columbia Law School in New York City, where he teaches courses in, among other things, communications law and intellectual property. Professor Wu has also taught at the law schools of Harvard, Stanford, University of Chicago, and the University of Virginia.

Professor Wu recently served as senior adviser in the Competition and Consumer Protection Division at the Federal Trade Commission. He is also widely credited with coining the term "net neutrality" through the publication of his paper, "Network Neutrality, Broadband Discrimination."

Professor Wu clerked for Judge Richard Posner at the Seventh Court of Appeals, and Supreme Court Justice Stephen Breyer.

Professor Wu received a bachelor of science degree in biochemistry from McGill University and his law degree from Harvard, magna cum laude.

Each of the witnesses' statements will be entered into the record in its entirety, and I ask that each witness please summarize your testimony in 5 minutes or less.

You have some indicators in front of you. Much like the traffic signal, green means go, yellow means hurry up, and red means stop.

So we will get going, and we will start with Commissioner Wright. You are recognized for 5 minutes.

TESTIMONY OF THE HONORABLE JOSHUA D. WRIGHT, COMMISSIONER, FEDERAL TRADE COMMISSION

Mr. WRIGHT. Chairman Goodlatte, Chairman Bachus, Ranking Members Conyers and Johnson, and Members of the Subcommittee, thank you for the opportunity to appear before you today. My name is Josh Wright, and I am a Commissioner at the Federal Trade Commission.

I am pleased to join you to discuss competition and regulation in the broadband sector and, more specifically, the issues highlighted by the ongoing debate surrounding net neutrality.

I should make clear at the outset that the views I express today are my own and do not necessarily reflect the views of the Federal Trade Commission or any other commissioner.

Today, I will focus my comments upon competition policy and regulation in broadband markets from a consumer welfare perspective. Consumer welfare is the lodestar of competition policy and antitrust, and it guides decisionmaking at the FTC.

The consumer welfare approach harnesses the power of rigorous economic analyses to inform competition policy and antitrust.

This emphasis on consumer welfare makes antitrust particularly well-suited for tackling complex issues and questions related to broadband competition, and for addressing the important issues raised in the net neutrality debate.

More specifically, the "rule of reason" analytical framework that lies at the core of antitrust analysis can be deployed effectively to analyze business practices in the broadband sector and to separate conduct that increases consumer welfare from those business practices that make consumers worse off.

I would like to begin by discussing net neutrality from an economic perspective. At its heart, the net neutrality debate concerns the competitive effects of what economists would describe as vertical contractual arrangements between broadband providers and content providers.

Put another way, net neutrality is about the fear that broadband providers will enter into business arrangements that disadvantage certain content providers, harm competition, and thereby leave consumers and Internet users worse off.

For example, a broadband provider might enter into an exclusive contract with an online video site to foreclose a rival video site's access to the broadband provider's subscriber. This type of potential competitive concern is grounded in antitrust economics, and more specifically, in the "raising rivals costs" literature familiar to students of antitrust.

Proponents of net neutrality traditionally have responded to these types of concerns by favoring a rigid, categorical ban or other significant restrictions upon broadband providers' ability to enter into vertical contractual relationships.

Fearing that any network discrimination by broadband providers creates undue risk of competitive harm, they often have argued for a one-size-fits-all approach prohibiting such arrangements. This ap-

proach, however, fails to recognize the fundamental economic point that most vertical contractual relationships benefit consumers.

The economic literature is replete with examples and empirical evidence that vertical contracts create consumer benefits by reducing double marginalization, preventing free-riding, facilitating new business models on entry, and aligning manufacturer and distributor incentives.

Consumers benefit from these efficiencies because they are passed on to them in the form of lower prices, increased output, more content, higher quality, and greater innovation.

Moreover, considerable empirical evidence further supports the view that vertical contracts are more often than not procompetitive. These empirical studies cut sharply against the idea that broadband providers necessarily will use such arrangements in a way that harms competition.

The marketplace experience and learning also demonstrates that so-called non-neutral business models deployed by providers have proven highly beneficial to consumers.

For instance, in 2002, a fledging Google was able to strategically achieve economies of scale by beating out its competition in a bid to become the default search engine on AOL, then the country's leading Internet service provider, by offering a substantial financial guarantee.

To be clear, the economic literature and empirical evidence does not claim that vertical contracts never create competitive concerns. The correct regulatory question is not whether vertical contracts can harm consumers, but rather what regulatory structure and legal rules will best promote consumer welfare in this context?

Any economically coherent answer to that question must, in my view, begin with the fundamental observation and market experience that the business practices at the heart of the net neutrality debate have generally been procompetitive.

In light of the economic theory and evidence, in my view, antitrust offers a superior analytical framework—one that focuses upon consumer welfare—to address any potential anticompetitive concerns in the broadband sector.

Over the past century, antitrust jurisprudence has evolved a highly sophisticated "rule of reason" balancing approach for investigating whether vertical arrangements are anticompetitive in practice. The "rule of reason" framework is a flexible one that allows consumers to benefit from the vast number of vertical agreements that help consumers while also creating a means, grounded in sound economics and evidence, for identifying those contracts that harm consumers.

In closing, it is my belief that antitrust offers a superior approach to addressing anticompetitive concerns in broadband markets in a manner that achieves the best result for consumers.

I will be happy to answer any questions. Thank you.

[The prepared statement of Mr. Wright follows:]

Federal Trade Commission

PREPARED STATEMENT OF

COMMISSIONER JOSHUA D. WRIGHT*
FEDERAL TRADE COMMISSION

ON

NET NEUTRALITY: IS ANTITRUST LAW MORE EFFECTIVE THAN REGULATION IN PROTECTING CONSUMERS AND INNOVATION?

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

WASHINGTON, D.C.
JUNE 20, 2014

---

* The views stated here are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

I. Introduction

Chairman Bachus, Ranking Member Johnson, and Members of the Subcommittee, thank you for the opportunity to appear before you today. My name is Joshua Wright and I am a Commissioner at the Federal Trade Commission. I am pleased to join you to discuss competition and regulation in the broadband sector and, more specifically, the issues highlighted by the on-going debate surrounding net neutrality. I should make clear at the outset that the views I express today are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

Today I will focus my comments upon competition policy and regulation in broadband markets from a consumer welfare perspective. Consumer welfare is the lodestar of competition policy and antitrust, and it guides decision-making at the FTC. The consumer welfare approach harnesses the power of rigorous economic analyses to inform competition policy and antitrust. This emphasis on consumer welfare makes antitrust particularly well suited for tackling complex questions related to broadband competition and addressing the important issues raised in the net neutrality debate.[1]

---

[1] For additional discussion about antitrust, broadband competition, and net neutrality, see Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Broadband Policy & Consumer Welfare: The Case for an Antirust Approach to Net Neutrality Issues, Remarks at the Information Economy Project's Conference on US Broadband Markets in 2013 (Apr. 19, 2013); Thomas W. Hazlett & Joshua D. Wright, *The Law and Economics of Network Neutrality*, 45 IND. L. REV. 767 (2012); Jonathan E. Nuechterlein, *Antitrust Oversight of An Antitrust Dispute: An Institutional Perspective on the Net Neutrality Debate*, 7 J. ON TELECOMM. & HIGH TECH. L. 20 (2009); Howard A. Shelanski, *Network Neutrality: Regulating With More Questions Than Answers*, 6 J. TELECOMM. & HIGH TECH. L. 23 (2007).

More specifically, the "rule of reason" analytical framework that lies at the core of antitrust analysis can be deployed effectively to analyze business practices in the broadband sector to separate socially beneficial conduct—conduct that increases consumer welfare—from business practices that are likely to result in the acquisition or maintenance of market power and harm consumers.

II. Net Neutrality From an Economic Perspective

I would like to begin by discussing net neutrality from an economic perspective. At its heart, the net neutrality debate concerns the competitive effects of vertical contractual arrangements between broadband providers and content providers. Put another way, net neutrality is about the fear that broadband providers will enter into business arrangements that disadvantage certain content providers, harm competition, and thereby leave consumers worse off. For example, a broadband provider could enter into an exclusive contract with an online video site to foreclose a rival video site's access to the broadband provider's subscriber. This type of competitive concern is grounded in antitrust economics, and more specifically, in the "raising rivals costs" literature familiar to students of antitrust that outlines the conditions that must hold in real world markets for this theoretical concern to give rise to a serious risk that a monopolist will disadvantage rivals, reduce competition, and harm consumers.[2]

---

[2] *See, e.g.*, Steven C. Salop & Thomas Krattenmaker, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L. J. 214 (1986).

Proponents of net neutrality traditionally have responded to these concerns by favoring a rigid, categorical ban or other significant restrictions upon broadband providers' ability to enter into vertical contractual relationships. Fearing that any network discrimination by broadband providers creates undue risk of competitive harm, they often have argued for a one-size-fits-all approach prohibiting such arrangements. This approach however fails to recognize the fundamental economic point that most vertical relationships benefit consumers. Indeed, although it is well accepted that vertical contracts occasionally can lead to anticompetitive foreclosure under certain specific conditions, it is equally clear that such arrangements often are part of the regular competitive process and can generate significant efficiencies.

The economic literature documents that vertical contracts can create efficiencies by reducing double marginalization, preventing free riding on manufacturer-supplied investments, and aligning manufacturers and distributors' incentives. Consumers benefit because these efficiencies are at least partially passed on to them in the form of lower prices, increased output, higher quality, and greater innovation. Moreover, considerable empirical evidence further supports the view that vertical contracts are more often than not procompetitive.[3] The empirical studies cut sharply against the idea

[3] For a comprehensive survey of the economics of vertical restraints, see Dan P. O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, *in* REPORT: THE PROS AND CONS OF VERTICAL RESTRAINTS 40, Konkurrensverket, Swedish Competition Authority (2008); James C. Cooper, Luke M. Froeb, Dan P. O'Brien & Michael Vita, *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639 (2005); Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy* (Sept. 2005) (unpublished paper).

that broadband providers necessarily will use such arrangements in a way that harms competition. The marketplace experience also demonstrates that "non-neutral" business models deployed by providers have proven highly efficient.[4] For instance, in 2002, a fledging Google was able to strategically achieve economies of scale by beating out its competition in a bid to become the default search engine on AOL, then the country's leading Internet service provider, by offering a substantial financial guarantee.[5]

To be clear, the economic literature and empirical evidence does not claim that vertical contracts never create competitive concerns. The correct regulatory question—from an economic perspective focused upon consumer welfare—is not whether vertical contracts and related business practices employed by broadband providers can ever harm consumers. The better question is "what regulatory structure and legal rules best promote consumer welfare?" Any economically coherent answer to that question must begin with the fundamental observation and market experience that the business practices at the heart of the net neutrality debate are generally procompetitive.

III. The Advantages of Antitrust

In light of the economic evidence, in my view, antitrust offers a superior analytical framework—one that focuses upon consumer welfare and adopts the best

---

[4] *See* Hazlett & Wright, *supra* note 1, at 785-796 (exploring the widespread use of non-neutral business practices among Internet service providers)
[5] *Id.*

available economic tools—to address potential anticompetitive conduct in the broadband sector. Over the past century, antitrust jurisprudence has evolved a highly sophisticated "rule of reason" balancing approach for investigating whether vertical arrangements are anticompetitive. The "rule of reason" requires that vertical arrangement are assessed on a case-by-case basis by marshalling the available economic literature and empirical studies to evaluate evidence of actual competitive harm based on the specific circumstances of the case. The "rule of reason" framework is a flexible one that allows consumers to benefit from the vast number of vertical agreements that are procompetitive while also creating a means, grounded in sound economics and empirical evidence, for identifying those vertical contracts that harm consumers. A regulatory regime that prohibits all vertical arrangements or imposes significant restrictions upon their use is only in consumers' best interests if vertical agreements are overwhelmingly anticompetitive. As discussed, the vast body of economic theory and empirical evidence demonstrates that such conditions do not hold in the case of the business arrangements and contracts at the heart of the net neutrality debate.

IV. Conclusion

In closing, it is my belief that antitrust offers a superior approach to addressing anticompetitive business conduct in broadband markets in a manner that achieves the best result for consumers. I am happy to answer any questions.

Mr. FARENTHOLD. Thank you, Commissioner Wright.

We will now go to Commissioner McDowell.

TESTIMONY OF THE HONORABLE ROBERT M. McDOWELL, FORMER FCC COMMISSIONER, AND VISITING FELLOW, HUDSON INSTITUTE, INC., CENTER FOR THE ECONOMICS OF THE INTERNET

Mr. MCDOWELL. Thank you, Mr. Chairman, Ranking Members, and Members of the Committee. It is an honor to be back here before your Committee again today.

At the outset, I should make clear that it is my hope that the Internet remains open and freedom-enhancing, as it has been since it was privatized in the mid-1990's.

As the Internet migrated further away from government control, it proliferated beautifully, growing from just under 90,000 users in the late 1980's to approximately 3 billion users globally today.

Its success as the fastest-growing disruptive technology in human history was the direct result of the Clinton administration's bipartisan policy to keep the government's hands off the Internet sector. In short, the Internet is the greatest deregulatory success story of all time, in my view.

When it comes to the net neutrality debate, it is important to remember that nothing is broken that needs fixing. The FCC is pursuing new rules without the benefit of a comprehensive, peer-reviewed economic study, something I have called for time and again over many, many years.

If there is systemic market failure, let's discover that through a data-driven process.

In 2007, the Federal Trade Commission examined the market. And in a unanimous and bipartisan fashion, found that there was no market failure, while eloquently warning against creating new rules that may produce harmful, unintended consequences, a report whose lead staffer was another FTC Commissioner, Maureen Ohlhausen.

Instead of making a new and untested body of law that would produce uncertainty and potentially collateral regulation of the entire Internet sector, our public policy should rely on what has worked so well for virtually every other aspect of the highly complex American economy: our antitrust and consumer protection laws.

Those laws are effective, enjoy a century of court-tested legal precedent, and can be administered by the Federal Trade Commission at the same speed, or lack thereof, as the Federal Communications Commission.

Additionally, other State and Federal statutes and common law offer powerful consumer protections, such as those covering breach of contract, tortious interference with contract, deceptive trade practices, fraud, and much more.

For instance, if ISPs were to breach their terms of service with customers, the plaintiffs bar would have a field day launching an uncountable number of class action lawsuits. These are powerful deterrents against anticompetitive practices.

Additionally, having been part of official U.S. diplomatic delegations to negotiate treaties in the communications space, as well as

recently being a member of the international blue ribbon panel on Internet governance, I can personally attest to the influence of the American net neutrality debate on international efforts to regulate all corners of the Internet.

The ongoing prospect of new net neutrality rules has generated thinking throughout the world that more regulation in the Internet ecosystem should be the norm. Recent initiatives in Europe, covering all types of Internet-related companies, underscore this point.

In sum, Internet regulation appears to be a one-way ratchet.

Lastly, today, I offer a warning. Some technology companies that are pushing for classification of Internet access as a telecommunications service under Title II of the Communications Act of 1934 should be careful what they wish for.

This section of the Communications Act is not only antiquated—in fact, the FCC just celebrated its 80th birthday yesterday—but it is particularly powerful, prescriptive, far-reaching, and, by some counts, has over 1,000 requirements. As market forces caused the technical architecture of tech and telecom companies to converge, companies that today are calling for the regulation of their rivals, and naively think they will not get swept up in Title II regulations themselves, could wake up one day having to live under its mandate.

As a technical and business matter, transmission services and information services are quickly becoming indistinguishable.

So across the globe, content and application companies are falling under the purview of more and more regulations and court orders.

In conclusion, whether creating new rules or foisting antiquated laws on new technologies, the end result would be counterproductive and create uncertainty and unintended consequences. A better path would be to rely on time-tested antitrust and consumer protection laws that have helped make the American economy the strongest and most innovative in the world.

Thank you for the opportunity to testify today, and I look forward to your questions.

[The prepared statement of Mr. McDowell follows:]

STATEMENT
OF
THE HON. ROBERT M. MCDOWELL
VISITING FELLOW
HUDSON INSTITUTE
CENTER FOR THE ECONOMICS OF THE INTERNET

"NET NEUTRALITY: IS ANTITRUST LAW MORE EFFECTIVE THAN REGULATION IN PROTECTING CONSUMERS AND INNOVATION?"

BEFORE THE
U.S. HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW
UNITED STATES HOUSE OF REPRESENTATIVES

JUNE 20, 2014

INTRODUCTION

Thank you, Chairman Goodlatte, Chairman Bachus and Ranking Members Conyers and Johnson for inviting me to join you today. It is an honor to be before your Committee again.

Currently, I serve as a Visiting Fellow at the Hudson Institute's Center for Economics of the Internet. The Hudson Institute is a nonprofit, nonpartisan policy research organization dedicated to innovative research and analysis that promotes global security, prosperity, and freedom. Having said that, the opinions I will put forth today are purely my own.

I would also like to thank Rep. Anna Eshoo who, although she does not serve on this Committee, graciously offered to reschedule an appearance she was to have made with me this morning at the Hudson Institute so I could testify today. I am grateful for her generosity.

At the outset, I should make clear my hope that the Internet remains open and freedom-enhancing, as it has since it was privatized in the mid 1990s. As the Net migrated further away from government control, it proliferated beautifully – growing from just under 90,000 users in the late 1980s, to approximately three billion globally today.[1] Its success as the fastest growing disruptive technology in human history was the direct result of the Clinton Administration's policy to keep the government's hands off of the Internet sector. In short, the Internet is the greatest deregulatory success story of all time. Policy makers should learn from this history to continue to keep the Net thriving.

Today's hearing is quite timely. Yesterday marked the Federal Communications Commission's (FCC) 80th birthday. This milestone is significant because many proponents of new Internet regulations would like to see the Communications Act of 1934, a law designed for the copper wire-based, circuit-switched, Ma Bell voice phone monopoly of yore, foisted on the

[1] International Telecommunication Union, ICT Data for the World, located at: http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx.

Internet under the harmless sounding moniker of "net neutrality." Such a development, however, would be a devastating blow to the technology sector of the American economy and, more importantly, to American consumers.

For nearly a decade, I have been deeply involved with the complicated debates surrounding the regulation of Internet network management. During my seven years as a Commissioner of the FCC, the Commission conducted three proceedings and issued two orders regarding net neutrality.[2] In each case, I voted against the FCC's orders for several legal, factual and policy reasons. For the Committee's reference, I have enclosed a copy of my dissent from the FCC's "Open Internet" order of 2010. *See* Exhibit A. Ultimately, both orders were largely overturned by the U.S. Court of Appeals for the District of Columbia Circuit, as predicted.[3] Despite its poor performance in the appellate courts, the FCC is plowing ahead with yet another attempt to thread the eye of a tiny legal needle with a fat regulatory rope - all while ignoring the fact that a new body of regulations is not needed and may, in fact, cause harmful unintended consequences.

NOTHING IS BROKEN IN THE INTERNET ACCESS MARKET THAT NEEDS FIXING

At the outset, it is important to understand that nothing is broken that needs fixing. Even if Congress had given it the authority to do so to begin with – which it has not, the FCC is pursuing new rules without the benefit of an economic study indicating a market failure that requires a remedy through a new body of *ex ante* regulation. For years, I have argued that a bona fide and peer-reviewed economic study of the Internet access market, which should be put out for public comment, would be tremendously helpful to policymakers who could then determine

[2] *See Preserving the Open Internet*, GN Docket No. 09-191, Report and Order, 25 FCC Rcd 17905 (2010); *Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd 7866 (2010); *Formal Compl. of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd 13,028 (2008).

[3] *Verizon v. FCC*, 740 F. 3d 623 (D.C. Cir. 2014); *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

whether anything was indeed wrong. Proponents of government regulation of Internet network management have opposed this idea, and one has to wonder why. If an illness really exists, wouldn't we want policymakers to have ample data to diagnose it properly before dispensing "medicine"? And are new rules "medicine" or something more toxic to the Internet economy?

Perhaps proponents of new Internet regulations are reluctant to study the broadband Internet access market empirically and transparently given the conclusions from the last time the government meaningfully did so. In 2007, the Federal Trade Commission, one of the premier antitrust authorities in government, examined the market and in a unanimous and bipartisan fashion found that there was *no market failure*.[4] The FTC 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."[5] Regulators should heed that bipartisan warning, and thoroughly examine the market before going further.

Instead, every few months, proponents of new mandates have painted a succession of new targets for their proposed regulations to the point where it is difficult to keep track of what it is they really want other than a massive regulatory regime drawn from 19th Century railroad regulations. Years ago, they first argued that Internet service providers (ISPs) had an economic incentive to act anti-competitively to thwart consumers' desires to access the content and applications of their choice. These doomsday market failure scenarios never materialized. In fact, most major ISPs long ago inserted clear language into their terms of service agreements with their customers pledging to protect Internet openness and freedom. It is important to

---

[4] *See* FED. TRADE COMM'N STAFF. BROADBAND CONNECTIVITY COMPETITION POLICY (2007), *available at* http://www.ftc.gov/reports/broadband/v070000report.pdf (hereinafter "FTC STAFF REPORT")

[5] *Id.* at 157.

remember for this debate that these agreements are contracts and are enforceable under an array of state and federal laws.

Later, Internet regulation proponents pivoted their arguments and focused on the retail prices of broadband Internet access, or economic regulation, of ISPs. More recently, the pro regulation movement has focused on not just "last mile" residential connections offered by ISPs, but so-called "middle mile" high-volume commercial or business-to-business connections - and now even the long-haul Internet backbone or "peering" sector.

Building on the theme of creating more regulation in the Internet space using almost any pretext, foreign governments and multilateral and treaty-based organizations, are watching American policy debates closely. They are busy finding ways to broaden the regulation of the entire Internet sector to include schemes where "sending parties," especially many American content and application providers, would be required by international law to pay network operators (some owned by foreign governments) for the termination of data traffic on their networks. Domestically, some are arguing that websites should not be allowed to take down their content under a bizarre, chilling and patently unconstitutional forced speech construct growing out of the net neutrality feeding frenzy. Apart from content transmitted over broadcast television, the Commission has virtually no authority to regulate content provided online, or for that matter, through any other means of delivery. Perhaps most significant, the creation or attempted exercise of such authority would raise significant Constitutional concerns and would almost certainly result in less free, high-quality content available to consumers online.

In sum, the term "net neutrality" seems to morph almost daily, but ultimately all of the arguments for it translate into "please regulate my rival … but not me!" in order for the politically-favored to gain a competitive advantage through regulatory arbitrage. Policymakers

should beware of such siren calls. History teaches us that such policies always result in everyone losing, especially consumers. For the Committee's reference, I have attached some research I conducted on this concept in the form of a speech I gave to the Italian Parliament in 2012. *See* Exhibit B.

AMPLE LAWS ALREADY EXIST TO ADDRESS ANY MARKET FAILURE AND CONSUMER HARM

Instead of creating a regulatory Leviathan that will only grow to insatiably consume the entire Internet sector, policymakers should use their quivers full of existing laws that already deter and cure any anticompetitive conduct that results in consumer harm, if it should ever arise. In other words, even if empirical data were to reveal that a systemic failure existed to the point where market power was being abused and consumers were being harmed as a result, ample laws already exist to fix the problem.

First and foremost, for purposes of today's hearing, are America's antitrust laws. Other complex sectors of the American economy operate under government supervision through the rules afforded by antitrust law without new extra layers of untested regulations and bureaucracies. Antitrust authorities are experienced in analyzing complex markets of the tech economy, such as software operating systems and Internet search. Not only do antitrust laws act as a deterrent against engaging in anticompetitive behavior, but they provide a "cure" for such behavior after-the-fact as well. These laws also apply to the broadband and Internet space because those are information services, not telecommunications services, thus avoiding the common carrier exemption.[6]

[6] *See* Maureen K. Ohlhausen, *Telecommunications & Electronic Media Net Neutrality vs. Net Reality: Why an Evidence-Based Approach to Enforcement, and Not More Regulation, Could Protect Innovation on the Web*, 14 Engage 81, 83 (2013) ("[T]he FTC Act exempts "common carriers" from its jurisdiction.").

Other laws that apply are Section 5 of the Federal Trade Commission Act,[7] which forbids "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." The FTC "has both authority and experience in the enforcement of competition and consumer protection law provisions pertinent to broadband Internet access."[8] Additionally, there are the protections of state and federal common law such as breach of contract, tortious interference with contract, deceptive trade practices, fraud and more. For instance, if ISP's were to breach their terms of service with their customers, the plaintiff's bar would have a field day launching an uncountable number of class action lawsuits.[9]

Furthermore, the argument that antitrust or consumer protection actions take too long and would produce results only after it was "too late" are specious. Antitrust and consumer protection agencies, such as the Federal Trade Commission, can act at the same speed as the Federal Communications Commission.

NEW RULES WILL ONLY SPUR INTERNATIONAL EFFORTS TO REGULATE THE INTERNET

Having been part of official U.S. diplomatic delegations to negotiate treaties in the communications space, as well as recently being a member of a blue ribbon panel on Internet governance,[10] I can personally attest to the influence of the American net neutrality debate on international efforts to regulate all corners of the Internet. Vladimir Putin has stated plainly his goal to have "international control of the Internet" through the International Telecommunication Union. Given Russia's recent expansion into the Crimea and Ukraine, it is now obvious that Putin's threats should be taken seriously. And so should the explicit proposed treaty language of

[7] 15 U.S.C. § 45.

[8] FTC STAFF REPORT, at 41.

[9] *See, e.g.*, *Chin v. RCN Corp.*, No. 1:08-cv-07349 (2011).

[10] *See* Panel On Global Internet Cooperation and Governance Mechanisms, *available at* www.internetgovernancepanel.org.

China, Saudi Arabia, Iran and their client states, some of which call for massive multilateral regulation of the Internet including networks, content and applications.

Furthermore, I have been told in official bilateral negotiations with foreign governments, as well as by global ministers of communications, regulators and international business executives in more informal settings, that the American effort to issue net neutrality rules has created a new frame of mind and has generated thinking throughout the world that more regulation in the Internet ecosystem should be the norm. Recent initiatives in Europe underscore this point.[11] Ironically, the Snowden/NSA matter has also fueled international efforts in this regard – as if the problem of government involvement in this area can be cured by even *more* government involvement.

In short, pressing ahead with new Internet regulations will provide cover to less freedom friendly international regimes that wish to subvert the private sector, non-profit and non-governmental multi-stakeholder model of Internet governance.

TECHNOLOGY COMPANIES WILL BECOME ENSNARED IN "TITLE II" NET NEUTRALITY

Technology companies that are pushing for classification of Internet access as a telecommunications service under Title II of the Communications Act of 1934[12] should be careful what they wish for. Having practiced law in the Title II world for years, in addition to my seven years of service as a Commissioner of the FCC charged with interpreting and enforcing Title II, I am deeply familiar with its scope and reach. This section of the Communications Act is particularly powerful, prescriptive and far-reaching. Some estimate it has over 1,000 requirements.

---

[11] *See, e.g.*, Case C-131/12, *Google Inc. v. Agencia Española de Protección de Datos* (E.C.R. 2014) (European High Court's ruling on the "right to be forgotten"); *European Single Market for Electronic Communications*, COM (2013) 0627 – C7-0267/2013 – 2013/0309(COD) A7-0190/2014 (European Union's Net Neutrality proposal).

[12] 47 U.S.C. § 201 *et seq.*

As a threshold matter, Title II not only allows for, but *encourages*, the "two-sided" market that some content and app providers are seeking to avoid in order to shift their costs. Furthermore, tiered, or usage-based, pricing is not just contemplated in Title II, but is *called for*. Similarly, "discrimination" among users is allowed, provided all similarly-situated customers are treated the same.[13]

Practically speaking, as technologies, business strategies and consumer demand produce convergence in the Internet ecosystem, from an engineering standpoint it is becoming harder to distinguish a "tech" company from a "network operator." Both can have thousands of miles of fiber connecting servers and routers all over the globe while providing voice, video and data services. It is naïve to think that, from a regulation's or regulator's perspective, "tech" companies and "network" companies won't be swept up into the same or similar regimes, especially if the FCC reverses its longstanding and bipartisan precedent and classifies "information" services as "telecommunications" services.[14] The concept of traditional "telecommunications" services is quickly disappearing as technology evolves and the Internet ecosystem evolves to the next level: an all-Internet Protocol world. The old-fashioned distinction between "transmission" and "information" services no longer makes sense as a practical matter.[15]

Without belaboring the point, the stovepipe laws of the late 19th and early 20th centuries written in the days of manual switchboards, copper wires, and vacuum tubes are woefully out-of-

---

[13] 47 U.S.C. § 202(a).

[14] *See, e.g.*, *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 F.C.C.2d 384, 387 ¶¶ 5-7 (1980) ("*Second Computer Inquiry*").

[15] *See, e.g.*, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Docket No. FCC-02-77, 17 FCC Rcd 4798, at ¶ 40 (2002) ("All information services require the use of telecommunications to connect customers to the computers or other processors that are capable of generating, storing, or manipulating information. Although the transmission of information to and from these computers may constitute 'telecommunications,' that transmission is not necessarily a separate 'telecommunications service.'"); *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

date for dynamic 21st Century technologies. Antitrust and consumer protection laws are not, however, and are more comprehensive, nimble and better able to protect the public interest.

Furthermore, as discussed in Exhibit B, the flaw in the "Please Regulate My Rival, But Not Me" school is that regulations almost never stop where proponents want them to. Eventually, the same logic that provided a pretext for new rules to begin with is applied to the original proponent of the regulation, much to their chagrin. Internet companies supportive of net neutrality in the U.S. are discovering this sad fact in Europe where content and applications are falling under the purview of more and more regulations and court orders.[16] In short, Title II will only complicate the technology sector of our economy as "tech" companies become exposed to its powerful reach and are treated as regulated "utilities" as well.

CONCLUSION

Creating new regulations, or foisting antiquated laws on new technologies, would be counterproductive, create uncertainty, hinder innovation and investment and expose the entire Internet ecosystem to the risks of unintended consequences. A better path would be to rely on time-tested antitrust and consumer protection laws, with their century-old precedent, that have helped make the American economy the strongest and most innovative in the world.

Thank you for the opportunity to testify and I look forward to answering your questions.

##

[16] *See* sources cited *supra* at n.11.

EXTENDED LEGAL ANALYSIS

I. The Existing Regulatory Framework Is Adequate.

The Internet is thriving under *current law*. The Commission recently stated in its Notice of Proposed Rulemaking[17] that 87 percent of Americans now use the Internet, up from 14 percent in 1995;[18] the Internet supports an e-commerce marketplace that boasts U.S. revenues of $263.3 billion;[19] and the app economy alone is responsible for almost 752,000 jobs in the United States.[20] Broadband companies, in particular, are pouring funding and effort into broadband deployment—to the tune of $60 billion per year.[21]

As FCC Commissioner O'Rielly recently explained, it is the *current* legal framework that has provided the "climate of certainty and stability" necessary for broadband investment and Internet innovation generally.[22] Under current laws, competition and innovation drive growth: no one needs permission from the federal government to start up a website or app, to navigate the Internet freely, or, most importantly, to add his or her ideas into the Internet's ecosystem in a way that changes it—at the structural layer or content level. Handing over control to the federal government to regulate each of these areas does not ensure a freedom-enhancing Internet. It

---

[17] *In re: Protecting and Promoting the Open Internet*, GN Docket No. 14-28, 2014 WL 2001752 (May 15, 2014) (hereinafter "*Net Neutrality Notice*").

[18] Pew Research Internet Project, Internet Use Over Time, *available at* http://www.pewinternet.org/data-trend/internetuse/internet-use-over-time/.

[19] *See* U.S. Census Bureau, Quarterly Retail E-Commerce Sales, 4th Quarter 2013.

[20] *See* Michael Mandel, *752,000 App Economy Jobs on the 5th Anniversary of the App Store*, Progressive Policy Institute Blog (July 8, 2013), *available at* http://www.progressivepolicy.org/2013/07/752000-app-economy-jobs-on-the-5thanniversary-of-the-app-store/.

