Remarks of Commissioner Meredith Attwell Baker

Net Neutrality: The Wrong Path for a Pro-Jobs, Pro-Investment Agenda

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The Commission plans this month to adopt rules that mandate that the government will decide how Internet networks are to be 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 this month. While that should be more than sufficient reason, Net Neutrality is also the wrong policy to drive more investment, jobs, and opportunity into our Internet economy.

I want to talk to you this afternoon about the FCC's role in regulating the Internet with respect to the courts and Congress. I want to touch on our Net Neutrality proceeding and process, the problems facing our agency and our collective broadband future, and the consequences— many I fear unintended—of us moving forward in a rushed manner this month. To wrap up, I want to talk about what a bipartisan consensus approach could look like.

The FCC is not empowered to regulate the Internet.

We have two branches of government—Congress and the courts—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.

Let's start with the courts. In April, 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] We have seen proponents of Net Neutrality at different times interpret this decision both very broadly and very narrowly. In one voice, proponents argued that the decision stripped the FCC of authority to do practically anything broadband related. We have also seen proponents characterize that decision very narrowly: the court simply found our prior efforts sloppy. By its own action after *Comcast*, the Commission seemed to place itself in the former category. To escape the court's conclusion in *Comcast* about the limits of our Title I authority, the Commission opened a proceeding to reclassify broadband services as a monopoly-era Title II offering.

As with most things in life, the answer lies in the middle. At its core, the court held that our actions must either be pursuant to our statutorily mandated responsibilities or must be ancillary to a specific responsibility. The *Comcast* decision was not about our broadband agenda, it was about enforcing specific Net Neutrality policies. With respect to Net Neutrality specifically, the court did not say go back and think creatively about how to contort the statute to discover or discern new authority. Yet, that is how we intend to proceed. The Chairman's approach would have the Commission adopt policies far more intrusive than those previously rejected under effectively the same legal analysis. I see nothing that has changed so significantly in the past eight months with respect to our statutory authority to suggest a different outcome if, and when, our action is challenged.

With respect to Congress, over 300 members of Congress have expressed concern with the Commission's approach to regulating the Internet. Three weeks ago, the new majority in the House Energy and

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

Commerce Committee clearly asked the Commission not to rush out an order by the year's end.[2] We saw last week Senator Kay Bailey Hutchison state that she was "troubled that the action would occur without Congressional input."[3] Chairman-Elect Fred Upton said plainly now "is the time for the FCC to cease and desist."[4] When elected officials so strongly ask an agency to delay action to allow Congress to take the lead, the only appropriate course is to defer, particularly here where the Commission's authority to act is so lacking.

Our intended approach to Net Neutrality—namely adopting a version of a draft bill from Chairman Waxman—underscores that we are acting beyond the appropriate role of an independent agency. The Commission endeavors to legislate, not regulate on December 21. By all accounts, we are taking off from where Chairman Waxman stopped. We are doing what Congress could not, or would not do. It is also not simply co-opting the 10-page Waxman Bill. We take the bill, write our own legislative history, and implementing order in a document 8 times as long. We will adopt implementing regulations for a statute that has never been enacted. By definition, we are doing much more than Waxman proposed, exercising our own discretion and judgment. The Waxman bill would have given the Commission very specific responsibilities. By doing it ourselves, there are no jurisdictional limits. We delegate to ourselves an unbounded regulatory power to adopt policies to promote a particular vision for the Internet. Congress is right to ask us to stand down.

This one-two shot of judicial and congressional scrutiny should give us serious pause, but we seem to be racing towards three unelected officials crafting a national Internet policy on their own. This is beyond a philosophical or policy difference of how best to preserve an Open Internet. It goes to a broader question of the proper role of an independent agency whose operation is increasingly divorced from the limits of its statute.

