

Testimony of FCC Commissioner Mignon L. Clyburn

Subcommittee on Communications and Technology

Committee on Energy and Commerce

February 16, 2011

SUMMARY

- The Internet is a crucial American marketplace that 78% of U.S. adults rely upon every day.
- The current success of the Internet is largely due to its open architecture, and it should remain open, accessible, and affordable for every American.
- With an open Internet, businesses both large and small, can offer their products and services to consumers no matter their location.
- Hugely effective new business models have experienced staggering growth, due in no small part, to their ability to directly offer their services to consumers online, without Internet Service Providers (“ISPs”) demanding payment from them for prioritizing their websites.
- Without clear rules protecting end users’ ability to access products and services on the web, investment in new services and applications will be uncertain and overly cautious, resulting in an underperforming marketplace.
- Open Internet rules protect consumers and small businesses’ ability to access lawful websites, applications, and services, so that they, not their ISPs, can choose which companies, products, services and ideas will succeed.

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Mr. Chairman, Congresswoman Eshoo, Members of the Subcommittee, good morning and thank you for inviting me to testify before you today regarding the Commission's Open Internet Order.

The Internet is a crucial American marketplace. With each passing day, it becomes more essential in our everyday lives. Whether it's finding a job, receiving comprehensive health care, applying for essential benefits, accessing educational materials, news and information, or participating in our democratic society—Americans are increasingly relying on this world wide network.

The current success of the Internet is largely due to its open architecture. It is a tremendous "technological leap," and I say without hesitation, that an open Internet is a great equalizer. It allows traditionally underrepresented groups to have an equal voice and equal opportunity. It enables any connected individual to distribute his or her ideas to a global network, or run a business right from their very own home. The Internet reduces the barriers to entry for new players. It is a gateway to success at a low capital cost.

That is why it is so important for me to see that this technological marvel remains open, accessible, and affordable for every American, regardless of where they live, work or play.

There have been strong criticisms over the past several months regarding the Commission's decision to convert the Four Internet Policy Principles—which in fact, were

agreed to by a bipartisan, unanimous vote at the Commission in 2005 and have been governing the marketplace for the past six years—to actual rules that were expanded to include transparency and unreasonable discrimination provisions. Included were criticisms that: “Nothing was broken, so rules aren’t needed.” “This will kill job opportunities and stifle innovation and investment in the Internet and broadband networks.” On the other hand, we also have heard, “The Order is riddled with loopholes, provides inadequate protections for wireless technologies, and prioritizes profits over the general public good.” Even people who can’t define Net Neutrality, or are unsure of what we mean when we talk about the open Internet, have strong opinions about the Commission’s Order. And while I am fairly certain that I won’t change many minds here today, as a Commissioner who voted to approve the decision, I would like to address some of those concerns; and when the time comes, I look forward to an exchange during the question and answer period, or at any point following this hearing.

First, I would like to address the criticism that the Commission’s process to consider and adopt the Open Internet rules was not sufficient. We received the Open Internet Order for Commission consideration on November 30, 2010, and voted it on December 21st. This three-week timeframe is in accordance with every other Commission Agenda Meeting framework in which I have participated over the past 18 months, and is consistent with the FCC’s typical monthly meeting processes.

I stress, however, that this three-week time period only represents a small fraction of the actual amount of time that went into deliberating, crafting, and vetting the issues in this proceeding. In fact, dozens of FCC personnel from the Wireline Competition Bureau, the Office of Strategic Planning & Policy Analysis, the Office of Engineering & Technology, the Wireless Telecommunications Bureau, the Office of General Counsel, to the Commissioners’ individual

offices, conducted hundreds, if not thousands of hours of meetings with outside parties, and took every perspective into account before the Open Internet Order was circulated for a vote. My staff and I put in innumerable hours meeting with diverse interests, considering the record, and reviewing the draft Order, and I can say, with all sincerity, that I did not rush to judgment. We were at this for more than a year, 14 months to be exact, and the process ran an orderly course. These efforts can all be traced through the public disclosure of our proceedings on the Commission's website.

Apart from process, there have been a number of strong criticisms about the Commission's decision that I wish to address in more detail.