[21] Letter from Thomas R. Stanton, Chairman & CEO, ADTRAN, *et al.*, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (May 13, 2014).

[22] Dissenting Statement of Commissioner Michael O'Rielly, *Net Neutrality Notice*, 2014 WL 2001752, at *80 (hereinafter "O'Rielly Dissenting Statement").

ensures an Internet regulated by five unelected bureaucrats at the Federal Communications Commission in Washington, D.C.

The Commission's proposal - and its vast implications - cause particular concern because they address a phantom problem. Network management "incidents" have been few and far between; *de minimis*, in fact. The *Net Neutrality Notice* explicitly admits this fact. Far from a pervasive problem, the FCC acknowledges that "the number of existing cases has been relatively few" because of policies "that the Commission has had … in place during the period in question."[23]

Moreover, independent studies have repeatedly confirmed this. In the broadband industry, analyses have shown that competition is robust. For example, the Federal Trade Commission (FTC) has concluded that the broadband market is "competit[ive]."[24] Likewise, it has warned that regulators should be "wary" of network management rules because of the unknown "net effects … on consumers."[25]

II. Current Laws Are Adequate To Resolve Any Issues.

When network management problems have arisen, existing laws have been more than sufficient to address them. The Department of Justice (DOJ) and the FTC are well-equipped to address any market failures in the broadband industry. DOJ has at its disposal the full panoply of U.S. antitrust laws. In the broadband context specifically, the Sherman Act and the Clayton Act would prohibit: (1) "exclusive dealing," or vertical arrangements where, for example, a provider only permitted streaming video from a preferred partner site; (2)"refusals to deal," where, for example, a broadband provider only permitted a content delivery network to stream content to its

[23] *Net Neutrality Notice*, 2014 WL 2001752, at *11, ¶ 40.

[24] FTC STAFF REPORT, at 157.

[25] *Id.*

customers if they paid more than the provider charged other content delivery networks; and (3) "raising rivals' costs," or achieving the same results using different techniques.[26]

In addition, under current law, the FTC may address problems under Section 5 of the Federal Trade Commission Act (FTCA), which forbids "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[27] The FTC "has both authority and experience in the enforcement of competition and consumer protection law provisions pertinent to broadband Internet access."[28] Moreover, "the FTC Act provisions regarding '[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce,'" are especially suited to deal with harmful network management practices because they "are general and flexible in nature."[29]

As FTC Commissioner Maureen K. Ohlhausen explained, this flexibility is critical to government intervention in the Internet ecosystem, which is characterized by "growth, innovation, pro-competitive efficiencies, significant consumer benefits, largely successful industry self-regulation, [and] few reported cases of abuse."[30] The "flexible and fact-intensive approach to enforcement" permitted under the FTCA is better suited to targeting problems in this

---

[26] Section 1 of the Sherman Act prohibits contracts "in restraint of trade," 15 U.S.C. § 1; Section 2 of that Act prohibits "attempt[s] to monopolize" and monopolization," *id.* § 2; and Section 3 of the Clayton Act prohibits exclusivity arrangements that may "substantially lessen competition" or tend to create a monopoly," *id.* § 14.

[27] 15 U.S.C. § 45(1). "Congress has deliberately left these phrases undefined so that the parameters of the FTC's powers and the scope of its administrative and judicial functions could be responsive to a wide variety of business practices." ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 643 & n.4 (6th ed. 2007) (citing *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-44 (1972); *FTC v. R.F. Keppel & Bros.*, 291 U.S. 304, 310-12 (1934).

[28] FTC STAFF REPORT, at 41; *see, e.g.*, *AOL & Time Warner, Inc.*, FTC Dkt. No. C-3989 (Dec. 17, 2000) (complaint), *available at* http://www.ftc.gov/os/2000/12/aolcomplaint.pdf; *Cablevision Sys. Corp.*, 125 F.T.C. 813 (1998) (consent order); Summit *Commc'ns Grp.*, 120 F.T.C. 846 (1995) (consent order).

[29] FTC STAFF REPORT, at 41.

[30] Ohlhausen, *supra* note 6, at 85.

dynamic environment than categorical treatment under Section 706 or Title II of the Communications Act.[31]

The FTC is already equipped to address the harmful practices targeted in the FCC's proposed rule. However, the FTCA empowers the FTC to act only so long as Internet access service is considered an "information service."[32] The Act specifically does not apply to "common carriers."[33] And while the FTC has advocated for changing this aspect of the Act,[34] Congress has not done so and a common carrier designation would remove the FTC from the enforcement picture entirely.

Multiple other laws exist that directly bear on network management practices in the broadband industry. The U.S. Court of Appeals for the District of Columbia recently upheld the FCC's "Disclosure Rule," which requires broadband providers to disclose their network management practices, performance, and the commercial terms of their services.[35] As the FCC has explained, this rule "ensures that end users can make informed choices regarding the purchase and use of broadband service, which promotes a more competitive market for broadband services and can thereby reduce broadband providers' incentives and ability to violate open Internet principles."[36] Transparency in and of itself can be an effective deterrent against harmful practices and is a meaningful pathway toward facilitating timely resolution, and alerting regulators if anti-competitive behavior is in the offing.

---

[31] *Id.*

[32] *See* Robert E. Litan, *Regulating Internet Access as a Public Utility: A Boomerang on Tech If It Happens*, Economic Studies at Brookings, at 3 (June 2, 2014).

[33] *Id.*

[34] *See* FTC Jurisdiction over Broadband Internet Access Services: Hearing before S. Comm. on the Judiciary, 109th Cong. 9-11 (2006) (statement of William E. Kovacic, Comm'r, FTC), *available at* http://www.ftc.gov/opa/2006/06/broadband.shtm.

[35] *Verizon v. FCC*, 740 F. 3d 623, 659 (D.C. Cir. 2014).

[36] *Preserving the Open Internet*, 25 FCC Rcd 17905 (2010).

Finally, under current law, most major Internet Service Providers (ISPs) have long-standing published policies that prohibit paid prioritization. First, the FCC can take legal action against any company that violates its internal policies and has successfully done so in the past—both in the *Comcast* (discussed earlier) and *Madison River* decisions. In the latter case, for example, Madison River Communications blocked voice over Internet Protocol (VoIP) service provider Vonage over its DSL connections.[37] The FCC intervened and resolved the conflict through a consent decree, under which Madison River agreed to pay a fine and cease blocking access.[38] In addition, the full range of common law remedies is also available to consumers to enforce these internal policies including tortious interference with contract, fraud, and breach of posted terms and conditions.

Thus, the extensive existing legal framework and enforcement mechanisms provide ample protection from any anti-competitive behavior by broadband companies. Under these laws, any problems may be (and currently are) handled on a case-by-case basis. This practice keeps government involvement at a responsible minimum. It is worth noting that even the Antitrust Law Section of the American Bar Association has concluded that current laws are adequate to address competition problems in the broadband industry.[39]

III. A Comprehensive Market Study Must Precede Any Regulatory Action.

In any event, before rushing into regulation of such a significant sector of the economy and fundamental aspect of American life, at the very least, the FCC should commission a *bona fide*, peer-reviewed market study—put out for public comment—to examine the structural and economic effects of regulating broadband providers as common carriers. Members of Congress

[37] *See Madison River Commc'ns LLC and Affiliated Cos.*, 20 FCC Rcd 4295 (2005).

[38] *Id.*

[39] ABA Comment on Federal Trade Commission Workshop: Broadband Connectivity Competition Policy, 195 Project No. V070000 (2007).

have repeatedly called for the FCC to conduct such a cost-benefit analysis before imposing a new net neutrality rule. In an April 2014 letter, Representative Marsha Blackburn asked the Commission to conduct a cost benefit analysis of such a rule.[40] Also, Chairman Greg Walden has advocated in support of his draft legislation on Reforming FCC Process, that the agency should be required to conduct a cost-benefit analysis of a new net neutrality framework before enacting one. As Chairman Walden has explained, "[c]ost-benefit analyses are valuable because they require an agency to squarely address the cost of regulation, determine whether other methods may be less costly, and make a reasoned determination that the benefits outweigh the costs."[41]

Commissioner Ajit Pai recently noted that historically, the FCC has "commissioned a series of economic studies in … media-ownership proceedings."[42] Commissioner O'Rielly similarly stated that "the Commission should have specific and verifiable evidence that there is a market failure," before applying regulations that assume such a failure.[43]

In the past, the FCC has relied on market studies to inform complex regulatory decisions. For example, the FCC commissioned ten studies to provide it with a comprehensive review of the nature and structure of the broadcast sector *before* formulating any new ownership policies. These peer-reviewed studies, which were conducted by outside researchers and Commission staff, examined a range of issues including "diversity, competition, and localism," within the

---

[40] Letter from the Hon. Marsha Blackburn to the Hon. Tom Wheeler (Apr. 24, 2014), *available at* http://blackburn.house.gov/uploadedfiles/blackburn_letter_to_chairman_wheeler.pdf.

[41] *Reforming FCC Process*, 112th Cong. (2011) (statement of Rep. Walden, Chairman, H. Subcomm. on Communications and Technology).

[42] Dissenting Statement of Commissioner Ajit Pai, *Net Neutrality Notice*, 2014 WL 2001752, at *78 (hereinafter "Pai Dissenting Statement").

[43] O'Rielly Dissenting Statement, 2014 WL 2001752, at *81.

industry, three of the FCC's important policy goals in the rulemaking.[44] They looked at everything from "How People Get News and Information" to "Television Station Ownership Structure and the Quantity and Quality of TV Programming" to "Vertical Integration and the Market for Broadcast and Cable Television Programming."[45] In addition, the FCC sought public comment on these studies and incorporated this input into the broadcast rulemaking docket.

The net neutrality debate presents issues at least as significant and far-reaching as did the broadcast ownership rules and they should be approached through similar processes. Commissioner Pai has proposed that the FCC "ask ten distinguished economists from across the country to study the impact of [the] proposed regulations and alternative approaches on the Internet ecosystem," with "each Commissioner pick[ing] two authors."[46] Each study would be peer-reviewed and "to ensure public oversight," the Commission would hold "hearings where Commissioners could question the authors of the studies and the authors of those studies could discuss their differences."[47] Such an approach would ensure that the FCC, at the very least, is examining real data before it makes its regulatory decision.

IV. A New Body of Law in This Area Would Create Uncertainty, Raise Prices and Invite International Efforts To Regulate the Net.

New regulatory mandates for network management—particularly those of the vague nature proposed by the FCC (*see infra* at 9)—guarantee uncertainty for all players involved in this dynamic and growing industry. First, new rules would have the effect of deterring market entrants and reducing competition in the broadband market overall. Existing and startup

[44] *FCC Seeks Comment on Research Studies on Media Ownership*, MB Docket No. 06-121, FCC Rcd 14313 (2007).

[45] *See* FCC, 10 Research Studies on Media Ownership (2007), *available at* http://go.usa.gov/8YSA.

[46] Pai Dissenting Statement, 2014 WL 2001752, at *78.

[47] *Id.*

companies would face greater difficulty in attracting the investment capital needed to build out their infrastructure.[48]

At the consumer level, a new regulatory regime would likely "have the perverse effect of raising prices to all users" and some users would likely see the end of their service entirely.[49] As Commissioner Pai has explained, "there are thousands of smaller Internet service providers—wireless ISPs (WISPs), small-town cable operators, electric cooperatives, and others—that don't have the means or the margins to withstand a regulatory onslaught. If they go dark, consumers they serve …will be thrown offline."[50]

In addition, up until recently, the United States has presented a united front to strongly oppose regulation of the Internet by foreign governments. Subjecting broadband to a new domestic regulatory overlay would significantly undermine these efforts. For example, in Europe, providers have long sought to impose termination charges on U.S.-based content providers and app developers that would be forced to pay foreign ISPs to carry traffic to their customers. With the United States' example of imposing more regulation in the Internet arena paving the way, European (and other) ISPs would have more leeway to demand the charges they have long sought to impose.

Finally, a new regulatory regime would be just the beginning, and not an endpoint, of greater regulation of the Internet by the federal government. In its *Net Neutrality Notice*, the Commission relies on vague terms that have no discernible meaning, such as the requirement to provide a "minimum level of access" or the prohibition of "commercially unreasonable"

---

[48] FCC's Capital Formation Workshop (Oct. 1, 2009).

[49] 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 and Verizon and Verizon Wireless Reply Comments at 17–18 to *Preserving the Open Internet*, GN Docket No. 09-191.

[50] Pai Dissenting Statement, 2014 WL 2001752, at *78.

practices. While the *Notice* suggests that companies could seek FCC "guidance" on what these terms mean, "it is very troubling when legitimate companies are put in the position of having to ask the government for its blessing every time they need to make a business decision in order to avoid costly enforcement or litigation."[51] Nonetheless, many are already calling for new rules to be applied to the mobile sector.[52]

Likewise, some argue that websites should not be allowed to take down their content. Yet, here again, the market for the provision of content to consumers online is intensely competitive, and there is no market failure, or other sustainable basis, that would warrant FCC regulation of online content. Apart from content transmitted over broadcast television, the Commission has virtually no authority to regulate content provided online, or for that matter, through any other means of delivery. This wholly undesirable result could then cascade to hamper consumer demand for broadband and thus defeat, rather than promote, the ultimate objective of incentivizing investment in broadband deployment. Perhaps most notable, the creation or attempted exercise of such authority would raise significant Constitutional concerns and would almost certainly result in less free, high-quality content available to consumers online.

Finally, under a new, expanded regulatory regime, the Commission would be under ever-increasing pressure to further expand its power over the Internet. Each complaint filed would invite further regulation, as was demonstrated by the Comcast/BitTorrent case.[53] Regardless of

---

[51] O'Rielly Dissenting Statement, 2014 WL 2001752, at *81.

[52] *See* Alina Selyuky & Marina Loyes, *Mobile 'net neutrality' faces new day of reckoning at FCC*, Reuters UK, June 15, 2014 ("Both sides plan to lobby the FCC as the agency collects public comments on its proposed rules until Sept. 10. Scrutiny on the wireless space promises to be more intense than before. 'It'll be a topic that will have big resonance among the commissioners: why should wireless be treated differently than wireline in terms of net nentrality,' said one senior FCC official, who spoke anonymously to discuss the ongoing review."), *available at* http://uk.reuters.com/article/2014/ 06/15/us-usa-netnentrality-wireless-idUKKBN0EQ0N520140615.

[53] *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, Mem. Op. and Order, 23 FCC Rcd. 13,028 (2008); *see also* David Kirkpatrick, *Comcast-BitTorrent: The Net's Finally Growing Up*, CNN.COM, Mar. 28, 2008, *available at* http://money.cnn.com/2008/03/27/technology/comcast.fortune/index.htm.

whether the Commission proceeds under Section 706 or Title II (discussed further below), net neutrality rules will empower the FCC to continue to expand its control over the Internet.

V. Reclassification Under Title II Would Have Negative Collateral Consequences.

In its *Net Neutrality Notice*, the FCC suggests that should Section 706 provide an insufficient legal underpinning for new rules, the agency could also classify broadband providers as "common carriers" under Title II of the Communications Act (for the first time in history, by the way). Title II provides the statutory basis for regulation of telecommunications monopolies as "common carriers." It dates back to the 1930s and was designed to address circuit-switched, analog, copper-based voice telephone monopolies – creatures that look nothing like today's Internet companies. Many Title II provisions are already completely obsolete and the FCC has admitted that it would have to seek forbearance from many of Title II's myriad requirements if it applies that provision to the Internet.[54]

Proponents may not realize, however, the key problem with a Title II approach: It does *not* prohibit paid prioritization. Title II prohibits "unjust or unreasonable discrimination"[55] and the Commission has consistently interpreted this provision to *allow* carriers to charge different prices for different services.[56] Common carriers are "only bound to give the same terms to all

---

[54] *See Net Neutrality Notice*, 2014 WL 2001752, at *44, ¶¶ 153-155.

[55] 47 U.S.C. § 202(a).

[56] *See, e.g.*, *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010; Establishment of Rules and Requirements for Priority Access Service*, WT Docket No. 96-86, Second Report & Order, 15 FCC Rcd 16720 (2000) (finding Priority Access Service, a wireless priority service for both governmental and non-government public safety personnel, "prima facie lawful" under section 202); *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases Of Switched Access Services Offered By Competitive Local Exchange Carriers; Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket Nos. 96-262, 94-1, 98-157, CCB/CPD File No. 98-63, 14 FCC Rcd 14221 (1999) (granting dominant carriers pricing flexibility or special access services, allowing both higher charges for faster connections as well as individualized pricing and customers discounts).

persons alike under the same conditions and circumstances," and "any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge."[57]

For example, two-sided markets are not only allowed under Title II, but *encouraged*. Tiered pricing is permitted as well; the statute simply requires carriers to treat similarly-situated customers the same. Thus, if one qualifies for a high volume discount, one receives one. As Commissioner Pai recently noted, there has not been a single case where the Commission has found it unlawfully discriminatory to offer a different service to customers at a different price.[58]

Reclassifying broadband service providers as common carriers under Title II would also have far-reaching effects on service providers, content-users, and end-users. It would impose significant burdens on the targeted companies and would inevitably cause fee increases for content providers and end-users. The regulatory burdens resulting from a Title II classification are substantial and include rate-regulation, non-discrimination requirements (again, which *allow* discrimination), entry and exit requirements, confidentiality requirements, audits, and customer proprietary network information privacy restrictions, among other mandates.[59] In a Title II universe, for instance, broadband providers would likely charge access fees to recover their

---

[57] *Interstate Commerce Comm'n v. Baltimore & Ohio R.R. Co.*, 145 U.S. 263, 283–84 (1892).

[58] *See* Pai Dissenting Statement, 2014 WL 2001752, at *76.

[59] As Commissioner O'Rielly recently explained in his Dissenting Statement:

> Title II includes a host of arcane provisions on topics like interlocking directorates, valuation of carrier property, uniform system of accounts and depreciation charges, telephone operator services, telemessaging service, Bell Operating Company entry into interLATA services, manufacturing of telecommunications equipment and customer premises equipment, and electronic publishing. Even if the Commission granted forbearance from all of the provisions that it has eliminated for incumbent telephone companies—and then some—advocates are ignoring that broadband providers and services would still be subject to a host of unnecessary rules. The idea that the Commission can magically impose or sprinkle just the right amount of Title II on broadband providers is giving the Commission more credit than it ever deserves.

O'Rielly Dissenting Statement, 2014 WL 2001752, at *80.

regulated costs.[60] In addition, Title II would impose its own price increases on broadband consumers. For one, the statute imposes universal service fees on all telecommunications carriers.[61] Under this provision, all telecommunications service providers must assess USF fees on their customers, which is currently at a rate of 15.7 percent.[62] Therefore, the FCC would be "taxing" Internet on-ramps.

Finally, a Title II framework would threaten a dramatic expansion of the Commission's authority to regulate the Internet. It would be impossible to draw a principled line between broadband service providers and other entities that combine transmission with information processing or storage. As Robert Litan recently explained, "[t]here is a very slippery slope from having designated ISPs as being subject to common carriage regulation to having to include other forms of Internet transmissions as well because they arguably use 'telecommunications services', the legal hook in Title II for its application."[63] Litan uses the examples of Google or Microsoft, which link to advertisers' websites in their search engines, or Amazon's Kindle, because Kindle owners download books from Amazon.[64]

The Commission has acknowledged this slippery slope problem. It admitted at oral argument in the *Comcast* case that under a Title II approach, "the Commission could someday subject [broadband] service to pervasive rate regulation to ensure that … [a broadband] company provides the service at 'reasonable charges.'"[65] Previously, it also admitted that if it "interpreted the statute as breaking down the distinction between information services and

---

[60] *See Net Neutrality Notice*, 2014 WL 2001752, at *43, ¶¶ 151–52.

[61] 47 U.S.C. § 254(d).

[62] *See Proposed Third Quarter 2014 Universal Service Contribution Factor*, CC Docket No. 96-45 (June 12, 2014).

[63] Litan, *supra* note 32, at 2.

[64] *Id.* at 2-3.

[65] *Comcast Corp. v. FCC*, 600 F.3d 642, 655 (D.C. Cir. 2010) (referring to Oral Arg. Tr. 58-59).

telecommunications services, so that some information services were classed as telecommunications services, it would be difficult to devise a sustainable rationale under which all, or essentially all, information services did not fall into the telecommunications service category."[66]

As part of their "information" service, numerous entities provide transmission service as well. For example, many application and content providers, content delivery networks (CDNs), and providers of services over connected devices, like Amazon or General Motors, provide transmission service as a component of their information service. The same is true for search engines that connect an advertising network to a search request (like Google and Bing), and for email providers and social networks that enable chat or messaging sessions.

Also caught within the ambit would be companies that sell other services, such as e-reader services, but which buy wireless access on a wholesale basis to deliver their content. For example, in the past, Amazon Kindle has collaborated with Sprint to deliver its e-reader services via a wireless delivery system. Such synergistic deals would be prohibited under Title II because, with respect to its Kindle product, Amazon would be considered a reseller of telecommunications services under Commission precedent.

[66] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11529, ¶ 57 (1998) ("*Stevens Report*").

Mr. FARENTHOLD. Thank you, Commissioner McDowell.

We will now recognize Professor Owen for his 5 minutes.

TESTIMONY OF BRUCE M. OWEN, MORRIS M. DOYLE CENTENNIAL PROFESSOR IN PUBLIC POLICY, AND DIRECTOR, STANFORD PUBLIC POLICY PROGRAM, STANFORD UNIVERSITY

Mr. OWEN. Thank you, Mr. Chairman, Ranking Member, and Members of the Committee, for this opportunity to testify today.

Net neutrality is a seductive slogan. It seems to have many people in favor of it, many of whom I suspect don't know exactly what it means. Its meaning seems quite protean. It adjusts like a mutating virus to fit the defenses of the body against it.

I think the most common current definition or usage of net neutrality involves what is more commonly called common carrier regulation. That is a public utility to which anyone has a right of access on nondiscriminatory terms.

Now, we have a lot of experience with common carrier regulation in the United States, starting with the first Federal regulatory legislation in 1887, the Act to Regulate Commerce, which created the Interstate Commerce Commission, and began the regulation of railroads. Later, trucking and other modes of transportation were included, all under a common carrier rubric.

The fact is that none of that regulation stopped discrimination. In fact, discrimination 20 and 30 years into regulation of transportation under the act was much worse, or at least much more extensive, than when it began.

Moreover, like many other industries, the transportation industries became embedded in the political economy of the regulatory structure. The loudest voices affecting transportation policy in Washington were the railroads, and the trucking industry itself.

And before very long, before the Depression, in fact, we had a series of regional monopolies or cartels overseen and refereed by the regulator. And the results for consumers were not good.

Consumers were clearly worse off. They paid higher prices, output was reduced, entrants were kept out, and innovation was resisted, because you had to get a license from the ICC to compete in the transportation business. And one of the things the ICC took into consideration was whether the current incumbents would be harmed.

The issue was not whether customers would be benefited, but whether incumbents would be harmed.

The same thing happened in telecommunications and telephone regulation, in particular. It came to be true that the interests of AT&T, the old Bell monopoly that was broken up in 1982, were primary at the FCC, and the interests of consumers were definitely secondary.

Entrants were excluded. Technology was excluded or slowed. And consumers lost in order to benefit the incumbent monopoly.

We don't have a good history with regulation, even where there is a lot of concentration in the industry.

I think, therefore, we have to be very careful before imposing regulation. The first stop, the presumption in our economy is competition, and the promotion of competition by the government is the ideal way to go. And if that fails, which it can do, then we turn

to regulation reluctantly as a last resort to solve serious and otherwise irremediable market failures.

We don't start with regulation. We start with competition.

So there is no particular evidence that competition isn't working in the parts of the telecommunications industry devoted to Internet supply. And there is every evidence that competition is in fact increasing, largely because of technology and, in particular, the growing use of portable devices supported by broadband wireless service.

The capacity of wireless broadband service to serve the needs of consumers in competition with wireline Internet access providers is limited only by the FCC, which is in control of the amount of spectrum that can be devoted to that use.

If we would like to see even more competition than we already have in local broadband access to the Internet, the first thing to do is to increase the spectrum available to wireless providers.

Technology will also help with that. As we move to the fifth generation of wireless service, we will be able to provide greater amounts of service within roughly the same bandwidth.

Antitrust policy promotes and protects competition. Regulation, whatever its intent and however well-meant, has the practical effect of suppressing competition. Antitrust promotes and protects innovation that makes it easier to enter an industry, when that would benefit consumers. Regulation, whatever the intent of it may have been, tends to suppress innovation in the interests of the incumbent regulated firms.

It seems clear that antitrust is an effective way to preserve competition. One of those great victories of antitrust in the last century was breaking up the Bell System monopoly, the result of which was a huge increase in competition, both at the local level and in long-distance service. And, more important, unleashing the forces of innovation.

The Bell telephone monopoly was a great inventor. Bell Labs was a wonderful source of——

Mr. FARENTHOLD. Professor Owen, if you could wrap it up. We need to try to stay on our time here.

Mr. OWEN. I am sorry.

But it was a reluctant innovator. AT&T didn't become an innovator until after it was largely deregulated after the breakup.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Owen follows:]

"Net Neutrality: Is Antitrust Law More Effective than Regulation in Protecting Consumers and Innovation?"

Submitted Written Testimony of

Bruce M. Owen
Morris M. Doyle Centennial Professor in Public Policy
Director, Stanford Public Policy Program
Stanford University

Thank you, Mr. Chairman, for this opportunity to address the subcommittee.

Is antitrust law enforcement sufficient to address so-called "net neutrality"? Or do we need new regulatory safeguards? Although these questions are somewhat technical and arcane, they seem to arouse strong emotions among many citizens. I commend the committee on its efforts to contribute to the public debate, and perhaps to better define the policy issues.

My written testimony briefly summarizes the analysis set out in greater detail in the publications appended to this submission.

I have devoted much of the past 45 years to study of the communications industry and its regulation, including radio and TV broadcasting, cable television, telephone service, use and allocation of the radio spectrum, the Internet, and the many technologies, old and new, used to supply such services. I have had the privilege of working in telecommunications policy analysis in the executive branch of the government, in antitrust enforcement at the U.S. Department of Justice, in academic research and teaching at Stanford and Duke, and in consulting work. My special focus has been on the effects of regulation of these industries on the consuming public.

Communications regulation does not make a pretty picture. Over the last 100 years the Federal Communications Commission has pretty generally interpreted its legislative mandate in ways that stifle competition and technological innovation. Outcomes have in many cases probably been worse for consumers than the dangers they might have faced from unregulated monopolies or oligopolies. I believe that FCC commissioners have been trying their best for the public. However, the nature of our political system can easily mislead policy makers who seek to further the public interest. When it comes to low-salience technical matters involving regulated industries, it is the regulated firms themselves and

other well-financed interest groups that dominate the policy debate. Theirs are the loudest voices heard in Washington and at the FCC. The interests of consumers are far less well represented.

Antitrust enforcement has, in general, been much more successful than regulation in service to the public. Especially since the 1970s, the goal of enhancing consumer welfare has been explicit at the antitrust agencies, and widely accepted by the judicial branch. The days of protecting competitors from competition are long past. I played a role in the litigation[1] that resulted in the disintegration of the old Bell System monopoly—both before the complaint was filed and in testimony at the trial. I believe that antitrust case, together with the burst of bipartisan deregulatory policies in the 1970s, led to the explosion of competition and technological innovation in the communications industries that we see all around us today.

The history of communications policy over the last century, however well-meant, has tended to protect incumbent providers from would-be competitors and innovators at a substantial cost to the public. This cost in my view likely far outweighs whatever benefits may have resulted from the short-term purposes served by the regulation. This applies especially to regulations that were vague, or prophylactic—that is, intended to forestall a theoretical danger in advance of its possible occurrence. In contrast, antitrust enforcement (merger law aside) is designed to deter or remedy specific instances of anticompetitive behavior, defined in terms of harms to customers. Antitrust action requires *evidence of harm.* Even in merger cases, courts increasingly require strong evidence that harm to consumers is very likely.

History lessons

History, of course, can be a useful adjunct to analysis of policy alternatives. Proponents of net neutrality may recognize their own fears and goals, for example, in the following 120-year-old claim:

> [T]he paramount evil chargeable against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the [proposed legislation] is the prevention of these discriminations....[2]

This is from the legislative history of the first modern attempt by the federal government to regulate directly the behavior of large firms, in this case railroads. The result was the 1887 Act to Regulate Commerce, which contained this key provision:

> [I]t shall be unlawful for any common carrier [railroad] subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect

[1] U.S. v. AT&T et al. 552 F. Supp. 131 (D.D.C., 1982), affirmed February 28, 1983.
[2] Senate Report No. 46, 49th Cong., 1st Sess., p. 215, as quoted in Houston E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342 (1914).

> whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.[3]

This and subsequent legislation gave the now-defunct Interstate Commerce Commission (ICC) the power to prevent discrimination of the kind apparently feared by proponents of net neutrality. The policy did not work.

Railroads continued to price discriminate, filing rates with the ICC to charge different prices for hauling different commodities of the same weight, volume and origin/destination. So did regulated trucking firms. Railroad tariffs grew longer and more complex each decade. In the end, before it was abolished in 1995, the ICC was little more than the titular head of a series of highly discriminatory and dysfunctional regional transport cartels. There are few today who believe that this century-long experiment with regulation achieved net benefits for Americans.

We have more recent evidence in telecommunications itself of the intractable difficulty of preventing even truly anticompetitive discrimination, in this case by vertically integrated monopolies.[4] Few historical events resonate in telecommunications policy with the clarity of the 1982 settlement that terminated the trial in U.S. v. AT&T. The old Bell System agreed to settle by accepting the entire relief package sought by the government. The relief called for a platonically pure structural disintegration and future isolation of the local Bell telephone monopolies from the competitive services then offered by Bell, including long-distance service and equipment manufacturing. The reason: regulation had failed to prevent discrimination against and in fact exclusion of Bell's competitors. It was antitrust action not regulation that brought an end to the suppression of competition in telephone service.

I have more to say about transportation and telecommunications regulation later in this testimony. But it is important to explain at once that a primary focus of the net neutrality issue is vertical integration. The fear of discrimination arises, I suppose naturally, from the perception that a vertically integrated firm will use any market power it may have at any stage of production to protect or extend market power in other stages.

Abstract economic models predict that when allocation within a firm replaces what had been decentralized market exchanges, consumer welfare (present and also future, because of incentives for innovation) may increase or decrease. In other words, the economic incentive to expand horizontally or vertically is usually, though not always, compatible with the social interest in maximizing long-run consumer welfare. We have two tools to deal with the possible bad outcomes: antitrust and regulation.

---

[3] Section three of the Act to Regulate Commerce (February 4, 1887, c. 104, 24 Stat. 379, 380).

[4] Local telephone companies were generally assumed to be natural monopolies until at least the 1990s. AT&T Corp. et al. v. Iowa Utilities Board et al. 525 U.S. 366, 371 (1999).

Antitrust policy works by seeking to prevent, directly or through deterrence, welfare-reducing expansions in the scope of firms without indirectly and inadvertently deterring expansions that benefit consumers. This is easy to say, but very tough to accomplish in practice. The requisite information is difficult to assemble and assess and the same tools (e.g., statements of enforcement policy and appellate precedents) can have indirect deterrent effects on both good and bad changes in the scopes of firms.

Hard as it is to calibrate antitrust policy, calibrating regulation is even more difficult. Aimed at improving serious long-term incompatibility between private incentives and social welfare, regulators intervene continuously and directly in firm decisions. The simplest case is the incentive of a monopolist to restrict output in order to maximize profit. Traditionally, public utility regulators set maximum prices and required utilities to serve all comers at or below those prices. In principle, this might achieve an efficient level of output. But in practice, the constraint itself almost invariably produced incentives that distorted internal allocation decisions of regulated firms, raising costs. In addition to and generally worse than those distortions, regulatory agencies themselves frequently have been more concerned with the welfare of the firms they regulate than with the economic welfare of the consuming public. In many cases, consumers would have been better off without regulation. The starkest evidence: deregulation of airlines, trucking, and most rail rates actually produced lower prices and more efficient industry structures.

