DISSENTING STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

Re*:* *Framework for Broadband Internet Service*, GN Docket No. 10-127

First, I can't emphasize enough that we all want an open Internet that maximizes consumers' freedom. It is important to remember that an open and freedom-enhancing Internet is what we have today as the result of a decades-old, bipartisan and international consensus that governments should not interfere with Internet network management issues. At the same time, authorities should discourage and punish anti-competitive conduct, and they have the legal means to do so today as they have had for decades.

Before I go further, however, I thank the Chairman for his graciousness and generosity throughout this debate. He has consistently extended his hand in a willingness to discuss the issues. I'd like to underscore that 90 percent of what we accomplish at the FCC is not only bipartisan but unanimous as well. Few governmental institutions can make such a claim. That also means, however, that we disagree on one in 10 proceedings. Disagreement and debate are healthy and necessary components of a functioning democracy. Today's Notice of Inquiry is one of those moments of strong, but respectful, disagreement.

Having said that, I also thank the Chairman, his legal team and the bureau staff for writing a NOI that contains several open-ended questions that provide ample opportunity for public comment.

Nonetheless, I disagree with the premise of this proceeding. Not only is the idea of classifying broadband Internet access as common carriage under Title II unnecessary, already it has caused harm in the marketplace.

As a threshold matter, classifying broadband as a Title II service is not necessary to implement the recommendations of the National Broadband Plan. The *Comcast* decision certainly does not affect our ability to reallocate spectrum, one of the central pillars of the Plan. Nor does the decision undermine our authority to reform our Universal Service program, the other major component of the Plan. In the unlikely event that a court decided against granting us *Chevron* deference in the pursuit of directly supporting broadband with Universal Service distributions, the FCC could tie future subsidies to broadband deployment. This idea was agreed to in principle by a bipartisan group of four Commissioners in late 2008, and I remain optimistic that we could successfully defend such an idea on appeal.

In fact, the *Comcast* decision was quite limited in its scope. The court merely held that Title I does not grant us authority to regulate Internet network management. It reasoned that the Commission could not do so because its ancillary authority over Internet service providers was not tethered to a specific Congressional mandate. In short, if the Commission would like to regulate that activity, it must wait for Congress to change the law. We are not Congress.

As a young attorney 20 years ago, I cut my legal teeth on Title II. Over the decades, an overwhelming consensus emerged among tech companies and policy makers from both parties to insulate new technologies from the application of early 20th Century common carrier regulations. The fundamental Title II rules from the Communications Act of 1934, which the majority seeks to apply to today's broadband sector, are the same regulations adopted in the late 19th Century for the railroad monopolies. In essence, the Commission is seeking to impose 19th Century-style

regulations designed for monopolies on competitive, dynamic, and complex 21st Century Internet technologies.

The ideas put forth for comment in today's NOI are not new. In fact, they were discussed and *discarded* in an overwhelmingly bipartisan way in the 1990s. Let's look back at a 1998 Commission report under the leadership of Bill Kennard, Chairman during President Clinton's second term:

> Turning specifically to the matter of Internet access, we note that classifying Internet access services as telecommunications services could have significant consequences for the global development of the Internet. We recognize the unique qualities of the Internet, and do not presume that legacy regulatory frameworks are appropriately applied to it.[1]

Just two years later, then-Chairman Kennard said:

> It just doesn't make sense to apply hundred-year-old regulations meant for copper wires and giant switching stations to the IP networks of today. . . . We now know that decisions once made by governments can be made better and faster by consumers, and we know that markets can move faster than laws.[2]

And here's what the Clinton White House had to say about placing legacy regulations on the Internet:

> We should not assume . . . that the regulatory frameworks established over the past sixty years for telecommunications, radio and television fit the Internet.[3]

The regulatory regime suggested by the majority today is likely to create asymmetries in the market place. For example, investment and innovation at the "edge" of the Internet, specifically devices and applications, are largely unfettered by regulation. This is as it should be. But the proposed new regime will place the heavy thumb of government on the scale of a free market to the point where innovation and investment in the "core" of the 'Net are subjected to the whims of "Mother-May-I" regulators. Although I have a tremendous amount of respect for my colleagues, no one can predict who will occupy these chairs in the future, or how they will act. Or, as Senator Olympia Snowe warned the Commission in a letter earlier this month:

> I am concerned about the long-term implications such classification could have on innovation occurring in all segments of the Internet supply chain and the uncertainty that would

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[1] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd. 11501, ¶ 82 (1998).

[2] Remarks of the Honorable William E. Kennard, Chairman, FCC, *Voice Over Net Conference: Internet Telephony: America Is Waiting* (Sept. 12, 2000).

[3] The White House, *A Framework for Global Electronic Commerce* (July 1, 1997).

> prevail, since nothing precludes future Commissioners from retracting the very rules you plan to implement.[4]

Moreover, the agency's dramatic attempt to regulate broadband Internet access services comes at a time when consumers are demanding more convergence between the core and the edge. While consumers and their suppliers in a competitive marketplace have been erasing lines of distinction separating tech business models, the Commission is proposing to up-end market trends and draw artificial legal lines to create new regulatory silos.

