THE BEST BROADBAND PLAN FOR AMERICA: FIRST, DO NO HARM

COMMISSIONER ROBERT M. MCDOWELL
FEDERAL COMMUNICATIONS COMMISSION

Free State Foundation Keynote
National Press Club
Washington, D.C.
Friday, January 29, 2010

As prepared for delivery

Thank you, Randy, for that kind introduction. And many thanks to the Free State Foundation for your invitation. You have an impressive line-up today, and I am sure that it will generate some lively dialogue.

I'd like to wish everyone a belated happy New Year. It's amazing how much can change in one year. For instance, if we had been meeting one year ago today, I probably would have been talking about how Congress was moving legislation to push back the digital TV transition deadline from February 17 to June 12.

Even one month can make a big difference. Three weeks ago, I was on C-SPAN talking about how our National Broadband Plan would be presented to Congress no later than February 17. Of course, that deadline was extended too. So the life lesson here is: Never plan *anything* for February 17. It is a cursed day.

But in all seriousness, a year ago the Commission was predicting that the DTV transition would be the biggest communications story of the year. Instead, smart phones led the headlines throughout 2009. And stories were no longer all about the iPhone. The buzz was all about the innovation and competition in devices and mobile apps that few anticipated a year ago. At this point, consumers can choose from over 630 mobile devices, produced by 32 manufacturers. At the same time, literally hundreds of thousands of mobile apps created by thousands of entrepreneurs have gushed onto the scene, with more pouring over the horizon. All are available to app-thirsty consumers through an increasing number of outlets. In an effort to diversify growth opportunities, companies that began their corporate lives in worlds that bear no resemblance to the conventional telecommunications market, such as Barnes & Noble, Amazon and Google, are now rushing to take advantage of this latest technological revolution.

Perhaps some of the most interesting stories about the power of mobility come from names with less brand identity, at least for now. Let's follow the lead of consumers like Heather Reed, a mother from Cypress, Texas. She is using her mobile device to put the squeeze on retailers as she becomes more cost-conscious in a down economy. The *New York Times* reported that previously unheard of names like ShopSavvy, RedLaser, TheFind, Yowza and PriceGrabber.com enable shoppers like Heather to use their phones to scan bar codes of items at their favorite bricks-and-mortar stores to find coupons that slash prices or direct them to less expensive competitors. "It went from $29.99 to $9.99, all in five minutes. No searching the Internet or spending hours trying to find a deal or a coupon," the *Times* reported Heather as saying. "It's all right there in your hand."

But the mobile app revolution reaches deeper into people's lives than just shopping. Mobile apps are actually saving lives. For instance, patients can wear devices that can help doctors predict heart attacks hours before they occur. The wireless device is able to transmit vital information to the patient's cardiologist who can examine the data in real time and take immediate action.

Similarly, mobile apps have saved lives in the wake of the tragic Haitian earthquake. Not only have we heard about victims using text messages to help rescuers locate them, but in one instance reported by NBC News, a man trapped in the rubble used an iPhone app to learn how to make a tourniquet that helped keep him alive until rescuers arrived.

The mobile app world is in its infancy. Creativity is erupting all over. Hundreds of thousands of apps produced by thousands of developers are available to consumers through an increasing number of outlets. Innovation at the "edge" appears to be robust and unfettered, as it should be. At the same time, consumers are demanding the added value that comes from intelligence inside networks. And that should remain unfettered as well.

As Heather Reed of Texas said, it really is "all right there" in the hands of consumers. And keeping in the hands of consumers that power to choose among products and services in a fast-changing and competitive free market should be the FCC's prime directive when it comes to crafting our National Broadband Plan and examining proposed rules governing Internet management. The Commission's No. 1 goal should be to do no harm.

But first we must ask: How have we met with such success in the first place? With calls for more regulation, some are bending the light of history through a revisionist lens. Keep in mind that innovation and investment in broadband *did not* come about due to a government mandate. In fact, for over three decades now, it has been the bipartisan policy of the U.S. Government to keep information services lightly regulated. The innovation that consumers are enjoying today came about under a minimalist regulatory framework.

The government didn't call for the creation of broadband technologies or mobile apps. In fact, the government didn't even have the ability to foresee these developments. Instead, under both Republican and Democratic presidents and Congresses, the government was careful to stay out of the way while a competitive free market experimented with new ideas. While the FCC continued on the logical path of classifying broadband services as less regulated information services under Title I in 2002, 2005, 2006 and 2007, investment, innovation, competition and consumer choice were growing.

