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REMARKS AS PREPARED FOR DELIVERY

Good afternoon. Thank you, Randy, for that kind introduction.

Please, go on eating. I'm a former law school professor, so I'm well accustomed to speaking to people completely focused on what they are eating. The one thing I won't tolerate, however, is if you fall asleep while I'm talking – that privilege is reserved for my wife.

The topic of the conference today, as you know by now, is "net neutrality." Before I offer my two cents I need to make one point absolutely clear. The remarks that I am going to make today do not reflect the views of the FCC as an institution or of any individual Commissioner. The views are my own.

That said, I was thrilled to be invited to share these views with you. I know that Randy and PFF have had some distinguished luncheon speakers in the past, so I am honored to be here today.

What I don't know is whether any of my predecessors were invited to talk about something as warm and fuzzy as "net neutrality." What a lovely notion. Net Neutrality. Who could possibly object to that? The Swiss are neutral. Everybody loves the Swiss, right? This is real motherhood and apple pie stuff.

But what is it really? Are we referring to neutrality with respect to government intervention in the market? That is, after all, how we normally think of neutrality. Baseball umpires are supposed to be neutral, i.e., indifferent as to the outcome and impartial with respect to their calls. If that is what we mean by net neutrality, we're done; conference over. One would think, and in this case, rightly so, that we would not be having this conference if we were just here to talk about the status quo.

Instead, we learn, the term is meant to capture the general concept of "openness," which, we are reminded repeatedly, has characterized the Internet in the dial-up, narrowband

context. At its most basic, the notion is that Internet networks should be agnostic to the nature or origin of the content or applications that people use. That's another apple pie-like concept – openness. Who can oppose openness? What are you for then, closed-ness?

This starts to sound a little like the abortion debate with the pro-choicers against the pro-lifers. You don't really want to be opposed to either of those things. But what do they really mean and what policy and/or legal structures flow from either basic position? That's the problem with slogans, or maybe it is their attractiveness. They obviate thought. Once you have a slogan you can survive in popular debate. I just had my fill of that with the canaries in coal mines and five companies owning your every thought.

The difficulty for the proponents of an "openness" mandate, however, is in turning the general concept into some systematic regulatory approach. When you sit on the policy making side, you don't have the luxury -- or at least you should not succumb to the temptation -- of simple sloganeering. Public policy formulation, at its best, should involve thorough, serious consideration of the proposed course of action and refined sensitivity to the balance of public interest harms and public interest benefits that will follow. Slogans don't get you there.

So I turn to the question on the table. Should the government -- presumably the FCC-- adopt some form of proscriptive or prescriptive "openness" rule?

You've heard most of the proposals – heard them all already and heard them debated from both sides all morning. I'm not going to rehash the arguments. As a luncheon speaker I suppose my role to be half-entertainment, half-summation. I feel a little like John McLaughlin at the end of each segment of the McLaughlin group... "and the answer is...."

So what do I think of these calls for openness regulation? To borrow from Milton, "license they mean when they cry liberty."

As I think you heard earlier from some of the economists – the effect of the regulatory overlay that the proponents of government-mandated openness seek would be to shift subtly the balance of power— and hence the economic power – from the owners of distribution to the so-called fringe. That will not be without ramifications. Most importantly from my perspective is that investment will shift along with it away from platform development. It is a regulatory thumb on the scales, and – at this point at least – I think the wrong side of the scales.

It is, in substance, surrendering to regulation as a substitute for competition. The theory of this model, if you will, is that there is not, nor will there soon be, sufficient competition at the distribution level – ergo government must regulate access on the currently existing platforms. It's very much common carrier thinking – it's very much 19th Century thinking.

I, for one, am not ready to surrender to the easy path of regulated duopoly. I still have great hope for a world in which there are multiple broadband pipes into homes and businesses. And that is one very important reason to avoid any regulatory structure that would have the effect of shifting investment away from platform development. Competitive broadband distribution will allow us to rely upon market forces, rather than government regulation, to govern market structure and service provision in this space, as we do in virtually every other segment of our economy.