There is no weakness in conveying to Congress the natural limits of your authority and the need for additional congressional action to conduct your mission as you see it. Congressional leaders have asked the Commission to single out those recommendations of the Broadband Plan that need additional statutory authority. We should work cooperatively with Congress to determine the appropriate role for the Commission in regulating the Internet. We should not set out our own aggressive vision and force Congress and the courts to stop us.

The Net Neutrality proceeding and process.

With respect to the Net Neutrality proceeding itself, I reject outright that adopting Net Neutrality rules under a Title I approach is in any way a compromise position. The spin that this is a middle ground approach is just that, spin. Carriers are faced with two choices: door number one is Title II—the most intrusive regulatory tool available to the Commission designed for monopoly-era telephone services—or door number two, prescriptive Net Neutrality rules under Title I. It is the equivalent of offering a 5 year old the choice between broccoli and brussels sprouts, and concluding the kid really likes broccoli. Selecting between bad and worse options is not tantamount to an actual choice.

I want to briefly talk about the Title II proceeding itself. I still have serious reservations with how the Title II proceeding was initiated, and how it was apparently used as leverage to seek agreement on a Title

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

[3] Sara Jerome, "Hutchinson 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).

I approach. We in DC are prone to hyperbole, but Title II is a job-killing proposal that would inhibit the ability of providers to raise capital to invest in broadband. The threat of Title II was an unmistakable—and completely avoidable—economic drag on the industry for the summer.

If we decide to move forward with Net Neutrality under Title I, we must close the Title II docket at the same time and provide certainty that we will maintain a pro-growth, pro-investment approach to broadband under Title I. Keeping open the Title II docket—and the associated regulatory uncertainty—would undercut significantly the market certainty the Commission now seeks.

The false choice between Title I and Title II is representative of broader process concerns that have been voiced this week. It is certainly 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.

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 his 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. We are under no deadline to act, yet we proceed as if we were.

We still have the opportunity to do this right, and demonstrate our good faith in working as partners with the new House leadership. 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.[5] 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.

Challenges and consequences.

There is no crisis facing the Open Internet that we need to resolve this month. Our actions are not about preserving the Open Internet. We can retire this talking point. The Internet was open when the term Net Neutrality was coined in 2002, and it is open today. Preserving the Open Internet is non-negotiable: it is a bedrock principle everyone across the Internet ecosystem can agree on. It is also not at risk: 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 isolated incidents to try to justify sweeping industry-wide rules.

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[5] 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").

We see billions in investment across all sectors of the Internet economy: almost half a trillion dollar contribution into the economy.[6] We see consumers benefiting from new services, faster connections, and the latest and greatest applications. There is no emergency to remedy. Rather, what we are doing is checking the box on a campaign promise. In doing so, the government will now micromanage the most dynamic and investment-friendly portion of our economy.

The Broadband Plan in March set forth the two core challenges facing the Internet ecosystem: how do we reach the 5 percent of the nation that does not have access to 4 Mbps or more terrestrial broadband; and how do we get almost a third of the nation to connect to broadband. The Plan did not highlight structural problems on the edge—innovators roll out exciting new devices and applications at a breathtaking pace. There is no systemic evidence that good ideas are not getting funded.

Recent Commission data corroborate the Broadband Plan's focus on deployment and adoption. On the whole, our reports show that consumers are well served where broadband is available. Specifically, just this week, our consumer survey results reveal that 93 percent of users are satisfied, or somewhat satisfied, with their broadband service overall, and 91 percent are satisfied, or somewhat satisfied, with their broadband speed.[7] These results also underscore the robustness of competition. 36 percent have switched broadband providers in the past three years, and 63 percent of those with choice think it is easy to switch.[8] The major reason customers have switched varies greatly—from faster service and better prices to better bundles and more features—reinforcing that broadband is not a one-size-fits-all service and that providers compete with differentiated products.