Let's allow the facts to speak for themselves. According to a Pew Internet & American Life Project study, in 2003 only about 15 percent of American adults had access to broadband at home.[1] Today that number is closer to two-thirds.[2]

Some form of wireline-based broadband is available to roughly 95 percent of Americans. Cable broadband alone is available to 92 percent of the country. Once deployment of DOCSIS 3.0 is complete, those consumers could enjoy speeds of up to 100 mbps. That means 92 percent of the country could have access to far faster broadband services merely through an upgrade. This incredibly positive fact is overlooked too frequently in the debate over America's broadband future.

With these key facts in mind, I hope that the FCC's National Broadband Plan will emphasize the importance of providing incentives for network operators to upgrade as

[1] *See* John Horrigan, Pew Internet and American Life Project, *Home Broadband Adoption 2009,* 11 (2009).
[2] *Id*.

well as allowing the market to deliver incentives to consumers to adopt broadband. We certainly don't want to create disincentives for either one.

Another overlooked fact is that America enjoys more competition among different broadband platforms than most of our international competitors. For instance, studies by the Fiber-to-the-Home Council show that the number of homes passed by fiber increased from only 1 percent five years ago to about 15 percent today.[3] That means that the number of American homes that have access to fiber rose from about 180,000 in 2003 to just under a million a year later in 2004, to 17.2 million five years later.[4] Only 5.3 million homes that have access to fiber actually use it, however. More adoption, of course, would support more build-out. Nonetheless, some estimate that the pace of fiber deployment will slow soon once Verizon completes its build out of its FiOs network. If so, America's public policy, especially our tax policy, should provide incentives for companies to deploy fiber into areas that would never get it otherwise.

In addition to acknowledging the fatter and faster pipes being delivered to consumers through coax and fiber, we should not forget the tremendous explosion of wireless broadband. In fact, wireless is the fastest growing sector of the broadband market. Wireless broadband was rarely mentioned in 2003, but by December of 2005, there were already 3.3 million wireless broadband subscribers.[5] And, last November, that number had grown to 99.7 million wireless broadband subscribers.[6] It should go without saying that as more and more spectrum bands are built out – for example, BRS/EBS, AWS-1 and 700 MHz – this trend will continue. But today, over 50 percent of American

---

[3] *See North American Fiber to the Home Connections Surge Past Five Million*, Press Release, FTTH Council North American (Sept. 29, 2009).
[4] *Id.*
[5] *See* comScore M:Metrics MobiLens Market Viewer - United States (accessed Nov. 11, 2009).
[6] *Id*.

consumers have a choice of five wireless carriers, with 94 percent having a choice of four carriers. And nearly 25 percent of households are wireless only.[7] That kind of last-mile competition was simply not envisioned a few years ago.

In fact, America's wireless market is an illustration of how well policies that encourage competition over regulation work for consumers. This graph shows how competition and innovation spiked after the FCC opened up new frequencies for use in the mobile market. Markets previously served by only two wireless companies had the potential to be served by up to six more. More competition spurred innovation and reduced prices, resulting in increased adoption. This was accomplished not through coercive government mandates, but by creating opportunities for the construction of new delivery platforms.

Investment, innovation, deployment and adoption have all been growing rapidly in the stability of the current regulatory environment. These are positive trends that should be nurtured and strengthened. As the FCC goes forward it should, at the very least, be careful to do no harm.

I am looking forward to seeing the details of the National Broadband Plan in the coming days and weeks. As I have said before, my preference is that it should not propose heavy-handed industrial policy. It should remain flexible and iterative, relying on incentives rather than coercive mandates. I don't think that any part of our economy changes faster than the information, communications and technology sector, and no one can foresee with certainty the innovation and dynamism that is coming over the horizon.

---

[7] Stephen J. Blumbert, Ph.D. and Julian V. Luke, *Wireless Substitution: Early release of Estimates from the National Health Interview Survey, January – June 2009,* Centers for Disease Control (released December 16, 2009)

With that in mind, the Plan – and subsequent policy making – should not foreclose any positive and constructive developments that are simply unknowable today.

