Remarks of Commissioner Meredith Attwell Baker

The Proven Way: A Regulatory Approach to Promote the Public Interest by Creating Jobs, Fostering Investment, and Driving Broadband Opportunity

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My approach to broadband regulation begins with the core principle that we must take the statute seriously and always respect our limited role of implementing Congress's direction. We must recognize the basic teachings of economics and financial markets, the core tenants of engineering, the time-tested proposition that competitive markets protect consumers better than prescriptive government regulation, and some plain old common sense: if it isn't broken, don't fix it. And, our Title I regime for broadband is certainly not broken.

The Internet Has Flourished Under the Commission's Current Regulatory Framework.

Over a decade ago, the Commission established a bipartisan approach that the Internet should be lightly regulated under Title I.[1] Time has shown this to be one of the best decisions the Commission has ever made for consumers. In direct reliance on a consistent regulatory approach, wired and wireless network providers pumped $60 billion into their networks last year alone.[2] Billions more have gone into applications and devices that ride on those networks. By every metric, broadband is a remarkable success: more universally available, faster, and cheaper.

My travels as a Commissioner have also reinforced that the Internet is still a very new and evolving technology, and that former Commissioner Abernathy's call for "Government Humility" is particularly true when confronting this dynamic industry.[3] In Cambridge, I learned about Akamai, which carries up to 20 percent of the world's Internet traffic with 70,000 servers around the globe. Its service underscores that the lines between networks, applications, and devices have blurred substantially, and it is difficult, if not impossible, to segregate particular Internet functionalities. In San Diego, Qualcomm taught me that prioritization and quality of service are innovative and can benefit consumers. Cisco explained that a managed network can carry twice the bandwidth of an unmanaged one. Demonstrations in Boulder at

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1 *Federal-State Joint Board on Universal Servic*e, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998) (*Stevens Report*); *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 4798 (2002) (*Cable Modem Declaratory Ruling*), *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (*Brand X*); *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 14853 (2005) (*Wireline Broadband Order*).

2 Federal Communications Commission, *Connecting America: The National Broadband Plan* at 38 (Mar. 17, 2010) (*National Broadband Plan*)(detailing that "[c]able and telephone companies invested about $48 billion in capital expenditures (capex) in 2008 and about $40 billion in 2009); *id.,* at 40 (explaining that "[i]n 2009 wireless companies were expected to have incurred about $20 billion in capital expenditures").

3 Remarks of Commissioner Kathleen Q. Abernathy, *My View from the Doorstep of FCC Change,* Address to the Indiana University (Mar. 4, 2002).

CableLabs confirmed that networks function similarly across platforms, and it is a big stretch to presume that today's complex networks are just dumb pipes.

The Comcast Decision is Consistent With Our Existing Regulatory Approach.

Nothing the D.C. Circuit did in the recent *Comcast* case requires us to revisit this regulatory construct, which is working.[4] It is important to focus on the specific holding in the *Comcast* decision because the rhetoric surrounding the case has obscured it, and led us to this unfortunate reclassification discussion. The court said what a number of courts have previously concluded: our Title I authority is not unlimited, and we need to tie regulations adopted under Title I to explicit statutory directives captured somewhere else in the Act.[5] In this case, we failed to do so and were rightfully turned away.

The *Comcast* decision neither called into question our information service classification for broadband Internet access services, nor denied the Commission's lawful use of ancillary authority going forward, as first affirmed by the Supreme Court in 1968, and more recently addressed in *Brand X*.[6] Indeed, the D.C. Circuit did not opine on the Commission's ability to regulate broadband beyond net neutrality. Even for net neutrality, the court rejected the statutory basis provided, but refrained from categorically rejecting other potential bases. Bottom line: the *Comcast* decision did not alter the minimal regulatory approach the Commission has repeatedly endorsed for broadband Internet access services, and will serve as a helpful reminder that the Commission should not overreach. For once, bad facts made good law.

The Commission Should Not, and Need Not, Pursue Reclassification.