This brings us to net neutrality. I suppose most of the people who favor net neutrality have no very specific idea what it means. Net neutrality is a slogan, not a policy. Perhaps deliberate vagueness explains the term's popularity. Of course, it is a rare curmudgeon who opposes fairness and favors unfair discrimination. Journalists tend to explain net neutrality as a condition in which all users pay the same for Internet access, no one gets inferior service, and no one is denied service, "for the same content." Regulation is thought to be required to ensure this, even though there is no significant evidence of anticompetitive discrimination today.[5] The fear is that such behavior may develop in the future. Specifically, cable operators have long had a reputation for dubious service quality and increasing prices, and well-publicized media and telephone mega-mergers are often regarded as signs of impending threats. The most specific fear apparently is that cable television providers that currently offer both conventional "linear" TV networks and also Internet access service will discriminate against or deny service to competing providers of competing on-line video services, such as Netflix, in order to protect their profits from the traditional part of their businesses.

---

[5] In fact the FCC after trying and failing twice to enact lawful versions of net neutrality (see Verizon v. F.C.C., D.C. Cir. No. 11-1355, decided Jan. 14, 2014), only last week announced that it was opening an inquiry to see if it could find evidence that would justify such a policy, the week *after* it announced pursuit of yet a third version of net neutrality. Edward Wyatt for the New York Times, "F.C.C. to Investigate Agreements Between Content Companies and Net Service Providers," June 13, 2014 http://nyti.ms.1gbObFG

What is Discrimination?

The Internet is an interconnected set of facilities (fiber optic cables, servers, routers) owned by many different companies that provide services to each other and to end users. These facilities are used for many purposes, not just Internet service. Examples include ordinary telephone service and capacity leased to cell phone companies and large businesses that use private networks to interconnect plants and offices. Each Internet user negotiates terms with the owner of whatever hardware is used to connect to the greater Internet. That owner in turn negotiates terms with other networks with which it seeks to exchange traffic. Large facilities providers with roughly equal demands for each other's capacity may exchange traffic without any payment (the payments roughly cancel out, so why bother?) This is known as "peering." When demands are not symmetric, one party typically pays the other for interconnection service. The negotiation involves prices and service quality, including "bandwidth" (speed in bits per second). Prices vary with, among other things, the amount of capacity (bandwidth) supplied. This is because more capacity costs more to produce. Notably, as with telephone service, users pay both to initiate and to be able to receive communications whether open circuits or digital packets. Even retail users of the Internet often negotiate both price and service quality. New or renewing cable and telephone subscribers are typically offered various discounts (or months of free service); subscribers threatening to terminate service also may be offered discounts.

Providers typically offer different Internet connection speeds or bundles of services at different prices. For example, business users may demand and be willing to pay more for faster speeds, and this is also true for some residential users. The actual performance of any interactive system using shared facilities varies according to capacity utilization. Each user's traffic varies, and at peak times or days capacity utilization in one or more parts of a network may approach 100%. Traffic then stops or slows as longer alternative routes (if any exist) are taken. Providers offering such service must invest in enough capacity to maintain the minimum service quality promised to each user even as overall traffic grows.

Digital communications capacity is fungible, in the sense that capacity used for any given purpose can be repurposed for a different use. These changes require time and may involve new equipment; they are not costless. In this context, one must be very precise in defining "discrimination." In antitrust and economic analysis it is **not** discriminatory to charge different customers different prices unless the services provided are identical in all respects and also cost the same to produce. Note even then, discrimination may increase consumer welfare, enabling consumers with lower values to be charged lower prices.

Internet users, whether residential or industrial, should expect to pay more for goods and services that cost more to produce, even when the "content" is identical or similar. Competitive markets produce that result and economic efficiency requires that result. The reportedly adverse popular reaction to the FCC's most recent proposal on net neutrality, which essentially took the position that charging more for higher speed service was not by itself discriminatory, suggests a widespread misunderstanding of how competitive markets work. A moment's reflection should make it plain that buying more of almost any

good or service, or a better quality of service, will cost more to supply and for that reason alone carry a higher price. If regulators forbid charging more for the more costly service the result will simply be that the service will not be provided. On the other hand, charging a price significantly higher than cost creates profitable opportunities for competitors or entrants to expand their market shares. Competition provides this discipline automatically. Regulation does not.

Further, the "equal prices for all who provide the same content" interpretation of net neutrality rests on no coherent theory of social justice. Some regulatory interventions are at least nominally intended to benefit disadvantaged groups such as minorities, the elderly, or the poor, and thus to justify reductions in efficiency. There is no such argument favoring net neutrality. Unlimited Internet access at a below-cost price should not be an inalienable right. Its beneficiaries are not minorities, the elderly or the poor.

Discrimination against competitors

What about the fear that cable television operators that also offer Internet access will discriminate against suppliers of competing online video programmers? Several lines of analysis are helpful here.

First, denying access to a competing supplier of a vertical service is not necessarily profitable, even if the cable company (for example) is the only local supplier of Internet access. Such a monopoly operator can charge a monopoly price for access. If it excludes a competing program supplier, however, it gives up the increased monopoly revenue that would come from the competitor's use of the access service. Charging users a higher price for programming is not guaranteed or even likely to offset the loss of monopoly revenue from transmission. Generally, a monopolist can only charge one monopoly price. Some exceptions exist. The old Bell System was an exception because its profits were regulated, and not at monopoly levels at a time when local telephone service was assumed to be a natural monopoly. Excluding competitors raised costs but also permitted higher prices to offset the costs of exclusion. The Bell monopoly lasted for many decades in part *because* of regulation.

Second, it simply is not true that cable television operators have monopolies in the distribution of video programming, online or otherwise. Most U.S. households have access to at least three established providers of linear video services—one cable operator and two satellite companies. In addition, wireless broadband internet service is growing very rapidly, largely because of the popularity of smart phones and tablets, which can be and are used to watch online video. A growing number of individuals use such services as their chief source of video entertainment. This adds three or four additional wireless video and Internet access providers to the three pre-existing video suppliers and the one or two Internet access providers already serving many large cities. (The largest landline telephone companies, AT&T and Verizon, offer fiber optic broadband service to residential users in several densely populated areas.) This amount of competition is sufficient to make regulation a truly bad bet for improving consumer welfare and stimulating innovation.

Further improvements in wireless broadband services lie in the future, even for relatively low-population-density areas: low earth orbit micro satellites are one such possibility. Today's large broadcast satellites are in geostationary orbit, much too far away for interactive Internet services because of delays in transmission. Low earth orbit satellites are not stationary with respect to the Earth, so more of them are required to ensure that at least one is always serving a given area, but they are much less expensive to build and launch. Miniaturization, economies of scale, and private launch services continue to reduce costs. This technology may eventually offer an opportunity for even more competition in video and other broadband services. Also, suppliers in other nations, such as South Korea, are already developing so-called "5G" technology to harness new frequency ranges for terrestrial wireless services.[6]

The presence of competition in local digital transmission services means that, going forward, cable operators cannot successfully exclude video competitors from the market through discriminatory pricing or otherwise. It would be pointless to discriminate against or exclude rival program suppliers from access to digital cable subscribers. The FCC has traditionally ignored this conclusion by regulating each transmission technology as if the others did not exist. This Alice in Wonderland approach is rationalized by the structure of the Communications Act, which also takes a technology-based approach to communications law. Whatever the legal basis for the regulatory silos used by the FCC, the effect is anticompetitive. Regulation generally impedes competition.

Third, even if anticompetitive behavior took place on a broad scale (hypothetically making antitrust solutions impractical) the FCC has the power to provide a competitive rather than a regulatory solution. Virtually all of the growing competition in broadband Internet service involves use of the radio spectrum. The FCC controls the amount of spectrum available for each use. The FCC can and should make more spectrum available for wireless broadband services and also permit licensees in other bands to repurpose their spectrum for wireless broadband. Indeed, it is now clearer than ever, from the FCC's spectrum auctions and subsequent market transactions, that markets rather than regulators should be deciding how spectrum should be allocated and assigned, using a property rights system.

The bottom line here is that if a cable operator or other transmission entity is accused of attempting to exclude competitors through discriminatory tactics there should not be a high index of suspicion, and there should not be a prophylactic regulation. If what appears to be anticompetitive discrimination takes place it is more likely to be because the entity is pursuing a competitive advantage resulting from cost reductions or product improvements than because the intent is to harm consumers. In any case, exclusion is unlikely to be successful. Such situations rule out regulatory regimes and blanket prohibitions because they are likely to result in handicapping rather than encouraging competition. In contrast, antitrust law that treats each case on its merits is well-suited to the task of deterring or penalizing discriminatory behavior in the unusual situations where it may arise. Finally, if the FCC wants

[6] "EU, South Korea to Ally on Faster Mobile Access," Wall Street Journal Online, June 16, 2014. http://online.wsj.com/articles/eu-south-korea-to-lay-out-plan-for-5g-networks-1402844523?KEYWORDS=5G+wireless

to ensure that Internet access is priced competitively, efficiently, and at the lowest possible prices, it can accomplish that goal best by eliminating its longstanding competitive restraints in spectrum markets. For example licensees are presently forbidden to use their spectrum assignment for anything but the narrow purpose specified in their licenses, even if the alternative use creates no interference problems and increases competition.

As noted above, a relevant example of regulatory distortion is the incentive to expand the scope of the firm vertically into the sale of unregulated products, and a concomitant incentive to exclude competitors from such markets. This was the central economic basis for the Justice Department litigation, seeking to disintegrate the old AT&T vertically, that was commenced in 1974 and led to the 1982 settlement and the actual breakup in 1984. One policy basis for the lawsuit was the failure of the FCC, despite many years of effort, to prevent AT&T from finding ways to keep competitors out of potentially competitive markets into which it had integrated vertically. One way to characterize the problem is that because the Bell system owned the local telephone monopolies, it could force them to accept the lost revenues and lost profits that resulted from exclusion of AT&T's long distance and equipment competitors. Some of the loss would be made up by rate-of-return regulation and another part from paying supra-competitive prices for the goods and services supplied exclusively by AT&T to the local companies. FCC staff officials testified in the trial of the case that, despite strenuous effort, their attempts to prevent exclusionary conduct had failed.

Behind the failure of the FCC's attempts to control AT&T's anticompetitive behavior were AT&T's control of the information (about, for example, its costs) required by regulators to monitor and control the company's behavior, AT&T's control of the definitions and pricing of its services, and the inherent constraints of administrative law on agency behavior. A leading example of those problems is the series of regulatory proceedings called Computer Inquiries I, II, and III. In those proceedings, the FCC sought to find an effective method to permit the old AT&T to provide services in unregulated competitive markets while ensuring that AT&T would not or could not engage in anticompetitive behavior by favoring its own subsidiaries.

Among the regulatory strategies explored was the concept of the "fully separated subsidiary," a corporate unit organized to provide competitive services that was separated by an accounting firewall from the monopoly side of the business. But it became apparent that a meaningful accounting separation was impossible so long as the benefits from permitting AT&T to continue to supply inputs both to its own competitive downstream businesses and to the competitors it faced in those businesses arose from economies of scope or scale in the joint provision of inputs to both monopoly and competitive markets. For example, there exists no unique, economically legitimate method to allocate joint and common costs. In any case, so long as AT&T owned both the regulated monopoly business and the related competitive business, anticompetitive incentives would persist. The Computer Inquiry rulemakings ended in morasses of complex, unworkable, and ineffective or self-defeating regulations.

Remarkably similar problems arose in negotiations between AT&T and the Antitrust Division to settle the Section 2 antitrust litigation. The negotiations took place in the last days of the Carter administration and the early days of the Reagan administration. The talks ended with complex regulatory proposals ultimately abandoned by both sides as unworkable. They were referred to by the parties as Quagmire I and Quagmire II. AT&T chairman Charles Brown later explained his decision to accept the relief sought by the government in the antitrust case. The quagmires of unworkably detailed regulatory solutions that seemed inevitably to emerge from efforts to solve the underlying problem of incentive incompatibility (not his phrase) led him to conclude that isolation of the monopoly portion of the business from its competitive components was the only way AT&T would be able to escape endless private and public disputes with competitors and regulators, and become free to focus on its business of providing communication services. AT&T therefore capitulated.

Unfortunately, Judge Harold Greene had not had the benefit of the Computer Inquiries and Quagmire experiences. When the government and AT&T filed the proposed settlement, with its stark and permanent isolation of the monopoly local service companies from participation in any competitive business requiring use of their monopoly facilities, Judge Greene rejected the platonic solution in favor of regulation by the court. He made exceptions for certain "information" services and he insisted on a waiver process, permitting the local monopolies to enter competitive lines of business on a case by- case basis with the court's consent. Predictably, the court was subsequently bogged down in massive and bitter multiyear waiver proceedings, most of which recapitulated the lessons of the Computer Inquiries and the Quagmires.

The AT&T settlement ultimately was undone by the 1996 Telecommunications Act, which sought to solve the problem of competitive access to monopoly local telephone facilities by, among other policies, providing for the further (accounting) disintegration of local telephone facilities into "network elements," each to be offered and priced separately to businesses seeking to compete with the local Bells. The resulting FCC implementation procedures were repeatedly challenged by the Bells, resulting in several trips to the Supreme Court. The 1996 Act failed to induce facilities-based entry into local wire line telephony. Instead, market forces took an end-run around the Bell bottleneck.

Despite Judge Greene's misstep, the temporary isolation of the Bell companies from long-distance service, combined with growing competition from wireless telephone providers and VOIP services such as Skype was sufficient to permit competition to develop both in long-distance and local telephone service. About forty percent of the U.S. population has now abandoned wireline telephone service entirely. The arrival of competition in local telephony (and, as it turned out, video services) was made possible by the advance of digital and wireless technology and continuing reductions in the hardware costs of providing such services. Competition has finally come to local telephone service, not because of a century of government regulation, but in spite of it.

We need not repeat history

The history of attempts to regulate the old Bell System under traditional utility regulation principles (common carrier access rules and maximum price regulation) and the ICC's even less successful experience in eliminating discrimination in transportation suggest some lessons for communications policy today. Those lessons recapitulate the story of the earlier attempts to control discrimination in rail service.

First, as the examples above attest, there is little clear evidence that traditional regulation ever achieved even its narrow objective of making nondiscriminatory service available to all at cost-based prices. On the contrary, discrimination on the basis of factors correlated with price elasticity has been a commonplace of regulation from the time of the 1887 Act to the present. The FCC, if it is to enforce what appears to be its version of net neutrality, will have to compare prices with costs for cable television systems and other multimedia providers. Joint and common costs are an inherent feature of the provision of Internet access and transmission. The task is simply beyond the FCC's abilities.

Second, the regulation remedy makes the disease worse. Regulators and regulation often have served as deterrents to technical innovation, both by incumbent monopolists and potential entrants. Bell Labs was a famous source of *invention*, but AT&T was a ponderous and reluctant *innovator*—that is, implementer of new technology. The framework of regulation and the principles of administrative law gave incumbent producers great leverage in preventing entry by competitors. This, in turn, reduced the incumbent's own incentive to innovate.

Third, there is no body of learning or experience from other contexts suggesting that these failures might be remedied significantly by "better" regulatory practices. The long run interests of consumers arguably are better served by unregulated (and therefore hopefully shorter-lived) monopoly than by regulated (and therefore likely semi-permanent) monopoly. In Internet access, fortunately, there is no incumbent monopoly and every chance that the extent of competition will increase—if the regulators act in consumers' rather than in incumbent suppliers' interest.

With the possible exception of the platonic isolation approach of the original, never-implemented 1982 Justice Department/AT&T settlement agreement, no approach to controlling anticompetitive behavior by vertically integrated, regulated monopolists in the communications industry or in transportation has been successful, and most have injured consumers' interests. If consumers really did face the imminent prospect of last-mile monopoly and anticompetitive access discrimination in broadband services, the sad lesson of history is that the "net neutrality" remedy is a cure far worse than the still hypothetical disease.

ATTACHMENT

Appended Online Materials

"Antitrust and Vertical Integration in 'New Economy' Industries with Application to Broadband Access," *Review of Industrial Organization* 38:4 363-386, 2011. DOI: 10.1007/s11151-011-9291-y

"Antecedents to Net Neutrality," *Regulation,* Fall 2007
http://www.cato.org/pubs/regulation/regv30n3/v30n3-3.pdf

"Assigning Broadband Rights," *Regulation*, Summer 2004.
http://www.cato.org/pubs/regulation/regv27n2/v27n2-2.pdf

PUBLICATIONS

BOOKS

"Decorrupting Government" (unpublished draft monograph, 2013).

The Internet Challenge to Television, Harvard University Press, 1999.

Economics of a Disaster: The Exxon Valdez Oil Spill, Praeger, 1995. (with others)

Electric Utility Mergers: Principles of Antitrust Analysis, Praeger, 1994. (with M. Frankena)

Video Economics, Harvard University Press, 1992. (with S. Wildman)

The Political Economy of Deregulation, American Enterprise Institute, 1983. (with R. Noll)

The Regulation Game: Strategic Use of the Administrative Process, Ballinger, 1978. (with R. Braeutigam)

Economics and Freedom of Expression: Media Structure and the First Amendment, Ballinger, 1975.

Television Economics, D.C. Heath, 1974. (with J. Beebe, and W. G. Manning, Jr.)

CHAPTERS OR SECTIONS OF BOOKS

"Communication Policy Reform, Interest Groups, and Legislative Capture." In R. May, ed. *Communications Law and Policy in the Digital Age: The Next Five Years.* Carolina Academic Press, 2012

"Media Regulation," *Oxford Companion to American Politics,* Oxford Univ. Press 2012

"A Fresh Start in Communications Policy: Two Modest Reforms," in R. May, ed., *New Directions in Communications Policy,* Carolina Academic Press, 2009.

"Antitrust in China 2006: The Problem of Incentive Compatibility," in *Policy Reform and Chinese Markets,* B. M. Fleisher, et al., eds., Edward Elgar, 2008 (with S. Sun and W. Zheng).

"Local Broadband Access: Primum Non Nocere or Primum Processi? A Property Rights Approach," in T. Lenard and R. May, eds., *Net Neutrality or Net Neutering,* Springer, 2006. (with G. Rosston).

"Spectrum Allocation and the Internet," in *Cyber Policy and Economics in an Internet Age*, edited by William Lehr and Lorenzo Pupillo, 2003. (SIEPR Policy paper No. 01-009) (with G. Rosston)

"Broadband Mysteries" in R. W. Crandall and J. H. Alleman, eds, Broadband: Should We Regulate High-Speed Internet Access? Brookings, 2002.

"Media as Industry: Economic Foundations of Mass Communication" in R. Islam, ed., *The Right to Know: Institutions and the Media*, World Bank, 2002.

"A Novel Conference: The Origins of TPRC," in J. MacKie-Mason and D. Waterman, eds., *Telephony, the Internet and the Media: Selected Papers from the 1997 Telecommunications Policy Research Conference*, Erlbaum, 1998; reprinted in S. Braman ed., *Communication Research & Policy: A Sourcebook*, MIT Press, 2002.

"The Future of Television: Understanding Digital Economics," in Noll and Price, eds., *A Communications Cornucopia: Markle Foundation Essays on Information Policy*. Brookings Institution, 1998.

United States v. AT&T: The Economic Issues, in Kwoka and White, eds., *The Antitrust Revolution*, Scott Foresman, 1988; 2nd ed. 1994. (with R. Noll)

"United States v. AT&T: An Interim Assessment," in Hausman and Bradley, eds., *Future Competition in Telecommunications*, Harvard Business School Press, 1988. (with R. Noll)

"Defining Geographic Markets under the 1984 Merger Guidelines: An Economic Perspective (Outline)," in Practicing Law Institute, 27th Annual Advanced Antitrust Seminar, Course Handbook Series No. 581, PLI, 1987.

"The Rise and Fall and Rise of Cable Television Regulation," in L. Weiss, ed. *Regulatory Reform: What Actually Happened*, Little, Brown, 1986. (with P. Gottlieb)

Horizontal Mergers: Law and Policy, ABA Section of Antitrust Law Monograph No. 12, 1986. (contributor)

"Program Competition in the New Video Industry," in E. Noam, ed., *Rivalry Among the Video Transmission Media*, Columbia Univ. Press, 1985. (with S. Wildman)

"Interest Group Behavior and the Political Economy of Regulation," in J. Meyers, ed., *Incentives vs. Controls in Health Policy: Broadening the Debate*, AEI, 1985.

"Some Economic Implications of the Divestiture of the Bell Operating Companies," in H. Shooshan, ed., *Disconnecting Bell*, Pergamon Press, 1984. (with R. Crandall)

The Use of Economists in Antitrust Litigation, J. Greenfeld, ed., ABA Section of Antitrust Law, 1984. (contributor)

"Economic and Postal Pricing Policy," in J. Fleishman, ed., *The Future of the Postal Service*, Praeger, 1983. (with R. Willig)

"Differing Media, Differing Treatment?" in D. Brenner and W. Rivers, eds., *Free But Regulated: Conflicting Traditions in Media Law*, 1982.

"The Rise and Fall of Cable Television Regulation," in L. Weiss, ed., *The Regulatory Revolution*, Little, Brown, 1981.

"Diversity and Television," OTP Staff Research Paper, 1972, reprinted in D. H. Ginsburg, *Regulation of Broadcasting,* West, 1979.

"Alternative Structures for Television," OTP Staff Research Paper, 1972, reprinted in D. H. Ginsburg, *Regulation of Broadcasting,* West, 1979. (with J. H. Beebe)

"The Place of Print in an Electronic Society," in G. O. Robinson, ed., *Communications for Tomorrow: Policy Perspectives for the Future,* Praeger, 1978.

"Cable Television: The Framework of Regulation," in Study on Federal Regulation, App. to Vol. XI, Framework for Regulation, Comm. on Govt'l Affairs, United States Senate, 95th Cong., 2nd Session, October 1978.

"Economic Policy Research on Cable Television: Assessing the Cost and Benefits of Cable Deregulation," in P. A. MacAvoy, ed., *Deregulation of Cable Television*, American Enterprise Institute, 1977. (with others)

"The Role of Analysis in the Formation of Cable Television Policy," in R. E. Park (ed.) *The Role of Analysis in Regulatory Decision Making: The Case of Cable Television,* Lexington Books, 1973.

ARTICLES

"Antitrust and Vertical Integration in 'New Economy' Industries with Application to Broadband Access," *Review of Industrial Organization* 38:4 363-386, 2011. DOI: 10.1007/s11151-011-9291-y

"The Temptation of Media Regulation," *Regulation, Vol. 31, No. 1, Spring 2008*

"Antecedents to Net Neutrality," *Regulation* (Fall 2007) http://www.cato.org/pubs/regulation/regv30n3/v30n3-3.pdf

"China's Competition Policy Reforms: The Antimonopoly Law and Beyond," 75 *Antitrust Law Journal* 401 (2008) (with Su Sun and Wentong Zheng) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=978810 Reprinted in *Library of Essays on Chinese Law, Volume III, Law and the Market Economy in China,* Perry Keller, ed., 2011.

"Antitrust in China: The Problem of Incentive Compatibility," 1 *Journal of Competition Law and Economics* Winter, 123-48, 2005, (with Su Sun and Wentong Zheng). http://ssrn.com/abstract=595801

"Assigning Broadband Rights," *Regulation*, Summer 2004. http://www.cato.org/pubs/regulation/regv27n2/v27n2-2.pdf

"Coordinated Interaction and Clayton Enforcement," 12:1 *Geo. Mason L. Rev.* 89, 2003 (with Stuart Gurrea) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=406840

"Regulatory Reform: The Telecommunications Act of 1996 and the FCC Media Ownership Rules" 2003 *Michigan State-DCL Law Review* 671, 2003. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=406261

"Determining Optimal Access to Regulated Essential Facilities," 58 *Antitrust Law Journal* 887, 1989.

"Competitive Policy Considerations in Cable Television Franchising" 4 *Contemporary Policy Issues* 69, April 1986. (with P. Greenhalgh)

"The Evolution of Clayton §7 Enforcement and the Beginnings of U.S. Industrial Policy" 31 *Antitrust Bulletin* 409, Summer 1986. (Reprinted in D. Audretsch, ed., *Industrial Policy and Competitive Advantage,* Edward Elgar, 1997.)

"An Economic Analysis of Alternative Fee Shifting Systems" 47 *Law and Contemporary Problems* 801, 1984. (with R. Braeutigam and J. Panzar)

"Structural Approaches to the Problem of TV Network Economic Dominance," 1979 *Duke Law Journal* 191, 1979

"Diversity in Broadcasting: The Economic View of Programming," 28 *Journal of Communication* 43, Spring 1978.

"Television Programming, Monopolistic Competition and Welfare," 91 *Quarterly Journal of Economics* 103, February 1977. (with A. M. Spence)

"Kickbacks, Specialization, Price Fixing, and Efficiency in Residential Real Estate Markets," 29 *Stanford Law Review* 931, May 1977. (with J. Grundfest)

"Regulating Diversity: The Case of Radio Formats," 21 *Journal of Broadcasting* 305, Summer 1977.

"Television Rivalry and Network Power," 24 *Public Policy* 33, Winter 1976. (with W. Manning)

"Newspaper and Television Station Joint Ownership," 18 *Antitrust Bulletin* 787, Winter 1973.

"Monopoly Pricing in Combined Gas and Electric Utilities," 15 *Antitrust Bulletin* 713, Winter 1970.

"Public Policy and Emerging Technology in the Media," 18 *Public Policy* 539, Summer 1970.

NOTES AND REVIEWS

"The FCC and the Unfree Market for TV Program Rights," Free State Foundation, Perspectives from FSF Scholars, March 2011.

"Saving Mt. Wilson -- and Increasing Spectrum Efficiency," Free State Foundation, Perspectives from FSF Scholars, October 27, 2009.

"A Better Way to Manage Spectrum," Free State Foundation, Perspectives from FSF Scholars, April 6, 2009.

"The Temptation of Media Regulation," Free State Foundation, Perspectives from FSF Scholars, May 1, 2008

Book review of Beato and Laffont, eds. *Competition Policy in Regulated Industries: Approaches for Emerging Economies. Journal of Economic Literature*. 2005.

"Imported Antitrust," Review of Michal Gal, *Competition Policy for Small Market Economies,* 21 *Yale Journal on Regulation* 441 2004. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=525042

Book Review of G. W. Brock, Telecommunications Policy for the Information Age, 34 *Journal of Economic Literature* 797 1996.

Book Review of F.M. Scherer, Competition Policies for an Integrated World Economy, 33 *Journal of Economic Literature* 1993, 1995.

"Flawed Reasoning," *Public Utilities Fortnightly,* July 15, 1993. (with M. Frankena)

"Antitrust Analysis of Electric Utility Mergers After the Energy Policy Act," International Merger Law, No. 30, February 1993. (with M. Frankena)

"Merger Control in Argentina," *International Merger Law,* No. 27, November 1992.

"Competitive Issues in Electric Utility Mergers," International Merger Law, No. 26, October 1992. (with M. Frankena)

"The Electronic Media," in Proceedings of the 1990 Stanford Symposium on Democracy, Diversity, and News Media Ownership (forthcoming).

Book Review of P. Temin, The Fall of The Bell System, 1988 *Regulation*: AEI Journal on Government and Society 2.

Book Review of A. Brown, Commercial Media in Australia: Economics, Ownership, Technology and Regulation, 17 *Economic Analysis and Policy* (n.s.) 105, March 1987.

"Recent Developments in Cable Television Regulation," 1 *Regulatory Reform: The ABA Section of Antitrust Law Industry Regulation Committee Newsletter*, December 1985.

"Cynicism and Credulity in Explaining Regulation," in *The Political Economy of Regulation: Private Interests in the Regulatory Process*, FTC Law and Economics Conf., March 1984.

Book Review of F. Fisher, et al., Folded, Spindled, and Mutilated: Economic Analysis of U.S. v. IBM, *Sloan Management Review*, Winter 1984.

R. G. Noll and B. M. Owen, "What Makes Reform Happen?" *Regulation*, March/April 1983.

"Discussion" prepared for the Session on the Economics of the First Amendment, annual meetings of the American Economic Association, New York, December 1973, 64 *American Economic Review* 400, May 1974.

"Comment on the Perfectly Competitive Allocation of Public Goods," *Review of Econ. and Statistics*, November 1969.

CONFERENCE PROCEEDINGS

Papers and Proceedings, 1972 Conference On Telecommunications Policy Research, Office of Telecommunications Policy, 1972. (editor)

Report of Papers and Proceedings, 1975 Conference on Telecommunications Policy Research, Aspen Institute for Humanistic Studies Program on Communications and Society, 1975. (editor)

OTHER

Decorrupting Government: The United States Board of Overseers. working paper. 2013.

Consumer Welfare and TV Program Regulation, Mercatus Center Report May 2012

Communication Policy Reform, Interest Groups, and Legislative Capture, working paper 2012.

Shooting in the Dark: Comments, CeLPU & CTIC Fourth International Conference on Equal Access Issues in Communications Law, Honolulu, November 26, 2010

Antitrust and Vertical Integration in 'New Economy' Industries: Application to Broadband Access Stanford Law and Economics Olin Working Paper No. 400. October 26, 2010.

Old Media Policy Failures, New Media Policy Challenges, Keynote Speech, Conference on the Future of Public Broadcasting, University of Bayreuth, Germany May 2009

Comments of 71 Concerned Economists: Using Procurement Auctions to Allocate Broadband Stimulus Grants, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1377523 2009

"Supreme Court Amicus Brief Regarding Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County, Washington" (November 01, 2007). Baumol, William J., Blaydon, Colin, Cicchetti, Charles J., Dubin, Jeffrey A., Fisher, Franklin M., Hahn, Robert W., Hausman, Jerry A., Hogan, William W., Kalt, Joseph P., Kleindorfer,

Paul R., Michaels, Robert J., Owen, Bruce M., Pirrong, Craig, Salinger, Michael A, Shavell, Steven, Smith, Vernon, Stulz, Rene, Sweeney, James L., Willig, Robert D. and Wolfram, Catherine D., AEI-Brookings Joint Center Brief No. 07-02 Available at SSRN: http://ssrn.com/abstract=1034200

Bamberger, G., Baumann, M., Gale, J. Hazlett, T., Katz, M., Mikkelsen, K., and Owen, B., Economists Joint Letter on Bundling of Cable Programming, FCC Docket MB 04-207, 2004

Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets in Promoting Efficient use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, FCC WT Docket No. 00-230, (with 36 other concerned economists) February 7, 2001.

"Brief of Economists Amici Curiae," State of New York, et al., v. Microsoft, United States District Court (DC), (with others) June 18, 2002.

"Lies, Damn Lies and the Legal Fictions of American Broadcast Regulation," presented at American Enterprise Institute Conference on the Role of Government in the Transition to Digital Television, October 26, 2001.

"Vertical Integration by Cable Systems," prepared for ABA Section of Antitrust Law, Cable Television: Was Regulation Right or Wrong?, National Symposium on Competition in the Cable Television Industry, Washington, D.C., June 12, 1990.

"Economic Incentives and Legal Reform," *Perspectives: Journal of the Overseas Young Chinese Forum*, (English edition). (with J. Portillo) June 2003

"Economists as Trustbusters?" *Wall Street Journal*, January 22, 1987.

"Cable Competition at Sufferance of Cities," *Wall Street Journal*, May 9, 1985.

"Give AT&T the Freedom It Didn't Want," *Wall Street Journal*, December 6, 1984.