First, I want to speak to the assertion that the Internet marketplace is functioning fine and does not need fixing. The fact is that there have been several formal complaints filed and informal complaints and allegations lodged at the Commission about Internet Service Provider ("ISP") behavior. This is so despite the fact that in general, ISPs claim that they believe in an open Internet and the Commission's 2005 Policy Statement. The Internet has thrived because of its openness, and I believe that the Commission has a duty to ensure that consumers continue to have unimpeded access to it. To that point, the rules we codified in December, will serve to ensure that the Internet *remains* open and vibrant, and that millions of surfers, innovators, and every day consumers, will have the essential protections they need, so that an open Internet is still there tomorrow.

I am certain that at least half of the people in this room use the web to view photos, sitcoms, and full-length movies on their personal computers. The action that we took in December, will allow them to continue doing so, without deliberate interruption, distortion, or

blockage by any ISP provider which has competing economic interests. I believe one of my primary obligations as an FCC Commissioner is to protect consumers and their lawful activities on the Internet, such as using VoIP services that compete with an ISP or watching video from an ISP competitor. Our Open Internet Order does just that.

Regarding the impact that our ruling will have on investment, I embrace the position that *without* clear rules, investment in new services and applications will in fact be uncertain and overly cautious, resulting in an underperforming marketplace. We have heard this concern repeatedly from innovators and small businesses in the proceeding. In the final days of our deliberation, I heard from numerous companies about their difficulty, and sometimes inability, to obtain financing to offer their services on the web, due to unclear rules of the road, or the lack of open Internet protections. They explained that venture capitalists feared that ISPs would discriminate against their possible competitors. Small businesses like these are the life blood of this nation. As you know, they are directly responsible for employing the majority of our citizens. The uncertainty and lack of investment in this sector will stifle the full potential of these enterprises, including their abilities as employers.

Since we adopted the Open Internet Order, some of the leading executives at telecommunications and technology companies, such as DISH, Time Warner Cable, and AT&T, have publicly stated that our ruling will have *no adverse effect* in the communications marketplace. Analysts have also kept their fingers off of the alarm buttons, saying our rules are in fact a light touch that will ultimately provide for a common-sense framework.

Another criticism offered revolves around the notion that existing law provides sufficient consumer protections and safeguards. I disagree. My understanding of current antitrust law is

that it addresses issues only *after* violations and harms have occurred. ISPs thus have the ability and potentially the incentive, to stifle new, competitive businesses on the Internet, and no government action *after the fact* could properly address such significant impact. Thus, I believe, that putting basic protections in place, was not a reckless act. The Commission did this in order to prevent very real and irreversible harms that could occur in the marketplace.

Allow me to further highlight a few facts that were at the front of my mind while dissecting and deliberating this matter. E-commerce shopping broke a single-day record in 2010, when on “Cyber-Monday,” the Monday following Thanksgiving, companies saw online retail spending surpass the \$1 billion dollar mark. What is even more fascinating than that statistic, is the realization that the Internet allowed small online retailers to compete with their much larger, big box counterparts on that day; thus, eliminating the physical stigma of being located miles from a popular shopping mall or heavily trafficked area of town. On the web, these sellers can offer their products and services to consumers no matter their location, and that is one vital aspect of an open Internet that I think is worth protecting.

Hugely effective new business models have experienced staggering growth, due in no small part, to their ability to directly offer their services to consumers on the Internet without ISPs demanding payment from them for prioritizing their websites. The ability to see the profile picture of someone you just met or to offer your own content—photos, backyard movie clips, sound recordings, etc—is what many are doing, and I believe that our ruling safeguards their ability to do so, without delays in sending or receiving that could result from ISPs picking winners or losers on the Internet, through their gatekeeper role to end users.

Thousands of sites with some incredibly unique features and characteristics were not even in existence 10 years ago, and I want to ensure that many more that offer spectacular, as-yet-unheard of functionalities, are here in 2021. More people rely on the Internet on a regular basis, as indicated in a recent Pew Research Center study, which shows that 78% of American adults sign on daily. The President has said that the Internet is “vital infrastructure” and “has become central to the daily economic life of almost every American.” And the U. S. Congress recognized its significance too, as it charged the FCC with developing a National Broadband Plan to ensure that high-speed Internet is available to *all* Americans—no matter where they live. This is a goal we continue to work towards, as evidenced by our recent unanimous decision to reform the Universal Service Fund and intercarrier compensation regime to bring high-speed Internet capacity to every American home.

So I do not think we acted recklessly, nor do I believe that we have harmed the Internet. What we did was put a policy in place that will ensure and enable users to access lawful websites, applications, and services, so that they, not their Internet Service Providers, can choose which companies, products, services and ideas will succeed.