Chairman Genachowski has announced his intent to turn this regulatory foundation on its head by classifying broadband Internet access service as a monopoly-era Title II offering.[7] The Chairman has attempted to brand his proposal as a compromise position or a "Third Way." It is neither. There are two paths forward for the Commission: stay on the bipartisan regulatory road that has brought us high-paying jobs and billions of dollars of investment, or use the most intrusive one-wire tool in the Commission's toolbox to regulate the Internet. The Chairman has chosen the latter approach suggesting that the *Comcast* decision left him no choice. No matter how well-intentioned, I have to respectfully disagree with both the Chairman's decision and its apparent causation.

At the outset, I have concerns that this Title II debate is really about putting potential net neutrality rules on firmer ground. An effort to first shop for a desired list of regulatory authority and then define broadband to fit into the corresponding classification is not a task for the Commission. Only Congress should make such a fundamental decision. If the existing classification fails to provide the necessary regulatory results, legislation is the appropriate remedy. Prominent members of Congress representing

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4 *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (*Comcast*).

5 *Id.,* at 661 (quoting *Am. Library Ass'n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)) (explaining that the Commission had "failed to tie its assertion of ancillary authority over Comcast's Internet service to any 'statutorily mandated responsibility.'")

6 *See United States v. Sw. Cable Co.*, 392 U.S. 157 (1962); *Brand X.*

7 Chairman Julius Genachowski, *The Third Way: A Narrowly Tailored Broadband Framework* (May 6, 2010) (available at http://blog.broadband.gov/?entryId=417981).

both parties have expressed a willingness to adopt legislation to address any specific area in which existing authority is lacking. The Chairman's proposal takes a different approach, effectively legislating through reclassification.

This results-driven process alone dooms the Chairman's proposal, but it is not its sole infirmity. First, the Chairman's proposal presumes that broadband Internet access services can be divided into separate components and that a distinct telecommunications transmission service can be isolated. I disagree. The Commission found broadband Internet access services to be a single integrated offering in 2002, and nothing has materially changed.[8] Consumers are still offered, and purchase, a single service. If anything, convergence within the Internet world has blurred the lines even further between transmission and information, network and application. Is the Kindle a network to deliver books, a device to read books, or an application that lets you turn the pages?

Second, a good deal of discussion has centered on whether competition predicted in 2002 has or has not materialized. It has—broadband competition has grown dramatically since 2002. Eighty percent of households have a choice between robust terrestrial services, satellite services offer additional nationwide options, and over 120 million have 3G wireless connections.[9] Are broadband competition and deployment perfect? Of course not: there is more work to be done, but competition is far greater than it was in 2002, and future trends continue to be promising. Clear is now providing 4G wireless services with speeds up to 10 Mbps, and reports that almost half of its new subscribers are broadband cord cutters.[10] Nationwide 4G deployments are imminent.

Third, while the Chairman continues to speak about the need for regulatory certainty, he seems to overlook that we had certainty until this classification debate began last month. The U.S. Supreme Court validated the Commission's decision to classify broadband Internet access service as an information service. It took us years to get there, but we had a stable and predictable broadband regulatory regime under Title I that produced solid results. Now, uncertainty abounds: analysts describe the current condition as "chaos" and "nuclear war." Institutionally, investors and companies understand that elections have consequences and policies will shift. Reclassifying entire sectors of the communications industry is a pendulum swing far greater, and it undermines the ability of companies to rely on this agency's decisions.

Even if a court were to ultimately accept reclassification, which I seriously doubt, the Chairman's approach would require a lengthy period of severe uncertainty. It took five years to resolve cable modem's classification, and a similar period of legal uncertainty for Title II would just be the beginning.

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8 *Cable Modem Declaratory Ruling* at 4823 (ruling that cable modem service is a "single, integrated service that enables the subscriber to utilize Internet access service.")

9 *National Broadband Plan* at 20 (explaining that "more than 80% live in markets with more than one provider capable of offering actual download speeds of at least 4 Mbps."); Morgan Stanley Internet Trends, CM Summit (June 7, 2010) (finding that there were 123 million 3G subscribers in the United States last year) (available at http://www.slideshare.net/CMSummit/ms-internet-trends060710final).

10 Clearwire Corporation Q4 2009 Earnings Call Transcript (Feb. 24, 2010) (explaining that "[r]oughly half of the customers come on and use it overall as a replacement to whatever it is they were having before which is a combination usually of DSL or cable broadband."); www.clear.com (detailing that "[b]ased on internal speed tests of CLEAR network users, download speeds average around 3-6.0 Mbps with bursts up to 10 Mbps.").