With that perspective, our laser-like focus on Net Neutrality is puzzling. Net Neutrality cannot fairly be characterized as doing anything directly to help broadband deployment or adoption, which should be our primary focus. If anything, it may complicate efforts to help bridge those gaps commercially. What it would do is favor the edge over networks. It would ensure a future where innovation is focused primarily on the edge—in applications and devices. This would represent a stark departure from today's Internet where innovation is spread across the Internet economy to the great benefit of consumers, and where government has not picked winners and losers.

We focus on preserving the status quo for networks, today's Internet— ignoring that such an approach harms tomorrow's Internet. We will set ground rules for the Internet's future, a future we do not understand, and cannot predict. We will rob networks of the ability to freely innovate and experiment, to seek out the differentiation that breeds opportunity and consumer choice. Worse yet, networks cannot sit still. None of us would be satisfied with our Internet connection from five years ago. I was recently in Japan, meeting with government officials and Internet experts. I was reminded that even fiber networks are reaching capacity limits faster than ever imagined. The capacity demands to maintain existing users—let alone new users—are skyrocketing. In 2014, estimates project that the Internet will be four times the size it was last year, and mobile data will double every year through 2014.[9]

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6 *Id.* (estimating that "Internet creates annual value of $444 billion").

7 FCC Working Paper, "Broadband satisfaction: What consumers report about their broadband Internet provider," at 3 (Dec. 2010).

8 FCC Working Paper, "Broadband decisions: What drives consumers to switch – or stick with – their broadband Internet provider," at 1-2 (Dec. 2010).

9 Cisco Visual Networking Index: Forecast and Methodology, 2009-2014 (June 2, 2010).

Carriers need clear incentives and sufficient flexibility to invest in next-generation networks, in specialized services, in managing their networks and customer relationships. Really, what they need is to be able to optimize their networks and provide investors a viable return on investment.

We talk often about the international consequences of our actions, and the need to ensure our Internet-economy remains the global leader. Yet, we propose to take a far more interventionist approach to Net Neutrality than the rest of the world. In doing so, if our Net Neutrality rules are not narrowly tailored or clear, if the incentives to continue investment in the core are not apparent, and if we do not provide a clear path to innovate, we will be exporting on December 21 the next generation of the Internet. Carriers in Asia and Europe – free from prescriptive rules or ominous warnings – will be the ones innovating, and creating value for consumers and business. This translates into jobs, this translates into engineering and entrepreneurial opportunities, and this translates into future competitiveness. To be blunt, freezing America's core networks—by law or by admonition—would be a job killer.

A positive consensus agenda.

I recognize that it is easy to say "no." November's election reinforced that is incumbent upon all of us to seek out a sensible consensus-driven middle ground.

With respect to Net Neutrality, the Commission should recognize that issues can be resolved by means other than affirmative regulations. The Broadband Internet Technical Advisory Group (BITAG) was formed in June bringing together a broad cross-section of network and edge companies to find solutions to network management and engineering disputes. BITAG has the ability to craft engineering-based solutions that are more flexible, responsive, and efficient, and infinitely less polarizing and political than our regulations. Unfortunately, the Commission has not yet embraced the potential and power of BITAG.

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. The best means to combat concern about alleged gatekeepers is to build more roads. Next-generation mobile broadband offers the promise of viable third, fourth, fifth, and sixth broadband pipes into our homes. More robust competition has proven to be the best means by which to promote consumer welfare. I recently laid out four steps we could take to promote 4G in 2011, and I am hopeful we can work together aggressively to help drive 4G networks nationwide.

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. We have a limited window of opportunity to work with Congress on this pro-jobs, pro-investment agenda. Instead, the Commission is working through the holidays on scoring partisan political points. I have real concerns that this can only hamper our ability to achieve our shared goals.

To sum up, my Christmas wish list for Santa has four things on it: the Commission putting the draft Net Neutrality rules out for comment; closing the Title II docket to allow true compromise solutions; working with Congress pro-actively on solutions; and shifting our efforts to focus on a bipartisan pro-jobs agenda. Thank you.