STATEMENT OF
COMMISSIONER MICHAEL J. COPPS
CONCURRING

Re: *In the Matter of Preserving the Open Internet; Broadband Industry Practices*, Order (GN Docket No. 09-191, WC Docket No. 07-52)

In years to come, I hope we can look back on this day as an important turning point in the struggle to ensure the continued openness of the Internet against powerful gatekeeper control. On numerous fronts in the *Open Internet Order* before us today, the Commission is taking strides forward. On others, I pray that our timidity will not undermine the spirit of the Order that we are adopting. The Internet was born on openness, thrived on openness and will achieve its full potential only through continued openness. It is my fervent desire that, with this Order, we start to write the next chapter in the great Internet success story—one of continued openness, innovation without needing permission from anyone, and expanded access for all Americans. We cannot afford to permit special interests to relegate the awesome opportunity-creating power of the open Internet into the sad history of "what might have beens."

Allowing gigantic corporations—in many cases, monopoly or duopoly broadband Internet access service providers—to exercise unfettered control over Americans' access to the Internet not only creates risks to technological innovation and economic growth, but it poses a real threat to freedom of speech and the future of our democracy. Increasingly our national conversation, our source for news and information, our knowledge of one another, will depend upon the Internet. Our future town square will be paved with broadband bricks. It must be accessible to all—not handed over to a handful of gatekeepers who can control our access. As I have long argued—and as many students of the medium have written—previous telecommunications and media technologies, also conceived in openness, eventually fell victim to consolidated control by a few powerful interests, speculative mania by investors, and mistaken government policies which assumed that wise public policy was no public policy. We're supposed to learn from history; too often we don't. Increasingly, the private interests who control our Twenty-first century information infrastructure resemble those who seized the master switch, as Tim Wu's new book calls it, of the last century's communications networks.

In 2003, I cautioned, somewhat dramatically perhaps—but not inaccurately—that the "Internet may be dying . . . because entrenched interests [were] positioning themselves to control the Internet's choke-points." I called then—as I have repeatedly since—for clear rules to maintain openness and freedom on the Internet and to fight discrimination over ideas, content and technologies. Two years later, I was able to convince my colleagues to—at a minimum—adopt an *Internet Policy Statement* that contained the basic rights of Internet end-users to access lawful content, run applications and services, connect devices to the network and enjoy the benefits of competition. Now, at long last, we adopt at least some concrete rules to prevent gatekeepers from circumventing the openness that made the Internet the Internet and from stifling innovation, investment and job creation.

All we need to do is look at our history at the FCC as a cautionary tale. It wasn't all that long ago (well, at least, when you're my age) that one network—AT&T—ran the whole show.

AT&T had the power to decide how the network would be used. When innovators showed up at the door with ideas and new technologies, they were often greeted with a courteous but quick "go away." For a long time, the FCC fully supported this type of network, and in fact served as its protector. It was thought that only through comprehensive control by a single company could the quality, safety and scale economies of the network be guaranteed. Bigger was better, and uniformity and stability were thought to be worth the price of lost opportunities for innovation and consumer benefits.

All of this began to change in the late 1960s when an innovator called Carter Electronics Corporation developed a device that connected mobile radio-telephone systems to the wireline network. This device, called the Carterfone, had a cradle into which a regular handset was placed. It converted voice signals to radio signals without the need for a direct electrical connection. But the entrenched incumbent claimed that allowing this innovative and foreign attachment would bring down its entire system. Why? Because the entrenched incumbent didn't build it, sell it and control it. Sound familiar?

Over the complaints of a powerful special interest, the Commission worked up enough courage to change tack, stand up to the network gate-keeper and do the right thing, requiring the network operator to permit attachment of this new application into the existing network. In spite of all the monopolist's alarm bells that this decision meant the end of network quality and the end of reliable service as we knew it, just the opposite came to pass. The idea of having a network that couldn't discriminate against innovators who wanted to improve it finally began to break the choke-hold that the gatekeeper had on the system.

Years after the *Carterfone* decision, as we entered the early days of the Internet age, the Commission reaffirmed its policy of openness and competition by protecting freedom on both the access layer and the architectural layer of the network. In the *Computer Inquiries*, earlier Commissions mandated that common carriers that own transmission pipes used to access the Internet must offer those pipes on non-discriminatory terms to independent Internet Service Providers, among others. Through these decisions the Commission fostered competition by ensuring that customers could reach independent providers. Congress then moved, in provisions of the Telecommunications Act of 1996, to protect the architectural layer. Congress said that local telephone companies with choke-point control of physical infrastructures would have to unbundle their transmission networks.

