

Remarks of Commissioner Meredith Attwell Baker
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Thank you. I am honored to be here. You've certainly planned a weighty topic for the holiday season. We've taken it from Dr. Seuss to Dr. Scalia at the FCC and have our own weighty agenda, so it's timely and appropriate. I know we are keeping you busy. I can only imagine the number of law review articles that will be inspired by our action on net neutrality. Off the top of my head I can think of several topics, including:

- The ability of a federal agency to use a policy statement as direct authority
- The contours of a federal agency's ability to legislate on pressing matters in the absence of an up-to-date authorizing statute
- What is left for the FCC to regulate if the courts strike down the Chairman's view of net neutrality?
- What can't the FCC regulate if the courts uphold the Chairman's view of net neutrality?

And I could go on, but instead I will get to my point.

As you know, the Commission plans next week to adopt rules to mandate that the government will decide how Internet networks are managed. We do this against the will of the courts, which have told us that we lack authority to act. And Congress, which has asked us bluntly not to act, and definitely not to act his month. While that should be more than sufficient reason, net neutrality is also the wrong policy to drive investment, jobs, and opportunity into the Internet economy that this country so desperately needs.

I am alarmed because we have two branches of government—the courts and Congress—expressing grave concerns with our agency becoming increasingly unmoored from our statutory authority. By seeking to regulate the Internet now, we exceed the authority Congress has given us, and justify those concerns.

Just eight months ago, the D.C. Circuit ruled unambiguously that the Commission “failed to make [its] showing” that Title I-based net neutrality protections were within the FCC's authority.¹ Nonetheless we stand ready to follow the very same course, preparing *under Title I* to adopt policies far more intrusive than those previously rejected under effectively the same legal analysis.

Now, as I read *Comcast*, I see no invitation to go back and think creatively about how to contort the statute to discover or discern new authority without an appropriate statutory hook. And, I see nothing that has changed so significantly in the past eight months with respect to that authority to suggest a different outcome if, and when, our action is challenged.

¹ See *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

Congress has been equally direct. Over 300 members of Congress have expressed concern with the Commission's approach to regulating the Internet. The new majority in the House Energy and Commerce Committee clearly asked the Commission not to rush out an order by the year's end.² In the Senate, Kay Bailey Hutchison has stated that she was "troubled that the action would occur without Congressional input."³ Not mincing any words, Chairman-Elect Fred Upton has said plainly, now "is the time for the FCC to cease and desist."⁴

And just yesterday, 29 Senate Republicans, including Senator McConnell and the entire leadership team, expressed continued opposition to the Chairman's announced plans, calling them "an unjustified and unnecessary expansion of government control over private enterprise."⁵ They "implored" the Chairman to reconsider his decision to regulate broadband services.

When so many elected officials express such concern and ask an agency to allow Congress to take the lead, the only appropriate course is to defer. Particularly where, as here, the Commission's authority to act is so lacking.

The facts—or the lack of them—don't help the Chairman's case. They only make it worse. The Commission has identified no market failure or systemic public interest harm that threatens the Open Internet. We have looked everywhere for problems to solve, and are still left with the same handful of dated, isolated incidents to try to justify sweeping industry-wide rules.

Instead, what we see is billions in investment across all sectors of the Internet economy; a contribution of almost half a trillion dollars to the economy. We see consumers benefiting from new services, faster connections, and the latest and greatest applications. We are putting this at risk.

In short, unless something dramatically changes before next Tuesday, three unelected officials will effectively be doing what Congress could or would not do: passing into law a new bill and writing the accompanying legislative history. They will adopt implementing regulations for a statute that has never been enacted, exercising their own discretion and judgment. They will create new jurisdictional limits, delegating to the Commission an unbounded regulatory power to adopt policies to promote a particular vision for the Internet.

This is beyond a philosophical or policy difference of how best to preserve an Open Internet. It is a partisan, big government intervention in a rapidly evolving sector that has flourished without its heavy hand. And, it goes to a broader question of the proper role of

² Letter from Ranking Member Joe Barton *et al* to Honorable Julius Genachowski (Nov. 19, 2010).

³ Sara Jerome, "Hutchison pans net-neutrality proposal," *The Hill* (Dec. 1, 2010).

⁴ Press Release, "Upon Urges FCC to Cease and Desist on Net Neutrality," (Dec. 1, 2010).

⁵ Sara Jerome, "Senate Republicans oppose net neutrality," *The Hill* (Dec. 15, 2010).

an independent agency whose operation is increasingly divorced from the limits of its statute. Congress is right to ask the Commission to stand down.

I would like to focus on three particular points that weigh heavily upon my analysis of this issue. First, Chairman Genachowski's letter to Chairman Barton states that the Commission has authority to act under Sections 706(a) and (b) of the 1996 Act. I respectfully disagree. We didn't before *Comcast* and we don't today.

