STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL
DISSENTING IN PART, CONCURRING IN PART

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

At the outset, I would like to thank the Chairman for his graciousness and good faith as well as for the energetic spirit of cooperation he has maintained throughout his brief tenure, and especially in the past three weeks as we have examined this Notice of Proposed Rulemaking. Although we may sometimes disagree on substance, I commend him on his persistent eagerness to maintain an open and constructive dialogue with his fellow commissioners in an effort to promote a healthy process for this agency. And today we do disagree on substance. I do not share the majority's view that the Internet is showing breaks and cracks, nor do I believe that the government is the best tool to fix it. I also disagree with the premise that the Commission has the legal authority to regulate Internet network management as proposed.

Nonetheless, it is important for everyone to remember that today the Commission is *starting* a process, not ending one. The window of opportunity for dialogue is just beginning to open. Furthermore, today's action provides ample opportunity for the public to comment on a wide universe of issues. In that vein, I thank the Chairman for including in today's Notice of Proposed Rulemaking the text of proposed rules for public comment. For too long the Commission has fallen into the habit of obscuring from public view the text of proposed rules. I am delighted that the Chairman has taken this step toward better transparency. The Chairman should also be complimented on providing a long and thorough comment period during which I hope a deep and substantial record based on the facts, the law and the public interest will emerge to illuminate a path to a sensible resolution of these important issues.

All of us can agree that the Internet is a tool that should maximize freedom. Consumers should be able to enjoy the fruits of Internet freedom, and the Internet itself should operate under freedom. America's policies, and the policies of all governments, should seek to strengthen such freedoms. We all agree that an open Internet should be preserved. Accordingly, in today's spirit of collegiality, those who disagree with the substance of today's Notice, which carries with it the caption "Preserving the Open Internet," should not be presumed opposed to an Open Internet.

With freedom in mind, the Internet is perhaps the greatest deregulatory success story of all time. It became successful not by government fiat, but by all interested parties working together toward a common goal. By definition, the Internet, a global network of networks, is a "Wiki" environment which we all pay for, share and shape. Since it was opened up for public use, as a free society we have worked hard to ensure that the Internet remains robust, safe and open. Also, since its inception, uncounted dedicated souls have worked to ensure that the Internet works, period. Since the early days of the state-run ARPANET, network management and Internet governance initiatives have migrated further away from government regulation, not

closer to it. This evolution away from government intervention has been the most important ingredient in the Internet's success.

Early efforts to keep the Internet open and free sparked the creation of non-state-controlled Internet governance entities staffed by volunteer engineers, academics and software developers. These groups have remained largely self-governed, self-funded and nonprofit, with volunteers acting on their own and not on behalf of their employers. No government owns or regulates them.

For example, the Internet Society (ISOC), an umbrella organization founded in 1992, is home to the Internet Engineering Task Force (IETF) that develops technical standards for the Internet. It is a non-profit corporation with a board of trustees consisting of, and funded by, individuals and organizations in the Internet community virtually free from government influence. Several other organizations work with ISOC on a variety of Internet governance issues. Among them are: the Internet Engineering Steering Group (IESG), the Internet Research Task Force (IRTF), the Internet Research Steering Group (IRSG), and the Internet Architecture Board (IAB), among others.[1] The P4P Working Group, which works on peer-to-peer congestion issues, is essentially no different.

Similarly, the Internet Corporation for Assigned Names and Numbers (ICANN) is a private non-profit entity that works to coordinate the Internet's domain name system. Until last month, ICANN managed the domain name system through a joint project agreement (JPA) with the Department of Commerce. On September 30, the Department of Commerce and ICANN announced the expiration of the JPA, yet another step away from government involvement. In place of the JPA, ICANN and the Department of Commerce have forged a new agreement that reaffirms the private sector-led model for coordination of the domain name system.

By creating flat Internet governance mechanisms that collaboratively work from the "bottom-up," rather than relying on a government-mandated "top-down" model, the Internet is better able to flourish as an entity that promotes freedom at all levels. By way of illustration, some argue that nations whose governments regulate the Internet less live under more freedom, while societies that regulate it more live under less freedom. Or, as Thomas Jefferson observed more than two centuries ago, "The course of history shows that as the government grows, liberty decreases."