Sadly, both of these policies were, in fairly short order, decimated by the two Commissions that served between 2001 and 2009. Over my strenuous objections—and those of my colleague Jonathan Adelstein—the FCC took American consumers on a dangerous deregulatory ride**,** moving the transmission component of broadband outside of the statutory framework that applies to telecommunications carriers. When those Commissions stopped treating advanced telecommunications as telecommunications, they relegated American competitiveness to the sidelines. I don't like to see my country on the sidelines. Neither do most Americans. And remember, this was a major flip-flop from the historic—and successful—approach of requiring nondiscrimination in our communications networks. Because of the errors of those previous Commissions, a court told us earlier this year that the legal framework upon

which the FCC built its action against Comcast for disrupting peer-to-peer traffic was inadequate.

Since the decision in *Comcast*, the "Good Ship FCC" has found itself adrift without the tools needed to keep even the most basic consumer protections afloat in today's communications networks. Today, we finally try to patch the hole left by the *Comcast* decision by adopting certain rules to preserve the openness of the Internet. To be clear, we do not anchor ourselves on what I believe to be the best legal framework. Nor have we crafted rules as strong as I would have liked. But, with today's action, we do nonetheless appear to steer ourselves back toward a better course.

I had hoped that we would move full-throttle to restore the kind of policies that had worked in the past. I wanted to put those eight years of public policy aberration—some, me included, dare call them years of abdication—totally behind us. So I pushed—pushed as hard as I could—to get broadband telecommunications back where they belonged, under Title II of our enabling statute, where hard-won consumer-friendly protections that had been built up over many years provided a framework under which business could do its job of building and managing this great communications enterprise—making handsome profits in the process—while operating within a public policy framework giving them certainty and giving consumers the protections they needed and deserved. I wanted to go back to that balancing act that had generally worked, for so many years, for the common good. So, yes, I continue to believe that a reassertion of our Title II authority would have provided the surest foundation for future Commission action. And I note with interest that the Commission's *Reclassification* docket will remain open.

There is more that I would have liked in this Order. I would have preferred a general ban to discourage broadband providers from engaging in "pay for priority"—prioritizing the traffic of those with deep pockets while consigning the rest of us to a slower, second-class Internet. I also believe we should have done more to strip loopholes from the definition of "broadband Internet access service" to prevent companies falsely claiming they are not broadband companies from slipping through. We've made some improvements on the definition, but I still have some worries. I also argued for real parity between fixed and mobile—read wireline and wireless—technologies. After all, the Internet ***is*** the Internet, no matter how you access it, and the millions of citizens going mobile nowadays for their Internet and the entrepreneurs creating innovative wireless content, applications and services should have the same freedoms and protections as those in the wired context. I had other areas of concern about something less than a bright-line nondiscrimination rule, keeping "reasonable network management" within bounds, and the substitution of monitoring for the certainty of enforcement in too many areas.

So, in my book, today's action could—and should—have gone further. Going as far as I would have liked was not, however, in the cards. The simpler and easier course for me at that point would have been dissent—and I considered that very, very seriously. But it became ever more clear to me that without some action today, the wheels of network neutrality would grind to a screeching halt for at least the next two years. So, reserving the right to dissent throughout, I spent the past three weeks in intensive discussions—with all interested parties—about how we might be able to do something to ensure the continued openness of the Internet and to put

consumers—not Big Phone or Big Cable—in control of their online experiences. In the end, I believe we made some progress. Not nearly so much as I had hoped, but more, I think, than many people expected. The language in the Order that we will hopefully approve today moves the item, in my mind, from unacceptable to something in which I can concur. That is what I intend to do.