Chairman Genachowski and I agree that the billions America will need to spend to provide faster broadband services throughout our country must come from the private sector. If the FCC's October 1st hearing on capital formation in the broadband sector taught us only one thing, it was that the best way to provide a *disincentive* for investment is to create regulatory uncertainty.

With that in mind, shadowing the Broadband Plan is the FCC's Open Internet proceeding. It proposes to dramatically change the existing regulatory environment for broadband – the same environment that has allowed for the development of the robust and dynamic market I have just described. Before embarking on any regulatory journey, it is pragmatic for the government to ask, "What exactly is broken that only the government can fix?" The record in this proceeding is open, so there is still time to answer that question by filling it with hard evidence of systemic market failure that would require narrowly tailored rules.

In the past couple of years both the FCC and Federal Trade Commission examined the relevant markets. They cast their nets far and wide, but when it came to harvesting evidence of systemic market failure, they came up empty. But a lot can happen in the two-and-a-half Earth years since those proceedings concluded. That's practically a century in Internet time.

Thankfully, earlier this month, new findings came to light. Both NTIA and the Department of Justice (DOJ) filed comments in our proceeding. Not surprisingly, neither provided evidence of a failed Internet marketplace. In fact, DOJ's comments were downright optimistic about the competitive and dynamic future of the broadband market. Here's one quote:

> Between the ongoing deployment of wireline broadband networks, the geographic expansion of wireless broadband services (hopefully spurred by the availability of additional spectrum to broadband wireless services), and increased transparency, the Department is hopeful that the vast majority of American households will benefit from significant competition in their local broadband markets. Put differently, most regions of the United States do not appear to be natural monopolies for broadband service.[8]

And when considering the idea of imposing new regulations in this space, DOJ's tone sounded eerily similar to the FTC's 2007 bipartisan and unanimous admonition that stated, "Policy makers should be wary of calls for network neutrality regulation simply because we do not know what the net effects of potential conduct by broadband providers will be on consumers ...."[9]

In that spirit, DOJ concluded, "Although enacting some form of regulation to prevent certain providers from exercising monopoly power may be tempting ... care must be taken to avoid stifling the infrastructure investments needed to expand broadband access…. In particular, price regulation would be appropriate only where necessary to protect consumers from the exercise of monopoly power and where such regulation would not stifle incentives to invest in infrastructure deployment."[10]

Nonetheless, even in the absence of a clear showing of systemic market failure, the Commission may still be headed toward enacting new regulations. Up until recently, it appeared that the Commission would rely on its ancillary jurisdiction under Title I as

---

[8]Letter from Christine Varney, Assistant Attorney General, U.S. Department of Justice Antitrust Division, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, at p.28 (filed January 4, 2010).
[9] Federal Trade Commission, *Broadband Connectivity Competition Policy*, 157 (2007).
[10] DOJ Letter at 28.

its legal springboard to issue new regulations. In a nutshell, some relevant questions swirling around the Title I debate are:

- First, according to court precedent, rules generated through the Commission's Title I authority must be "reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[11] So does Title II impose the appropriate ancillary hook needed to survive appeal if information services have never been classified as Title II common carrier services?

- Second, did Congress intend for Title I to allow the Commission to regulate broadband services as proposed in the NPRM?

- Assuming, for argument's sake, that the FCC has sufficient Title I authority to impose new regulations on broadband, isn't the proposed nondiscrimination language a broader and more onerous construct than Title II's "unjust or unreasonable" standard?

- Can the Commission create and impose a new and stricter regulatory regime on a class of providers that has flourished in the absence of regulation without having the benefit of standing on the solid legal foundation of a new legislative mandate?

- As a matter of good government, wouldn't creating such a new and untested regulatory regime without congressional authorization cause more uncertainty and not less, as advertised? And speaking of inevitable appellate litigation, how many years will it take to resolve these issues?

According to recent press and analysts' reports, however, the Commission now may be considering classifying broadband services as Title II common carriage. As a young attorney, I grew up in the common carrier world, so I'd like to review some history with you.

First, modern day "information services" have *never* been regulated as common carriage. Second, starting with cable modem services in 2002, the Commission examined the early 21st Century broadband market and determined that it was far different from the early 20th Century "plain old telephone service" market that inspired the 1934 Act. As

---

[11] *Am. Library Ass'n. v. FCC*, 406 F.3d 689,700 (D.C. Cir. 2005).

the result of these significant differences, the Commission determined that broadband should be classified as less regulated information services under Title I.