As I participated in the International Telecommunications Union's conference in Geneva two weeks ago, I was reminded how closely the international community watches the FCC's movements. After I spoke with regulators from other nations, it became obvious to me that some countries are waiting for the U.S. to assert more government authority over the Internet to help justify an increased state role over Internet management internationally. It is not an exaggeration to say the world is watching what we do. Although we are proceeding with the best of intentions, as we examine the important issues raised in today's Notice, we should keep in mind that our final actions inadvertently could be setting a precedent for some foreign governments

[1] Association for Computing Machinery, *A Concise Guide to the Major Internet Bodies*, http://www.acm.org/ubiquity/views/v6i5_simoneli.html.

with less pure motives to use in justifying stricter Internet regulation. That would be a mistake. Freedom is best served if we promote abundance, collaboration and competition over regulation and rationing. No government has ever succeeded in mandating innovation and investment.

We are here today, in part, because we have seen a deepening division between some network operators and some in the application industry. Some in the applications industry are calling for government regulation of network engineering problems that historically have been resolved through many of the collaborative bodies I've just mentioned. Such collaborative bodies have never failed to resolve major network management challenges. That is a track record the government simply cannot match. One of my concerns regarding today's Notice is that its premise looks at innovation in a way that could actually deepen the division between applications and networks precisely at a time when the market is sparking unprecedented *convergence* between the two.

For instance, many proponents of network management regulation speak of unfettered innovation at the "edge" of networks – such as on consumers' personal computers and wireless devices – while the freedom to innovate "in the middle" of networks should be more limited due to concerns regarding potential anticompetitive conduct by network operators. Today's Notice and its proposed rules could be viewed as operating from a similar premise, however, which could produce counterproductive results. Constructive public policy should subscribe to the philosophy that unfettered innovation should be encouraged equally at *all* points of the network – at the edge and in the core.

As a practical matter, it is fast becoming impossible to separate the two. Consumers are telling the marketplace that they don't want networks that operate merely as "dumb pipes." Sometimes they want the added value and efficiency that comes from intelligence inside networks as well. Those who oversimplify this issue as a zero sum scenario between a dumb pipe and smart edge versus a smart pipe and dumb edge offer only a false choice that does not reflect the realities of today's market. I hope that yesterday's joint blog post between Google and Verizon Wireless on the importance of the consumer Internet experience is the start of continued collaboration and dialogue among these two communities.

Some questions that I hope get addressed in the record are: Is the Commission suggesting today that the government draw a bright line of distinction between networks and applications in an effort to justify regulation in this space? If so, should not the Commission refine its view because networks and applications are converging faster than regulators can measure? Otherwise, would the Commission not be favoring one market player over another absent evidence of an abuse of market power?

For example, Cisco builds Internet routers that contain over 28.1 million lines of code. How are we to ascertain whether each line of code offers a pure operating system function or some other application that adds value? Should that be the Commission's role? Can we make such determinations efficiently? Do we even have the statutory authority to do any of this? [2]

[2] My view is that regulation of network management is simply not reasonably ancillary to responsibilities set forth under other sections of the Act. *See United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), *see also FCC v. Midwest Video Corporation*, 440 U.S. 689 (1979) (*Midwest Video II)*.

These thorny questions abound, and I strongly encourage commenters to fill the record with solid facts and legal theories to substantiate their points of view.

Furthermore, as we go forward, I hope we can explore the differences between discriminatory conduct and anticompetitive conduct. The public interest would be better served if the debate would focus more on this dichotomy. During the course of this debate, many have confused the important difference between discriminatory conduct and anticompetitive conduct. But the reality is that the Internet can function only if engineers are allowed to *discriminate* among different types of traffic. The word "discriminate" carries with it negative connotations, but to network engineers it means "network management." Discriminatory conduct, in the network management context, does not necessarily mean anticompetitive conduct.

For example, to enjoy online video downloads without interruption or distortion, consumers expect video bits to be given priority over other bits, such as email bits. Such conduct is discriminatory, but not necessarily anticompetitive. If discriminatory conduct were to become anticompetitive conduct, then could it not be addressed in the context of competition and antitrust laws? While today's Notice provides an opportunity to comment on the applicability of such laws, I hope that the record will contain a relevant market analysis before we venture further. Without a finding of a concentration of market power and abuse of such power in the broadband market, additional regulation is likely not warranted.