Among the many improvements to the Order we achieved, we now at least conclude that "pay for priority" arrangements would generally violate our "no unreasonable discrimination" rule. We have also explicitly changed the text of the definition of "broadband Internet access service" to close a loophole that, while protecting residential customers, would have jeopardized the open Internet rights of small businesses, educational institutions and libraries. We insisted on providing greater context to the definition so that broadband companies cannot easily evade the open Internet protections. We have expanded our transparency requirements to give consumers the information they need to make an informed choice by requiring disclosure on the broadband provider's website and also at the point of sale. In discussing the "no unreasonable discrimination" standard, we put particular emphasis on keeping control in the hands of users and preserving an application-blind network—a key part of making the Internet the innovative platform it is today. Given the importance of preserving the open Internet, we have also provided for "rocket docket" expedited treatment to address consumer complaints. Rules on the books are simply a tool waiting to be wielded unless the Commission makes a priority of enforcing them.

While it is no secret that I would have liked to see much more in the mobile section of today's Order, I believe the improvements we have made can start us on a path toward full parity with fixed broadband. After all, we clearly recognize today that "[t]here is one Internet, which should remain open for consumers and innovators alike, although it may be accessed through different technologies and services." More narrowly, we have managed to better refine the actions we do take today. For example, we clarify that a wireless broadband provider cannot block applications that compete with not only its own competitive voice and video telephony applications, but also with those in which it has an attributable interest.

Separate and apart from today's Order, we as a Commission must recognize that we have much urgent business to address to ensure a truly competitive mobile broadband environment—including resolving the pending proceedings related to early termination fees (ETFs), handset exclusivity arrangements, interoperability in the 700 MHz band, and data roaming, to name some of the pending decisions this Commission needs to make.

It is not the job of just the FCC or government writ large, or just consumers ands citizens, or just innovators and entrepreneurs to keep our information infrastructure open and dynamic. It is the job of all of us. Why is this important? Because we have in our grasp now the most powerful and promising communications technology in all of history. If we allow this opportunity-creating technology the freedom and openness it needs to reach its full potential, we can prepare our kids for a future that our country is finding more and more challenging. We will give our schools powerful new tools to educate us, young and old. We will be able to deploy these tools to improve our health, decrease our energy dependence, and create opportunities for whole communities that are being left behind in this new century—rural communities, the inner

cities, minorities, Indian country, and those with disabilities. The Internet has be accessible to all, responsive to all, and affordable to all. That's what this country worked for—and largely achieved—in building out electricity and plain old telephone service to all our citizens. It is what we now need to work for with our Twenty-first century broadband infrastructure.

If vigilantly and vigorously implemented by the Commission—and if upheld by the courts—today's Order could represent an important milestone in the ongoing struggle to safeguard the awesome opportunity-creating power of the open Internet. While I cannot vote wholeheartedly to approve the order, I will not block it by voting against it. It is a first step in the right direction—not that first sturdy step I hope my newest grandchild will take, but at least forward, if somewhat hesitant, movement.

Today's majority was crafted by discussion, respectful consideration of one another's thoughts, and give-and-take. I would have welcomed a little more "give," but I suppose the Chairman might see it differently. In any event, I thank him for his engagement and his commitment. I want to pay special tribute to my colleague Commissioner Mignon Clyburn. We shared many of the same concerns, I think it is fair to say, and her thoughtful and creative work, along with her heartfelt commitment to make this item work for consumers—***all*** consumers—had a lot to do with making this a better Order.

Finally, I want to express a deep sense of gratitude to staff. Mine was great in every aspect of this endeavor. John Giusti and Margaret McCarthy worked creatively and tirelessly into the wee hours of many nights and through some awfully long weekends. So, too, Commissioner Clyburn's excellent team, Dave Grimaldi and Angie Kronenberg. I know many folks in the Chairman's office sacrificed similarly, especially Rick Kaplan, Zach Katz and Eddie Lazarus. Literally dozens of people in the Bureaus have worked mightily here, too. I thank them all.

Thanks apart, our job doesn't end today. We haven't finished any race here. We haven't guaranteed an open Internet going forward. We will have, I suspect, a lot of new roads to build—and some other roads, even ones that we lay out in today's Order, that may require repaving and repair before long. If that happens, I hope we will be fast off the mark to do whatever needs to be done. So better than lapsing into a year of post-game armchair analysis, impugning motivations and all the rest, let's instead get to work on the huge job at-hand. Our challenge is nothing short of historic—it is to ensure that the liberating potential of our Twenty-first century communications tools are used to provide the opportunities our citizens—***all*** our citizens—require to be fully productive citizens of a fully productive country.

Thank you.