Don't forget that the aim of the 1996 Act was to deregulate this space as competition grew, and the broadband classification orders were drafted with such Congressional intent in mind.

The FCC's approach was challenged in court, and ultimately the Supreme Court ruled in the FCC's favor. Later, without dissent, the Commission classified all broadband services as information services, regardless of platform or technology.

Generally speaking, if the Commission wishes to change its mind courts will allow it to do so – provided the Commission relies on a rational factual basis. When reversing course from a prior deregulatory decision, an agency bears the burden of openly acknowledging its reversal and providing a reasoned and detailed justification for the change based on *record evidence*.[12] Yet so far, the record contains scant evidence that would help protect a Title II classification order from appellate scrutiny.

[12] *See Federal Communications Commission v. Fox Television Stations, Inc*., *et al*, 129 S.Ct. 1800 (2009). The Court has clarified that while the standard of review under the Administrative Procedure Act for agency reversal of action is not different than that applied to an agency's action in the first instance, *Id*. at 1810, an agency in certain circumstances may have to provide "a more detailed justification than would suffice for a new policy created on a blank slate." *Id*. at 1811. Such is the case when

> its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests. It would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.

Id. at 1811(internal citations omitted). Moreover, the Court has warned, agency action may be set aside under the APA "because of failure to adduce empirical data that can readily be obtained." *Id*. at 1813. Here, there is a serious question as to whether such data exists at all – but given the Commission's history of administering Title II, there can be no serious question about the agency's ability to readily recognize and gather the type of empirical evidence relevant to the classification question.

But for a minute let's assume that hard evidence of systemic market failure existed, and broadband services were swept under Title II. What does the Title II world look like? Let's take a look.

First, common carriage regulation's original purpose was to regulate the rates, terms and conditions of the coal-fired railroads of the 1880s. That was before the West was won. Then it moved into regulating the economics of the then-"modern era" of monopoly, analog, circuit-switched, voice service of the 1930s. That was before penicillin was developed as an antibiotic. In short, the early 20th Century intent behind Title II was to impose direct and indirect economic regulation on monopoly common carriers.

Additionally, the New Deal Congress wanted to give a tip of the hat to federalism. Title II gives us concurrent federal <u>and</u> state regulation. This 76-year-old statutory construct stems partially from the early 20th Century technological and geographical differences between local and long-distance analog voice communications – a concept that is foreign to the IP-based packet switching of today.

Tariffs! I simply don't have enough time to explain these fascinating creatures.

Disputes regarding which carrier is "dominant" versus "non-dominant." An administrative law litigator's dream.

Government-supervised network planning requirements under Section 256. This slow moving, top-down planning regime would be for the Internet industry that gave us the lightning fast, bottom-up "Wiki" world?

Of course, then there are the plethora of recordkeeping, reporting, accounting and other such requirements scattered about Title II.

And let's not forget about the strict treatment of customer proprietary network information under Section 222. Maybe that one is not such a bad idea, you say?

But let's ask a bigger question: Exactly what kind of companies might get tangled up into this regulatory Rubik's Cube? Any Internet company that offers a voice application? What about an app developer that makes an app closely "ancillary" to a voice application? With this newfound authority, why stop at voice apps? Isn't voice just another type of data app?

As the distinction between network operators and application providers continues to blur at an eye-popping rate, how will the government be able to keep up? Internet application developers now own massive server farms and fiber optic connectivity. At the same time, broadband companies create and maintain software with millions of lines of code inside their systems. They also own app stores that are seamlessly connected to their networks. As technology advances, will the government be able to make the distinctions between applications and networks necessary under a new regulatory regime?

Will it be able to do so in Internet time?

Perhaps most importantly, will competitors use litigation under the new regime as a competitive weapon in lieu of investing in better products and services for consumers? Companies come to the FCC all the time asking us to regulate their rivals. Wouldn't we be providing a new platform to do just that? Will any of this actually be good for innovation and investment, let alone America's competitiveness?

These questions are more than just a law review parade of horribles. These are practical nuts and bolts questions that could be asked for years – in court. If the Commission determines that market conditions have become *less* competitive than they were in 2002, 2005, 2006 and 2007, the years of the classification orders, and that information services should therefore be regulated under Title II, it could always try to forbear from many of these outdated regulations. But in order to forebear, the Commission would have to turn around and say that broadband services once again are *different* enough from other services to warrant forbearance.