"How Roles Grew in a TV Rule-Making Drama" *Wall Street Journal*, October 19, 1983. (with R. Noll)

"A Most Expensive 'Real Estate Custom,' "Los Angeles Times, December 4, 1977. (with J. Grundfest)

RESEARCH REPORTS

"The Net Neutrality Debate: Twenty Five Years after United States v. AT&T and 120 Years after the Act to Regulate Commerce" Stanford Institute for Economic Policy Research Working Paper 06-15 February 2007. http://siepr.stanford.edu/papers/pdf/06-15.html

"Antitrust in China 2006: The Problem of Incentive Compatibility," August 2006, (with Su Sun and Wentong Zheng). Working Paper, Stanford Center for International Development. http://siepr.stanford.edu/papers/pdf/03-40.html

"Confusing Success with Access: 'Correctly' Measuring Concentration of Ownership and Control in Mass Media and Online Services Stanford Law and Economics Olin Working Paper No. 283, SIEPR Policy Paper No. 03-026. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=545302 May 2004

"Cable Networks: Bundling, Unbundling, and the Costs of Intervention," Economists Incorporated, July 2004 (with John Gale).

"The Effect of Controlling for Frequency Band (UHF/VHF) When Comparing the Quantity of Local News and Public Affairs Programming on Television Broadcast Network Owned and Operated Stations Relative to Network Affiliate Stations." Economists Incorporated. Filed at FCC May 12, 2003. (with M. Baumann and R. Mortimer)

"Affiliate Clearances, Retransmission Agreements, Bargaining Power and the Media Ownership Rules." Economists Incorporated. Filed at FCC April 21, 2003. (with M. Baumann and K. Mikkelsen)

"The Project for Excellence in Journalism's PEJ Study of Ownership and Quality of Newscasts: A Critique. Economists Incorporated. Filed at FCC March 13, 2003. (with M. Baumann and K. Mikkelsen)

"News and Public Affairs Programming: Television Broadcast Network Owned and Operated Stations Compared to Network Affiliated Stations." Economists Incorporated. Filed at FCC December 19, 2002. (with K. Mikkelsen, R. Mortimer, and M. Bauman)

"Statement on Media Ownership Rules." Economists Incorporated. Filed at FCC January 2, 2003.

"News and Public Affairs Programming Offered by the Four Top-Ranked Versus Lower-Ranked Television Stations." Economists Incorporated. Filed at FCC January 2, 2003. (with K. Mikkelsen and A. Ivory)

"Effect of Common Ownership or Operation on Television News Carriage, Quantity and Quality. Economists Incorporated. Filed at FCC January 2, 2003. (with K. Mikkelsen, R. Mortimer, and M. Baumann)

"Comments on FCC Ownership Study #10. Economists Incorporated. Filed at FCC January 2, 2003. (with M. Baumann, R. Mortimer, and K. Mikkelsen)

"Comment On FCC Ownership Study #4. Filed at FCC January 2, 2003. (with M. Baumann and R. Mortimer)

"Concentration Among National Purchasers of Video Entertainment Programming." Economists Incorporated. Filed at FCC January 2, 2003. (with M. Baumann)

"Counting Outlets and Owners In Milwaukee: An Illustrative Example." Economists Incorporated. Filed at FCC January 2, 2003. (with K. Mikkelsen)

"Preemption By O&Os Compared To Affiliates. Economists Incorporated. Filed at FCC January 2, 2003. (with M. Baumann and A. Ivory)

"News and Public Affairs Programming: Television Broadcast Network Owned and Operated Stations Compared To Network Affiliated Stations." Economists Incorporated. Filed at FCC January 2, 2003. (with K. Mikkelsen, R. Mortimer and M. Baumann)

"Economic Comments on Media Ownership Issues. Economists Incorporated. Filed at FCC February 3, 2003. (with M. Baumann and K. Mikkelsen)

"Competition Policy in Latin America" Stanford Law and Economics Olin Working Paper No. 268. http://ssrn.com/abstract=456441 SIEPR Policy Paper No. 03-003. (October 2003).

"Legal Reform, Externalities and Economic Development: Measuring the Impact of Legal Aid on Poor Women in Ecuador" May 2003. Stanford Law and Economics Olin Working Paper No. 255; Stanford Law School, Public Law Working Paper No. 55. http://ssrn.com/abstract=406260 SIEPR Policy Paper No. 02-032 (with J. Portillo)

Impact of Legal Aid: Ecuador, World Bank, 2003. (with others)

An Economic Approach to Project Impact Measurement and Evaluation Methods in Legal and Judicial Reform, World Bank, 2002 [DRAFT]

"Cable Modems, Access and Investment Incentives," report prepared for the National Cable Television Association, December 1998. (with G. Rosston)

Competition Policy in Peru: Report and Recommendations, November 1995. (with others)

An Economic Analysis of the Broadcast Television National Ownership, Local Ownership and Cross-ownership Rules, May 17, 1995, 2 vols. (with others)

An Economic Analysis of the Prime Time Access Rule, March 7, 1995, and A Supplementary Analysis of the Prime Time Access Rule, May 26, 1995. (with others)

Cable Rate Regulation—A Multi-Stage Benchmark Approach, January 1993. (with others)

Competition Policy and Consumer Protection in Argentina, Report of the Advisory Team to the Government of Argentina, July 1992. (with others)

An Economic Analysis of the Effect of the Exxon Valdez Oil Spill on Alaskan Seafood Prices, Report to the Trans-Alaska Pipeline Liability Fund, December 1991. (with others)

Competition Policy in Jamaica, Report of the Advisory Team to the Government of Jamaica, January 1991. (with R. Skitol and R. Crandall)

Federal Antitrust Policy and the Incentive to Undertake Research and Development in the Information Technologies, prepared for the Office of Technology Assessment, U.S. Congress. Economists Incorporated Research Report, 1989. (with M. Spence and P. Greenhalgh)

Economic Effects of the Financial Interest and Syndication Rule. Economists Incorporated Research Report, 1983. (with R. Crandall and R. Noll)

A Framework for Economic Analysis of Electronic Media Concentration Issues. Economists Incorporated Research Report, 1982. (with K. Baseman)

Notes on the Merger Guidelines: Economic Perspectives, Economists Incorporated Research Report, 1982. (with P. Greenhalgh and W. Myslinski)

Five Propositions on the Social Effects of Television, prepared for the Sloan Foundation, Duke University, 1979.

Policy Options in Mobile Radio Spectrum Management, prepared under contract with the UHF Task Force of the FCC, Stanford University, 1978. (with D. Dunn)

Licensing of Real Estate Brokers as Underwritten Title Insurance Agents, Report to the State of California, Studies in Industry Economics #64, Stanford Univ., 1976. (with J. Grundfest)

SEARCH

THE WALL STREET JOURNAL. TECH

BRUCE's Journal Live Help

WORLD CUP 2014 » BEL vs ALG 12 PM ET TODAY GROUP STAGE | BRA vs MEX 3 PM ET TODAY GROUP STAGE | RUS vs KOR 6 PM ET TODAY GROUP STAGE | Follow us: @WSJSports | MORE

TECHNOLOGY

EU, South Korea to Ally on Faster Mobile Access

So-Called 5G Could be Crucial for European Bloc, Which Trails Telecom Rivals

By FRANCES ROBINSON in Brussels and MIN-JEONG LEE in Seoul CONNECT

In South Korea, more than one mobile device is in use for each person. *Agence France-Presse/Getty Images*

In the race to get the world's fastest mobile Internet service, South Korea and the European Union on Monday announced a major new pact to join forces on so-called 5G networks.

WSJ Radio

Listen to the latest technology news from The Wall Street Journal Radio Network.

00:00 | 05:11

The deal sets up a joint group to develop systems, set standards and get radio frequencies ready to accommodate the new technology. The aim is to have a global consensus and vision on 5G by the end of 2015, according to a statement released by the Korean government.

The agreement could be crucial for the EU, which is lagging behind in the global telecommunications race after late and patchy implementation of the current 4G standard. While users can download a one-hour high-definition film in six minutes on 4G mobile Internet, 5G would slash the time to six seconds, according to EU data.

European businesses have long warned that Europe's growth will suffer if the bloc continues to trail its rivals on mobile technology. The 5G race is already on: Huawei Technologies Co. of China is investing heavily—$600 million through 2018—in the next-generation network. The U.S. doesn't have a nationally backed program, but universities are researching various aspects of the next-generation standard.

The Journal reported the news on Sunday, based on a draft of the agreement.

WSJ.D

The EU is eager to regain its position as a global leader in mobile standards. The European GSM standard led the world

Popular Now #WatchThis!

ARTICLES

1 YouTube Superstar Earns Millions Playing Games

2 The Race Is on for 5G

3 The End of the Shooting Guard

4 U.S. Strikes Early, and Late, to Beat Ghana

5 AmEx Revs Up Pursuit of the Masses

VIDEO

1 PewDiePie, On Being the World's Most Famous YouTuber

2 The $30 Trillion Question

3 U.S.-Iran Dialogue on Iraq 'Extremely Dangerous'

4 Paper Airplane to Drone in 60 Seconds

WSJ.D is The Journal's home for tech news, analysis and product reviews

- Samsung Galaxy Tab S First Look
- Priceline to Buy OpenTable
- Your Stuck-at-Work Guide to World Cup 2014

when people first started using portable phones.

While Europe rested on its laurels, South Korea pushed ahead to set out fresh revenue streams, with the first comers to the technology expected to hold a leading share in the industry.

5 San Antonio Spurs Win Fifth NBA Title

South Koreans are perhaps the world's most dedicated smartphone users. The country's mobile-penetration rate of more than 100% means that more than one mobile device is in use for each person.

Forging ahead together would benefit both Europe's mobile-equipment manufacturers—such as Ericsson, Nokia Siemens Networks Oy and Alcatel-Lucent SA (ALU FR +0.88%) —and, among others, South Korea's Samsung Electronics Co. (005930 SE 0.00%), the world's largest maker of smartphones.

Samsung, which relies heavily on its mobile business for profit, is expected to play an active role in realizing South Korea's goal of seizing a firm foothold on patent rights on related telecom technologies.

Last year, the company claimed a breakthrough in the development of 5G technology, saying it found a way to transmit large volumes of data using a much higher frequency band than conventional ones, which would eventually allow users to send massive data files at much faster speeds through their mobile devices, "practically without limitation." In January, the South Korean government announced its road map for 5G wireless-communication technology, with a goal of being the first to bring the technology to commercial markets, in December 2020.

This would be achieved through joint private-sector efforts involving the country's three mobile carriers— SK Telecom Co. (017670 SE +1.96%), KT Corp. and LG Uplus Corp. (032640 SE +1.78%) —and manufacturers such as Samsung and LG Electronics Inc. (066570 SE +1.17%) The government forecast the country would invest a combined 1.6 trillion won ($1.57 billion) over the next seven years in trying to bring the technology live.

Under the plan, the government is aiming for total revenue of 331 trillion won from sales of mobile devices and network equipment that support 5G communications technology, during the 2020-26 period.

From the EU side, in December 2013 the European Commission said that it would allot €700 million ($948 million) and industry partners more than €3 billion to conduct exploratory research into 5G "without delay." The commission, the EU's executive arm, intends to select the first set of projects to fund at the end of this year, with €125 million to allocate.

The partnership will be led by two groups: Europe's 5G PPP, which is based in Belgium and includes European technology and telecom companies such as Telefónica SA (TEF MC +0.18%) and Nokia Oyj (NOKIAV HE +0.77%) ; and its South Korean equivalent, the 5G Forum.

Work on 5G should start "the sooner the better—it is extremely important that we take the lead again," said EU digital commissioner Neelie Kroes. "In the '90s we were in the driver seat, talking about GSM, so it would nice to be back in that position."

Write to Frances Robinson at frances.robinson@wsj.com and Min-Jeong Lee at min-jeong.lee@wsj.com

WSJ In-Depth

Expats Break Up With Uncle Sam to Escape

Asylum Policy Gives Inside Track to Gays

Allergan Bid Puts Valeant's R&D in Focus

The New York Times | http://nyti.ms/1qbObFG

MEDIA | NYT NOW

F.C.C. Begins Investigation Into Quality of Internet Download Speeds

By EDWARD WYATT JUNE 13, 2014

WASHINGTON — The Federal Communications Commission has opened an investigation into recent deals where entertainment companies like Netflix have agreed to pay Internet service providers like Comcast and Verizon for faster video delivery, a practice that critics contend will divide Internet service into fast and slow lanes.

Tom Wheeler, the F.C.C. chairman, said on Friday that the purpose of the investigation was to see whether consumers were getting the speed and quality of service that Internet service providers had promised. The inquiry resulted in part from more than 19,000 public comments submitted to the F.C.C. in recent weeks urging it to protect Internet freedom, he said.

"Consumers pay their I.S.P. and they pay content providers like Hulu, Netflix or Amazon," Mr. Wheeler said. "Then when they don't get good service, they wonder what is going on. I have experienced these problems myself and know how exasperating it can be."

He added: "To be clear, what we are doing right now is collecting information, not regulating. We are looking under the hood. Consumers want transparency. They want answers. So do I."

The thousands of comments from the public came in response to the agency's proposal last month to institute a new set of rules that Mr. Wheeler and other commissioners said would keep the Internet free and maintain net neutrality, the concept that Internet service providers should

treat all legal web traffic equally.

Critics, however, say the F.C.C.'s proposal would destroy net neutrality by allowing pay-for-priority deals, which could stifle start-up companies that do not have the cash to pay the tolls.

The move by the F.C.C. is significant because it has begun an investigation of Internet service providers at the same time that it is trying to define whether it has jurisdiction over their businesses. There is no guarantee that the commission has the power to do anything, because there are currently no rules in place to enforce net neutrality; two earlier attempts by the F.C.C. to forge rules were thrown out by an appeals court.

The agency has managed to get Internet service providers to agree to abide by net neutrality. But the deal between Netflix and Comcast, struck in February, has opened the commission to criticism that it is not enforcing net neutrality principles. Even Netflix itself, after agreeing to pay Comcast, objected to the terms of the agreement, asserting that it should not have to pay to stream its video content to its customers.

Mr. Wheeler as well as many others at the F.C.C. and in the Internet industry say that such agreements — known as peering or interconnection agreements — are not covered by net neutrality, arguing that the concept extends only to the so-called last mile of Internet service to the consumer's screen.

The agency does, however, have the authority to ensure that telecommunications companies act in the public interest, and Mr. Wheeler appears to be acting under that authority.

Mr. Wheeler said he had viewed, "a couple of times," a recent comedy segment by John Oliver on HBO's "Last Week Tonight" that explored the net neutrality debate. Mr. Oliver urged viewers to contact the F.C.C. and protest against net neutrality rules that would allow fast and slow lanes. So many people did so that the comments section of the F.C.C.'s website became gridlocked.

Calling the sketch "creative and funny," Mr. Wheeler also noted that "satire is not C-Span," suggesting that Mr. Oliver stretched some facts in

the interest of comedy. Nevertheless, "it represents the high level of interest that exists in the topic in the country, and that's good," Mr. Wheeler said. Comcast and Verizon said they welcomed the inquiry.

"We welcome this review, which will allow the commission full transparency into the entire Internet backbone ecosystem and enable full education as to how this market works," Sena Fitzmaurice, Comcast's vice president for government communications, said in a statement.

Most Internet service providers have said they intend to abide by net neutrality, and Comcast, as a result of concessions made when it bought NBCUniversal, is bound by the F.C.C.'s previous rules even though a court threw them out. Comcast has also said it will abide by net neutrality rules as a condition of its present efforts to buy Time Warner Cable, as has AT&T with respect to its proposed acquisition of DirecTV.

Public interest and consumer advocacy groups cheered the opening of the F.C.C. inquiry. These groups have been pushing for a strict definition of net neutrality and have asked the agency to reclassify Internet service so that it can regulated like a utility, similar to telephone service or electricity.

Republicans in Congress have warned the F.C.C. against trying to regulate the Internet, echoing comments made by the agency's two Republican commissioners, who have said the net neutrality proposal is "a solution in search of a problem."

But Senator Patrick J. Leahy, the Vermont Democrat who leads the Judiciary Committee, said the inquiry was important.

"As I said during the Judiciary Committee's hearing on the Comcast-Time Warner Cable merger," he said, "when Internet service providers can charge tolls or block access to their networks at the interconnection point, net neutrality rules alone may no longer be enough to promote an open Internet."

A version of this article appears in print on June 14, 2014, on page B2 of the New York edition with the headline: F.C.C. Begins Investigation into Quality of Internet Download Speeds.

Mr. FARENTHOLD. Thank you, Professor.

We will now go to Professor Wu.

TESTIMONY OF TIM WU, PROFESSOR OF LAW, COLUMBIA LAW SCHOOL

Mr. WU. Chairman, Ranking Member, Members of the Subcommittee, thanks so much for holding this hearing. I welcome the opportunity.

I can summarize my comments in a few sentences. I have the highest admiration for the antitrust laws and the agencies enforcing antitrust laws. But I simply don't think they are equipped to handle the broad range of values and policies that are implicated by net neutrality and by the open Internet.

Just to take a sample, what I am suggesting is that when we consider Internet policy, what we are really considering is not merely economic policy, not merely competition policy, but also media policy, social policy, oversight of the political process, issues of free speech.

There are a wide range of noneconomic values that I fear the antitrust law, despite its expertise, despite the decades, indeed, over a century of lawmaking in that area, simply does not capture.

And for that reason, I think that, despite its imperfections, we should stick with the process of FCC oversight of the Internet and enforcement of net neutrality rules.

So let me break some of these ideas out a little bit.

First, as I said, I have enormous appreciation for the antitrust laws and the agencies that enforce them. I served for some time at the Federal Trade Commission.

And I think there are some advantages that the FCC could learn from in this area. There is a commendable insulation from influence. The adversary process is very well handled. I think the FTC does a good job at what it does.

The problem is with the FTC and other antitrust agencies is that they are optimized for one kind, or two kinds in the case of FTC, two kinds of problems. And that is the protection of consumer welfare through the competitive process.

And this is obviously a worthy goal. I am not going to sit here and say we shouldn't protect the competitive process. That is terrific.

And this is typically accomplished by focusing on a complex and very sophisticated economic analysis, which, again, I commend when we are considering only the issue of competition.

The problem is that in its day-to-day operations, the Internet implicates a whole host of noneconomic values, which are simply not well-captured by antitrust processes.

Let me just give an example. Let's imagine we had an Internet service provider that for its own reasons decided it did not like political speakers on one or another side of the spectrum. Let's say we had a different ISP that for whatever reason believed that local news sources were less valuable than national news sources and decided to favor them. Or let's say we had an ISP that had a bias in favor of big speakers as opposed to small speakers, for whatever reasons. Or maybe just something totally irrational, like it favored one sports team, it just thought the New York Rangers were a bet-

ter hockey team despite losing the Stanley Cup than the L.A. Kings, and so tried to adjust coverage around sports.

Whatever it was, these are the kinds of issues, whether political, social, sports, whatever, you name it, that simply do not register in the antitrust analysis, because if you have political bias, it doesn't necessarily give a competitive advantage to the ISP.

And so what I am trying to suggest here is that at stake in the net neutrality debate is really protection of the American political process and protection of the United States as an open society. And we can't accomplish that simply—we can't leave a matter that important to the economists. That is what I am trying to suggest.

I have great respect for economists. I have a great respect for economic analysis. But I want to suggest we cannot leave the multiple values at stake in American society and in our political process to mere economic analysis.

And I will close my comments right there. Thank you very much.

[The prepared statement of Mr. Wu follows:]

Testimony of Tim Wu, Professor of Law, Columbia Law School

House Judiciary Subcommittee
on
Regulatory Reform, Commercial and Antitrust Law

"Net Neutrality: Is Antitrust Law More Effective than Regulation in Protecting Consumers and Innovation?"

June 20, 2014

Thank you for inviting me to testify about the prospects of using antitrust law, and in particular the powers of the Federal Trade Commission, to protect the norms related to Net Neutrality and the Open Internet.

I stand second to no one in my respect and admiration for the Federal Trade Commission and the men and women who work there. I enjoyed the time I spent at the Commission, and I think the agency has a strong institutional culture appropriately focused on the consumer. The Commission's decisions are thoughtful and relatively immune from undue political influence. Moreover, as an agency that oversees so many different industries, it is inherently less vulnerable to so-called regulatory capture. I should also say that I am a believer in the antitrust law, which I think has a critical role to play in protecting the competitive process.

In short, I think the Commission is good at what it does and that the antitrust laws are important. Nonetheless I do not think the Commission is the right agency to oversee communications and media policy, as its enforcement of Net Neutrality rules would necessarily imply. The basic reason is straightforward. As I see it, the Commission is optimized to deal with two issues, both described in Section 5 of the Federal Trade Commission Act. The first is protection of the competitive process; the second is detecting and punishing the deception of buyers. These are, to be sure, important tasks. But they implicate only a subset of the important values and policies at stake.

In particular, there are three very important public values that I fear FTC oversight might not address:

Free Speech & the Political Process. There is, in our times, an intimate relationship between Internet policy, free speech and the political process. At the risk of stating the obvious, the Internet now serves as an incredibly important platform for both political and non-political speech of every possible description. In this respect, it probably comes closer than any

other speech technology to creating Oliver Wendell Holmes' vision of a marketplace of ideas. The Internet has also served as the launching pad for numerous political movements and campaigns, and has tended to provide a place for outsider parties and candidates to challenge the establishment.[1]

When we understand the Internet as a speech and political platform, it is clear that protecting the open Internet – dealing with matters like discrimination as between competing forms of content – has obvious implications for both free speech and the political process. You might say that to protect the open Internet is much the same thing as protecting the United States as an open society.

This becomes obvious when we look abroad, to countries where the Net Neutrality norms are less established and routinely violated. In many places around the world, we find the Internet censored by both government and private entities. Consequently it has become an important part of State Department policy to try and promote an open Internet abroad. As Secretary of State John Kerry remarked in April, "we need to continue to stand as we have for open markets, for open societies, and for an open Internet. ... The places where we face some of the greatest security challenges today are also the places where governments set up firewalls against basic freedoms online."

Unfortunately, issues like protecting an open society or safeguarding the political process are not, I'd suggest, ones that the Federal Trade Commission was designed to deal with. The Commission is, rather, designed to protect the competitive process. It approaches that problem generally by relying on sophisticated economic analysis. There is much to say in favor of this approach for competition policy. But economic analysis was never designed to reflect diffuse but important values like speech or a healthy political process. Questions like how it might continue to protect an open society and prevent excessive control over political speech are not really the kind of things the Commission is designed to think about.

Consider a few examples. Imagine an Internet carrier slows down Internet news sites of a particular political viewpoint. Consider a mobile carrier deciding it will decline to allow on its network any site that asked for political donations. These are forms of conduct that raise important issues, but simply do not register in a competition analysis, particularly if the action entailed no particular economic advantage for the parties involved. But they would obviously raise important concerns about the political or speech environment in the United States. The examples given may be blatant, but I

[1] Some of this can be credited to the neutral design of the network, which tends to level the playing field between larger and smaller speakers. See Robin Lee & Tim Wu,

want to suggest that speech concerns are inherent in many of the questions faced in any Net Neutrality dispute, or the underlying rules.

Other Non-Economic Values. The point about speech and the political process is a specific example of a broader point. The Federal Trade Commission, as its name suggests, is inherently focused on *trade* – the buying and selling of goods and services. Unfortunately, many of the highest value uses of the open Internet are not actually trade in goods or services. They are, rather, transactions whose value cannot be easily measured. Take, for example, an extended family that shares pictures over email or Instagram. This might arguably be one of the highest values of the network, but it doesn't show up in any calculation of gross domestic product. For grandparents usually don't pay their sons and daughters to sell them pictures of their grandchildren, at least in my experience.

Non-economic values are an inherent part of the media and communications industry. For that reason the Federal *Communications* Commission has long been sensitive to any number of non-economic concerns, such as the importance of regionalism, diversity in speech, and others. That has not been the history of the Trade Commission. Consequently, conduct that might affect non-commercial uses of the Internet might not be easy for the Trade Commission to take cognition of, because of its focus on anticompetitive practices and consumer deception. The lack of a quantitative, commercial value threatens to make such harms invisible.

Innovation. Protection of the open Internet has, over the last several decades, functioned as a major innovation policy for the United States. Once again at the risk of pointing out the obvious, since the time of the AT&T breakup countless firms have grown up on the nation's computer networks, creating a major driver of economic growth in this country. Since the 1990s, the United States has returned to a position of clear global leadership in the high technology industries, a position that seemed at times threatened in the 1980s and 1990s.

One way or another, the light-handed protection of open Internet norms over the last twenty years has served to protect the Internet as an innovation platform. I am not saying that the process has been pretty, but it has been effective. The question is whether the antitrust law is well equipped to continue that practice. In theory, the Sherman Act or the FTC's prohibition on unfair methods can be interpreted to try to accomplish some of the same goals. Unlike speech or other non-economic harms, the protection of innovation is a stated goal of antitrust policy, so I will admit the matter is worthy of debate.

The problem is that the tradition in competition practice has been to focus on price-related harms – such as, classically, price-fixing cartels, or exclusionary conduct designed to maintain monopoly prices. As even economists acknowledge, competition policy has struggled to incorporate innovation or dynamic-efficiency concerns in its analysis.[2] I'm not saying that this might be impossible, by any means. But it would require an antitrust approach that is far more focused on innovation, as opposed to pricing harms, that we currently see.

* * *

If antitrust norms do not capture everything at stake in the protection of an open Internet, might the Commission's statute be amended to better equip it to oversee Net Neutrality norms on the Internet? This is, in theory, possible, but I think institutional history and agency expertise take longer time to change that statutory language. The agency, as I said earlier, has a particular, Progressive-Era focus on commercial interactions, anticompetitive conduct, and consumer deception. It knows what it is looking for, and does what it can with the resources it has (I also think it should have more resources, but that's another matter).

Making the Commission the new guardian of an open Internet might, I think, require the agency equivalent of a brain transplant. For the agency to safeguard the open Internet would be to make it an agency dedicated to the protection of speech, innovation and non-economic values. I don't think this would be impossible, but it would require the development of different kind of expertise and mindset at the agency. And, of course, that would come at the expense of losing some of the focus that the agency has now, rendering it less effective at enforcement of consumer protection and antitrust norms. That, at least, is something to be concerned about.

I thank you for the opportunity to discuss these issues with the Subcommittee, and I welcome any questions.

---

[2] Tim Wu, "Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most," 78 Antitrust Law Journal 313 (2012).

Mr. FARENTHOLD. Thank you very much.

We will now recognize the Chairman of the full Committee, the gentleman from Virginia, for the first round of questioning.

Mr. GOODLATTE. Thank you very much, Mr. Chairman, for your forbearance.

And, Professor Wu, while I disagree with much of what you just said, particularly the thought that, as has been attempted in the past, regulating the content offered by broadcasters on television and radio, which was a very popular thing to do in the past, and now that that has been pushed aside to allow for freer speech, I would suggest to you that we have far greater diversity of opinion expressed in that traditional market. And the thought that we would need to have FCC commissioners regulating content on the Internet to make sure that somebody's avenue to access to the Internet was fair and balanced would be, to me, an extraordinarily harmful thing to do.

But I want to commend you on one thing and that is you have picked a name for this subject, "net neutrality," that stuck. I have been at this issue for a dozen years. Congressman Rick Boucher and I introduced legislation before Congressman Conyers and Congressman Sensenbrenner did several years ago. We called it "open access." And I think we would probably agree on the principle that the Internet should have open access to all the competitors and all of the consumers that have access to it.

So let me direct a question first to Commissioner Wright. It has been reported that, during peak hours, Netflix traffic accounts for approximately a third of all Internet traffic. When I saw that recently, I was amazed. I think that is a great credit to the popularity of Netflix, of whom I am one of their customers.

This amount of traffic could indicative of a significant market position. One of the reasons that antitrust law holds more appeal than regulation is its ability to prosecute improper conduct by all market participants, not just a select few. And I am not in any way suggesting that Netflix has an improper market position.

But to the extent that Netflix were to use its market position to engage in anticompetitive behavior, would antitrust law, or existing or proposed regulation, be more effective at policing improper conduct?

Mr. WRIGHT. Thank you, Chairman. I appreciate the question.

And "House of Cards" is quite a show. Whether it grants Netflix market power I think is a question that is one—the place where antitrust analysis began with such a question is what the antitrust laws do with respect to market power is say that if a firm achieves its market position by innovation, by building a better mousetrap, by making content that benefits consumers, this is the type of conduct that the antitrust laws celebrate rather than condemn. Antitrust laws step in when a firm with market power abuses it in such a way to make consumers worse off.

Those sorts of concerns, that a Netflix, for a hypothetical example, or any firm in the broadband space with market power would discriminate in such a way to harm consumers would set off a set of standard analyses. The FTC and other antitrust agencies and courts, for that matter, have analyzed these problems for decades

upon decades in a variety of industries. And the formula, the algorithm, for analyzing these problems are now sort of well-known.

I will say, with respect to the methodology rather than boring you with its details, that it is focused upon asking a central question of whether the conduct at issue makes consumers better off—in this case, Internet users—better off or worse off.

Mr. GOODLATTE. I am going to interrupt you there, because I want to direct one more question, and I have 1 minute left. I am going to direct it to Commissioner McDowell.

Antitrust law has the benefit of being available for prosecution of improper conduct, if and when it occurs. In your view, has there been a demonstration of widespread abuses by Internet service providers or other market participants that justifies deploying a before-the-fact regulatory approach to potential improper conduct on the Internet?

And a follow-up question is, can you explain why the FCC is unwilling to conduct a cost-benefit analysis before regulating such an important component of our national economy? Is it fearful of the potential results?

Mr. MCDOWELL. No, I am not aware of widespread market failure. And that is why for years I called for a bona fide, peer-reviewed market study to be put out for public comment time and time again. The FCC is 0-and-2 in the appellate courts. I can't speak to their motivations.

The courts have now handed the FCC a very tiny legal needle, and it is trying to put a big, fat regulatory rope through that eye. I think they will fail again in court unless they are very, very careful.

And if anything, this is an issue for Congress to look at, if there were a market failure to begin with, which there is not.

Mr. GOODLATTE. Thank you very much.

Thank you, Mr. Chairman.

Mr. FARENTHOLD. Thank you, Mr. Chairman.

We will now recognize the Ranking Member, Mr. Johnson, for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman.

I would ask unanimous consent to include a letter from Consumers Union on the importance of rules to protect net neutrality, for it to be placed in the record.

Mr. FARENTHOLD. Without objection, so ordered.

[The information referred to follows:]

ConsumersUnion
POLICY & ACTION FROM CONSUMER REPORTS

June 19, 2014

The Honorable Spencer Bachus, Chairman
The Honorable Hank Johnson, Ranking Member
Subcommittee on Regulatory Reform,
Commercial and Antitrust Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Bachus and Congressman Johnson:

As strong supporters of both net neutrality and the antitrust laws, Consumers Union, the advocacy and policy arm of Consumer Reports, appreciates the Subcommittee's holding a hearing to bring further attention to the issue of how best to advance the goal of net neutrality.

With the Internet becoming ever-more central to American life, it is essential that we not devolve into a two-tiered society where some get special preference over others. And consumers agree. In a recent national Consumer Reports survey, 58 percent were opposed to allowing Internet service providers to charge extra for preferential treatment. Only 16 percent of those surveyed thought this was a good idea.

Consumers Union has been very engaged in working with the Federal Communications Commission over the years to ensure that net neutrality is the law of the land. We were deeply disappointed when the court overturned the FCC's net neutrality rules, and have been working ever since to convince the FCC to restore the rules by using Title II authority to reclassify the Internet as a public utility. We have also asked the FCC and the Justice Department to investigate the recent Comcast-Netflix deal involving Netflix paying for faster access to Comcast customers, to determine its impact on net neutrality and competition.

As the Subcommittee considers the role the antitrust laws can play in advancing the goals of net neutrality, we hope you will bear in mind that the antitrust laws address specific kinds of harmful marketplace conduct – agreements in restraint of trade, monopolization and attempts to monopolize, and mergers that may substantially lessen competition. However, there are other kinds of harmful marketplace conduct that the antitrust laws do not reach.

