

Keynote Address: The Real Stakes in Internet Openness

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Today, March 20, 2015, I want to speak about the Federal Communication Commission's efforts to protect and promote the greatest platform for competition the world has ever known—the free and open Internet. Specifically, I would like to think out loud with you about the choices that government agencies must make.

One of the most fascinating aspects of my job is that I sit in an office to which I used to go to advocate on behalf of my former client. The issues seem simpler when you are an advocate for one narrow position, than when you are making a decision that is in the broad public interest.

The job of government is to make decisions based on the facts and the record, and to do so even in a media-saturated era when issues are advocated in apocalyptic terms. One day, demonstrators at my home kept me from leaving my driveway by using a huge banner with the words, “Free the Internet.” About one hundred feet from the driveway, a stop sign (and multiple others in the neighborhood) had affixed to it a sticker causing it to say, “STOP Wheeler from braking [sic] the Internet.” If only choices in the real world were as simple as those opposing positions.

The Commission's Open Internet Order¹ rejects these two purported choices as false. We can have both an open Internet and continued investment in bigger and better broadband. We can have an open Internet and light-touch regulation that encourages innovation and consumer choice. The Commission's Open Internet Order rests on a basic choice—whether those who build the networks should make the

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¹ In the Matter of Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, And Order, 30 FCC Rcd 1506 (Feb. 26, 2015). The open Internet rules are now codified at 47 C.F.R. §§ 1, 8, and 20 (2015).

rules by themselves, or whether there should be a basic set of rules and a referee on the field to throw the flag if they are violated. Let me explain.

The open Internet allows innovation to come from anyone, anywhere. All you need is a computer and a broadband connection, and you can introduce new products, services, or ideas to a global audience—and this is the key part—without asking for anyone’s permission. The marketplace—not some gatekeeper—gets to pick winners and losers. This simple reality has allowed inventors in dorm rooms and garages to launch startups that have toppled powerful incumbents to become world-leading companies.

For more than a decade, the Commission has grappled with the issue of how best to preserve Internet openness. The question has not been whether to protect and promote an open Internet—that has been the bipartisan policy of Republican and Democratic Chairs alike—but rather how best to achieve that objective. In February 2015, the FCC moved to settle this dispute, once and for all, by adopting the strongest open Internet protections ever proposed by the Commission. I believe that the result will be overwhelmingly positive for consumers and innovators. I firmly believe that it will also be positive for network operators who now have regulatory certainty with no impact on their consumer revenue streams.

We have heard an avalanche of arguments against this order. We have been told that our rules are too clear and too uncertain; that we are too fixated on the past and too focused on the future; and that we will protect the profits of incumbent broadband providers and that we will threaten them.

What should we make of these contradictions—this fog of advocacy? We should conclude that the biggest broadband providers in the land have one objective: to operate free from control by their customers and free from oversight by the government. If they succeed, then, for the first time in America’s communications history, private gatekeepers will have unfettered power to control commerce and free expression. The true choice is between protecting the gatekeepers or protecting the consumers and the insurgents who wish to boost the greatest strength of America’s economy—namely innovation.

To understand the problem, it is necessary to understand the power of the biggest ISPs. Consider this simple fact: About two-thirds of American households have zero or one choice for high-speed, wired broadband to their homes.² No choice or one choice does not make an

² David N. Beede, Office of the Chief Economist, U.S. Department of Commerce, Competition Among U.S. Broadband Service Providers (Dec. 2014), available at www.esa.doc.gov/reports/competition-among-us-broadband-service-providers (“[O]nly 37

attractive marketplace from a consumer's perspective. As gatekeepers, the ISPs have the power to decide what travels between consumers and the Internet; they have all of the tools necessary to block, degrade, or favor some content over others. In fact, there is no doubt that broadband providers have the ability to disadvantage companies that need to use their transmission services to distribute products and services to the public.

You remember the story of Robin Hood's first encounter with Little John; Robin Hood wanted to cross the river but Little John controlled the passage from one side to the other. Unlike Robin Hood, today's consumers lack the power to fight back against ISPs. Consumers have few choices—wireless is not a full substitute—and they face barriers in exercising the choices that may exist.