So, to recap, broadband is the same as telephone service – and broadband is different, all at the same time?

And this would survive appeal?

And these Commission actions would not create extreme litigation risk and regulatory uncertainty? Would this new regime create the environment needed to attract up to $350 billion in private risk capital to build out America's broadband infrastructure, as the Commission analysts drafting the National Broadband Plan have estimated?

I remain hopeful that, as this concept is examined further by parties on both sides of this issue, a more pragmatic view will emerge. For example, in their interesting joint filing, Verizon and Google expressed their shared view that old-style communications regulations should not be imposed in this space. Perhaps more parties will subscribe to that view.

Another question to ask is: What effect will a new regulatory framework have on the economics of the Internet ecosystem? As the Commission prepares its National Broadband Plan, it is becoming clearer that two of its conclusions could be: 1) We want broadband adoption to increase, in part, through affordable pricing; and that 2) we urge the private sector to increase its investments in broadband infrastructure.

Investors of all sizes expect a return on their expenditures. Broadband service providers pay back their investors through the earnings they receive from their paying customers. Earnings also support capital expenditures. In light of the historical fact that Title II restrictions on common carriers' discriminatory conduct are, in essence, economic regulations of rates, terms and conditions, how would any proposed rules affect broadband service providers' freedom to be flexible in their pricing?

As of today, broadband service providers can use any number of pricing methodologies to recover their costs. The most common way to charge for services is flat-rate pricing, also known as "all you can eat." But as application providers write new bandwidth intensive software that some consumers want but not others, an increasing number of diners at the "flat-rate buffet" are eating massive amounts more bandwidth than others. As the fairness and economic realities of this natural market evolution become clearer, broadband service providers must be able to retain the freedom to be flexible and creative in their pricing. Other countries such as the U.K., Australia and Canada are finding that pricing freedom is an effective bandwidth capacity management tool.[13] It can allow all users, regardless of how much they consume, to be able to use broadband services in a way that gives them, and everyone else, maximum satisfaction.

Historically, nondiscriminatory pricing was all about ensuring similarly situated consumers were treated the same and were charged the same amount. It has never meant that the minority of heavy users be subsidized by the majority of more efficient users.

Some who advocate for new rules are also arguing against pricing freedom. They should be careful what they wish for. Direct or indirect economic regulation of

---

[13] Peter Burrows and Olga Kharif, *Can AT&T Tame The iHogs?*, Bloomberg BusinessWeek, Dec. 28 & Jan. 4, 2010, at 21.

Internet access could very well *increase* prices for all consumers. Under a new nondiscrimination construct, if every consumer is to be treated the same regardless of usage, then all prices must rise to compensate for the costs imposed by heavy users. This is especially true for shared networks such as wireless and cable where consumers share bandwidth with their neighbors, whether they know it or not. In short, under one scenario, the majority of broadband consumers would pay a higher rate to compensate for a minority of users who consume more bandwidth.

Higher broadband prices? Would that possible result of new regulation not undermine our efforts to promote affordable broadband for all Americans?

With the small amount of time remaining, let me also touch on a couple of other issues that haven't been discussed much yet. One can't speak at a Free State Foundation event without mentioning the Constitution. I'll start with the First Amendment, because it's first. The Supreme Court just reaffirmed last week in its *Citizens United*[14] decision that corporations have a protected right to speak under the First Amendment.[15] Additionally, the Commission bears the burden of justifying any speech regulation it imposes on corporate entities, just as it does with individual citizens.[16] Some commenters contend that new rules could impermissibly burden speech in several different ways, including by imposing capacity restraints on network providers' own services in order to accommodate the speech of others. Others contend that the act of routing data is conduct and not speech.

Nonetheless, if new rules are enacted, the courts are sure to be presented with a First Amendment challenge during the inevitable appeals. The level of constitutional

---

[14] *Citizens United v. Federal Elections Commission*, No. 08-205 (U.S. Jan. 21, 2010).

[15] See, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

[16] *See, e.g., Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal*., 475 U.S. 1 (1986).

scrutiny applicable to a net neutrality "nondiscrimination" mandate is a key question to be resolved.