Investors and international observers are expressing serious concerns about what the FCC is poised to do. In the past two weeks I have traveled to New York and Europe. I have met with a diverse assortment of investors, market analysts, regulators, business people and academics. At every turn, I was met with confusion and questions regarding the idea of regulating broadband as an old-fashioned phone service. For decades now, the international consensus has been for governments to keep their hands off the Internet and to leave Internet governance decisions to time-tested non-governmental technical groups. Once that precedent is broken, it will become harder to make the case against more nefarious states that are meddling with the Internet in even more extensive ways than are contemplated here. In short, we will have lost the moral high ground. Again, a version of this scenario was foreseen by the Clinton Administration's Secretary of Commerce, William Daley, in 1997:

> [W]e have been working with the private sector to convince other nations of the advantages of a user empowerment approach over cumbersome government regulation of the Internet.[5]

Analysts are counseling a wide variety of investors to withhold badly needed investment capital in fear of regulatory uncertainty and litigation risks. While Title II classification is being advanced in the name of furthering broadband deployment, it may have the unintended consequence of stunting growth in this sector. Or, as written this week on a business website:

> But while it's business as usual now, capital investment will come down if Title II becomes a reality, said Credit Suisse telecom services dir[ector] Jonathan Chaplin. He said the next place companies would look to capture some of the return is costs, which would mean jobs.[6]

In fact, one recent economist's study estimates that a net 1.5 million jobs could be put at risk by a Title II classification.[7]

These thoughts aren't coming just from Wall Street, but from those who represent America's small and disadvantaged businesses as well. Listen to last month's remarks of David Honig of the Minority Media and Telecommunications Council:

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[4] Letter from the Honorable Olympia Snowe, United States Senator, to the Honorable Julius Genachowski, Chairman, FCC (June 1, 2010).

[5] Remarks of the Honorable William M. Daley, Secretary, U.S. Dept. of Commerce, *Internet Online Summit: Focus on the Children* (Dec. 2, 1997).

[6] *Street Talk*, CableFAX, June 14, 2010.

[7] Coleman Bazelon, *The Employment and Economic Impacts of Network Neutrality Regulation: An Empirical Analysis* (Apr. 23, 2010).

> Lender and investor uncertainty stemming from potentially years of litigation over Title II reclassification could make it profoundly difficult for MBEs and new entrants to secure financing. MBEs, especially, continue to experience great difficulty securing access to capital in the broadband space.[8]

Members of Congress also are asking the Commission to abandon the Title II route citing the investment and economic risk that they fear will come with it. Here is a segment of a letter from 74 Democratic House Members:

> The uncertainty this proposal creates will jeopardize jobs and deter needed investment for years to come. The significant regulatory impact of reclassifying broadband service is not something that should be taken lightly and should not be done without additional direction from Congress. We urge you not to move forward with a proposal that undermines critically important investment in broadband and the jobs that come with it.[9]

In fact, a large bipartisan majority of Congress – consisting of at least 291 Members – has weighed in asking the Commission to discard this idea or at least to wait for Congress to act. In other words, a commanding majority of the directly elected representatives of the American people do not want the FCC to try to regulate broadband Internet access as a monopoly phone service.

If my colleagues feel compelled to act, however, I hope that they would keep an open mind about an idea I have proffered for a couple of years now and that would certainly withstand appeal. In the absence of new rules, which already have started to create uncertainty and will be litigated in court for years, let us create a new role for the FCC to spotlight allegations of anti-competitive conduct while working with non-governmental Internet governance groups and consumer protection and antitrust agencies. In each of the small number of cases cited by proponents of network management rules, all were rectified quickly, without new rules. The recently announced technical advisory group could serve as a component of such an endeavor.

Additionally, it is my hope that instead of diverting precious resources towards creating new regulations, we focus on adopting policies that will help create abundance, competition and jobs. For instance, we could recapture the bipartisan and unanimous spirit of 2008 when the Commission approved the concept of unlicensed use of the television white spaces. This effort needs to be reenergized. American consumers will benefit tremendously from the unimaginable applications and devices that will use white spaces. Use of this spectrum also is an antidote to potential anti-competitive conduct by broadband providers as it will inject more competition into the "last mile." For instance, if one last-mile broadband provider were to act in an anti-competitive way, it would risk losing its customer to a white spaces provider. Or, as the Commission unanimously stated in 2008:

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[8] Letter from David Honig, Counsel, Minority Media Telecommunications Council, to Marlene H. Dortch, Secretary, FCC (May 7, 2010).

[9] Letter from the Honorable Al Green *et al.*, U.S. House of Representatives, to the Honorable Julius Genachowski, Chairman, FCC (May 24, 2010).

> We also anticipate that these new devices will have economic benefits for consumers and businesses by facilitating the development of additional competition in the broadband market.[10]

In sum, the Commission has many avenues it can pursue to further the cause of more broadband deployment and adoption without having to take on the risks associated with a Title II classification. I respectfully ask my colleagues to listen to the growing chorus of a large and bipartisan majority of voices in Congress and consider these different paths in lieu of the course they are embarking upon now. In the meantime, I fundamentally disagree with the premise that has been offered to support this item. As a result, I respectfully dissent.

[10] *Unlicensed Operation in the TV Broadcast Bands: Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, ET Docket No. 02-380, Second Report and Order and Memorandum Opinion and Order, 23 FCC Rcd 16807, ¶ 32 (Nov. 4, 2008); Erratum, 24 FCC Rcd 109 (Jan. 9, 2009).