Net neutrality is one area where the antitrust laws cannot be counted on to provide the complete solution. An Internet service provider raising prices on targeted content providers or on targeted consumers may or may not be violating the antitrust laws. But even if that conduct is not violating the antitrust laws, it is harming consumers, and it needs to be prohibited. That

is why we support the Federal Communications Commission's vigorous use of its broader public interest authority in this area.

The principle of net neutrality reflects an overriding policy judgment that the benefits of the Internet, for consumers and for the overall economy, are best achieved if the Internet is available to everyone on equal, nondiscriminatory terms. We need a regulatory framework that promises to achieve that goal. The antitrust laws are not inconsistent with that goal, and can also help promote it, but they are not by themselves sufficient to fully achieve it.

We need the FCC to restore network neutrality rules that will ensure an open and accessible Internet for everyone.

Sincerely,

Delara Derakhshani
Telecommunications Counsel

George P. Slover
Senior Policy Counsel

cc: Members, House Judiciary Committee.

Mr. JOHNSON. And I would also, for clarification, just note that, Commissioner Wright, you are testifying before us today only in your individual capacity, and that your oral and written testimony do not necessarily reflect the views of the Federal Trade Commission.

Is that correct?

Mr. WRIGHT. That is correct.

Mr. JOHNSON. All right, thank you, sir.

Now, Professor Owen, you stated that most consumers are confused about the definition of the term "net neutrality." Would you give us your definition?

Mr. OWEN. I don't have my own definition.

Mr. JOHNSON. Okay, well, I will tell you what, then——

Mr. OWEN. I do my best to infer it.

Mr. JOHNSON. All right, let me ask, then, for Professor Wu to give us his definition of the term.

Mr. WU. Net neutrality is a principle that suggests that Internet carriers should give consumers what they want when they want it, and not stand in the way, not to block some sites, and not to favor some sites over others. It is just a basic principle of nondiscrimination, which we have in many public accommodations, inns, hotels, airlines, and so forth, as applied to the basic transportation facilities of the Internet.

Mr. JOHNSON. All right, thank you.

Commissioner Wright, the U.S. Supreme Court's recent decision in *American Express v. Italian Colors* upheld the rights of companies to force arbitration of antitrust terms through adhesive clauses hidden in contracts in companies' terms of service online.

Are you familiar with that decision?

Mr. WRIGHT. I am vaguely familiar with that decision.

Mr. JOHNSON. Well, in her dissent, Justice Kagan clarified the issue. She said that as a result of that decision, AMEX's contract will succeed in depriving Italian Colors of any effective opportunity to challenge monopolistic conduct allegedly in violation of the Sherman Act. The Federal Arbitration Act, the majority says, so requires. Don't be fooled, she says, only the Supreme Court so requires. The Federal Arbitration Act was never meant to produce this outcome. In the hands of today's majority, arbitration threatens to become more nearly the opposite, a mechanism easily made to block the vindication of meritorious Federal claims and insulate wrongdoers from liability. The Court thus undermines the Federal Arbitration Act no less than it does the Sherman Act and other Federal statutes providing rights of action.

So, Commissioner Wright, in your written testimony, you argue that the courts should set the rules of the road for Internet openness through antitrust law. But how could a complaint of anticompetitive behavior even reach the courts if it is lawful to force every consumer, small business, and employee to arbitrate their claims in a foreign venue that is secret, that is for profit.

You are familiar with arbitration process—no jury trial, no right to appeal.

How does your opinion about how the Internet should be regulated fare in light of that Supreme Court ruling?

Mr. WRIGHT. I appreciate the question, and I am going to give you two quick answers. One is, there is nothing in that decision that would preclude the FTC or DOJ from bringing a case. We are not in arbitration agreements with any of the companies at issue. We bring investigations in areas where there are arbitration clauses all of the time.

Mr. JOHNSON. The public, though, would be banned, essentially, from a jury trial.

Mr. WRIGHT. The second reason—so that speaks for the public agencies, like the FTC and DOJ.

Mr. JOHNSON. We would need the public subject to the government going to court.

Mr. WRIGHT. The second part of the answer, with respect to private rights of action, I can tell you, perhaps not on an industry-by-industry basis, but private rights of actions, both before and after the Supreme Court's decision in Italian Colors, are alive and well.

There is no downtick in exercise of private rights of antitrust action. In fact, over the last 30 years, private rights of action are at an all-time high.

Mr. JOHNSON. Well, they are going to be at an all-time low, as we proceed forward under this U.S. Supreme Court ruling, which actually snuffs out the constitutional right, Seventh Amendment right, to a jury trial where the case in controversy exceeds $20 or more.

So I will, at this time, yield back the balance of my time.

Mr. FARENTHOLD. Thank you very much.

The gentleman from Southern California has indicated that he is under a time constraint, and out of the good sense of yielding to my full Committee Chair on Oversight and Government Reform Committee, I will now recognize Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman. And as a result, I will go to a different Subcommittee on the other side of this wall in just a few minutes, and I thank you.

Professor Wu, I really appreciate your being here. I think you have given us the appropriate characterization of the true reason for net neutrality. You said it was social media policy, speech policy, political policy. You used words including control. All of that, you did voluntarily here, right?

So what you are saying, in effect, is that if the FCC gets ahold of this, we would go back to the "Leave It to Beaver" times, times in which two married adults had to be in twin beds in order to get past the social norms of the day, times in which even today Bill Maher, who I often disagree with, can't be on broadcast, because the FCC won't let him on because he uses the "F" bomb too often, times in which complaints are being considered today and in the last year against "Two and a Half Men" because they are too sexually explicit.

This is the FCC's role. They are a regulatory policy entity that actually does limit free speech, carefully questions moral norms and the like.

Do you have any way to tell me that that is not true, after your opening statement?

Mr. WU. What I am trying to suggest——

Mr. ISSA. Please answer the question, then you can pivot to your suggestion.

Mr. WU. I am suggesting that if the antitrust agencies overtake——

Mr. ISSA. No, no. You were telling me the good reasons for the FCC to have this kind of control. And I have countered with you are absolutely right. Everything you said about social policy, speech, political, these are things the FCC has controlled over the airwaves for my entire life.

Commissioner McDowell, you probably have the best perspective, because you are a former commissioner. And there is nothing like somebody who has been on both sides of it.

Do you have any question but that, in fact, that is still today a part of how the FCC views its mandate, when it takes complaints on whether "Two and a Half Men" is crossing the line in broadcast?

Mr. MCDOWELL. Absolutely. The FCC has control over speech over broadcast licensees under a doctrine called spectrum scarcity, which its days may be numbered at the Supreme Court. We don't know yet.

But it does have control over speech.

And to build on Professor Wu's comments, and a lot of other net neutrality proponents, this is about bringing such controls to the Internet as well. It is social policy, speech policy, political regulation policy. And I think that actually does summarize it quite well, just as he said.

Mr. ISSA. Well, I have been in Washington for nearly 14 years——

Mr. WU. With respect, if I can answer the question?

Mr. ISSA. Well, I think you answered it wonderfully in how you phrased it.

Mr. WU. No, I would just say that I——

Mr. ISSA. Professor, Professor, Professor, I will ask the Chair to remind you this is my time. I got an answer to your question. I will come back to you in a moment.

Mr. WU. All right.

Mr. ISSA. In my 14 years, the one thing I have noticed is that we like to harmonize things.

So, Commissioner Wright and Commissioner McDowell, do you have any question but that there would be, if the FCC takes full net neutrality authority, if you will, that the FCC, by definition, will tend to want to harmonize other spectrum, such as broadcast and its limited cable role, with the Internet?

In other words, the rules of the road for broadcast that have given us not having things on broadcast inevitably would be applied, at least in some part of the Internet, maybe similarly to how we regulate cable can only go so far. And I am just going to give you a simple question: You can't put what some people consider pornography on broadcast television, can you?

Mr. MCDOWELL. No.

Mr. ISSA. And it is extremely limited as to what can be on cable? It cannot be a free-for-all?

Mr. MCDOWELL. It cannot be obscene. It is a different constitutional standard.

Mr. ISSA. Right. But on the Internet today, it is limited only to criminal acts, is that correct? You can put anything on the Internet, no matter how much somebody doesn't like it, as long as it is not a crime, is that correct?

Mr. MCDOWELL. Correct.

Mr. ISSA. And if it is a crime, then law enforcement regulates it?

Mr. MCDOWELL. Correct.

Mr. ISSA. Okay.

Professor Wu, I will give you the last word. Do you see any inconsistency with exactly that? Because you are talking about in your statements about speech policy, social policy, control? Isn't that part of the concern the American people should have, that much of what they see on the Internet could be regulated out of existence?

Mr. WU. No, I disagree. Net neutrality prevents the exact opposite. Net neutrality protects the——

Mr. ISSA. Net neutrality doesn't exist. Net neutrality is a concept, isn't it?

Mr. WU [continuing]. Platform for a diversity of freedom of speech. We have had net neutrality rules, de facto, for the last 20 years. We have had an incredible outpouring of speech from all across the political spectrum.

And I am suggesting that if we maintain——

Mr. ISSA. Professor, Professor, your own words indict you.

One last quick question. It is an antitrust question. Isn't our real ability to ensure competition in our control, if we, as a Congress and this Committee, define the relevant market, so that in fact it is intended—and promote competitiveness by defining a relative market to a low enough level to always ensure free flow of competition?

Mr. JOHNSON. Mr. Chairman, I would ask for regular order, if we are not going to allow Professor Wu to answer the question.

Mr. FARENTHOLD. It is Mr. Issa's time. I indulged you with——

Mr. ISSA. To be honest, any of them can answer any of the questions, and the last question is one.

I think I got the answers from Professor Wu.

Mr. JOHNSON. The time has expired, Mr. Chairman.

Mr. ISSA. Mr. Johnson, when the gentleman goes off of the actual question, it is not his time. And Chairman Conyers is over there, and he knows well. I ask a question. I asked Professor Wu to answer the question and be succinct. Now the fact is the pertinent question right now, and I don't care how much time the Chairman gives to Professor Wu to go on disagreeing with us, but the pertinent question is the antitrust relevant market question.

I would appreciate all four witnesses answering.

Mr. FARENTHOLD. We will give them a short time to answer. And as your time is up, we will allow each witness a couple seconds to go in, and then we will recognize the gentleman from Michigan, if anyone wants to tackle that.

Mr. WRIGHT. I hate to do it at this point, but can you repeat the question?

Mr. FARENTHOLD. No.

Mr. ISSA. It is short. The relevant market, in other words, how we define competition—is competition an entire State or is competi-

tion what is available to you in your home. Those kinds of relevant markets we can set, which, of course, would make antitrust harder and harder to circumvent, which would push for more antitrust control over entities that have 60, 70, or 100 percent market share in your particular rural home.

Mr. WRIGHT. That is a—yes, that is correct. There is a standard mode of market definition analysis with antitrust that I think has very sound economic principles that I think would serve just fine here.

Mr. MCDOWELL. So the definition of markets is very key with what the FCC does in defining the public interest under its public-interest standard. And when it comes to broadband, there is coaxial cable, there is fiber, there is copper, there is DSL.

There is also wireless broadband, the fastest-growing segment of the broadband market. And there is unlicensed wireless broadband, which I have been a big proponent of for a long time.

But also what is important here is how these companies are converging. These and no longer dumb pipes. As everything migrates to Internet protocol, there is intelligence embedded in networks. And if you are a content delivery network, you have networks. And if you are a traditional telco or cable company, you have networks, and you have intelligence and content embedded in those.

And from an engineer's perspective, they are starting to look a lot alike. And so the danger for the government trying to parse this and with a scalpel somehow outguess the marketplace, that is the big danger that will undermine innovation and investment, and our competitive advantage.

Mr. FARENTHOLD. Professor Owen, if you could be real quick, we are way over on time here, if you want to take a stab at it. You are welcome to pass.

Mr. OWEN. I have been invited to pass. I pass.

Mr. FARENTHOLD. Professor?

Mr. WU. All right. I will answer the question.

Market definition is essential to the antitrust policy, and it would determine everything we do in this area. And it is one of the problems in this area, because the FCC is equipped to deal with issues like regionalism, like localism, like diversity, which are important American values that aren't captured by an analysis that only focuses on market definition.

Mr. FARENTHOLD. Thank you very much, Professor Wu.

And we will now recognize the Ranking Member of the full Committee, the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Subcommittee Acting Chairman Farenthold.

Mr. ISSA. He looks good in that chair, though.

Mr. CONYERS. I am impressed with the fact that we have three very distinguished witnesses taking one position, and Professor Wu, I would just like to go through a few things in the minutes that I have.

Would the FCC be regulating content, as was suggested by our full Committee Chairman Goodlatte?

And isn't antitrust regulation weak and slow, and can't operate in a preventive way?

Mr. WU. The answer to the question is the FCC would not be regulating content. Net neutrality is not a call for content regulations. It is a call for nondiscrimination norms on the Internet, which everyone on this panel seems to agree with in one form or another.

And my suggestion is that by having a neutral platform, it has served as an incredible platform for free and diverse speech, and threats to the neutrality network ultimately threaten speech environment and the political process of the United States.

I mean, how many political outsiders have come from nowhere from an Internet campaign? I would suggest, with respect to the Chairman of the full Committee—he seems to have left—that he has things precisely wrong, 180 degrees wrong, and doesn't seem to understand the Internet very well, because, under net neutrality, over the last 20 years, we have an incredible flourishing of speech, including his speech, which would probably not have been heard in an earlier era.

He owes and all speakers owe the Internet an incredible debt of gratitude for getting their voices out there, all of the speakers in our society.

And so what I am suggesting is net neutrality has supported and upheld this network as a platform for speech and a platform for innovation and a platform for noneconomic values. None of this is well-captured by antitrust scrutiny.

The FCC has taken—it hasn't always been pretty, but over the last 20 years, it has taken a light-handed approach that has had incredible benefits for the entire society.

And I agree with your suggestion that the antitrust laws, had they been in place over the last 20 years, probably would not have been adequate to oversee and create the kind of incredible speech and innovation environment we have seen over the last 20 years.

So I thoroughly agree with your suggestion, and I think that the FCC, despite its imperfections, remains the right agency to oversee this network.

Mr. CONYERS. I would like now to turn to our other three witnesses and ask if there was anything objectionable that was just uttered by Professor Wu?

Yes, former Commissioner?

Mr. MCDOWELL. It is great to see you again, Congressman, by the way.

So I am not going to say an objection, but I think there is a fine point of distinction, especially for the House Judiciary Committee, which has jurisdiction over the First Amendment, which is when we are talking about speech, what I think the professor is offering is speech balancing. In the broadcast context, historically at the FCC, we call that the fairness doctrine. That would probably be ruled unconstitutional by the Supreme Court today.

So when you have private parties speaking on private platforms, the constitutional precedent says the government can't balance the speech, that that is actually censorship.

When private parties shout down one another, that is not censorship. Censorship inextricably is intertwined with state power and state involvement.

Now, we want the Internet to be open and free and a great platform. That is going to come through abundance and competition. And that is what regulation actually subverts.

Mr. CONYERS. Could I ask Professor Wu my last question?

Mr. FARENTHOLD. Sure.

Mr. CONYERS. Why can't most people see what I think I have heard? Why is antitrust, which is slower and weaker and can't get in front of a problem, why would it be advocated over the FCC?

Is there something I don't understand going on underneath this discussion?

Mr. WU. I, certainly, don't advocate it.

Antitrust is slower and sometimes weaker. It is not always weaker. The AT&T breakup was pretty strong.

But I think what it does is it would turn, as opposed to being a public debate over the open Internet, it would turn to an economists' debate where you have one set of economists with one set of data and another with another.

And as I have suggested, many of the important values, which I think are values in our communication network, values of our media, would be neglected.

Mr. CONYERS. But there is more than that?

Mr. WU. Yes, there are important values—localism, regionalism, diversity, technical expertise, all of which are lost when we turn to a purely economic analysis that only considers economic, financial aspects of the Internet.

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

Mr. FARENTHOLD. Thank you, Mr. Conyers.

I will now recognize myself for 5 minutes for questions.

I am going to start with Professor Wu. I was going to not engage, but you have drawn me on.

So what is broken now? Give me some examples of where you see Internet service providers regulating political speech or shutting down potential speakers? I don't see a big public outcry that this is happening.

Mr. WU. Right, I would point to the countries outside the United States where they don't have net neutrality to suggest where you see the problem.

Now, in the United States——

Mr. FARENTHOLD. But it is countries themselves that are doing that through their Internet policy, not so much private sector ISPs.

Mr. WU. Often it is a mixture of the two, whether it is the private ISP or the government involved. I also don't think the government should discriminate, should censor the Internet either.

Let me say, the reason we haven't had a problem over the last 20 years is that we have had du jure or de facto net neutrality policy in place.

Mr. FARENTHOLD. Again, I have limited time, so I want to get to some other people.

This sounds like an "if it ain't fit broke, don't fix it" kind of argument. I have been on the Internet for a very long time. Back when I was in college in the 1980's accessing USENET and things like that. And whenever there was some sort of content regulation or something that wasn't deemed fair, there was a huge outcry. And I don't think there is a more vocal advocacy group out there than

Internet users. We need look no further than we were looking at SOPA and PIPA in this Committee to see how effective an advocate Internet users are.

You have the ability, even though we are seeing a consolidation in the number of providers in the vast—outside of rural areas, you typically have two or three providers. You have a cable provider, a wireline provider, and a wireless provider of broadband.

So, Commissioner Wright, Commissioner McDowell, do you see it broken? Do you see a problem here?

Mr. WRIGHT. I don't. And the FTC has studies in this regard.

But I want to focus on one part of your question, which is the values. We heard a lot about the values of Internet users in a variety of ways, reflecting on the debate.

I think that is important to note that what consumers value in their activities on the Internet is in fact what lies at the center of antitrust analysis. I have heard now, I think, something that needs correction with respect to how cramped a view of antitrust sort of is out there.

Antitrust is a consumer welfare-based system. This means what economists do is not merely focus on the things we can count, but also on what consumers value.

And to the extent in antitrust analysis that things like the amount of content, the quality of content, innovation, things other than price and quantity, these are captured within an antitrust analysis.

Mr. FARENTHOLD. Commissioner McDowell, did you have anything you wanted to add?

Mr. MCDOWELL. So, first of all, I would like to say the Federal Trade Commission can act at the same speed as the Federal Communications Commission, or lack thereof. So the idea that antitrust law is slower moving is just not the case.

But also, I think it is important to point out that those countries where the Internet is regulated more, there is less freedom overall, but especially less freedom of speech. There is a direct correlation between more regulation, more state involvement with the net and less freedom, because these countries are balancing—it is really censorship.

Mr. FARENTHOLD. So potentially, could some of these net neutrality regulations get in the way of innovative offerings?

I pay close to $100 a month for my Internet access. I like it fast. I have four people in my house who are typically all streaming at the same time. But my mother, before she passed away, was email and Facebook. With net neutrality making these streaming services equally available, as opposed to somebody who just wants to use the Internet and email, doesn't it force Internet service prices higher and take away my options to buy a limited account?

Mr. WRIGHT. The case for antitrust overregulation is as simple as this: The general economic view is these types of contracts across many industries help consumers. What the antitrust ex post approach allows you to do is have the benefits of those contracts when they help consumers and reserve enforcement for those instances where we can find, and we do, abuses of market power. It allows consumers to have both.

Mr. FARENTHOLD. All right. And Professor Wu and some net neutrality advocates have suggested that antitrust law is ill-equipped to deal with this. While I disagree, are there any tweaks that we should be looking at in antitrust law that would perhaps address these problems and be there, should the problem arise?

Mr. WRIGHT. Antitrust over the last 50 years has evolved significantly a fine-tuned approach based on modern economics that focuses on consumer welfare. That approach is one that incorporates things like nonprice dimensions, quality and innovation, exactly the things that we would want an antitrust policy to do.

In my view, the consumer welfare approach has served antitrust incredibly well. It is flexible enough to reach these types of concerns, and, in my view, doesn't need any tweaking. It does what it does well. What it does well is broader than some of what we have heard. And I don't think it should do more than what it already does well.

Mr. FARENTHOLD. Thank you.

I see my time has expired. We will now recognize the gentlelady from Washington, Ms. DelBene.

Ms. DELBENE. Thank you, Mr. Chair.

And thanks to all of you for being here today. Appreciate it.

It is clear that we have bipartisan interest in ensuring a free and open Internet. And we all appreciate how essential it is to innovation and economic growth. And I appreciate that there are very different views on how we get there.

I believe that it is critical for the FCC to implement strong, enforceable rules that will protect consumers and make sure there are clear protections against blocking and discriminating on content.

Commissioner Wright, your testimony suggests you believe that the fears that network discrimination via broadband providers could lead to competitive harm are unwarranted. I am not sure I agree with that, but can you please talk more about what you see as the potential benefits or efficiencies that these type of contracts will create for consumers, and how consumers are going to actually see that?

Mr. WRIGHT. Sure. The idea of discriminatory what we call vertical contracts—for example, between broadband providers and content providers—these types of contracts have been the focus of antitrust inquiries and economics for a century.

Sometimes what they do, when we have close relationships between folks in different parts of the supply chain, is align their incentives more closely to provide new types of services by combining, not by merger, but by contract.

Ms. DELBENE. But specifically, a consumer today, what do you think they are going to see today in terms of benefits? When I hear from consumers, I hear concerns about net neutrality and violating the principles of net neutrality. I hear concern about pricing.

When you say there are benefits?

Mr. WRIGHT. So, for example, business models that charge—I mean, the heart of discrimination. Business models that charge different prices to consumers can allow lower prices to disadvantaged consumer groups for different types of services that might be

charged for higher prices. That discrimination gives some people cause for concern, and I understand that concern.

But it also provides, and I don't think that there is any debate in economic literature about this, that it provides real benefits to consumers by facilitating the growth and entry of new products, new business models, sometimes differentially priced or differentially designed. But those provide real benefits.

Ms. DELBENE. So I guess I have a question for Professor Wu, then.

Did the regulation of the Internet today prevent venture capitalists or others from investing in startups like Google and Yahoo? Have we seen a lack of innovation?

Mr. WU. No. We have had a net neutrality policy for the last 20 years, maybe 30, depending how you count.

And we have had, during this period, the most astonishing period of economic growth and development centered on the Internet that we have ever seen in telecommunications. And it has been a tide that has risen all boats.

The telecommunication sector itself, cable and telephone companies, are very profitable. And we have just had one great innovation after another.

I have suggested that under the net neutrality policy, we have approached what economists aspire to, which is a market with very few barriers to entry.

Ms. DELBENE. And we, de facto, today have a net neutrality policy that has been in place that folks have been operating under.

Mr. WU. Right.

Ms. DELBENE. Maybe not formally, but in some ways formally, but also informally.

Mr. WU. Yes. I am going to agree with the sentiment, if it is not broken, don't fix it. We have had net neutrality policy for the past 20 years, and it has been terrific.

This is no time to jettison it, jettison the FCC and turn to antitrust instead, which is unproven and will likely lead to disappointing results as compared to a successful policy we have had for the last 20 years.

Ms. DELBENE. So doing that would be a change.

Mr. WU. That would be a change. The change would be moving to antitrust.

The FCC oversight has been terrific, both in terms of economic development and innovation.

Ms. DELBENE. I also want to say that may be why we have a letter from over 100 Internet companies, from large companies, startups, services, who wrote the letter to the FCC last month, arguing that the commission's rules should protect users and Internet companies on both fixed and mobile platforms against blocking, discrimination, and paid prioritization.

Mr. Chair, I ask for unanimous consent to submit this record for the record.

Mr. FARENTHOLD. Without objection, so ordered.

[The information referred to follows:]

Federal Communications Commission
445 12th Street, SW
Washington D.C. 20554

May 7, 2014

Dear Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai, and O'Rielly:

We write to express our support for a free and open internet. Over the past twenty years, American innovators have created countless Internet-based applications, content offerings, and services that are used around the world. These innovations have created enormous value for Internet users, fueled economic growth, and made our Internet companies global leaders. The innovation we have seen to date happened in a world without discrimination. An open Internet has also been a platform for free speech and opportunity for billions of users.

The Commission's long-standing commitment and actions undertaken to protect the open Internet are a central reason why the Internet remains an engine of entrepreneurship and economic growth.

According to recent news reports, the Commission intends to propose rules that would enable phone and cable Internet service providers to discriminate both technically and financially against Internet companies and to impose new tolls on them. If these reports are correct, this represents a grave threat to the Internet.

Instead of permitting individualized bargaining and discrimination, the Commission's rules should protect users and Internet companies on both fixed and mobile platforms against blocking, discrimination, and paid prioritization, and should make the market for Internet services more transparent. The rules should provide certainty to all market participants and keep the costs of regulation low.

Such rules are essential for the future of the Internet. This Commission should take the necessary steps to ensure that the Internet remains an open platform for speech and commerce so that America continues to lead the world in technology markets.

Sincerely,

Amazon
Cogent
Dropbox
Ebay
Etsy
Facebook
Foursquare
Google
Kickstarter
Level 3
LinkedIn
Lyft
Microsoft
Netflix
Reddit
Tumblr
Twitter
Vonage Holdings Corp.
Yahoo! Inc.
Zynga

2600hz, Inc.
2redbeans
4chan
8x8, Inc.
Addy
AdviserDeck
Agile Learning Labs
Airdroids
AirHelp
AnalyticsMD
Appar
Apportable
AppRebates
Apptology
Assembly Made, Inc.
Authentise
Automattic/WordPress.com
BadgerMapping
Bitnami
BitTorrent
Blu Zone
CBeyond
Chirply
Clef
CloudFare
Codecademy
CodeCombat
CodeHS
CodeScience
Colourful Rebel
Contextly
Coursera
CrowdTilt
Cube, Co
dasData
Digg
Distinc.tt
DuckDuckGo
Duolingo
DynaOptics
Embedly
Fandor
Floor64
Flowroute
Flurry
Fonebook
Funeral Innovations
Gandi
Gawker
General Assembly
Github
Grid
Handy Networks
Haystack.tv
Heavybit Industries
HelloSign
HeyZap
iFixit
iLost
Imgur
Instapaper
inXile Entertainment
Kaltura
LawGives
Leaflad
LendUp
Linearair
Linknovate
littleBits
Lucipher.net
MDDHosting LLC
Medium
Meetup
Meteor Development Grouo
Minds + Machines
Misk
MixRank
MobileWorks
Motionry
MozartMedical
Mozilla
NOTCOT Inc
O'Reilly Media
OfficeNinjas
Open Materials
Open Spectrum
OpenDNS
Opera Software ASA
PayTango
Pocket/ReaditLater

Poll Everywhere, Inc
Printrbot
Publitas.com
Rallyware
Recrout
Redbubble
Rewheel/Digital Fuel Monitor
Reylabs
Rogue Labs
Shapeways
Sidecar
Sift Science
Simpolaris
SketchDeck
Skytree
SlidePay, Inc
Socialscope
Solidoodle
SpiderOak
SpoonRocket
Spotfront
StackExchange
StartX Stanford
Statwing
Tastemaker
The Next Web
Triggit
Tsumobi
Tucows
Twilio
UberConference
UltiMachine
Ustream
Vidmaker
Volary Foundation
Voys Telecom
Waxy
Worldly
Xola
Yanomo

Ms. DELBENE. So that is an example of folks feeling like we have a competitive environment today where they have been able to thrive and innovate, and want to make sure that we continue to maintain that.

So with that, Mr. Chair, I yield back.

Mr. FARENTHOLD. Thank you very much.

We will now recognize Mr. Smith.

Mr. SMITH OF MISSOURI. Thank you, Mr. Chairman. Thank you for holding this hearing.

I think it is important that we examine the importance of the antitrust laws can play in the discussion of the Internet, and particularly net neutrality debate.

In my first question is for Mr. McDowell. How would additional regulation impact small and midsize Internet providers?

Mr. MCDOWELL. Well, there is evidence in the record at the FCC during various rounds in 2008 and 2010, and I think coming in now under the current proceeding, wireless Internet service providers, WISPs we call them, and others were very concerned about this. Explicit evidence in the record, statements by owners saying they have been questioned by their banks as to what their future would look like, as to whether or not they could get loans from banks and build out and continue to improve their networks and serve their customers.

Mr. SMITH OF MISSOURI. Would these companies be similarly impacted by the application of antitrust law?

Mr. MCDOWELL. No, I don't think so. They wouldn't.

So one of the questions here is creating a new body of law.

By the way, I disagree with the premise that there has been de facto net neutrality policy of the government. There has been maybe de facto net neutrality policy in the private sector to maximize freedoms so that you are actually creating abundance and competition. But not by the government.

But in any case, no is the answer to that question.

Mr. SMITH OF MISSOURI. Okay. Well, in your view, do you believe the FCC is properly equipped to handle the enforcement of improper conduct over the Internet?

Mr. MCDOWELL. What do you mean by improper conduct? Like anticompetitive conduct?

Mr. SMITH OF MISSOURI. Yes.

Mr. MCDOWELL. So the courts have cabined in the FCC's authority here in part because Congress did not contemplate this.

I disagree with the D.C. Circuit in the Verizon case that Section 706 gives the FCC authority to add more regulation; 706 is about the FCC reducing regulations to stimulate broadband infrastructure deployment. So I disagree. It was a 2-to-1 decision. Judge Silberman's dissent is very compelling in that regard.

But the FCC has very limited authority here, and I think will fail again in court, if it goes outside the bounds of what Judge Tatel was drawing, which, again, I disagree with, but he is talking about commercially reasonable agreements, and that is something in the data-roaming context, which has worked so far.

But in any case, to answer your question more succinctly, I think the FCC has almost no authority in this space.

Mr. SMITH OF MISSOURI. Thank you.

Professor Wu, outside of the free-speech concerns outlined in your testimony, do you believe the FTC would be effective at protecting consumer interests and procompetitive behavior over the Internet?

Mr. WU. I think the FTC would do some things very well. I admire, as I said, the FTC and I think they are a good agency, and I think they are well-equipped to deal with violations of the Sherman Act and other unfair methods of competition.

But I don't think they have adequate scope to deal with the full scope of harms, including noneconomic harms that we might see arise from discriminatory practice by Internet service providers.

I have given the example of political bias, of regional bias, of localism concerns, diversity concerns. And so I think they would do a good job with a certain form of harm, but I don't think their review encompasses all the harms that we care about in the Internet space.

Mr. SMITH OF MISSOURI. Commissioner Wright, would you want to answer that same question?

Mr. WRIGHT. The Supreme Court has described antitrust laws in the United States as the Magna Carta of free enterprise. The idea behind the antitrust laws is that competition is what tries not just a lower price for a gallon of milk or increased output, but increased quality, proliferation of content variety, and a number of things that have been described in this context as noneconomic values.

I disagree that they are noneconomic values, but the fundamental idea of the antitrust laws is a belief that competition drives these things is the basis for having strong antitrust enforcement.

In my view, the evolution of the antitrust laws attached and tethered to sound economics have given antitrust enforcement at the FTC and other agencies a real strong intellectual, analytical basis for analyzing precisely this type of conduct, allowing the conduct that benefits consumers, over which there is basically no real debate, and preventing competitive harms.

Mr. SMITH OF MISSOURI. Thank you, Mr. Chairman. I yield back.

Mr. FARENTHOLD. Thank you very much.

We will now recognize the gentleman from Rhode Island, Mr. Cicilline.

Mr. CICILLINE. Thank you, Mr. Chairman.

Thank you to our witnesses.

I think we are all interested in preserving the Internet as an open platform for innovation and for free expression, and, obviously, as a tool for investment and economic growth.

I do think that it is very clear that the Internet plays a very special role in a free and open society, as Professor Wu says. So the notion is that the Federal Trade Commission has real expertise in ensuring competition on the sale of commodities and trades of widgets, of goods and services, but may not be the best agency when we are talking about a very different entity, and that is the Internet, which is a vehicle, a platform, for a whole series of other important democratic values.

So the first question I have is to you Commissioner Wright, to follow up on Congresswoman DelBene's point, or question rather, which I don't think you answered.

You said that vertical contractual arrangements between broadband providers and content providers are beneficial for innovation and for consumers because they create certain efficiencies.

