

**PREPARED REMARKS OF FCC CHAIRMAN TOM WHEELER  
SILICON FLATIRONS  
UNIVERSITY OF COLORADO LAW SCHOOL  
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Thank you, it's great to be here. For years I've been listening to lawyers. And listening. And listening. So the chance to be at a law school and make lawyers listen to me is an opportunity I couldn't possibly pass up.

Thank you, Phil Weiser, for inviting me to participate. I have relied on Phil's sage counsel multiple times, including when he did the Obama Transition's first work on the future of the FCC. It thus made all the sense in the world that I asked Phil for his help as I began this job. That we should continually turn to Phil is no surprise; he's made Silicon Flatirons and this law school a place where law, policy and entrepreneurship come together to discuss the present and plot the future. That is a unique contribution to our national dialogue.

I also want to give a big congratulations to my friend Gene Kimmelman on his new posting as the head of Public Knowledge. In baseball, the mark of a great trade is one that helps both teams. Well, this turned out to be a great trade. I have Gigi Sohn at my side and Public Knowledge has the benefit of Gene's considerable wisdom. I have looked to him, and I will look to him, for a better understanding of the issues the Commission faces.

There are too many people in this room of reputation and renown to name individually everyone that I am pleased to see. But I do want to recognize for their leadership my colleagues in the federal government who are present today.

I know I'm the last speaker at this conference, which reminds me of Mo Udall's old line that, "Everything has been said, but not everybody has said it." So, if you don't mind, I might diverge from the conference agenda.

I took office in November. In fact, my hundredth day in office is tomorrow. In this time, starting with a speech at my alma mater Ohio State in December, I've worked to make transparent how I approach the job as FCC chairman.

If there's ever a crowd that gets excited to hear somebody say, "Let me tell you about my regulatory philosophy," this is the one. So I thought this would be an appropriate forum to deliver the third installment in this opening trilogy of speeches on my governing approach. Think of it as Return of the Jedi, without the Ewoks.

In previous remarks, I've focused on the lessons of past network revolutions, concluding that successful networks fulfill an enduring Network Compact that defines the relationship between networks and their users. Its elements include universal accessibility, reliable interconnection, consumer protection, and public safety.

I've spoken about the primacy of "competition, competition, competition," and how our competition policy will take the "see-saw" approach: when competition is high, regulation can be low; when competition is low, we are willing to act in the public interest.

And I've spoken about the need for the Commission to remove obstacles and to supply inputs—tangible and intangible—to spur innovation.

Today's message is simple, so simple it can be summed up in a quote from Abraham Lincoln's second address to Congress.

"As our case is new, so we must think anew, and act anew."

I'll repeat that, since that's the big takeaway. "As our case is new, so we must think anew, and ACT anew."

To be clear, I am not suggesting that there is a close analogy to the Civil War in the challenges that urgently demand the attention of the FCC. But remember, I'm the guy who wrote *Mr. Lincoln's T-Mails: the Untold Story of How Abraham Lincoln Used the Telegraph to Win the Civil War*. That book was all about how President Lincoln harnessed the new technology of the telegraph—something the rest of America was still struggling to figure out. It is a fascinating story of what today we'd call an "early adopter" who truly did "think anew, and act anew," with regard to technology, and it is not dissimilar to the challenges we face today with our new networks. It is what makes me so excited about my job and how we at the FCC are privileged to address the new.

Now let's unpack that quote.

Our case is new.

As is obvious to this expert audience, changes in technology, business models, and consumer preferences have presented us with circumstances that are radically different from those that prevailed a generation ago. With widespread deployment of digital technology and high-speed broadband networks, wired and wireless have led us to an environment we could not have imagined when our communications laws were written. This undoubtedly is true for the 1934 Communications Act, but it also is true even for the significant amendments that have been enacted in the last two decades. As Phil Weiser and Jon Nuechterlein wrote in *Digital Crossroads*, "When, in 1996, Congress last enacted major revisions to the Act, it did not clearly

foresee the rise of broadband Internet access services, let alone their eventual centrality to all forms of electronic communications.” (Incidentally, since I seem to be plugging books today, I understand a new, updated edition of “Digital Crossroads” is available at physical and electronic bookstores everywhere.)