In fact, just over two years ago the Commission launched an inquiry into the state of the broadband services market. We cast a wide net in an effort to harvest evidence of fundamental market failure, and we came up empty. Similarly, after a lengthy and thorough market analysis, the Federal Trade Commission (FTC) issued a report on the state of the broadband market just 27

The majority uses Section 201(b) as part of its basis for jurisdiction contending that it gives the Commission specific authority "to prescribe such rules and regulations as may be necessary in the public interest to carry out the provision of th[e] Act." But all of the language preceding that clause in Section 201 refers to obligations imposed on common carriers. And although the Supreme Court has held that the Commission may treat the provision of Internet access service under Title I and still impose some degree of regulation, *see NCTA v. Brand X Internet Servs*., 545 U.S. 967 (2005), the Court did not abandon its established precedent on the limits of the agency's ancillary authority. The Commission simply cannot use the generalized provisions of Title I to impose more onerous regulations on providers of broadband Internet access service than it is authorized to impose on common carriers under the specific provisions of Title II. *Midwest Video II*, 440 U.S. at 705 - 707.

Also, I respectfully disagree that Sections 230 and 706 provide the ancillary hook. *See* 47 U.S.C. §§ 230(b), 1302(a). Section 230(b) opens with the clause, "It is the policy of the United States." While I agree with the importance of the goals set forth there, I do not read them as granting the Commission the necessary specific statutory authority to bolster further regulation through our ancillary jurisdiction powers. Additionally, Section 706(a) states that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." The majority view appears to be that this Section provides the Commission with authority over the regulation of network management because if such management is left unchecked by the government, some people may, by default, have less access to the Internet. If read literally, however, Section 706 means exactly what it says: that the "Commission shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." Evidence already before us suggests that imposing new regulations on the industry that must pay for broadband deployment could have the opposite effect of what Section 706 charges the Commission to do.

months ago. In a unanimous and bipartisan 5-0 vote, the FTC strongly cautioned against imposing Internet regulation, saying:

> [W]e suggest that policy makers proceed with caution in evaluating calls for network neutrality regulation …. No regulation, however well-intended, is cost-free, and it may be particularly difficult to avoid unintended consequences here, where the conduct at which regulation would be directed largely has not yet occurred. … Policy makers should be very wary of network neutrality regulation.[3]

What tectonic market changes have occurred since the 2007 FTC report that would warrant a change in policy? Since the Supreme Court's decision in *Brand X*,[4] we have been busy taking broadband services out of the common carriage realm of Title II and classifying them as largely *unregulated* Title I information services due to market conditions.[5] So an important question to ask might be to what degree would a lack of a change in market conditions threaten the viability of any new regulations on appeal?

Some point to less than a handful of troublesome actions – some several years old – by a few market players as sufficient evidence to justify a new regulatory regime. An important fact lacking in this debate is that once these actions were brought to light, however, all were resolved without imposing new regulations. Additionally, given the context of the uncountable number of Internet communications that occur every day, is such a small number of quickly resolved incidents evidence that the Internet is breaking to the point of needing more regulation?

As the Commission embarks upon this regulatory journey, we should do so with our eyes wide open regarding the potential consequences of our actions, be they beneficial or harmful and intended or unintended. For instance, the recent 700 MHz auction teaches important lessons about unintended consequences. I cast the only dissent against the open access requirements because the evidence in the record told me that the market was already headed toward offering

---

[3] Federal Trade Commission, *Broadband Connectivity Competition Policy*, 155 (2007). The FTC elaborated, "Policy makers should be very wary of network neutrality regulation simply because we do not know what the net effects of potential conduct by broadband providers will be on consumers, including, among other things, the prices that consumers may pay for Internet access, the quality of Internet access and other services that will be offered, and the choices of content and applications that may be available to consumers in the marketplace. Similarly, we do not know what net effects regulation to proscribe such conduct would have on consumers. This is the inherent difficulty in regulating based on concerns about conduct that has not occurred, especially in a dynamic marketplace." *Id.* at 157.

[4] *Brand X*, 545 U.S. 967.

[5] *See, e.g.*, *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*, WC Docket Nos. 04-242, 05-271, CC Docket Nos. 95-20, 98-10, 01-337, 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Order*), *petitions for review denied*, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

more device and application portability. As it turns out, not only were several WiFi-enabled handsets already on the market at the time of our order, but, more importantly, several carriers, device manufacturers and application providers were working together to produce open devices and networks long before even a draft of the 700 MHz order was contemplated. At the time, I also did not think that the rule would achieve the advertised goal of attracting a new national broadband provider. Additionally, I was concerned that larger carriers would avoid the encumbered spectrum and outbid smaller players in the smaller, unregulated spectrum blocks. Sadly, my fears proved to be correct, but I wish I had been wrong. Hopefully, we can all learn from that experience: Even with the best of intentions, our rules can produce unpredictable outcomes that cause unforeseen harms.