Tell my constituents what benefits you believe would arise from those contractual arrangements.

Mr. WRIGHT. Okay. So to give an example, a broadband provider and a content provider can have an arrangement where they are going to jointly, through their contract, offer a service to some group of consumers.

For example, we can have a service—MetroPCS had this a couple years ago, where they were going to offer a service at a reduced price, but because of concerns about congestion on the network take off the use of the video downloads. I think they had YouTube off of it.

But they were going to offer it at a lower price. There was a significant demand for that product. It was at a lower price to a consumer group that maybe couldn't buy services that would have the sort of full scale and be at a higher price.

We have that sort of——

Mr. CICILLINE. Okay, but again that all relates to an economic benefit.

And I guess this is where I would like, Professor Wu, for you to talk a little bit more about it. It seems to me that analysis is helpful as it relates to a strictly economic analysis.

What is the danger with approaching the Internet with that sort of narrow view? And what are the values that are at stake here, if we don't preserve vigorously an open, accessible Internet? What are the implications here and around the world?

Mr. WU. Yes, the implications are serious. I think the United States would no longer be the leader of Internet openness, which is in fact part of our foreign policy. The State Department has spent an enormous amount of time trying to say to authoritarian regimes that you need to be like us, you need to be an open Internet country.

If we abandon the open Internet, and our rules for the open Internet, and say, well, we decided it is an economic issue, I think that sends a bad message.

I also want to say that most of the most valuable uses of the Internet actually are not commercial uses. For example, probably one of the most valuable uses of the Internet is when extended family shares pictures. Parents send pictures of grandchildren to the grandparents. And that doesn't show up in an economic analysis, in a commercial analysis. It is very hard to measure these kinds of values.

I am concerned that things like families, just friends, totally noncommercial interactions will be the kind of things that won't get properly factored into an analysis that is just focused on trade. It is the Federal Trade Commission, or antitrust laws, which are focused on things you can measure that have a clear commercial value.

Mr. CICILLINE. And, Professor Wu, should we draw any inference from the fact that the overwhelming number of technology companies, as the letter that was introduced by Congresswoman DelBene from over 100 technologies companies who are calling on the FCC

to protect net neutrality, as compared to the folks who are the service providers, sort of the smaller group in the business of selling the products on the Internet, should we draw any inference from the different positions of those two sets?

We heard a lot of discussion that it is going to impede innovation, impede investment from entrepreneurs. It seems as if there has been a very loud signal from the innovators and entrepreneurs that, in fact, it is critical to them and to the growth of this sector of our economy that there be an open Internet.

Mr. WU. I thoroughly agree with you. I am going to return again to this idea that if it is not broken, don't fix it.

What is being proposed here is moving away from net neutrality policy as overseen by the FCC and toward an untested antitrust method. And we have seen very clearly that the incredibly vibrant economy, which has grown up on the Internet and in fact has been enormously beneficial to cable and telephone companies, they want net neutrality protected using the FCC.

So why would we mess with that by experimenting with antitrust enforcement, which is untested and will have results that we can't predict? And as you earlier indicated, it does not protect some of the most important noncommercial values at stake.

Mr. CICILLINE. Thank you very much sir.

I yield back. Mr. Chairman.

Mr. FARENTHOLD. Thank you very much.

I think that since we have been through the complete round of questioning, we will ask the witnesses, if anybody else has any additional questions, within the next 5 days, and we submit them, would you be willing to reply to those in writing?

So, without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses, or add additional material for the record.

hat concludes today's hearing. Thank you all very much. It was an informative and fun hearing.

[Whereupon, at 10:44 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Supplemental Material submitted by the Honorable Robert M. McDowell, Visiting Fellow, Hudson Institute, Center for the Economics of the Internet

APPENDIX A

DISSENTING STATEMENT OF COMMISSIONER ROBERT M. McDOWELL

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

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

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

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

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

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

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

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

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

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

My dissent is based on four primary concerns:

1) Nothing is broken in the Internet access market that needs fixing;

2) The FCC does not have the legal authority to issue these rules;

3) The proposed rules are likely to cause irreparable harm; and

4) Existing law and Internet governance structures provide ample consumer protection in the event a systemic market failure occurs.

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

---

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

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

All levels of the Internet supply chain are thriving due to robust competition and low market entry barriers. The Internet has flourished because it was privatized in 1994.[2] 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.[3] 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.[4] 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.[5] Mobile app downloads are growing at an annual rate of 92 percent, with an estimated 50 billion applications expected to be downloaded in 2012.[6]

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.[7] Eight announced national broadband providers are building out facilities in addition to the construction work of scores more local and regional providers. More competition is on the way as providers light up recently auctioned spectrum. Furthermore, the Commission's work to make unlicensed use of the television "white spaces" available to consumers will create even more competition and consumer choice.

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

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

---

[2] 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".

[3] *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").

[4] Roger Entner, Nielsenwire, *Smartphones to Overtake Feature Phones in U.S. by 2011* (Mar. 26, 2010).

[5] *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).

[6] *See* Chetan Sharma, *Sizing Up the Global Mobile Apps Market* (2010) at 3, 9.

[7] Federal Communications Commission, *Connecting America: The National Broadband Plan* at 20 (rel. Mar. 16, 2010) (*National Broadband Plan*).

anticompetitive behavior feared by the rules' proponents. But don't take my word for it. Every time the government has examined the broadband market, its experts have concluded that no evidence of concentrations or abuses of market power exists. The Federal Trade Commission (FTC), one of the premier antitrust authorities in government, not only concluded that the broadband market was competitive, but it also warned that regulators should be "wary" of network management rules because of the unknown "net effects ... on consumers."[8] 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.[9] 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."[10]

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,[11] but this new effort will fail in court as well. The Order makes a first-time claim that somehow, through the *de*regulatory 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.[12] This new conclusion, however, is suddenly convenient for the majority while it grasps for a foundation for its predetermined outcome. Instead of "*remov*[*ing*] barriers to infrastructure investment," as Section 706 encourages, the Order fashions a legal fiction to construct *additional* barriers. This move is arbitrary and capricious and is not supported by the evidence in the record or a change of law.[13] The

---

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

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

[10] *Id.* at 28.

[11] *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

[12] Order, ¶ 118.

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

(continued....)

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

Furthermore, the Order desperately scours the Act to find a tether to moor its alleged Title I ancillary authority. As expected, the Order's legal analysis ignores the fundamental teaching of the *Comcast* case: Titles II, III, and VI of the Communications Act give the FCC the power to regulate specific, recognized classes of electronic communications services, which consist of common carriage telephony, broadcasting and other licensed wireless services, and multichannel video programming services.[14] 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.[15]

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

[14] 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.

[15] *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.[16] If we were to accept the Order's argument, "it would virtually free the Commission from its congressional tether."[17] "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.'"[18] I am relieved, however, that in the Order, the Commission is explicitly refraining from regulating coffee shops.[19]

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. <u>The Commission's Rules Will Cause Irreparable Harm to Broadband Investment and Consumers</u>.

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.[20]

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.'"[21] Nothing indicates that the Commission has changed its mind since then. In fact, the Order appears to support both indirect and direct price regulation of broadband services.[22]

---

[16] 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).

[17] *Id.*

[18] *Id.* (quoting *Midwest Video II*, 440 U.S. at 706).

[19] Order, ¶ 52.

[20] 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.

[21] *Comcast*, 600 F.3d at 655 (referring to Oral Arg. Tr. 58-59).

[22] *See, e.g.*, Order, ¶ 76.

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.[23] How does this framework create regulatory certainty?[24] 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.[25]

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."[26] 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."[27] Additionally, "[t]o mandate overly [burdensome] network management policies would foster lower quality of service, raise operating costs (which in turn would raise prices for all subscribers), and/or create a large backlog of adjudicative proceedings at the Commission (in which it would be prohibitively expensive for *small and competitive ISPs* to participate)".[28] 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

---

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

[24] 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.

[25] 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).

[26] LARIAT Comments at 2-3.

[27] *Id.* at 3.

[28] *Id.* at 5 (emphasis added).

Congressional action."[29] Other small businesses have echoed these concerns.[30]

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.[31] In fact, the Antitrust Law Section of the American Bar Association agrees.[32] Nowhere does the Order attempt to explain why these laws are insufficient in its quest for more regulation.

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,

---

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

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

[31] 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.*

[32] ABA Comment on Federal Trade Commission Workshop: Broadband Connectivity Competition Policy, 195 Project No. V070000 (2007).

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.

* * *

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,[33] 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.[34] Despite any policy desires to the contrary, Congress has not yet 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

---

[33] *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

[34] 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.

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 pronunciations of ancillary authority that lack any "congressional tether" to specific provisions of the Act.[35] 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."[36] 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).[37] 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.[38] Overtly, the Order does not purport to change this legal classification.[39] Yet a reviewing court will look beyond the Order's

---

[35] *Id.* at 655.

[36] *Id.* at 644.

[37] 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.

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

[39] Order, ¶¶ 121-23.

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.[40] 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.[41] 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.[42] 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[43] 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.[44] This outcome will prove true not simply for the large providers tracked by Wall Street analysts but for the small businesses that supply vital and competitive broadband options to

---

[40] *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.").

[41] 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.

[42] 47 U.S.C. §§ 1302 (a), (b).

[43] 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.

[44] 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 "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.

consumers in many locales across the nation.[45]

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."[46] 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.'"[47] Rather, "[p]olicy statements are just that – statements of policy. They are not delegations of regulatory authority."[48] 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.[49] Section 706 does refer to one specific regulatory provision –

---

[45] 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).

[46] 47 U.S.C. § 1302(a).

[47] *Comcast,* 600 F.3d at 644.

[48] *Id.* at 654.

[49] 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 it's 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 FCC may employ in order to "encourage the deployment on a reasonable and timely basis

(continued....)

price cap regulation.[50] 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*."[51] 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."[52] 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.[53] This arbitrary and capricious move is not supported by evidence in the record or a change in law.[54] 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

---

(...continued from previous page)
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.

[50] 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.

[51] 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.

[52] 47 U.S.C. § 1302(b).

[53] Order, ¶ 120.

[54] 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.

Commission already to possess."[55] In other words, apparently, the agency's confused 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."[56]

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."[57] 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).[58]

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."[59] 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."[60] In fact, only 15 percent of Americans had access to residential broadband services in 2003.[61] Only seven years later, 95 percent enjoyed access, making broadband the fastest penetrating disruptive technology in history.[62] 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."[63] Unfortunately, this Order reveals that my fears were well founded.

---

[55] *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 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)).

[56] *Comcast*, 600 F.3d at 659.

[57] 47 U.S.C. § 1302(b).

[58] *Id.*

[59] *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.

[60] *National Broadband Plan* at 20.

[61] *See* John Horrigan, Pew Internet and American Life Project, *Home Broadband Adoption 2009*, 11 (2009).

[62] *National Broadband Plan* at 20.

[63] 47 U.S.C. § 1302(b).

One is left to wonder where this assertion of power, if left unchecked, may lead next.[64] 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.[65]

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.[66] 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.'"[67]

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*.'"[68] 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.[69] Nor may the general framework of one title of the Act – such

---

[64] 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?

[65] *Comcast*, 600 F.3d at 654.

[66] *Id.* at 647.

[67] *Id.* at 644 (citing *Library Ass'n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005).

[68] *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*)).

[69] *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

(continued....)

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

Moreover, arguments must be advanced on "a case-by-case basis" for each specific assertion of jurisdiction.[72] *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.[73] The D.C. Circuit apparently was concerned about the Commission's ability to grasp this point, for the opinion makes it repeatedly.[74] In doing so, the court directed the Commission to more closely

---

(...continued from previous page)
spectrum 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).

[70] *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.").

[71] 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.

[72] *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.").

[73] *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.

[74] *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

(continued....)

study the agency's failures in *NARUC II* and *Midwest Video II* to comprehend the limits of its ancillary reach.[75]

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.[76] 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.[77] (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.[78]

(...continued from previous page)

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).

[75] *Id.* at 653–54.

[76] 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.

[77] 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.'").

[78] *See, e.g.*, 47 U.S.C. § 153(11); *FCC v. Midwest Video Corp*, 440 U.S. 689, 705 (1979) (*Midwest II*)

(continued....)

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.[79] 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.[80]

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."[81] The

---

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

[79] 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.

[80] *Id.* at 655 (emphasis added).

[81] *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
(continued....)

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"[82] to ensure that the "charges [and] practices in connection with"[83] telecommunications services are "just and reasonable".[84] 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."[85] 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."[86] 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."[87] 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.[88] Therefore, as a corollary matter, broadband

---

(...continued from previous page)
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 case." (quoting *Detariffing the Installation and Maintenance of Inside Wiring*, CC Docket No. 79-105, Memorandum Opinion and Order, 1 FCC Rcd. 1,190, 1,192, ¶ 17 (1986)).

[82] Order, ¶ 125 (quoting *Comcast*, 600 F.3d at 645).

[83] 47 U.S.C. § 201(b).

[84] *Id.*

[85] 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.

[86] *Comcast*, 600 F.3d at 645 (citing to Section 201).

[87] 47 U.S.C. 251(a)(1).

[88] *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

(continued....)

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.

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"[89] 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.[90] 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".[91]

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.[92] 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.[93]

This is far from the kind of tight ancillary nexus that the Supreme Court upheld in

---

(...continued from previous page)
FCC Rcd. 22,404 ¶¶ 14, 20–22 (2004).

[89] *See Comcast*, 600 F.3d at 654.

[90] 47 U.S.C. § 153(11).

[91] *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).

[92] Order, ¶ 128.

[93] *Id.*

Southwestern Cable and *Midwest Video I*,[94] and it is even more attenuated than the jurisdictional stretch that the Court rejected in *Midwest Video II*.[95] 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.[96] 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.[97] 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.[98] 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.[99]

---

[94] *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 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).

[95] *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").

[96] 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.

[97] 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.

[98] *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*).

[99] *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).

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 the statutory language to read away explicit constraints on our power in this area.[100] 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.[101] 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.[102] 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.[103] 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.[104]

---

[100] *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).

[101] *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.

[102] Order, ¶ 130 (citing 47 U.S.C. § 548(b)).

[103] 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.

[104] *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

(continued....)

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.[105] 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.[106] 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.[107] Such a reading, however, would be in considerable conflict with the rationale of *Midwest Video II*,[108] as the D.C. Circuit in *Comcast* already has noted.[109]

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*:

(...continued from previous page)
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).

[105] 47 U.S.C. § 536.

[106] 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.

[107] 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).

[108] 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.

[109] *Comcast*, 600 F.3d at 654.

> [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 untrammeled 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 Comcast's Internet service to any "statutorily mandated responsibility," we ... vacate the Order.[110]

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.[111] 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

---

[110] *Comcast*, 600 F.3d at 661 (internal citations omitted).

[111] 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).

speech rights of common carriers by dismissing broadband ISPs as mere "conduits for speech" undeserving of First Amendment consideration.[112] There is good reason today to call into question well-worn conventional wisdom dating from the era of government-sanctioned monopolies about common carriers' freedom of speech, particularly in the context of a competitive marketplace.[113] Indeed, at least two sitting Justices have signaled a willingness to wrestle with the implications of the issue of common carriers' First Amendment protections.[114]

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.[115] 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.[116] Although the Order acknowledges the cases in today's Order, it makes no effort to

---

[112] 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)).

[113] 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).

[114] 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").

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

[116] *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

(continued....)

distinguish or challenge them. Instead, the Order simply "disagree[s] with the reasoning of those decisions."[117]

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."[118] But what are acts such as providing quality of service (QoS) management and content filters if not editorial functions?[119]

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.[120] 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,[121] and publishers rarely turn away ads in these difficult economic times[122] – 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?

(...continued from previous page)
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).

[117] Order, n. 458.

[118] Order, ¶ 143.

[119] 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.").

[120] 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).

[121] *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 (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).

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

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[123] – unless, of course, hints elsewhere in the document concerning capacity usage come to pass.[124] So while the Order concedes, as it 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.[125] The Order devotes all of its sparse discussion to the first prong of the intermediate scrutiny test, the "substantial" government interest,[126] 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."[127] 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.[128] Such a vague expectation creates a chilling effect of the type that courts are well placed to recognize.[129]

---

[123] Order, ¶¶ 145-46.

[124] Order, ¶¶ 112-14.

[125] 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.

[125] *American Library Ass'n v. Reno*, 33 F.3d 78 (D.C. Cir. 1994).

[126] 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.

[127] *Turner I*, 512 U.S. at 662.

[128] *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.").

[129] *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").

Yet the Order makes *no* effort, as First Amendment precedent requires, to weigh this burden against the putative benefit.[130] 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 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.

---

[130] *See, e.g.*, Order, ¶¶ 146-48.

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.[1] 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.[2] 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 sevices" as "information services" under Title I.

---

[1] *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*, 111th Cong., 2d Sess. (March 25, 2010).

[2] 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 Rcd. 22,466 (1998) *(GTEADSL Order)*. The *GTE ADSL 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."[3] 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."[4] 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"*[5]

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

To be clear, the FCC consistently held that any provider of information services could do so pursuant to Title I.[7] 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.[8] As a result of the *Cable Modem NOI,* on March 14, 2002, the Commission issued a declaratory ruling

---

[3] 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.

[4] *Federal-State Board on Universal Service,* CC Docket No. 96-45, Report to Congress, 13 FCC Rcd. 11501, K 73 (1998) *(Report to Congress).*

[5] *Id.* at 180 (emphasis added).

[6] *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.'").

[7] 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.)

[8] *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.[9] 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."[10] Only one month earlier, on February 14, 2002, in its Notice of Proposed Rulemaking[11] 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.[12] 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.[13]

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)[14], powerline (2006)[1*] and wireless (2007).[16] Consistent with

---

[9] *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).*

[10] *Id.* at H 2.

[11] *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).*

[12] *Brand X,* 545 U.S. 967.

[13] *Id.* at 977 (emphasis added, internal citations to the Commission's *Computer Inquiry II* decision omitted).

14 *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 Rcd 14853 (2005) *(Wireline Broadband Order), aff'd, Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

[15] *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 Rcd 13281 (2006).

[16] *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007)

APPENDIX B

REMARKS OF
THE HONORABLE ROBERT M. MCDOWELL
COMMISSIONER
FEDERAL COMMUNICATIONS COMMISSION
BEFORE THE
ASSOCIAZIONE EGO AND PUNTOIT
ITALIAN PARLIAMENT
AULA DEI GRUPPI PARLAMENTARI
ROME, ITALY
JUNE 28, 2012

[AS PREPARED FOR DELIVERY]

The Siren Call of "Please Regulate My Rival": A Recipe for Regulatory Failure

Thank you, Gildo, for that kind introduction. It is a great pleasure to be back in Rome, and an honor to be speaking before this impressive gathering of policy and business leaders.

Although planned months ago, both the location and timing of this conference could not have been more opportune. The Internet's fate is, yet once again, at a crossroads. As 193 countries convene in Dubai later this year to renegotiate the International Telecommunications Regulations (ITRs), Europe's view of new Internet regulations proposed by others will be pivotal to the outcome of this important debate. Furthermore, Italy has a crucial role to play in shaping Europe's position on these matters as we head towards the World Conference on International Telecommunications (WCIT) treaty negotiation this coming December.

As always, but especially with the world economy in such a weakened and precarious position, governments should resist the temptation to regulate unnecessarily, get out of the way of the Internet and allow it to continue to spread prosperity and freedom across the globe. Internet connectivity, especially through mobile devices, is improving the human condition like no other innovation in world history.

Take for example the profound effect the mobile Internet has had on the lives of Ali Morrison and Isaac Assan.[1] Ali and Isaac operate a small pineapple farm in Central Ghana. In the past, all too often they had no choice but to sell their pineapples well below market value due to a lack of accurate pricing information. Today, however, through a new mobile application, Ali, Isaac and countless farmers just like them, can instantly find the prevailing value of pineapples in surrounding markets and price their product accordingly. What was previously impossible to accomplish is now easy and quick, not to mention incredibly empowering. Earning more money from this new Web-powered knowledge enables Ali and Isaac to own more property and increase their

[1] *See* Ken Banks, *In African Agriculture, Information is Power*, NAT'L GEOGRAPHIC (Sept. 5, 2011), http://newswatch.nationalgeographic.com/2011/09/05/in-african-agriculture-information-is-power/.

standard of living – all while raising their expectations in both an economic and political sense. In short, the mobile Internet empowers the sovereignty of the individual while growing economies and fundamentally improving lives around the world.

Globally, upwards of 500,000 people become first-time Internet users *each day* precisely because the Internet has migrated further away from government control since its inception.[2] As governmental barriers around the Internet melted away in the mid 1990s, Internet usage skyrocketed – from only 16 million worldwide users in 1995 to over 2.3 billion today.[3] In short, the absence of top-down government control of the Internet sparked a powerful explosion of entrepreneurial brilliance which has not abated. That could soon change, however.

As we meet here today, some Member States of the International Telecommunication Union (ITU), as well as a few independent groups, are advocating for expanded intergovernmental powers over the Internet.[4] Some proposals are seemingly small or innocuous while others are conspicuously large and radical. We should be especially aware of incremental changes to the ITRs. With the potential to grow larger quite rapidly, proposed ITR amendments that appear tiny today can be the most insidious and lethal to the spread of prosperity and freedom tomorrow.

The proposals I am referring to are quite real, explicit and concrete. They are not imagined. Nor are they the product of caricatures or distortion, as a few pro-regulation proponents and some ITU leaders have alleged. The proposals speak for themselves. Or as they may have said here in Ancient Rome, "Res ipsa loquitur." So in the absence of rhetoric and hyperbole, please allow me to briefly outline a few of them.

First, let us start with then-Russian Prime Minister Vladimir Putin's proposal during a meeting with the Secretary General of the ITU almost exactly one year ago. Last June, he proclaimed that Member States should establish "international control over the Internet using the monitoring and supervisory capabilities of the International

---

[2] *See* Internet Growth Statistics, INTERNET WORLD STATS, http://www.internetworldstats.com/emarketing.htm (last visited June 19, 2012). The estimated number of new users per day, as calculated by determining the change in the number of Internet users over a year divided by 365, has varied greatly over the last 5 years. Between March 2011 and March 2012, the estimated number of new online users was 506,849 per day. Over the past 5 years, however, the average daily increase in online users was approximately 630,685. *Id.*

[3] *Id.*

[4] *See, e.g.*, *Proposals for Revision of the International Telecommunication Regulations*, ITU Member States Belonging to the Regional Commonwealth in the Field of Communications (RCC), at 6 (Apr. 17, 2012) ("Member States shall ensure that administrations/operating agencies cooperate within the framework of these Regulations to provide, by mutual agreement, a wide range of international telecommunication services of any type, including . . . services for carrying Internet traffic and data transmission.").

Telecommunication Union."[5] Again, these words speak for themselves and should be taken seriously.

True to Mr. Putin's word, the Russian Federation subsequently put forth formal proposals that would expand the jurisdiction of the ITU into the Internet sphere simply by changing the definition of "telecommunications" to include "processing" and "data."[6] At first glance, this proposed change seems small, but it is tectonic in scope. The submission by the Arab States is almost identical, by the way.[7]

The Russian proposal would also explicitly give the ITU jurisdiction over IP addresses, one of the most important components of the inner workings of the Net.[8] Control of IP addresses is control of the Internet itself.

Although the Russian Federation claims to support "unrestricted use" of the Internet, its submission calls for making a number of revealing *exceptions*, such as "in cases where international telecommunication services are used for the purpose of interfering in the internal affairs or undermining the sovereignty, national security, territorial integrity and public safety of other States, or to divulge information of a sensitive nature."[9] In short, the exceptions created by the Russian Federation's proposal would allow for unlimited intergovernmental control over the Internet's affairs, in keeping with Mr. Putin's vision.

---

[5] Vladimir Putin, Prime Minister of the Russian Federation, Working Day, *Prime Minister Vladimir Putin meets with Secretary General of the International Telecommunication Union Hamadoun Touré*, GOV'T OF THE RUSSIAN FED'N (June 15, 2011), http://premier.gov.ru/eng/events/news/15601/.

[6] *Proposed Revisions to Individual Articles of the ITRs*, Russian Federation, CWG-WCIT12 Contribution 95, at 2 (Apr. 13, 2012), http://www.itu.int/md/T09-CWG.WCIT12-C-0095/en ("*Russian Federation Contribution 95*") (defining telecommunication as "[a]ny transmission, emission, processing or reception of signs, signals, writing, images and sounds or data of any nature by wire, radio, optical or other electromagnetic system").

[7] *Proposed Revisions*, Arab States, CWG-WCIT12 Contribution 67, at 3 (Feb. 1, 2012), http://www.itu.int/md/T09-CWG.WCIT12-C-0067/en (defining telecommunication as "[a]ny transmission, emission, reception or processing of signs, signals, writing, images and sounds or intelligence of any nature by wire, radio, optical or other electromagnetic system"); *Proposal on Third Draft of the Future ITRs*, Arab States, CWG-WCIT12 Contribution 103, at 5 (June 4, 2012), http://www.itu.int/md/T09-CWG.WCIT12-C-0103/en ("*Arab States Contribution 103*"). Further, Iran argues that the current definition already includes the Internet. *Contribution from Iran*, The Islamic Republic of Iran, CWG-WCIT12 Contribution 48, Attachment 2 (Sept. 12, 2011), http://www.itu.int/md/T09-CWG.WCIT12-C-0048/en.

[8] *Further Directions for Revision of the ITRs*, Russian Federation, CWG-WCIT12 Contribution 40, at 3 (2011), http://www.itu.int/md/T09-CWG.WCIT12-C-0040/en ("To oblige ITU to allocate/distribute some part of IPv6 addresses (as same way/principle as for telephone numbering, simultaneously existing of many operators/numbers distributors inside unified numbers space for both fixed and mobile phone services) and determination of necessary requirements."). *See also Arab States Contribution 103* at 9 ("Member States shall, if they so elect, be able to control all naming, numbering, addressing and identification resources used within their territories for international telecommunications/ICTs.").

[9] *Russian Federation Contribution 95* at 3; *Comments on Document CWG-WCIT12/TD-64*, Russian Federation, CWG-WCIT12 Contribution 112, at 54 (June 6, 2011), http://www.itu.int/md/T09-CWG.WCIT12-C-0112/en.

Similarly, Egypt's submission calls for unprecedented economic regulation of Internet traffic through the ITU.[10]

Even though a few proposals have been offered in fora other than the ITU, each gives us a sense of where some ITU Member States would like to go with intergovernmental Internet regulation. For instance, proposals made directly to the U.N. General Assembly by China, Russia, Tajikistan and Uzbekistan call for intergovernmental regulation of Internet content and applications.[11] And, last year, India introduced a resolution at the U.N. calling for a new U.N. body to oversee the Internet.[12]

In short, whether submitted to the U.N. or the ITU, these proposals are about much more than conventional Internet governance. Their scope dwarfs the controversies regarding ICANN and domain names. Without exception, each proposal would radically restructure the Internet ecosystem for the worse. They are before us in black and white. So please look with great skepticism on vehement claims that no proposals to regulate the Internet are before the ITU or the U.N.[13]

---

[10] *Africa Region's Proposals to the Review of the ITRs*, Africa Region, CWG-WCIT12 Contribution 116, at 20 (2012), http://www.itu.int/md/T09-CWG.WCIT12-C-0116/en ("Member States shall [take measures to] ensure that fair compensation is received for carried traffic (e.g. interconnection or termination)."). *See also Proposal on International Telecommunications Connectivity (Based on Contribution CWG-WCIT12/C-84)*, Paraguay, CWG-WCIT12 Contribution 113, at 5 (June 6, 2012), http://www.itu.int/md/T09-CWG.WCIT12-C-0113/en (proposing that parties that enter into Internet connection agreements "take into account the possible need for compensation . . . for the value of elements such as traffic flow, number of routes, and cost of international transmission, and the possible application of network externalities, amongst others."); *Arab States Contribution 103* at 9 (proposing an amendment containing language similar to Paraguay's proposal).

[11] Letter dated 12 September 2011 from the Permanent Representatives of China, the Russian Federation, Tajikistan, and Uzbekistan to the United Nations addressed to the Secretary-General, Item 93 of the provisional agenda - Developments in the field of information and telecommunications in the context of international security, 66th Session of the United Nations General Assembly, Annex (Sep. 14, 2011), http://www.cs.brown.edu/courses/csci1800/sources/2012_UN_Russia_and_China_Code_o_Conduct.pdf.

[12] Dushyant Singh, Member of Parliament, Statement on Agenda Item 16 - Information and Communication Technologies for Development, 66th Session of the United Nations General Assembly (Oct. 26, 2011), http://www.un.int/india/2011/ind1945.pdf (proposing "the establishment of a new institutional mechanism in the United Nations for global internet-related policies."). *See also* Commission on Science and Technology for Development, Summary Report of the Chair: Briefing on the Open Consultation on Enhanced Cooperation on Public Policy Issues Related to the Internet (May 18, 2012), http://unctad.org/meetings/en/SessionalDocuments/ecn162012crp2_en.pdf ("Some delegates called for the establishment of an intergovernmental mechanism for enhanced cooperation within the United Nations structure, which would enable governments, on an equal footing, to carry out their roles and responsibilities in international public policy issues pertaining to the Internet.").

[13] *See, e.g.*, Hamadoun I. Touré, Secretary-General, International Telecommunication Union, Opening Remarks to Council Working Group – WCIT-12 (June 20, 2012), http://www.itu.int/en/osg/speeches/Pages/2012-06-20.aspx; Hamadoun I. Touré, Secretary-General, International Telecommunication Union, Remarks to ITU Staff on World Conference on International Telecommunications (WCIT-12) (June 6, 2012), http://www.itu.int/en/osg/speeches/Pages/2012-06-06-2.aspx; Hamadoun I. Touré, Secretary-General, International Telecommunication Union, Opening Welcome Speech at the World Telecommunication Policy Forum (WTPF), Meeting of the Informal Experts Group (IEG) (June 5, 2012), http://www.itu.int/en/osg/speeches/Pages/2012-06-05.aspx; Eric Pfanner, Debunking Rumors of an Internet Takeover, N.Y. TIMES (June 11, 2012),

In addition to the pro-regulation proposals emanating from Member States, a few non-governmental groups have put forth their own ideas for expanded Net regulation as well. This is not entirely surprising. I have learned during my six years on the U.S. Federal Communications Commission that the most common request we receive from industry is, "Please regulate my rival." Essentially, this request translates into, "My rival is running too fast, and I want government to slow him or her down to my level." Industry players that have long operated under legacy regulations are the most susceptible to this affliction.

Perhaps the same could be said of the recent proposal by the European Telecommunications Network Operators' Association (ETNO).[14] ETNO would like IP interconnection agreements to be brought under the ITRs for the first time with a new "sending party network pays" construct.[15] To be effective, the ETNO proposal would have to require an international dispute resolution forum with enforcement powers as well as an intrusive new mechanism for recording Internet traffic flows on the basis of the value of traffic delivery, presumably determined by the ITU. Such expanded "monitoring capabilities" for the ITU fit perfectly into Mr. Putin's vision of the Internet of the future.

In short, the ETNO proposal would upend the economics of the Internet by replacing market forces with international regulations that would create tremendous uncertainty, increase costs for all market players, especially consumers, and ultimately undermine the rapid proliferation of Internet connectivity throughout the globe. Disproportionately harmed by this upheaval would be the developing world. The upward trajectory of living standards for billions of people like Ali and Isaac, the pineapple farmers from Ghana, could be put in jeopardy too.

Furthermore, I can't imagine why network operators would consciously surrender their autonomy to negotiate commercial agreements to an international regulator – unless, of course, they suffer from the "please regulate my rival" malady of an industry that has been regulated too much and for too long. History is replete with such scenarios, and the desire for more regulation for competitors *always* ends badly for the incumbent regulated industry in the form of unintended and harmful consequences.