Industry will continue to face a period of significant regulatory uncertainty as the Commission and the courts deal with the untested legal concept of "un-forbearance." Specifically, what will happen if a future Commission seeks to use its Title II power more intrusively by undoing this Commission's forbearance decision?

This lingering uncertainty is significant because it closes checkbooks just as the National Broadband Plan highlighted the need for billions of additional investment in broadband networks. Next-generation networks will serve as a vibrant engine of economic growth: a job creator the nation desperately needs. To do so, we need to create incentives for those with capital to invest aggressively in our field. I am afraid this reclassification debate will have the opposite result—a feeling shared by over half the Members of Congress.

Fourth, a Title II approach has its own significant legal risk. It requires the Commission to alter a service's classification without evidence of any material change in circumstances, and forces the Commission to use its deregulatory forbearance authority in an unorthodox and untested manner to achieve a desired list of regulations. I simply disagree that the switch to Title II is more legally sound than maintaining the existing regulatory framework that has served industry and consumers so well.

Lastly, it is not just the investors who are watching our every move: international regulators are monitoring this proceeding closely, and will feel compelled to act if we do. Regulating any part of the Internet as a telecommunications service carries significance in the ITU and in other international regulatory bodies. Even more troubling, the stated goal to maintain Internet openness may well be used as a pretense for closing it in other parts of the world.

The Proven Way to Achieve A True Consensus Agenda

This Title II fight is not only regrettable, but I believe avoidable. While there is no such thing as a Third Way, there is a Proven Way. I believe the foundation of a strong national broadband policy is already in place, and we need not alter the regulatory classification to achieve a true consensus agenda. I want to briefly outline a way to achieve our national broadband objectives without reclassification.

Universal Service. There is clear consensus that an overhaul of the universal service fund is critical to better manage the costs of the program and help address broadband adoption and deployment challenges. In 2007, the Joint Board recommended that broadband Internet access services be a "supported service" under the program,[11] and a number of parties have advocated ways to expand the Fund to support broadband based on section 254.[12] Section 706's directive to deploy advanced services to all Americans provides further support that this would be consistent with congressional intent. I recognize that section 254's language could be read to be ambiguous, and this approach is not without some legal risk– but it is less risky than reclassifying an entire sector of the Internet.

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11 *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No, 05-337, CC Docket No. 96-45, Recommended Decision, FCC 07J-4, ¶ 56 (Nov. 20, 2007).

12 *See e.g.,* Letter from Kyle McSlarrow, President & CEO, National Cable & Telecommunications Association, to Julius Genachowski, Chairman, FCC, GN Docket Nos. 09-51, 09-191, WC Docket No. 07-52 (March 1, 2010) (*NCTA USF Letter*); *see also* Letter from Gary L. Phillips, General Attorney & Associate General Counsel, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-51, 09-47, 09-137, WC Docket Nos. 05-337, 03-109 (Jan. 29, 2010).

Disability Access. Another area of clear consensus is to make sure persons with disabilities have access to broadband. The Broadband Plan revealed that only 42 percent of disabled Americans subscribe to broadband.[13] We have twice extended the disability access protections of section 255 using our ancillary Title I authority: first for voicemail and interactive menus, and then for interconnected VoIP.[14] We have a record of success on this front, and a clear statutory nexus for the exercise of ancillary authority consistent with the *Comcast* decision. Section 706's call for deployment of advanced services to all Americans would be consistent with any future Commission action to protect persons with disabilities.

Consumer Protection. There is also consensus that consumers should be provided clear disclosures about their broadband service, and any limitations on their use. Transparency is critical for a properly functioning competitive market. When approaching Internet-related issues, we should avoid the temptation to believe that if the FCC does not act, no one will. Providers have publicly committed to best practices and standardized disclosures. I call on providers to implement these commitments, and not wait for a governmental mandate. The CTIA Code of Conduct can serve as a model of an industry framework that has served consumers and industry well.[15] We should also recognize that a shift to common carrier status under Title II would strip the FTC of authority over broadband services.[16] By doing so, the FCC would frustrate the ability of the FTC to address consumer protection and privacy issues in a holistic manner across Internet networks, applications, and devices.