Naive? Not at all. Pollyannaish? Absolutely not. This is not hope floating on wispy clouds of wish and desire. This is hope born of experience and grounded in real world technologies that even now are rising up to take their places in our lives and works. The development of broadband Internet access, while still in its early stages, has been remarkable. Barely ten years ago, the Internet itself was a novelty. I was clerking on the D.C. Circuit then and my judge – Judge Edwards – was one of the few people I knew who actually used the Internet on a regular basis. He was way ahead of me and most everyone else. And this was an entirely narrowband world we are talking about.

Five years ago, my wife and I signed up for cable modem service in our home. We were among the first of my friends to do so. Just five years ago we were, I think, early broadband adopters. I don't even keep my motorcycles that long.

In the time span since my judge was first getting me hooked on the Internet, more than half of American households (between 50 and 60 million homes) have logged on to the Internet. About a quarter of these households have now upgraded from cheaper dial-up narrowband service to broadband. In only three years, broadband Internet access has jumped from under 3 million subscribers in 1999 to nearly 20 million by the end of last year.

Now we all know about the technical developments in distribution that are either upon us or on the immediate horizon, whether it is wireline, powerline, wireless, or satellite – the next generation networks will not be put off. I don't need, I'm sure, to rehash developments in this area either. And although I can't predict very much about the future, I am confident that the gadgets that we will rely on ten years from now will be as different and technologically superior to those we use today as ours are to those that were familiar to us in 1993.

And if you use a time horizon that is just a bit longer – say twenty years – you almost exceed the reach of common imagination. Let's play time machine and go back twenty years to 1983, and take with us our digital wireless phones, rim pagers, palm pilots, laptops, and the rest of our gadgetry. We will blow them away. Satellite television? Satellite radio? The Internet? What in the world is that?

And yet some want us to surrender to regulation because today's technology leaves us with a limited number of broadband systems? Pshaw. The current platforms aren't even broadband! I'm in time travel mode ten years hence – I want 100 megabit speed!

So no, I'm not ready to roll over and surrender to regulation. The future is big and bold and right around the corner.

And what of the other side? What would we make of these calls for openness were we to stretch beyond the sloganeering? How would an openness regulatory overlay work? How much openness is demanded? How much access is acceptable? Put another way, what types of restrictions would be permissible and what would not? Is all discrimination of any sort to be prohibited? Some appear to want to sweep into the concept of net neutrality the idea that users should be able to attach any devices that can be used within the "bandwidth limits" of their service so long as they do not cause "harm" to the network. But what is "harm"?

Net Neutrality reminds me of a tennis story told to me by Deborah Klein, our Media Bureau Chief of Staff, who is an excellent tennis player. She was umpiring a tennis match between two junior players who were fighting it out tooth and nail. You'd think, perched high up in that chair, that you would have a perfect vantage point. The problem is, she told me, that from up there you absolutely cannot see the lines. Well, you can see the sideline directly below the chair. But the baseline, the far service line, and the far sideline, forget it. In a heated dispute over a line call on the baseline, they looked to Deborah, but she just could not overrule the call that the player made. She could see some space between the line and the ball if a ball was clearly out, but it was way too difficult to tell in the close cases like the one in dispute. One player started screaming at her in disbelief. She said that she now knows what it feels like to be on the receiving end of a tirade like those John McEnroe used to deliver – he once called umpires "the pits of the world."

The moral of the story is that FCC arbitration of commercial disputes over Internet access may sound better in theory than it turns out to be in practice. There are some fairly close calls to make and when the pen hits the paper, you may not get the answer you are looking for, we may not see the issues the way you do, and you may be worse off than before.

Then I'll have everyone screaming at me and, if I am to umpire neutrality on the web, I'm going to insist upon being called ref-ferree.

But how did I get into this anyway? Why is this an FCC matter? What is our jurisdiction? I've heard the arguments, but once you pin them down to something of substance beyond the always popular ancillary jurisdiction, they all come back to statutory charges that are fundamentally and inherently deregulatory, such as Section 230. We could be looking at some strikingly regulatory requirements if we were to proceed down this path – all marshaled beneath the banner of openness. I don't know how the FCC constructs an "open system" regime pursuant to Section 230 or its kin.

But the most glaringly odd thing about this whole "openness" debate – it seems to me – is that it's not even clear that a truly open distribution model ultimately will benefit the part of the Internet economy that it is supposed to benefit – those on the so-called fringe.