We are in the midst of the fourth great network revolution, the first three being the printing press, the railroad, and the telegraph. The first unshackled information, the second tore up the barrier of distance, and the third jolted electronic transmissions into being. Each of these revolutions redefined humanity’s path.

What makes our revolution different from its predecessors, however, is the speed with which it developed and the velocity with which it continues to evolve.

To give some perspective on the velocity of change and how “new” our circumstances are – relative to a short time ago – consider this.

In 1996, the last time Congress updated our communications law, the world’s fastest supercomputer cost \$55 million to develop and was roughly the size of a tennis court. Just 9 years later – Sony’s PlayStation 3 surpassed the performance of 1996’s most powerful supercomputer.

What’s remarkable is that, according to *The Second Machine Age*, a new book by MIT’s Erik Brynjolfsson and Andrew McAfee, we’re just getting warmed up. They write about Moore’s Law and how exponential growth in computing power has enabled remarkable progress the past few decades. Their argument is that we are only just now reaching an inflection point with computing speeds, the amount of information available, and the ability to combine new ideas and capabilities. For all the ways the computing revolution has already changed our world, the really big breakthroughs still lay ahead.

No question, we are living in a brave new world. And as Mr. Lincoln said, that means we must think anew.

That’s what this conference is all about. Thinking about how best to tackle the challenges and seize the opportunities of new technologies. And thinking about if and how our laws need to be updated to reflect this new landscape.

Of course, this is part of a larger debate happening in Washington. The leadership of the House Energy and Commerce has begun a discussion about modernizing the Communications Act. I commend Representatives Upton and Walden for initiating this debate, which is both warranted and necessary.

All of us have observed the growing convergence of previously separate and distinct communications services and with it, inevitably, the growing obsolescence of the Communications Act’s categories— principally the titles that address common carriage, broadcasting, and cable.

Titles II, III, and VI once addressed distinct activities in terms of production and consumption. While there may continue to be a viable distinction on the consumer, or demand, side, it certainly is no longer true on the production, or supply, side.

Anyone who doubts the commingled nature of previously separate activities should consider the 2012 legislation that authorizes the incentive auction. It simultaneously implicates broadcasting, wireless service, and public safety communications.

As we consider the Communications Act, there is one high-level point that deserves emphasis.

Given the dynamism of the technology sector, the FCC must exercise its lawful discretion to interpret the Communications Act to meet contemporary circumstances. In other words, internet speed means that even a new Telecommunications Act will be out of date the moment it is signed. The only way to deal with this reality is to have an expert agency capable of being as nimble as the innovators redefining technology and re-drawing the marketplace. We will behave that way today, and any new Act must preserve that nimbleness going forward.

As the Supreme Court ruled in its landmark *Chevron* decision, courts should defer to a government agency when it comes to the interpretation of a statute that agency is charged with enforcing. The Commission has used its flexible interpretive authority in aid of the very dynamism we are fortunate to be dealing with today. For example, flying in the face of the conventional wisdom, the Commission, several decades ago, reinterpreted Title II to provide for open entry, competition, and to preclude any restrictions on output. In the process, the Commission institutionalized the preference for dynamic efficiency (new and lower cost curves brought about by competition-induced innovation) over static efficiency (reaching a lower point on a stable cost curve by permitting a company to supply all available demand).

A very good summary statement of the FCC's discretion and the reasons for it can be found in a 1994 dissent authored by Justice Stevens that noted the "unusually dynamic character" of the Communications Act and the "unusually broad discretion to meet new and unanticipated problems."

I would note that, two years later, Congress overturned the decision that deprived the Commission of flexibility.