Take, for example, the American railroads of the early 20th century. Having been heavily regulated since the 1880s,[16] the railroads feared competition from a new and

---

http://www.nytimes.com/2012/06/11/technology/debunking-rumors-of-an-internet-takeover.html?pagewanted=all.

[14] *Revisions of the International Telecommunications Regulations – Proposals for High Level Principles to be Introduced in the ITRs*, ETNO, CWG-WCIT12 Contribution 109, at 3 (2012), http://www.itu.int/md/T09-CWG.WCIT12-C-0109/en.

[15] *Id.* at 2.

[16] Interstate Commerce Act of 1887, Pub. L. No. 49-104, 24 Stat. 379 (1887). I thank Clifford Winston, a senior fellow at the Brookings Institution's Economic Studies program, for lending his expertise with transportation and industrial organization research and Dominique Lazanski, the Head of Digital Policy at

nimble competitor, the trucking industry. Anxious not to let a less-regulated upstart eat their lunch, instead of convincing the U.S. Congress to deregulate rail to be on an even footing with trucking, the railroads asked lawmakers to *regulate their rivals*. The New Deal Congress, which was enamored with regulation (thus likely prolonging the Great Depression, but that's for another speech) was more than happy to oblige in 1935.[17]

What was the unintended consequence of regulating rivals in the transportation context? With transportation rates cemented at artificially high levels by the regulator, manufacturers and distributors of goods that required shipping found it cheaper to deploy their own trucking fleets.[18] Trucks that operated privately and not as common carriers were exempt from federal economic regulation. Of course, investment and revenue flowed to the least regulated option, private trucking. Congress, the regulators and the railroads didn't foresee this entirely predictable consequence. As a result, the regulated railroads lost market share and income for decades. Rail's share of the surface freight market had fallen from 65 percent at the end of World War II to only 35 percent by the 1970s.[19]

Finally, by the mid 1970s, railroad and trucking executives alike saw the light and pled with Congress to *deregulate* them to give them the freedom to invest and compete in an unfettered market. After enactment of deregulatory laws in 1976 and 1980,[20] the rail and trucking industries respectively began to grow and prosper. Consumers were immediate beneficiaries of deregulation with rates falling by 30 percent[21] and transit time reduced by at least 20 percent by 1988.[22]

But what about profitability? Don't falling prices equate to reduced profits? Isn't jumping from the certainty of price regulation into the unknown chaos of an unregulated competitive market sure to put downward pressure on net revenue? Aren't industries, and even individual companies, really better off in the shelter of command and control regulatory regimes? Doesn't investment in infrastructure increase under the certainty of rate regulation? The answer to all of these questions is: no.

---

the TaxPayers' Alliance, for her assistance with research regarding the regulation of the European postal system in the 17th century. I also would like to thank Tyler Cox, Emilie de Lozier, Emanuel Gawrich and Sarah Leggin for their research contributions.

[17] Motor Carrier Act of 1935, Pub. L. No. 74-255, 49 Stat. 543 (1935).

[18] CLIFFORD WINSTON ET AL., THE ECONOMIC EFFECTS OF SURFACE FREIGHT DEREGULATION 4 (1990).

[19] Robert E. Gallamore, *Regulation and Innovation: Lessons from the American Railroad Industry in* ESSAYS IN TRANSPORTATION ECONOMICS AND POLICY: A HANDBOOK IN HONOR OF JOHN R. MEYER 493, 493 (José Gómez-Ibáñez, William B. Tye & Clifford Winston, eds., 1999).

[20] Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976); Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980); Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980).

[21] Clifford Winston, *The Success of the Staggers Rail Act of 1980* 8-9 (AEI-Brookings Joint Center, Oct. 2005), *available at* http://www.brookings.edu/research/papers/2005/10/railact-winston.

[22] Clifford Winston, *U.S. Industry Adjustment to Economic Deregulation*, 12 J. ECON. PERSP. 89, 99 (1998).

History teaches us that profitability and investment tend to *increase* once the weight of regulation is lifted from the collective chest of industry. For example, rail's profitability gained steam after deregulation with its return on investment (ROI) nearly doubling.[23] Better yet, return on equity (ROE), or profit earned on shareholder investment, more than tripled in the early years after deregulation.[24] And investment was stoked by deregulation – railroads invested U.S. $480 billion into network upgrades, or 40 percent of revenue, between 1980 and 2010.[25] All of this was achieved even though the U.S. railroad industry's rates are half of Europe's and are the lowest in the world.[26]

My use of the railroad and trucking example isn't a matter of cherry-picking the most useful scenarios. Deregulation in other networked industries benefited all involved as well. For instance, American airline deregulation that encouraged competition and allowed pricing freedom produced similar results: fares declined, revenues increased, consumers enjoyed more choices and were able to fly more.[27] Similarly, after the partial deregulation of the American telecom sector in 1996, markets witnessed lower prices, increased investment, more powerful innovation, and skyrocketing consumer adoption of new offerings.[28] Success has been especially robust in the American wireless sector because it has been lightly regulated since its inception.[29]

---

[23] Railroad's ROI averaged 4.9 percent from 1971 through 1980, compared with a 2.5 percent average between 1970 and 1979. U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-90-80, RAILROAD REGULATION: ECONOMIC AND FINANCIAL IMPACTS OF THE STAGGERS RAIL ACT OF 1980 34 (1990).

[24] Railroad's ROE, which averaged only 2.3 percent in the 1970s, climbed to 9 percent between 1971 and 1980. *Id.* at 35.

[25] ASS'N OF AM. RAILROADS, RAIL EARNINGS TODAY PAY FOR CAPACITY AND SERVICE IMPROVEMENTS FOR TOMORROW 1 (2011), *available at* http://www.aar.org/~/media/aar/Background-Papers/Rail-Earnings-Today.ashx.

[26] ASS'N OF AM. RAILROADS, THE COST EFFECTIVENESS OF AMERICA'S FREIGHT RAILROADS 2 (2012), *available at* http://www.aar.org/~/media/aar/Background-Papers/The-Cost-Effectiveness-of-Freight.ashx.

[27] From 1976 to 1982 alone, real fares fell by more than 9 percent. *Compare* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1978 671, table 1134 (99th ed. 1978) *with* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1984 633, table 1099 (104th ed. 1983). These figures are even more impressive considering fuel costs increased by 88 percent over the same period. *Id.* at 636, table 1103. Moreover, passenger traffic and, with it, industry revenues, have expanded. Specifically, total operating revenues grew from 37,629 million in 1975 to 37,629 million in 1985. *See* U,S. DEP'T OF TRANSP., RESEARCH & INNOVATIVE TECH. ADMIN., NATIONAL TRANSPORTATION STATISTICS table 3-22 (2011), *available at* http://www.bts.gov/publications/national_transportation_statistics/pdf/entire.pdf (total operating revenues in 1975 to 37,629 million in 1985. Additionally, the number of air carriers, both passenger and freight, approximately tripled between 1976 and 1983. Thomas Gale Moore, *U.S. Airline Deregulation: Its Effects on Passengers, Capital, and Labor*, 29 J.L. & ECON. 1, 5 (1986) (citing thirty-three certificated carriers in 1976, compared with ninety-eight in 1982). Many new entrants have made their presence known by operating as "low-cost" or "independent," like Southwest Airlines or ValuJet (now known as AirTran). *See* Winston, *supra* note 22, at 93-94.

[28] For instance, local service providers doubled their revenues the year after the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56 (1996), was passed. *See* INDUSTRY ANALYSIS DIVISION, COMMON CARRIER BUREAU, FEDERAL COMMUNICATIONS COMMISSION, LOCAL COMPETITION (Dec. 1998), http://transition.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcomp98.pdf ("Local Competition Report"). And, between 1996 and 2001, investment by telecommunications firms skyrocketed and capital stock increased at a rate that far exceeded the period

Examples of deregulatory phenomena are by no means limited to American success stories. Europe has also benefited from deregulation. Since the introduction of competition, the European freight rail market has enjoyed healthier growth and investment just as the European postal system did in the 17th century![30]

---

before the passage of the 1996 Act. *See id.* at 3-4; Lawrence J. Spiwack, *The Truth About Telecommunications Investment After the Telecommunications Act of 1996*, PHOENIX CENTER POLICY BULLETIN NO. 4, at 3-4 (2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=503364. Additionally, the 1996 Act resulted in lowered prices and increased innovation. *See, e.g.*,Reed Hundt, *Ten Years Under the 1996 Telecommunications Act*, 58 FED. COMM. L.J. 399, 402 (2006); The Telecommunications Act of 1996, NTIA (Feb. 4, 1999), *available at* http://www.ntia.doc.gov/legacy/otiahome/top/publicationmedia/newsltr/telcom_act.htm#LOCAL (citing ECONOMIC REPORT OF THE PRESIDENT, ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISERS, U.S. Gov't Printing Office (1999), *available at* http://www.gpo.gov/fdsys/pkg/ERP-1999/pdf/ERP-1999.pdf).

[29] Today, the U.S. wireless industry directly or indirectly provides more than 2.4 million jobs and its economic contribution has grown more than five times faster than the overall economy (16 percent versus 3 percent). *See* CTIA-THE WIRELESS ASSOC., SEMI-ANNUAL 2011 TOP-LINE SURVEY RESULTS 10 (2012), http://files.ctia.org/pdf/CTIA_Survey_Year_End_2011_Graphics.pdf ("CTIA SEMI-ANNUAL 2011 SURVEY RESULTS"); *National Framework*, CTIA – THE WIRELESS ASSOC., http://www.ctia.org/advocacy/position_papers/index.cfm/AID/12062 (last visited June 20, 2012) ("CTIA National Framework"). Since the 1996 Act, estimated connections in the wireless industry have increased from 44 million in 1996 to over 331 million in 2011, while average local monthly bills have decreased. Also, in 2011 alone, over $25 billion was invested in United States' wireless infrastructure. *See* CTIA-THE WIRELESS ASSOC., CTIA SEMI-ANNUAL WIRELESS INDUSTRY SURVEY (2012), http://www.ctia.org/advocacy/research/index.cfm/AID/10316 (last visited June 19, 2012); CTIA SEMI-ANNUAL 2011 SURVEY RESULTS at 2, 10. According to the most recent FCC statistics, nine out of ten American consumers have a choice of at least *five* wireless service providers. *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, including Commercial Mobile Services, WT Docket No. 10-133, *Fifteenth Report*, 26 FCC Rcd 9664, 9669 (2011). As a result, American consumers enjoy low prices – 4 cents per minute – and high mobile usage rates. *See* Roger Entner, *The Wireless Industry: The Essential Engine of U.S. Economic Growth*, RECON ANALYTICS, at 1 (May 2012), http://reconanalytics.com/wp-content/uploads/2012/04/Wireless-The-Ubiquitous-Engine-by-Recon-Analytics-1.pdf).

[30] *Communication from the Commission to the Council and the European Parliament on Monitoring Development of the Rail Market*, at 6, COM (2007) 609 final (Oct. 18, 2007), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0609:FIN:EN:PDF (reporting that, between 2000 and 2005, the Member States with non-incumbent railways witnessed a significant increase in freight rail performance than Member States in which the market was still dominated by a monopoly); *see also* Oliver Stehmann & Hans Zenger, *The Competitive Effects of Rail Freight Mergers in the Context of European Liberalization*, 7 J. COMPETITION L. & ECON. 455, 462 (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1833323. Member States that liberalized early recorded the biggest increases in freight rail volume between 1995 and 2004: the U.K. (70 percent),Netherlands (67 percent), Austria (36 percent), and Germany (24 percent). By contrast, output declined in Member States like France that shielded their incumbents from competition. *See Annexes to the Communication on the Implementation of the Railway Infrastructure Package Directives ('First Railway Package')*, at 64, COM (2006) 189 final (May 3, 2006), *available at* http://ec.europa.eu/transport/rail/doc/communication_implementation_1st_rail_pack_annexes.pdf.

Furthermore, during the 30 years war (1618-1648), the decentralization of government undermined the previously monopolistic postal system. Where state monopolies were not enforced, wide diversity existed. For example, in 1695, postal customers in the Free City of Hamburg could choose among local postal entities affiliated with at least eight different regions and various private delivery services.

Hopefully, the point of these analogies is obvious. "Regulating my rival" is a seductive notion for many, but it only lures its victims to rocky shores before revealing itself as a perilous Siren call. Telecom companies should not look to regulate their "rivals," Internet content and applications companies, down to their level – especially not through an intergovernmental body.

Instead, network operators should seek deregulation by their home governments to allow them full flexibility to produce and price freely in competitive markets. In fact, as history shows us, attempting to regulate rivals will only produce unintended consequences that will harm the companies advocating regulation. More importantly, consumers end up losing the most. In short, the opposite of what is desired will occur, something called "regulatory failure." No government, let alone an intergovernmental body, can make economic and engineering decisions in lightning fast Internet time. Nor can any government mandate innovation. But new rules can undermine investment, innovation and job creation all too easily.

Despite these realities, resisting the temptation to regulate is difficult for many. Furthermore, deregulation can seem counterintuitive to some. We always hear talk of "market failure," but we rarely see analyses of "regulatory failure." Perhaps that is why, in the words of Professor Adam Thierer, "regulation *always* spreads."[31] As world economies contract and government debt mounts, repeating the same government actions of regulating more and spending more of the public's money will only produce the same results: shrinking economies and growing debt. It is time to reverse these trends, but doing so will require tremendous political courage.

We can start by avoiding any expansion of regulation to the Internet. Its phenomenal success can be traced directly to its *voluntary* and *self*-governing structure, the result of a multi-stakeholder process free from top-down governmental influences. In fact, policy makers should head in the opposite direction of the proposals outlined earlier. We should learn from the voluntary, bottom-up, self governance approach in the image of the non-hierarchical Internet itself, and look to apply this successful model elsewhere. Revolutionizing public policy through a fundamental modernization of legacy laws to clear away unnecessary regulatory obstructions will uncork the flow of investment

---

Competition drove down costs. In 1712, a postal order was issued reiterating the governmental monopoly and reversing private post in Prussia. By 1720, other European states proposed the establishment of cooperative postal arrangements which would bypass Prussia, but serve the Danzig to Petersburg line. The other European states signed a treaty in 1723, which divided the routes amongst the states and included a promise to suppress independent postal carriers, returning postal carriage to a monopolistic state. *See* ELI NOAM, TELECOMMUNICATIONS IN EUROPE 8-13 (Oxford University Press, 1992) (for broader economic themes, see all of chapter 2).

[31] Berin Szoka & Adam Thierer, *Net Neutrality, Slippery Slopes & High-Tech Mutually Assured Destruction*, TECH. LIBERATION FRONT (Oct. 23, 2009), http://techliberation.com/2009/10/23/net-neutrality-slippery-slopes-high-tech-mutually-assured-destruction/ ("The reality is that regulation *always* spreads. The march of regulation can sometimes be glacial, but it is, sadly, almost inevitable: Regulatory regimes grow but almost never contract.").

capital, spark innovation, drive economic growth and propel job creation. Couldn't today's world economy benefit from such positive and constructive change?

On the other hand, dragging rivals down to the lowest common denominator of overly regulated international telecom companies will enshrine mediocrity at best, and, at worst, snuff out incentives to take risks and reap the resulting rewards, therefore killing opportunities to revitalize moribund economies and improve the human condition.

Thank you for having me here today and I look forward to learning from this fabulous conference.

Before the
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Washington D.C.
June 20, 2014

"Net Neutrality: Is Antitrust Law More Effective than Regulation in Protecting Consumers and Innovation?"

Submitted Written Testimony of

Bruce M. Owen
Morris M. Doyle Centennial Professor in Public Policy
Director, Stanford Public Policy Program
Stanford University

Includes Supplementary Testimony Submitted July 7, 2014

"Net Neutrality: Is Antitrust Law More Effective than Regulation in Protecting Consumers and Innovation?"

Submitted Written Testimony of

Bruce M. Owen
Morris M. Doyle Centennial Professor in Public Policy
Director, Stanford Public Policy Program
Stanford University

Thank you, Mr. Chairman, for this opportunity to address the subcommittee.

Is antitrust law enforcement sufficient to address so-called "net neutrality"? Or do we need new regulatory safeguards? Although these questions are somewhat technical and arcane, they seem to arouse strong emotions among many citizens. I commend the committee on its efforts to contribute to the public debate, and perhaps to better define the policy issues.

My written testimony briefly summarizes the analysis set out in greater detail in the publications appended to this submission.

I have devoted much of the past 45 years to study of the communications industry and its regulation, including radio and TV broadcasting, cable television, telephone service, use and allocation of the radio spectrum, the Internet, and the many technologies, old and new, used to supply such services. I have had the privilege of working in telecommunications policy analysis in the executive branch of the government, in antitrust enforcement at the U.S. Department of Justice, in academic research and teaching at Stanford and Duke, and in consulting work. My special focus has been on the effects of regulation of these industries on the consuming public.

Communications regulation does not make a pretty picture. Over the last 100 years the Federal Communications Commission has pretty generally interpreted its legislative mandate in ways that stifle competition and technological innovation. Outcomes have in many cases probably been worse for consumers than the dangers they might have faced from unregulated monopolies or oligopolies. I believe that FCC commissioners have been trying their best for the public. However, the nature of our political system can easily mislead policy makers who seek to further the public interest. When it comes to low-salience technical matters involving regulated industries, it is the regulated firms themselves and

other well-financed interest groups that dominate the policy debate. Theirs are the loudest voices heard in Washington and at the FCC. The interests of consumers are far less well represented.

Antitrust enforcement has, in general, been much more successful than regulation in service to the public. Especially since the 1970s, the goal of enhancing consumer welfare has been explicit at the antitrust agencies, and widely accepted by the judicial branch. The days of protecting competitors from competition are long past. I played a role in the litigation[1] that resulted in the disintegration of the old Bell System monopoly—both before the complaint was filed and in testimony at the trial. I believe that antitrust case, together with the burst of bipartisan deregulatory policies in the 1970s, led to the explosion of competition and technological innovation in the communications industries that we see all around us today.

The history of communications policy over the last century, however well-meant, has tended to protect incumbent providers from would-be competitors and innovators at a substantial cost to the public. This cost in my view likely far outweighs whatever benefits may have resulted from the short-term purposes served by the regulation. This applies especially to regulations that were vague, or prophylactic—that is, intended to forestall a theoretical danger in advance of its possible occurrence. In contrast, antitrust enforcement (merger law aside) is designed to deter or remedy specific instances of anticompetitive behavior, defined in terms of harms to customers. Antitrust action requires *evidence of harm.* Even in merger cases, courts increasingly require strong evidence that harm to consumers is very likely.

History lessons

History, of course, can be a useful adjunct to analysis of policy alternatives. Proponents of net neutrality may recognize their own fears and goals, for example, in the following 120-year-old claim:

> [T]he paramount evil chargeable against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the [proposed legislation] is the prevention of these discriminations....[2]

This is from the legislative history of the first modern attempt by the federal government to regulate directly the behavior of large firms, in this case railroads. The result was the 1887 Act to Regulate Commerce, which contained this key provision:

> [I]t shall be unlawful for any common carrier [railroad] subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect

[1] U.S. v. AT&T et al. 552 F. Supp. 131 (D.D.C., 1982), affirmed February 28, 1983.
[2] Senate Report No. 46, 49th Cong., 1st Sess., p. 215, as quoted in Houston E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342 (1914).

> whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.[3]

This and subsequent legislation gave the now-defunct Interstate Commerce Commission (ICC) the power to prevent discrimination of the kind apparently feared by proponents of net neutrality. The policy did not work.

Railroads continued to price discriminate, filing rates with the ICC to charge different prices for hauling different commodities of the same weight, volume and origin/destination. So did regulated trucking firms. Railroad tariffs grew longer and more complex each decade. In the end, before it was abolished in 1995, the ICC was little more than the titular head of a series of highly discriminatory and dysfunctional regional transport cartels. There are few today who believe that this century-long experiment with regulation achieved net benefits for Americans.

We have more recent evidence in telecommunications itself of the intractable difficulty of preventing even truly anticompetitive discrimination, in this case by vertically integrated monopolies.[4] Few historical events resonate in telecommunications policy with the clarity of the 1982 settlement that terminated the trial in U.S. v. AT&T. The old Bell System agreed to settle by accepting the entire relief package sought by the government. The relief called for a platonically pure structural disintegration and future isolation of the local Bell telephone monopolies from the competitive services then offered by Bell, including long-distance service and equipment manufacturing. The reason: regulation had failed to prevent discrimination against and in fact exclusion of Bell's competitors. It was antitrust action not regulation that brought an end to the suppression of competition in telephone service.

I have more to say about transportation and telecommunications regulation later in this testimony. But it is important to explain at once that a primary focus of the net neutrality issue is vertical integration. The fear of discrimination arises, I suppose naturally, from the perception that a vertically integrated firm will use any market power it may have at any stage of production to protect or extend market power in other stages.

Abstract economic models predict that when allocation within a firm replaces what had been decentralized market exchanges, consumer welfare (present and also future, because of incentives for innovation) may increase or decrease. In other words, the economic incentive to expand horizontally or vertically is usually, though not always, compatible with the social interest in maximizing long-run consumer welfare. We have two tools to deal with the possible bad outcomes: antitrust and regulation.

---

[3] Section three of the Act to Regulate Commerce (February 4, 1887, c. 104, 24 Stat. 379, 380).

[4] Local telephone companies were generally assumed to be natural monopolies until at least the 1990s. AT&T Corp. et al. v. Iowa Utilities Board et al. 525 U.S. 366, 371 (1999).

Antitrust policy works by seeking to prevent, directly or through deterrence, welfare-reducing expansions in the scope of firms without indirectly and inadvertently deterring expansions that benefit consumers. This is easy to say, but very tough to accomplish in practice. The requisite information is difficult to assemble and assess and the same tools (e.g., statements of enforcement policy and appellate precedents) can have indirect deterrent effects on both good and bad changes in the scopes of firms.

Hard as it is to calibrate antitrust policy, calibrating regulation is even more difficult. Aimed at improving serious long-term incompatibility between private incentives and social welfare, regulators intervene continuously and directly in firm decisions. The simplest case is the incentive of a monopolist to restrict output in order to maximize profit. Traditionally, public utility regulators set maximum prices and required utilities to serve all comers at or below those prices. In principle, this might achieve an efficient level of output. But in practice, the constraint itself almost invariably produced incentives that distorted internal allocation decisions of regulated firms, raising costs. In addition to and generally worse than those distortions, regulatory agencies themselves frequently have been more concerned with the welfare of the firms they regulate than with the economic welfare of the consuming public. In many cases, consumers would have been better off without regulation. The starkest evidence: deregulation of airlines, trucking, and most rail rates actually produced lower prices and more efficient industry structures.

This brings us to net neutrality. I suppose most of the people who favor net neutrality have no very specific idea what it means. Net neutrality is a slogan, not a policy. Perhaps deliberate vagueness explains the term's popularity. Of course, it is a rare curmudgeon who opposes fairness and favors unfair discrimination. Journalists tend to explain net neutrality as a condition in which all users pay the same for Internet access, no one gets inferior service, and no one is denied service, "for the same content." Regulation is thought to be required to ensure this, even though there is no significant evidence of anticompetitive discrimination today.[5] The fear is that such behavior may develop in the future. Specifically, cable operators have long had a reputation for dubious service quality and increasing prices, and well-publicized media and telephone mega-mergers are often regarded as signs of impending threats. The most specific fear apparently is that cable television providers that currently offer both conventional "linear" TV networks and also Internet access service will discriminate against or deny service to competing providers of competing on-line video services, such as Netflix, in order to protect their profits from the traditional part of their businesses.

---

[5] In fact the FCC after trying and failing twice to enact lawful versions of net neutrality (see Verizon v. F.C.C., D.C. Cir. No. 11-1355, decided Jan. 14, 2014), only last week announced that it was opening an inquiry to see if it could find evidence that would justify such a policy, the week *after* it announced pursuit of yet a third version of net neutrality. Edward Wyatt for the New York Times, "F.C.C. to Investigate Agreements Between Content Companies and Net Service Providers," June 13, 2014 http://nyti.ms.1qbObFG

What is Discrimination?

The Internet is an interconnected set of facilities (fiber optic cables, servers, routers) owned by many different companies that provide services to each other and to end users. These facilities are used for many purposes, not just Internet service. Examples include ordinary telephone service and capacity leased to cell phone companies and large businesses that use private networks to interconnect plants and offices. Each Internet user negotiates terms with the owner of whatever hardware is used to connect to the greater Internet. That owner in turn negotiates terms with other networks with which it seeks to exchange traffic. Large facilities providers with roughly equal demands for each other's capacity may exchange traffic without any payment (the payments roughly cancel out, so why bother?) This is known as "peering." When demands are not symmetric, one party typically pays the other for interconnection service. The negotiation involves prices and service quality, including "bandwidth" (speed in bits per second). Prices vary with, among other things, the amount of capacity (bandwidth) supplied. This is because more capacity costs more to produce. Notably, as with telephone service, users pay both to initiate and to be able to receive communications whether open circuits or digital packets. Even retail users of the Internet often negotiate both price and service quality. New or renewing cable and telephone subscribers are typically offered various discounts (or months of free service); subscribers threatening to terminate service also may be offered discounts.

Providers typically offer different Internet connection speeds or bundles of services at different prices. For example, business users may demand and be willing to pay more for faster speeds, and this is also true for some residential users. The actual performance of any interactive system using shared facilities varies according to capacity utilization. Each user's traffic varies, and at peak times or days capacity utilization in one or more parts of a network may approach 100%. Traffic then stops or slows as longer alternative routes (if any exist) are taken. Providers offering such service must invest in enough capacity to maintain the minimum service quality promised to each user even as overall traffic grows.

Digital communications capacity is fungible, in the sense that capacity used for any given purpose can be repurposed for a different use. These changes require time and may involve new equipment; they are not costless. In this context, one must be very precise in defining "discrimination." In antitrust and economic analysis it is **not** discriminatory to charge different customers different prices unless the services provided are identical in all respects and also cost the same to produce. Note even then, discrimination may increase consumer welfare, enabling consumers with lower values to be charged lower prices.

Internet users, whether residential or industrial, should expect to pay more for goods and services that cost more to produce, even when the "content" is identical or similar. Competitive markets produce that result and economic efficiency requires that result. The reportedly adverse popular reaction to the FCC's most recent proposal on net neutrality, which essentially took the position that charging more for higher speed service was not by itself discriminatory, suggests a widespread misunderstanding of how competitive markets work. A moment's reflection should make it plain that buying more of almost any

good or service, or a better quality of service, will cost more to supply and for that reason alone carry a higher price. If regulators forbid charging more for the more costly service the result will simply be that the service will not be provided. On the other hand, charging a price significantly higher than cost creates profitable opportunities for competitors or entrants to expand their market shares. Competition provides this discipline automatically. Regulation does not.

Further, the "equal prices for all who provide the same content" interpretation of net neutrality rests on no coherent theory of social justice. Some regulatory interventions are at least nominally intended to benefit disadvantaged groups such as minorities, the elderly, or the poor, and thus to justify reductions in efficiency. There is no such argument favoring net neutrality. Unlimited Internet access at a below-cost price should not be an inalienable right. Its beneficiaries are not minorities, the elderly or the poor.

Discrimination against competitors

What about the fear that cable television operators that also offer Internet access will discriminate against suppliers of competing online video programmers? Several lines of analysis are helpful here.

First, denying access to a competing supplier of a vertical service is not necessarily profitable, even if the cable company (for example) is the only local supplier of Internet access. Such a monopoly operator can charge a monopoly price for access. If it excludes a competing program supplier, however, it gives up the increased monopoly revenue that would come from the competitor's use of the access service. Charging users a higher price for programming is not guaranteed or even likely to offset the loss of monopoly revenue from transmission. Generally, a monopolist can only charge one monopoly price. Some exceptions exist. The old Bell System was an exception because its profits were regulated, and not at monopoly levels at a time when local telephone service was assumed to be a natural monopoly. Excluding competitors raised costs but also permitted higher prices to offset the costs of exclusion. The Bell monopoly lasted for many decades in part *because* of regulation.

Second, it simply is not true that cable television operators have monopolies in the distribution of video programming, online or otherwise. Most U.S. households have access to at least three established providers of linear video services—one cable operator and two satellite companies. In addition, wireless broadband internet service is growing very rapidly, largely because of the popularity of smart phones and tablets, which can be and are used to watch online video. A growing number of individuals use such services as their chief source of video entertainment. This adds three or four additional wireless video and Internet access providers to the three pre-existing video suppliers and the one or two Internet access providers already serving many large cities. (The largest landline telephone companies, AT&T and Verizon, offer fiber optic broadband service to residential users in several densely populated areas.) This amount of competition is sufficient to make regulation a truly bad bet for improving consumer welfare and stimulating innovation.

Further improvements in wireless broadband services lie in the future, even for relatively low-population-density areas: low earth orbit micro satellites are one such possibility. Today's large broadcast satellites are in geostationary orbit, much too far away for interactive Internet services because of delays in transmission. Low earth orbit satellites are not stationary with respect to the Earth, so more of them are required to ensure that at least one is always serving a given area, but they are much less expensive to build and launch. Miniaturization, economies of scale, and private launch services continue to reduce costs. This technology may eventually offer an opportunity for even more competition in video and other broadband services. Also, suppliers in other nations, such as South Korea, are already developing so-called "5G" technology to harness new frequency ranges for terrestrial wireless services.[6]

The presence of competition in local digital transmission services means that, going forward, cable operators cannot successfully exclude video competitors from the market through discriminatory pricing or otherwise. It would be pointless to discriminate against or exclude rival program suppliers from access to digital cable subscribers. The FCC has traditionally ignored this conclusion by regulating each transmission technology as if the others did not exist. This Alice in Wonderland approach is rationalized by the structure of the Communications Act, which also takes a technology-based approach to communications law. Whatever the legal basis for the regulatory silos used by the FCC, the effect is anticompetitive. Regulation generally impedes competition.

Third, even if anticompetitive behavior took place on a broad scale (hypothetically making antitrust solutions impractical) the FCC has the power to provide a competitive rather than a regulatory solution. Virtually all of the growing competition in broadband Internet service involves use of the radio spectrum. The FCC controls the amount of spectrum available for each use. The FCC can and should make more spectrum available for wireless broadband services and also permit licensees in other bands to repurpose their spectrum for wireless broadband. Indeed, it is now clearer than ever, from the FCC's spectrum auctions and subsequent market transactions, that markets rather than regulators should be deciding how spectrum should be allocated and assigned, using a property rights system.

The bottom line here is that if a cable operator or other transmission entity is accused of attempting to exclude competitors through discriminatory tactics there should not be a high index of suspicion, and there should not be a prophylactic regulation. If what appears to be anticompetitive discrimination takes place it is more likely to be because the entity is pursuing a competitive advantage resulting from cost reductions or product improvements than because the intent is to harm consumers. In any case, exclusion is unlikely to be successful. Such situations rule out regulatory regimes and blanket prohibitions because they are likely to result in handicapping rather than encouraging competition. In contrast, antitrust law that treats each case on its merits is well-suited to the task of deterring or penalizing discriminatory behavior in the unusual situations where it may arise. Finally, if the FCC wants

[6] "EU, South Korea to Ally on Faster Mobile Access," Wall Street Journal Online, June 16, 2014. http://online.wsj.com/articles/eu-south-korea-to-lay-out-plan-for-5g-networks-1402844523?KEYWORDS=5G+wireless

to ensure that Internet access is priced competitively, efficiently, and at the lowest possible prices, it can accomplish that goal best by eliminating its longstanding competitive restraints in spectrum markets. For example licensees are presently forbidden to use their spectrum assignment for anything but the narrow purpose specified in their licenses, even if the alternative use creates no interference problems and increases competition.