Many of the companies on the fringe are those who still seemingly are groping for a business model that actually has some promise of success over the long term. We've seen the Internet bubble burst; we've seen company after company fold-up like a cheap tent; we've watched as the financial community has become increasingly calloused and skeptical of Internet business propositions while companies try to run from their internet heritage by changing their names to eliminate dot.com suffixes. And an open distribution model is the answer? Hey, we've found something that doesn't work, let's do more of it!

What these fringe companies may discover one day is that in the Internet world, just as in the brick and mortar world, some sort of favored access, or exclusivity, or "marketing partnership," if you will, between those with content and those who handle distribution actually makes commercial sense!

And, of course, this is not just about business success; it's about providing consumers with products and services over an extended period of time because the provision of service includes a return on investment. As ugly as it sometimes seems in the pristine world of Washington regulators, companies actually have to make money to provide consumers what they need and want in a market economy – at least if they want to do so more than once. Deal making between content providers, application developers, and distribution system operators may be precisely the engine for innovation and success on the web that we've been waiting for – and maybe for the success of the web itself at this early stage.

Interestingly, some of the chief proponents of what might be called net neutrality, in fact, eschew true nondiscriminatory treatment. In their view, content and application developers should be able contract with each other and with network owners to gain favorable treatment for certain content and applications, including featured placement on web- and browser pages. I read recently about a "marketing partnership" between SBC and Yahoo! which gives Yahoo! content favored placement on SBC's system. These contractual arrangements are intended to drive more Internet "eyeballs" toward selected material and services. Apparently, as in Animal Farm, all animals are created equal, but some are more equal than others.

That is, even the proponents of the model implicitly understand its weakness – it is a limiting factor, not an enhancing one. It restricts commercial flexibility rather than facilitate it. I don't care what business you are in, that is not conducive to success and you would only impose such restrictions based on some compelling reason. We have none here. We don't know what the broadband world of the future will look like, but for now it seems hardly a stretch to say that the same kinds of commercial arrangements that work in the brick and mortar world – including occasionally exclusive arrangements – will be a key to success in the virtual world.

Gee, I feel like I've said something almost controversial and yet it's all so obvious.

Now the objection might be made that some kinds of business deals are good and benign, and others are not. The proponents of openness regulation presumably would tell us it is the latter that call for regulation. The irony of course is that, if the kinds of commercial arrangements that the proponents of openness regulation fear actually come about – and if they are as pernicious as suggested – no regulatory check should be necessary. The kinds of conduct that have been posited are precisely what the antitrust laws were intended to combat. If distributors actually start using whatever market power they have at the distribution level to eliminate rivals or favor some vertically integrated enterprise in an anticompetitive way, we would expect the antitrust authorities to have more than a little interest.

Short of that, commercial arrangements that are not anticompetitive can be expected to promote competition, provide consumer benefits, and serve the public interest. I know of no policy justification for limiting these arrangements or otherwise shackling those that might be party to them. And I know of no way of distinguishing in advance between benign commercial arrangements and anticompetitive ones. The proof is in the pudding and I am not in a position to second guess the cook.

Numerous benefits result when people can obtain and use content, applications, and devices freely over the Internet. No doubt about it. At this point, and left to market forces, that seems to be the way the broadband Internet world is developing. Indeed, it's not entirely clear why a regulatory openness mandate is such an imperative right now. The only clear winners are the lawyers. Former Senator Sam Irvin used to tell a story about a young lawyer who showed up at a revival meeting and was asked to deliver a prayer. Unprepared, he gave a prayer straight from the heart: "Stir up much strife amongst thy people, Lord," he prayed, "lest thy servant perish."

Putting aside all of the wailing and gnashing of teeth, there seem to be powerful market incentives already for broadband providers to make their systems consumer friendly – that is, to ensure that their networks largely are "open." Pursuing such openness through unnecessary or premature regulation, however, threatens to tip the scales away from platform development and to the fringe. This may impede investment, stifle innovation, and undermine the long-term policy goals of the Commission. License they mean when they cry liberty. I am not inclined to grant it them.

Thank you for your attention – I hope I've been at least a little entertaining and perhaps helped to put a capstone on an otherwise terrific conference.

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