The Supreme Court's *Brand X* decision is a critical predicate to today's regulatory deliberations. I find *Brand X* interesting for two reasons. First, it involves a very learned discussion of the metaphysics of pizza delivery. And, second, it recognizes again the Commission's authority and responsibility to construe the Communications Act in accordance with contemporary reality. In concluding his opinion for the Court, Justice Thomas said, "The questions the Commission resolved in [*Brand X*] involve a 'subject matter [that] is

technical, complex, and dynamic.’ ... Nothing in the Communications Act ... makes unlawful the Commission’s use of its expert policy judgment to resolve these difficult questions.”

In the event that the Commission is thwarted in its ability to apply its expert policy judgment then, in light of the new, ever-changing technology landscape, I believe the best and ultimate outcome would be Congress’s significant modification of the Communications Act.

But: any update of the Communications Act will be a long process. The 1996 re-write was eight years in the making. So that brings me to my final and most important point. While new circumstances require that we think anew about our communications laws, they also demand that we must act anew.

We can’t just kick the can down the road. We have an obligation to act now with the principles that have been transmitted to us in the form of statutes, judicial and regulatory precedents, scholarship, and experience.

A central reason we must act now is that while the world is changing, certain values remain as critical as ever.

The Network Compact—universal accessibility, interconnection, public safety, and consumer protection—constitute the things we have to promote and protect if we are to be faithful to the public interest imperative. When being offline in America means being unable to participate fully in our economy and our society, it is imperative that the Commission work to ensure that every American has access to affordable broadband. An opportunity economy requires an opportunity network.

One example of an issue where the Commission must act anew and act now is the IP transition. Due in part to outdated rules, the majority of the capital investments made by U.S. telephone companies from 2006 to 2011 went toward maintaining the declining telephone network, despite the fact that only one-third of U.S. households use it at all. We must act to ensure that more investment flows to the fiber-optic networks of tomorrow, while consumers and competition are protected. With the Commission’s decision last month to begin a series of consumer-focused trials, we are beginning—hopefully accelerating—that process.

The most obvious case where the Commission must act anew is net neutrality.

In its *Verizon v. FCC* decision, the Court of Appeals invited the Commission to act to preserve a free and open Internet. I accept that invitation, and in the coming days, I will be outlining how I propose to proceed.

But for now, there are some points to make on this topic.

First, the Court has ruled that the FCC has the legal authority to issue enforceable rules of the road to preserve Internet freedom and openness. It affirmed that Section 706 of the Telecommunications Act of 1996

gives the FCC authority to encourage broadband deployment by, among other things, removing barriers to infrastructure deployment and promoting competition. It also found that the goals of the Open Internet Order are within the scope of authority granted to the Commission. The court opinion specifically included that the Commission was justified in concluding that an open Internet would further the interest of broadband deployment by enabling the virtuous cycle of innovation that unites the long-term interests of end-users, broadband networks and edge-providers. After all, it explained, when edge-providers are prevented from reaching end-users, demand for both those upstream applications and for network expansion suffer. So, the preservation of an open Internet is within the FCC's authority.

Bigger picture, the FCC has the authority it needs to provide what the public needs – open, competitive, safe, and accessible broadband networks. Indeed, that we have authority is well-settled. What remains open is not jurisdiction, but rather the best path to securing the public interest. Those are the challenges that the FCC will confront with the Open Internet, the IP transitions, the Incentive Auction, and other issues.

“As our case is new, we must think anew, and act anew.” Lincoln uttered those words more than 150 years ago, but they remain true for us today, in our mission. I'm here today to say as long as I am Chairman of the FCC, we WILL act anew. I am committed to transparent, inclusive processes, and our actions will be driven by the facts and the data. And on all major issues, we will act when the record warrants and the public interest demands.

We at the FCC are privileged, just as were some of our forebears, to address the new. It is what excites my colleagues and me—and, even if it didn't, we couldn't avoid it.

There's one more line worth recalling from Lincoln's second address to Congress. “We cannot escape history...” he remarked. “We will be remembered in spite of ourselves.” This is what confronts us and, appropriately, we will be judged by our responses, whether active or passive. I prefer active.

Thank you.