One could easily argue that strict scrutiny, the most exacting standard, should apply to net neutrality regulations because the regime would regulate speech exchanged on a privately managed broadband network.[17] In the context specifically of FCC actions, the Court's view has been that, "precedents … apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."[18]

The majority in *Citizens United* spoke forcefully, in the context of FEC regulations, about the constitutional pitfalls of regulatory schemes that burden some speakers more than others. The Court explained that "[b]y taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration …."[19]

Yet even if the government could prevail upon a court to apply only the lesser "intermediate scrutiny" standard to net neutrality regulations imposed upon network providers, the Commission still would have to prove that its burden on speech furthers an important state interest and is narrowly tailored to achieve that interest.[20] Even that test requires that the Commission first demonstrate, with empirical evidence, the existence of an actual problem – and then show that the challenged speech regulation actually

---

[17] *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*).
[18] *Id.* at 642.
[19] *Citizens United*, slip op. at 24.
[20] *See Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999).

addresses it. For instance, the Supreme Court has held that "[m]ere speculation of harm does not constitute a compelling state interest."[21]

In short, under any standard, court precedent requires the Commission to conduct a serious analysis proving that the harm is real before the agency adopts rules that restrict speech. Thus far, the record in this proceeding does not meet that burden of proof.

The Commission also needs to be careful of how its actions will be perceived internationally. As I have said before, countries that regulate the Internet more tend to be less free. Look around the globe: It is *state*-sponsored interference with the Web that is becoming the most troublesome. Google's recent wrangling with China is the most obvious example. But a lesser known fact is that the world's largest democracy regulates the Internet more than the United States does, and such regulations are complicating free expression on the Web there.

For example, last fall some individuals had posted on Google's Indian social networking site Orkut unflattering comments about the chief minister of one of India's southern states who had recently died in a helicopter crash. Some people found the comments to be offensive. According to press accounts, in response to complaints, Google removed not just the offensive material but the entire user group, fearing the content would heighten tensions within the country.[22] You see, India regulates speech with a government-determined "reasonableness" standard, and Google appeared to fear that the postings may have violated Indian law.

---

[21] *Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n*, 447 U.S. 530, 543 (1980).

[22] Amol Sharma and Jessica E. Vascellaro, *Google and India Test The Limits of Liberty*, WALL ST. J., Jan. 2-3, 2010, at A1.

Once the government starts regulating the Internet, it becomes harder to pull back. Or, as some have recently said, "the reality is that regulation *always* spreads."[23] Also, what may seem "reasonable" to some won't to others. More government involvement invariably means enforcement decisions will be politically influenced. So as we consider more regulation in this space, we must ask whether we want decisions affecting the Internet to be based on two-, four- or eight-year election cycles. Or, should we stick to the bipartisan policy that has served us well since the Clinton-Gore Administration – a policy that relies on bottom-up, non-governmental Internet governance bodies to make these decisions objectively?

Meanwhile, the European Union recently passed a telecom package that did *not* include a highly regulatory approach to net neutrality. Instead, it is taking a "wait and see" approach with reports due at the end of the year. I will be interested to see what debate ensues in response to the EU's decision.

In the meantime, I truly hope that the Commission will seriously consider a different course – a course that does not carry with it the unforeseen liabilities that new regulations are sure to bring. It is my hope that we all could agree on a middle ground idea, such as this one. In lieu of new rules, which will be tied up in court for years anyway, the FCC could forge a new partnership with the appropriate non-governmental collaborative Internet governance bodies that have worked flawlessly on these issues for years. Working together, we could collectively shine a bright light on allegations of anticompetitive conduct and work directly with the established Internet governance community to resolve controversies. This approach, coupled with strict enforcement of

---

[23] *See* Berin Szoka and Adam Thierer, *Net Neutrality, Slippery Slopes & High Tech Mutually Assured Destruction,* Progress Snapshot, Oct. 2009 (emphasis original).

our antitrust laws, could very well provide the benefits sought by proponents of new rules without incurring the unexpected costs of a new regulatory regime. After all, this way of doing business has worked quite well thus far.

In the meantime, the best antidote to potential anticompetitive behavior is more competition. Let's hope that all future FCC policies encourage more competition in lieu of regulation and rationing.

Thank you again to the Free State Foundation for inviting me to participate this morning. And I wish you the best with your program today.