Looking toward the future, network engineers forecast that Internet traffic will grow fivefold in the next three to four years. They also predict that when all television and video is personalized and sent over the Internet, there will be 30 times more traffic than today's network can accommodate. These traffic levels could materialize in less than 10 years, depending on how quickly user viewing habits change. Such congestion in the core requires constant and careful investment and management to ensure that consumers get the experience they expect while service providers expand their networks. Hopefully, all of us can also agree today that we will avoid adopting policies that may inadvertently stunt the growth of the network.

With that in mind, I want to again thank Chairman Genachowski for providing edits that allow for ample opportunity to comment on ways to achieve the goal of preserving an open Internet without additional regulation. Policies that promote abundance and competition serve as an antidote to potential anticompetitive conduct. If one market player were to manipulate Internet content or applications in an anticompetitive manner, sufficient competition would obviate the need for regulation by offering consumers multiple choices in "last-mile" providers. During the past few years, the Commission has worked diligently to adopt policies that have produced more last-mile competition by: making it easier for competitors to deploy fiber into American neighborhoods, auctioning new slices of the radio spectrum for powerful new broadband services and opening up the television "white spaces" for unlicensed uses.

In the past decade, however, most American consumers have had only two broadband platforms to choose from: a cable company and a phone company. This limited choice has produced a fear among proponents of regulation that last-mile providers could act in anticompetitive ways that limit consumer freedom on the Internet. But the reality is the days of the broadband duopoly are ending. Robust competition is budding, and more is on the way. Moreover, as we work on our National Broadband Plan for Congress, we should be mindful that investors of all sizes, as well as objective market analysts, have warned us that new regulation may frighten away critical investment capital needed to build America's broadband future.[6]

I hope that we will seriously consider the idea of having the Commission play a leadership role in helping to spotlight instances of market failure and conveying them to appropriate non-governmental collaborative bodies for review and action in an effort to avoid the unintended consequences of new regulation. This model, supported by strict enforcement of our

[6] *See* FCC Hearing on Capital Formation in the Broadband Sector (Oct. 1, 2009). Webcast located at http://www.fcc.gov/live/2009_10_01-workshop.html.

antitrust laws, could very well provide the benefits sought by proponents of new rules without incurring the unexpected costs of a new regulatory regime.

Although I respectfully disagree with the factual and legal predicates that have produced this item today, I agree that if we are to have rules the proper way to proceed is a notice of proposed rulemaking containing the text of proposed rules. These issues are complicated and highly technical and deserve the lengthy comment period the Chairman has suggested. The longer time frame may also allow us to receive guidance from the court on our legal authority to proceed as may be decided in the *Comcast/BitTorrent* appeal.

Let me reiterate that this is the beginning of a process. No irreversible decisions have been made. We have started a debate in the context of a healthy process. We can agree in part and disagree in part and be respectful and collegial about it all. I hope that all of us are entering into this with open minds that can be changed purely by the facts and law. I also thank the staff for their openness to ideas, hard work and diligence in preparing this Notice.

So it is in this spirit of collegiality and good faith that I respectfully dissent in part (on the factual and legal predicates) and concur in part (on the process).

But instead of ending on that note, let me close with a quote from someone we all know and who had a great deal of influence over how the Internet became privatized.

> Though government played a role in financing the initial development of the Internet, its expansion has been driven primarily by the private sector. For electronic commerce to flourish, the private sector must continue to lead. Innovation, expanded services, broader participation, and lower prices will arise in a market-driven arena, not in an environment that operates as a regulated industry.
>
> Accordingly, governments should encourage industry self-regulation wherever appropriate and support the efforts of private sector organizations to develop mechanisms to facilitate the successful operation of the Internet. Even where collective agreements or standards are necessary, private entities should, where possible, take the lead in organizing them.[7]

This, of course, comes from the Presidential Directive announcing the "Framework for Global Electronic Commerce" signed by President Bill Clinton in 1997. As we go forward, I think it may be advice worth heeding.

[7] Memorandum from the White House Office of the Press Secretary to the Heads of Executive Departments and Agencies (July 1, 1997).