Net Neutrality. There is agreement that the Internet should be open. It is today, and it must always remain open. There is no consensus, however, that the government should step in and adopt rules to preserve the openness provided today by competitive markets. The timing of the *Comcast* decision may be fortuitous as it gives us the opportunity to hit pause on net neutrality.

Proponents of prescriptive regulation continue to point to the same handful of isolated incidents to support the adoption of intrusive rules. There is simply no evidence of market failure warranting government action, and there are clear risks that come with adopting unnecessary or imperfect regulations. Specifically, the technical workshops held by the Commission– for which the Chairman deserves credit for hosting– have demonstrated that the Internet is too interconnected, too dynamic, and too complex for bright line rules set by the government. We are ill-equipped to define reasonable network management or managed services, or to distinguish good prioritization from bad in a workable

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13 *A Giant Leap and a Big Deal: Delivering on the Promise of Equal Access to Broadband for People with Disabilities*, OBI Working Paper Series No. 2, at 6 (Apr. 2010).

14 *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*; *Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417 (1999); *IP-Enabled Services; Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, WC Docket No. 04-36, WT Docket No. 96-198, CG Docket No. 03-123, CC Docket No. 92-105, Report and Order, 22 FCC Rcd 11275 (2007).

15 *CTIA Consumer Code for Wireless Service* (available at http://files.ctia.org/pdf/The_Code.pdf)

16 The FTC Act provides that Title II "common carriers subject to the Communications Act of 1934" are exempt from the FTC Act. 15 U.S.C. §§ 45(a)(2), 44.

and consistent manner across the Internet. We should avoid drawing artificial lines within the Internet ecosystem and micromanaging a subset of particular economic relationships.

Yesterday, eleven companies representing a cross-section of the Internet world announced plans for the Broadband Internet Technical Advisory Group, which will function as a "neutral expert technical forum" to address network management issues.[17] This is great news. I am hopeful that the formation of this group represents a significant first step towards a viable self-governance model to address Open Internet challenges. All involved in this effort deserve congratulations, but I do want to single out my dear friend Dale Hatfield's leadership in shepherding this effort. A group such as the TAG has the ability to craft an engineering-based process that is more flexible, responsive, and efficient, and infinitely less polarizing and political than regulation. I hope the Commission embraces such a model, and I encourage those involved in the effort to remain committed and move forward to formalize the TAG and establish a viable dispute resolution process "outside of an adversarial context."

Next Steps

The Title II fight diverts resources for the foreseeable future away from the core adoption and deployment challenges highlighted in the Broadband Plan. This too is unfortunate. One-third of Americans have chosen not to subscribe to broadband today, and both the Commission's and industry's focus is better served to address the constituencies that are on the sidelines of the broadband age.

The deployment of universal next-generation broadband will help create jobs, unlock untold opportunities for all Americans, revolutionize education, health care and energy use, and provide new innovations and applications to make all of our lives better. This cannot happen if streets do not get dug up, towers do not get built, and underinvested infrastructure cracks under congestion pressure. Even a marginal difference can be significant in challenging economic times when we cannot afford to deter a single investor or drive up the cost of capital by a fraction of a percent. We have a proven way to deal with all of these challenges and a demonstrated track record of success under Title I.

Spectrum policy remains to me another untapped opportunity for the Commission on a consensus basis to provide innovators and entrepreneurs with the tools necessary– oxygen as the Chairman likes to say– for next-generation 4G wireless and satellite offerings. I think our spectrum policy needs to focus as much on promoting broadband competition as wireless competition, which is flourishing by the way.

In the end, it would be a disservice to consumers and the entire Internet ecosystem for us to allow this Title II debate to devolve into a take-it-or-leave-it reclassification fight. The stakes are too high, and the opportunity too great to lose years in Title II litigation limbo. I urge all parties in this debate to disagree without being disagreeable, and maintain the ability to work together on issues of true consensus. I hope that a future regulatory approach based on Title I gets a fair hearing, and I ask all of you in this room to flesh out how we can proceed after *Comcast* without reclassification.

Thank you.

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[17] Press Release, *Initial Plans for Broadband Internet Technical Advisory Group Announced* (June 9, 2010).