As noted above, a relevant example of regulatory distortion is the incentive to expand the scope of the firm vertically into the sale of unregulated products, and a concomitant incentive to exclude competitors from such markets. This was the central economic basis for the Justice Department litigation, seeking to disintegrate the old AT&T vertically, that was commenced in 1974 and led to the 1982 settlement and the actual breakup in 1984. One policy basis for the lawsuit was the failure of the FCC, despite many years of effort, to prevent AT&T from finding ways to keep competitors out of potentially competitive markets into which it had integrated vertically. One way to characterize the problem is that because the Bell system owned the local telephone monopolies, it could force them to accept the lost revenues and lost profits that resulted from exclusion of AT&T's long distance and equipment competitors. Some of the loss would be made up by rate-of-return regulation and another part from paying supra-competitive prices for the goods and services supplied exclusively by AT&T to the local companies. FCC staff officials testified in the trial of the case that, despite strenuous effort, their attempts to prevent exclusionary conduct had failed.

Behind the failure of the FCC's attempts to control AT&T's anticompetitive behavior were AT&T's control of the information (about, for example, its costs) required by regulators to monitor and control the company's behavior, AT&T's control of the definitions and pricing of its services, and the inherent constraints of administrative law on agency behavior. A leading example of those problems is the series of regulatory proceedings called Computer Inquiries I, II, and III. In those proceedings, the FCC sought to find an effective method to permit the old AT&T to provide services in unregulated competitive markets while ensuring that AT&T would not or could not engage in anticompetitive behavior by favoring its own subsidiaries.

Among the regulatory strategies explored was the concept of the "fully separated subsidiary," a corporate unit organized to provide competitive services that was separated by an accounting firewall from the monopoly side of the business. But it became apparent that a meaningful accounting separation was impossible so long as the benefits from permitting AT&T to continue to supply inputs both to its own competitive downstream businesses and to the competitors it faced in those businesses arose from economies of scope or scale in the joint provision of inputs to both monopoly and competitive markets. For example, there exists no unique, economically legitimate method to allocate joint and common costs. In any case, so long as AT&T owned both the regulated monopoly business and the related competitive business, anticompetitive incentives would persist. The Computer Inquiry rulemakings ended in morasses of complex, unworkable, and ineffective or self-defeating regulations.

Remarkably similar problems arose in negotiations between AT&T and the Antitrust Division to settle the Section 2 antitrust litigation. The negotiations took place in the last days of the Carter administration and the early days of the Reagan administration. The talks ended with complex regulatory proposals ultimately abandoned by both sides as unworkable. They were referred to by the parties as Quagmire I and Quagmire II. AT&T chairman Charles Brown later explained his decision to accept the relief sought by the government in the antitrust case. The quagmires of unworkably detailed regulatory solutions that seemed inevitably to emerge from efforts to solve the underlying problem of incentive incompatibility (not his phrase) led him to conclude that isolation of the monopoly portion of the business from its competitive components was the only way AT&T would be able to escape endless private and public disputes with competitors and regulators, and become free to focus on its business of providing communication services. AT&T therefore capitulated.

Unfortunately, Judge Harold Greene had not had the benefit of the Computer Inquiries and Quagmire experiences. When the government and AT&T filed the proposed settlement, with its stark and permanent isolation of the monopoly local service companies from participation in any competitive business requiring use of their monopoly facilities, Judge Greene rejected the platonic solution in favor of regulation by the court. He made exceptions for certain "information" services and he insisted on a waiver process, permitting the local monopolies to enter competitive lines of business on a case by- case basis with the court's consent. Predictably, the court was subsequently bogged down in massive and bitter multiyear waiver proceedings, most of which recapitulated the lessons of the Computer Inquiries and the Quagmires.

The AT&T settlement ultimately was undone by the 1996 Telecommunications Act, which sought to solve the problem of competitive access to monopoly local telephone facilities by, among other policies, providing for the further (accounting) disintegration of local telephone facilities into "network elements," each to be offered and priced separately to businesses seeking to compete with the local Bells. The resulting FCC implementation procedures were repeatedly challenged by the Bells, resulting in several trips to the Supreme Court. The 1996 Act failed to induce facilities-based entry into local wire line telephony. Instead, market forces took an end-run around the Bell bottleneck.

Despite Judge Greene's misstep, the temporary isolation of the Bell companies from long-distance service, combined with growing competition from wireless telephone providers and VOIP services such as Skype was sufficient to permit competition to develop both in long-distance and local telephone service. About forty percent of the U.S. population has now abandoned wireline telephone service entirely. The arrival of competition in local telephony (and, as it turned out, video services) was made possible by the advance of digital and wireless technology and continuing reductions in the hardware costs of providing such services. Competition has finally come to local telephone service, not because of a century of government regulation, but in spite of it.

We need not repeat history

The history of attempts to regulate the old Bell System under traditional utility regulation principles (common carrier access rules and maximum price regulation) and the ICC's even less successful experience in eliminating discrimination in transportation suggest some lessons for communications policy today. Those lessons recapitulate the story of the earlier attempts to control discrimination in rail service.

First, as the examples above attest, there is little clear evidence that traditional regulation ever achieved even its narrow objective of making nondiscriminatory service available to all at cost-based prices. On the contrary, discrimination on the basis of factors correlated with price elasticity has been a commonplace of regulation from the time of the 1887 Act to the present. The FCC, if it is to enforce what appears to be its version of net neutrality, will have to compare prices with costs for cable television systems and other multimedia providers. Joint and common costs are an inherent feature of the provision of Internet access and transmission. The task is simply beyond the FCC's abilities.

Second, the regulation remedy makes the disease worse. Regulators and regulation often have served as deterrents to technical innovation, both by incumbent monopolists and potential entrants. Bell Labs was a famous source of *invention*, but AT&T was a ponderous and reluctant *innovator*—that is, implementer of new technology. The framework of regulation and the principles of administrative law gave incumbent producers great leverage in preventing entry by competitors. This, in turn, reduced the incumbent's own incentive to innovate.

Third, there is no body of learning or experience from other contexts suggesting that these failures might be remedied significantly by "better" regulatory practices. The long run interests of consumers arguably are better served by unregulated (and therefore hopefully shorter-lived) monopoly than by regulated (and therefore likely semi-permanent) monopoly. In Internet access, fortunately, there is no incumbent monopoly and every chance that the extent of competition will increase—if the regulators act in consumers' rather than in incumbent suppliers' interest.

With the possible exception of the platonic isolation approach of the original, never-implemented 1982 Justice Department/AT&T settlement agreement, no approach to controlling anticompetitive behavior by vertically integrated, regulated monopolists in the communications industry or in transportation has been successful, and most have injured consumers' interests. If consumers really did face the imminent prospect of last-mile monopoly and anticompetitive access discrimination in broadband services, the sad lesson of history is that the "net neutrality" remedy is a cure far worse than the still hypothetical disease.

I would like to comment on two points mentioned by Professor Wu. The first is Professor Wu's assertion that the question of Internet regulation was "too important" to be left to economists or economics alone. The second point is that, even if there is no "economic" evidence justifying Internet regulation today, there remains a need to regulate in order to preserve freedom of expression and competition in the marketplace of ideas.

Professor Wu's testimony reveals a misunderstanding of the role of economics in policy analysis. Economics is a collection of tools and methods useful in approaching any policy goal, not just those conventionally labelled "economic." Economics is focused on the allocation of scarce resources among competing objectives.

Economic policy analysis is a well-established branch of economics concerned with the well-being of humans. Economic welfare refers not merely to income or wealth as measured in dollars but to all aspects of human well-being as judged by individuals themselves. Thus, well-being includes anything and everything that people value, including freedom of expression and other political rights, environmental amenities, health, education, aesthetic goods, procedural fairness, social justice and so on. Many of these things are difficult to measure, and it is true that dollar income is often used as a rough proxy for well-being. In recent years, however, economists and other social scientists have become increasingly confident in estimating consumers' willingness-to-pay for non-market goods and also increasingly willing to rely on happiness surveys as measures of well-being.

Given limited resources, not everything that contributes to human well-being can be provided in sufficient measure to make everyone content. Trade-offs are inevitable, and understanding how to create the most well-being from limited resources is the essence of economic science. An economist is no less concerned with freedom of speech than with guns or butter. The extent of that concern is measured by the degree to which people in the aggregate are willing to trade off freedom of speech (or any other given value) against guns, butter, or other sources of happiness, along with analogous trade-offs in production.

Economists do not decide how much values such as freedom are worth. It is up to individual citizens to make those decisions, and also to decide what it is that increases their own well-being. Just as "we the people" are in principle the ultimate source of political power in our republic, economists take "we the people" to be the ultimate judges of their own well-being and sovereign over the economizing choices by which they exercise the "inalienable right" to pursue happiness.

Professor Wu's second point concerns competition in the marketplace of ideas, a notion that is at least as old as John Milton's famous *Areopagitica* (1644), a petition to the Long Parliament calling for freedom of the press. The claim is that "truth will emerge victorious" in a contest of ideas. If so, that is an additional reason—beyond the usual benefits of economic competition—to apply antitrust enforcement to the Internet. Clearly competition among ideas is not a reason to impose federal regulation on the Internet. The Founders of the American Republic, having experienced censorship of the press by royal

governors, drafted the press and speech clauses of the First Amendment precisely to forestall federal regulation of the media. Our experience with federal regulation of radio and broadcast television over many decades and even today has resulted in censorship and restriction of freedom of the press, both in economic media markets and in the marketplace of ideas. Regulation has seldom in American history been a friend to competition. If we want to preserve a free and open Internet, regulation should be our last not our first resort.

Appended Online Materials

"Antitrust and Vertical Integration in 'New Economy' Industries with Application to Broadband Access," *Review of Industrial Organization* 38:4 363-386, 2011. DOI: 10.1007/s11151-011-9291-y

"Antecedents to Net Neutrality," *Regulation,* Fall 2007
http://www.cato.org/pubs/regulation/regv30n3/v30n3-3.pdf

"Assigning Broadband Rights," *Regulation*, Summer 2004.
http://www.cato.org/pubs/regulation/regv27n2/v27n2-2.pdf

The American Antitrust Institute

June 27, 2014

Representative Spencer Bachus
Chairman
House Judiciary Committee
Subcommittee on Regulation Reform,
Commercial, and Antitrust Law
2138 Rayburn House Office Building
Washington, DC 20515

Representative Hank Johnson
Ranking Member
House Judiciary Committee
Subcommittee on Regulation Reform,
Commercial, and Antitrust Law
2240 Rayburn House Office Building
Washington, DC 20515

Re: Why FCC Regulation Is Superior to Current Antitrust Law for Protecting the Open Internet

Dear Chairman Bachus and Ranking Member Johnson,

The American Antitrust Institute[1] respectfully responds to whether open internet policy, also known as "network neutrality," can best be accomplished through application of the existing antitrust laws or through regulation by the Federal Communications Commission (FCC). Antitrust law has a critical role to play in policing mergers, collusion, and exclusion that threaten competition among internet service providers (ISPs), content providers, and other players on the internet. The Federal Trade Commission (FTC) should also use its broad statutory authority under Section 5 to protect competition in this important area. Aggressive antitrust enforcement is especially vital in markets characterized by network effects and rapid technological innovation. But while antitrust enforcement should complement regulation, we believe that FCC action should continue to play the lead role in maintaining an open internet.

I. The Aim of Open Internet Regulation Is More Expansive than the Focus of Modern Antitrust Law

a. Open Internet Policy Promotes Both Economic and Non-Economic Objectives

Open internet policy seeks to promote both economic and non-economic objectives. These goals include competitive markets for content and a vibrant realm of free expression.

Such a policy would be intended to ensure that all firms—new and old, large and small—can compete against each other on the merits. It would prevent vertically integrated firms, those that

[1] The American Antitrust Institute (AAI) is an independent non-profit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. For more information, see www.antitrustinstitute.org. The AAI's Board of Directors alone has approved this filing. The individual views of members of the AAI Advisory Board may differ from the AAI's position.

2919 ELLICOTT ST, NW • WASHINGTON, DC 20008
PHONE: 202-276-6002 • FAX: 202-966-8711 • bfoer@antitrustinstitute.org
www.antitrustinstitute.org

both provide broadband access and own content, from discriminating against competing, non-affiliated content. For example, Time Warner Cable would not be allowed to throttle streaming speeds for Netflix as a means of promoting its own Time Warner TV services. Likewise, Comcast could not boost the loading and video playback speeds of its own MSNBC.com at the expense of Foxnews.com.

Powerful content owners would also not be able to pay to obtain preferential access on broadband networks. They would not be allowed to insulate themselves from competition using their existing size and greater ability to pay broadband providers. In early 2006, for example, Google launched Google Video to compete with Microsoft's MSN Video and, more importantly, with a popular month-old startup, YouTube.[2] If Google or Microsoft had been able to pay for faster streaming speeds, YouTube may have withered on the vine, despite offering what users perceived as a superior service. Many of these concerns are in line with the goals of antitrust—ensuring competitive prices and maximizing consumer choice, for example—though they could be addressed through FCC regulation.

But open internet policy aims to protect more than just a competitive and innovative content market. It aspires to maintain an internet that supports a free and robust exchange of ideas. An open internet policy seeks to ensure that ISPs, who are gatekeepers between users and content, cannot stifle ideas they do not like. Many Americans do not have a choice of broadband providers,[3] and, for those that do, long-term contracts and penalties for early termination create significant switching costs.[4] Even consumers who enjoy a choice of providers do not have a realistic option of switching to a competitor if their current provider throttles a single, favored website. Though it may be an extreme example, absent open internet rules, nothing would prevent an ISP from blocking its subscribers' access to the campaign website of a politician who refused to support its favored policies. With such power, a provider can silence the voice of "unwelcome" speakers with a mere flick of the switch.

While these harms may seem merely speculative, they are not. In fact, such abuses have already happened—in both the wireline and wireless markets. In 2005, Telus, a Canadian ISP, was involved in a labor dispute with the Telecommunications Workers Union, and locked out the union members. It proceeded to block access to a website organizing and supporting the locked-out workers to all

---

[2] Kevin J. Delaney, *Google in Talks to Buy YouTube for $1.6 Billion*, WALL ST. J., Oct. 7, 2006, *available at* online.wsj.com/news/articles/SB116014813857884917; Gavin O'Malley, *YouTube is the Fastest Growing Website*, ADAGE.COM, July 21, 2006, *available at* adage.com/article/digital/youtube-fastest-growing-website/110632.

[3] Twenty-eight percent of American households have only one choice in broadband. Zach Epstein, *Almost One-Third of U.S. Households Have No Choice for Broadband Internet Service*, NEWS.YAHOO.COM, Mar. 14, 2014, https://news.yahoo.com/almost-one-third-u-households-no-choice-broadband-124510155.html.

[4] *See, e.g.*, Nicholas Economides, *Broadband Openness Rules are Fully Justified by Economic Research*, 84 COMM. & STRATEGIES, 4th Q., 2011, at 1, 12; *see also Verizon Commns. Inc. v. FCC*, 740 F.3d 623, 664 (D.C. Cir. 2014) (finding such long-term contracts ancillary to their analysis).

subscribers in western Canada.[5] In a similar vein, in 2007 AT&T contracted to be the presenting sponsor and sole provider of streaming services to a concert by the rock band Pearl Jam. During the stream, AT&T shut off the sound when the lead singer, Eddie Vedder, criticized President Bush, denying subscribers their ability to hear his speech.[6] Also in 2007, Verizon Wireless cut off access to an internet and text messaging program of NARAL Pro-Choice America, and stated it would not serve any group "that seeks to promote an agenda or distribute content that, in its discretion, may be seen as … unsavory."[7] In a 2014 survey, one in four European consumers reported experiencing content blocking by their provider.[8] Open internet policy seeks to prevent such abuses, and a suitably broad rule could be crafted by the FCC.

b. Modern Antitrust Law Does Not Aim to Advance Political and Social Goals

The non-economic aims of open internet policy go beyond the scope of modern antitrust law. Antitrust law, as it is currently applied, focuses strictly on economic goals; it rejects any consideration of social policy.[9]

Antitrust law, like open internet policy, is concerned with competition on the merits. As presently interpreted by most courts, antitrust law seeks to promote economic goals like competitive prices, abundant consumer choices, and dynamic product innovation. Some of the economic problems described above—vertically integrated firms blocking competitors or large incumbents using their size to drive out smaller innovators—could be challenged through an antitrust suit. But the second set of open internet concerns, relating to an internet where ideas can be spoken and heard freely, is not within the ambit of modern antitrust law.[10]

In the past, antitrust law addressed social and political goals, as courts interpreted the laws as intending to combat all the adverse effects of concentrated markets. Cases like *Brown Shoe Co. v. United States*[11] and *Associated Press v. United States*[12] upheld the intention of Congress that antitrust laws address social harm as well as economic dysfunction. But those days are over. Following writings by such scholars as Richard Posner and Robert Bork, the Supreme Court has narrowed the focus of the

---

[5] Ian Austen, *A Canadian Telecom's Labor Dispute Leads to Blocked Web Sites and Questions of Censorship*, N.Y. TIMES, Aug. 1, 2005, *available at* www.nytimes.com/2005/08/01/business/worldbusiness/01telus.html.
[6] Jon Healey, *AT&T Drops Pearl Jam's Call*, L.A. TIMES BIT PLAYER, Aug. 8, 2007, *available at* http://opinion.latimes.com/bitplayer/2007/08/att-drops-pearl.html.
[7] Adam Liptak, *Verizon Blocks Messages of Abortion Rights Group*, N.Y. TIMES, Sept. 27, 2007, *available at* http://www.nytimes.com/2007/09/27/us/27verizon.html?_r=0.
[8] European Commission, *E-Communications and Telecom Single Market Household Survey*, Report 414, 114–20 (Mar. 2014), *available at* http://ec.europa.eu/public_opinion/archives/ebs/ebs_414_en.pdf.
[9] *See, e.g.*, Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405 (2013); *see generally* Symposium, *The Goals of Antitrust*, 81 FORDHAM L. REV. 2151 (2013).
[10] For a dissenting analysis, *see* Maurice E. Stucke & Allen P. Grunes, *Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies that Support the Media Sector's Unique Role in Our Democracy*, 42 CONN. L. REV. 101 (2009); Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249 (2001).
[11] 370 U.S. 294, 316 & fn.28 (1962) (recognizing the importance of local control over industry and the maintenance of small businesses).
[12] 326 U.S. 1, 20 (1945) (finding Sherman Act vital to maintaining a free press against private restrictions).

antitrust laws. Decisions in *National Society of Professional Engineers v. United States*,[13] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,[14] and *Continental Television, Inc. v. GTE Sylvania, Inc.*[15] have held that the Sherman Antitrust Act now addresses solely economic concerns. Neither censoring Pearl Jam nor, for that matter, blocking access to a politician's election website, presents the kind of "competitive injury" that can be regulated by contemporary antitrust law.

If antitrust law alone were used to promote an open internet, ISPs could stifle speech that they find distasteful without violating the law. This approach would necessarily leave one of the goals of open internet policy, as outlined above, unmet. Given the current state of antitrust law, only FCC action can ensure that both goals are achieved.

II. Current Antitrust Law Is Not Doctrinally Equipped to Preserve an Open Internet

Leaving aside its focus on strictly "economic" considerations, antitrust law today does not have the doctrinal tools necessary to protect the open internet. Two recent Supreme Court decisions have weakened antitrust law's applicability to violations of open internet norms. They have raised the standards for refusal-to-deal claims and created the possibility that natural monopolies are not subject to a duty to share. In light of the Supreme Court's uncritical deference to dominant firms, ISPs may not be liable for choking off their direct competitors in content. Even if the so-called essential facilities doctrine survives these two rulings, it is a flawed means by which to preserve an open internet. An aggressive application of the essential facilities doctrine would, at most, maintain openness for only select types of content and in only parts of the country.

a. Supreme Court Hostility to Refusal-to-Deal Claims

Content owners could bring refusal-to-deal claims against broadband providers that fail to provide access to their networks, or provide access on discriminatory terms. While businesses have broad discretion as to whom they deal with, this discretion is not unlimited, especially in the context of dominant firms.[16] The Court once held that dominant firms that refuse to deal with rivals should present an efficiency justification for their conduct; otherwise they would face antitrust liability.[17] In recent years, however, the Supreme Court has made it difficult for plaintiffs to win refusal-to-deal claims. Two decisions in the past decade have questioned the earlier rulings on refusals-to-deal and suggested these claims are unlikely to succeed.

---

[13] 435 U.S. 679, 692 (1978) ("The purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether the policy favoring competition is in the public interest.").
[14] 509 U.S. 209, 220 (1993) (finding that "Congress did not intend to outlaw price differences that result from or further the forces of competition.").
[15] 433 U.S. 3656–59 (1977) (upholding vertical price restraints and market divisions because of theoretical increase in interbrand competition).
[16] United States v. Colgate & Co., 250 U.S. 300 (1919).
[17] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985).

The Supreme Court decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* limited the scope of refusal-to-deal liability.[18] To what extent is unclear, however. The Court held that it would not recognize antitrust refusal-to-deal claims simply because a refusal-to-deal violated regulatory requirements.[19] The FCC had brought remedial action against Verizon for its failure to share its network on non-discriminatory terms with rival phone carriers.[20] Because the FCC could resolve the particular dispute, the Court stated that where a regulatory "structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny."[21]

Troubling dicta in *Trinko* suggest the decision could have broad implications for refusal-to-deal claims. In his majority opinion, Justice Scalia asserted that requiring monopolists to share their facilities with rivals could have dire economic consequences. *Trinko* states that the prospect of monopoly profits is "what attracts 'business acumen' in the first place . . . [and] induces risk taking that produces innovation and economic growth."[22] Given this extraordinary view of monopoly in the economy,[23] the Court stated that mandated sharing of monopoly infrastructure, in addition to requiring judges to act as regulators, could reduce incentives to innovate and might even promote collusion.[24]

In *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, the Court affirmed that FCC sharing obligations do not create an analogous duty-to-deal under the antitrust laws.[25] While the plaintiffs' complaint alleged that the defendant engaged in a price squeeze[26] rather than a refusal to deal, the Court held that "[t]here is no meaningful distinction between the 'insufficient assistance' claims we rejected in *Trinko* and the plaintiffs' price-squeeze claims in the instant case."[27] As in *Trinko*, the Court ruled that the plaintiffs had not stated a cognizable claim under the Sherman Act.[28] Similarly, it stated that regulators are more capable of addressing the plaintiff's price squeeze claim.[29] Even as it acknowledged that refusals-to-deal could, in theory, give rise to antitrust liability, the Court stated that "[a]s a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing."[30]

---

[18] 540 U.S. 398 (2004).
[19] *Id.* at 406–07.
[20] *Id.* at 403–04.
[21] *Id.* at 412.
[22] *Trinko*, 540 U.S. at 407.
[23] Per Justice Scalia's view, firms would enter markets only if they had the possibility of obtaining monopoly power. Markets everywhere, however, suggest that monopoly power is not a necessary "carrot" for entry.
[24] *Id.* at 407–08.
[25] 555 U.S. 438, 457 (2009).
[26] A vertically integrated firm engages in a price squeeze when it raises its wholesale price and lowers its retail price, thereby making it uneconomical for non-integrated firms to compete. *See United States v. Aluminum Co. of Am.*, 148 F.2d 415, 437–38 (2d Cir. 1945) (Learned Hand, J.).
[27] *Id.* at 450.
[28] *Id.* at 457.
[29] *Id.* at 452–53.
[30] *Id.* at 448.

b. Limits of the Essential Facilities Doctrine

The Court in *Trinko* did not officially eliminate the essential facilities doctrine. It noted that it has never recognized the essential facilities doctrine by name but stated that it did not see a need to officially repudiate it either.[31]

The essential facilities doctrine requires the sharing of natural monopoly-type infrastructure. In one of the leading cases applying the doctrine, the Seventh Circuit held that a facility is "essential" and has to be shared if:

(1) A monopolist controls the facility;
(2) A competitor cannot practically duplicate the facility;
(3) A competitor is denied access to the facility; and
(4) The facility can be shared feasibly.[32]

The court in *MCI* also suggested a fifth factor. A plaintiff may also have to prove that the owner of the essential facility denied access as a means of extending its monopoly power into a separate market.[33]

The doctrine has historically been applied to assets with strong natural monopoly characteristics. Courts have directed firms controlling the following facilities, among others, to grant access to competitors on non-discriminatory terms:

(1) Electric transmission lines;[34]
(2) News reports of a dominant wire service;[35]
(3) Railroad bridges and terminals;[36] and
(4) Telephone local loops.[37]

In theory, the doctrine could be applied to broadband providers today. If a neighborhood, city, or state has only one broadband provider, that entity's network may qualify as an essential facility. And if this monopolist provider blocks users from accessing particular content, or degrades the delivery of content, injured consumers or the injured competitor may have a colorable essential facilities claim. An essential facilities claim is most likely to have traction if the broadband provider is blocking non-affiliated content to promote its own content. For example, a broadband provider that

---

[31] *Trinko*, 398 U.S. at 410–11. To our knowledge, at least one court has held after *Trinko* that the essential facilities doctrine can still be the basis for a Section 2 claim. *See Nobody in Particular Presents, Inc. v. Clear Channel Commns, Inc.*, 311 F. Supp. 2d 1048, 1114 (D. Colo. 2004) (denying defendant's motion for summary judgment on plaintiffs' essential facility claim).
[32] MCI Commns. Corp. v. AT&T Co., 708 F.2d 1081, 1132-33 (7th Cir. 1982).
[33] *Id.* at 1132.
[34] Otter Tail Power Co. v. United States, 410 U.S. 366, 368 (1973).
[35] *Assoc. Press*, 326 U.S. at 1.
[36] United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).
[37] *MCI*, 708 F.2d at 1081.

restricts access to a popular third-party video service to aid its own streaming service may be most vulnerable to antitrust liability.[38]

While an essential facilities claim may be viable against a monopolistic broadband provider, it is much less likely to succeed in markets with multiple providers. In parts of the country, residential customers can select from multiple providers. For example, in some neighborhoods in Washington, D.C., residents can choose from Comcast, RCN, and Verizon FiOS. Under these circumstances, the essential facilities doctrine may be unavailable. The *MCI* test requires monopolistic control of a facility. In areas with multiple providers, no entity, by definition, has monopolistic control over broadband service. In this type of market, a single provider that blocks access to content is not likely to be found liable under the antitrust laws. Even if competing broadband providers adopt a similar content restriction policy in parallel, antitrust enforcers would have to show some evidence of collusive agreement between them.[39]

Absent a doctrinal reevaluation, even an aggressive application of the essential facilities doctrine is unlikely to preserve a fully open internet. A monopolistic broadband provider could be liable for blocking access to a direct content rival but not for blocking access to content that it deems objectionable for non-economic reasons. Moreover, the essential facilities doctrine may protect an open internet in areas with only a single broadband provider, but not in places with some token choice. Under the most optimistic scenario, an open internet policy premised on the essential facilities doctrine is likely to produce a legal patchwork: some content providers and some consumers would enjoy non-discriminatory access while others would not.

III. Institutional Considerations Favor FCC Action over an Antitrust Law Approach

Institutional considerations also suggest that regulatory action is better suited to preserving an open internet than antitrust litigation. Antitrust is backward looking and intended to resolve specific disputes. The costly and protracted nature of antitrust litigation, along with the risk of reprisal by broadband providers, may also mean that many content owners are unable or unwilling to vindicate their rights to non-discriminatory treatment. In contrast, FCC regulation is forward looking and can apply on an industry-wide basis.

Antitrust litigation is intended to resolve discrete instances of anticompetitive behavior that have occurred or are likely to occur. In the context of non-discriminatory network access, content providers can bring a claim only when a broadband provider has degraded, or has threatened to degrade, access to their site. If a broadband provider does block select content, the content provider will have to initiate legal process to obtain redress.

---

[38] For the reasons discussed in Section I, a monopolistic broadband provider that blocks access to content for purely political or social reasons may not run afoul of the essential facilities doctrine today.
[39] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

Because courts today generally insist on conducting an open-ended economic inquiry, modern antitrust litigation is a costly and drawn-out affair.[40] Plaintiffs typically have to engage in extensive discovery and hire economic experts to establish liability and prove damages. With the flurry of Supreme Court decisions that have tilted procedural rules in favor of defendants,[41] plaintiffs may invest significant time and money in a case only to lose on a motion-to-dismiss or a motion for summary judgment. Even for meritorious claims, the chances of success for plaintiffs are very low.[42] Plaintiffs may spend hundreds of thousands or even millions of dollars litigating a case only to obtain an unfavorable result. Contemporary antitrust process favors large, powerful incumbents over small competitors and new entrants.

A successful antitrust suit only has precedential value if it produces a published opinion. And even then a district court opinion does not carry the same weight as an appellate, let alone Supreme Court, decision. Cases that do survive a defendant's motion for summary judgment are often settled. While a pro-plaintiff decision on summary judgment does yield positive precedent, a single district court decision may not greatly affect business behavior. Take for example a district court decision that denies a broadband provider's motion for summary judgment on a content owner's essential facility claim. Other broadband providers will certainly be put on notice that content discrimination could run afoul of the antitrust laws. Yet, until a more substantial body of legal precedent is developed, broadband providers may feel confident that they can engage in content discrimination without incurring liability.

An antitrust-only approach to internet openness is likely to have adverse effects on competition and innovation in content markets. The uncertainty of future marketability can deter new entry. Internet entrepreneurs may ask themselves: why risk money on a content venture that could be marginalized with impunity by a broadband provider's network practices? In light of the expense and uncertainty of antitrust litigation, the possibility of redress under the antitrust laws is not likely to provide comfort to would-be entrants.

For example, a broadband provider may be able to stifle an emerging third-party content provider in a short period of time through discriminatory tactics. Slow download speeds and other forms of degraded access are likely to result in a significant loss of popularity and revenues from advertising and subscriptions. By the time the antitrust process has been resolved, the content provider may be out of business. Even an outright legal victory is unlikely to revive a departed entrant. In short, a

---

[40] Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1460–65 (2009).

[41] Many of these decisions have arisen from antitrust claims. *See, e.g.*, Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (lowering legal standards for granting defendants' motions for summary judgment); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (lowering legal standards for granting motions-to-dismiss); American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013) (ruling that bilateral arbitration clauses in standard form contracts should be enforced even if individual arbitration is economically infeasible).

[42] William F. Adkinson, Jr., et al., *Enforcement of Section 2 of the Sherman Act: Theory and Practice* app. 5, 14–15 (Working Paper, FTC, 2008), *available at* http://ftc.gov/os/sectiontwohearings/docs/section2overview.pdf ("Of the 539 [Section 2] cases reviewed, 344 (64 percent) were found to have a judicial resolution of all of plaintiff's section 2 claims. *Of these, 335 cases were decided for defendants, and nine were decided for plaintiffs.*") (emphasis added).

protracted process is one of the incumbent's best friends. Under these circumstances, internet ventures are much less likely to attract entrepreneurial initiative and financial support than they would in an environment with guaranteed non-discrimination.

While far from a panacea, FCC action offers important advantages over antitrust litigation in preserving an open internet. The agency can issue forward-looking rules that cover all broadband providers. The result would be a much more comprehensive protection of the internet than antitrust law can realistically provide. We do not intend to suggest that FCC regulation would be flawless or that antitrust law should be displaced in this important area. The FCC would still likely rely on third party complaints in large measure. And the regulatory enforcement process would not resolve disputes overnight. Antitrust enforcement should remain very much involved in protecting competition on the internet. But in an environment subject to forward-looking, industry-wide FCC rules, internet ventures would enjoy greater economic certainty than in one governed exclusively by present antitrust law. Due to the doctrinal state of modern antitrust law, regulation provides the better short-term way to protect important economic, political, and social values.

We would be pleased to discuss this matter further with you or your staff.

Sincerely,

Albert Foer
President
American Antitrust Institute
(202) 276-6002
bfoer@antitrustinstitute.org

Sandeep Vaheesan
Special Counsel
American Antitrust Institute
(202) 204-4524
svaheesan@antitrustinstitute.org

Geoffrey Kozen
Research Fellow
American Antitrust Institute
(202) 408-4621
ghkozen@gmail.com

cc: The Honorable Bob Goodlatte
The Honorable John Conyers
The Honorable Tom Wheeler