I would like to reiterate my broader process concerns. It is true that this proceeding is over a year old, and that the Chairman has held five workshops and sought comment on the original proposed rules. But, it is equally true that the vast bulk of that work and those comments are from the beginning of this year, before iPads and 4G. More pertinent, the core public comment occurred before dozens of closed door FCC meetings were held with a select handful of prominent special interest groups and large companies. And, before Chairman Waxman socialized the draft bill on which our proposed action is supposedly based.

Finally, I want to underscore a fact that is often overlooked in the policy debate and press. This is not a parlour discussion or a dry academic debate. While it is interesting to know what is going on on the 8th Floor of the FCC, I am much more concerned about what is going to happen in networks; and I am worried. I am worried about what it will mean for consumers and innovation in America.

Reams of documents filed in connection with the National Broadband Plan as well as in the Open Internet dockets tell us that all networks are undergoing a phase of rapid evolution and investment to manage the exploding demands of broadband users. It is hard for me, at least, to know precisely what future networks will look like, but it will surely involve some mix of sophisticated wireless technologies and advanced broadband networks. These networks will need to support exponentially more traffic generated by consumers, businesses, and even things that we encourage to rely on the Internet for virtually everything they do.

The Chairman talks about preserving the Internet status quo through his net neutrality item. I say we need to enable the future; and our action next week will not, to my mind, come anywhere close to doing it. Indeed, it could do quite the opposite, discouraging investment and innovation, not only in the development and deployment of technologies and infrastructures, but also in the creation of new products and services that could benefit consumers even more than those we have today.

To take one example, it is reported that wireless, for now, will receive different treatment in the item. Some contend it should be subject to the same comprehensive restrictions as other types of networks. Because I believe in the very near future most broadband networks will include both wireless and wireline elements, we cannot ignore the laws of physics and the fundamental challenges you encounter when you transmit massive amounts of data over a wireless interface to a consumer.

If we are serious about promoting the deployment of next generation wireless networks our analysis must reflect that wireless is more than new; it is different. The technical and operational constraints of cell site demand, capacity-constrained spectrum and growing interference challenges must be addressed. We must not act in a manner to undermine the very technologies we want to see deployed. This is all the more true given our limited ability to meet exploding spectrum requirements, at least in the near future.

Chairman Genachowski deserves credit for seeking to make the Commission a model transparent agency. Doing the right thing in the next few days would be the clearest manifestation that this objective has been met. Fundamentally, there is no crisis we must resolve necessitating a rushed decision this month. Our data-driven process has yielded no systemic problems. Yet, the Chairman delayed the December open meeting, and circulated the draft in the dead of night. To make matters worse, the Bureau introduced nearly three thousand pages into the record on its own motion days before the vote, leaving precious few hours for the public, or my overworked staff, to assess their importance.

As I have said before, I still think we have the opportunity to do this right, to demonstrate our good faith in working as partners with the new House leadership and to deal openly with the facts. If this agency is to operate in the most transparent and inclusive manner, we should proactively put out a copy of our draft net neutrality rules for comment today. The comment cycle can be short, but putting some sunshine on what we are doing would inform our process.

The future of Internet is at stake, and the three millions jobs connected to the Internet.⁶ Input, especially from network engineers and experts on our specific proposals, would help curtail any unintended consequences. We should provide the time for a meaningful dialogue with all stakeholders that could be adversely affected by our actions.

Now, I realize that it is all too easy to say “no.” November’s election reinforced my long-held view that is incumbent upon all of us to seek out a sensible consensus-driven middle ground. With respect to net neutrality, that ground can be gained if we recognize that issues can be resolved by means other than affirmative regulations. As a start, to the extent net neutrality rules are sought out of a perceived concern that ISPs will act as gatekeepers; our efforts are better directed at facilitating advanced wireless network entry.

Beyond net neutrality, the Commission in March adopted a *Policy Statement* outlining a list of consensus-based projects we can work together on, including broadband deployment and adoption, public safety, spectrum, and universal service reform. We should work towards implementing this agenda proactively. I continue to believe that spectrum reform is an area of unparalleled opportunity for bipartisan action to benefit American consumers.

⁶ John Quelch, “Quantifying the Economic Impact of the Internet,” Harvard Business School (available at: <http://hbswk.hbs.edu/item/6268.html>) (last visited Dec. 8, 2010) (estimating “a total of 3.05 million, or roughly 2 percent, of employed Americans”).

Regardless of where we wind up next Tuesday, the Chairman should close the Title II docket. By closing Title II, the Chairman can signal definitively to the Internet sector that our widely successful pro-growth, pro-investment approach to broadband under Title I remains the right policy for today and tomorrow's Internet.

We have a limited window of opportunity to work with Congress on a pro-job, pro-investment agenda. I hope we can refocus our efforts before it is too late.