In 2010, the Commission found that broadband providers have the incentive and the ability to block, degrade, or unfairly favor content. Further, the D.C. Circuit upheld that conclusion, affirming the Commission's conclusion that broadband providers could decide to exercise their ability to the disadvantage of consumers and innovation.³

The biggest ISPs also have abilities that go beyond denying, degrading, or delaying material that must pass over their last mile transmission systems. They have what may well be an equally significant power. That is the power to establish norms for their industry—the customs of the trade that often will have more practical significance than the positive laws they are required to obey. The norms will manifest themselves in standard terms in contracts with consumers, e.g., mandatory arbitration clauses, or in contracts with other Internet merchants, e.g., interconnection fees. They may shape the quality of customer service. The big ISPs can determine the culture of innovation, shaping the expectations of consumers and innovators alike.

In these circumstances, what could possibly go wrong?

Most of the approximately four million people who expressed themselves in the FCC's Open Internet proceeding apparently thought that plenty could go wrong. We received a lot of elaborate, well-

percent of the population had a choice of two or more providers at speeds of 25 Mbps or greater.”).

³ *Verizon v. Fed. Comm'n's Comm'n*, 740 F.3d 623, 648 (D.C. Cir. 2014) (“[T]he Commission established that the threat that broadband providers would utilize their gatekeeper ability to restrict edge-provider traffic is not, as the Commission put it, ‘merely theoretical.’”).

reasoned, and carefully supported submissions in the Open Internet proceeding, but most of the four million filings were simple expressions of preference. How to understand them? I believe by and large they were saying two things. First, they were very concerned that there be effective rules to protect a free and open Internet, and, second, they know that the ISPs have the upper hand.

The record in front of the Commission presented two fundamental choices, both of which I concluded were false choices.

First, must we choose between an open Internet and continued investment in bigger and better broadband networks? I will say, frankly, that this issue weighed heavily upon me during the course of our proceeding. Yet I concluded, in part because of the history of regulation of the wireless industry, that an open Internet would actually boost the incentive for network investment because consumer demand will increase when networks are open.

Some ISPs say investment will suffer if an open Internet is mandated. Many ISPs, including companies like Sprint, T-Mobile, Frontier, Google Fiber, and hundreds of rural companies and small, competitive wireless companies say they can build their businesses within the sort of light-touch rules we have adopted. Even Comcast, AT&T, and Verizon, who oppose what we did, continued to invest in their networks even knowing that the rule was coming. In fact, AT&T and Verizon did so very dramatically in the Commission's recent AWS-3 spectrum auction,⁴ which attracted more than \$41 billion in net bidding—more than double the previous record.

Most importantly, ISP share prices were not adversely affected by the contemplation and adoption of the regulations. Very curious. Perhaps real investors—many of them, these days, professional investors, aided by professional securities analysts—concluded that the regulations would not do any damage. They might have even concluded that the regulations would do more good than harm, as I believe.

Following a determination that some type of regulation is needed, the issue becomes, what type? This raised the next supposed dilemma in the form of an asserted requirement to choose between two principles that the Commission has supported on a bipartisan basis for more than

⁵ "AWS-3" refers to three bands of spectrum (1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz) auctioned to licensees for the provision of Advanced Wireless Services. The auction concluded on January 29, 2015. FCC Public Notice DA 15-131, Auction of Advanced Wireless Services (AWS-3) Licenses Closes, Winning Bidders Announced for Auction 97 (Jan. 31, 2015), available at <https://www.fcc.gov/document/auction-97-aws-3-winning-bidders>.

a decade. On the one hand, the Commission has clearly wanted to ensure that broadband connections are not treated like old-fashioned utilities, the kind of telephone companies that your grandparents remember. Rather, it wanted to dispense with unnecessary regulatory costs and, more importantly, provide strong incentives for network investment. That was the basis of important Commission decisions in 2002,⁵ 2005,⁶ and 2008.⁷

On the other hand, the bipartisan support for an open Internet has been equally clear. From an important speech by then-Chairman in 2004,⁸ to the adoption of a formal policy statement in 2005,⁹ to enforcement actions,¹⁰ to the imposition of merger conditions¹¹ and the requirement that Verizon's extremely valuable spectrum used for 4G services be subject to openness requirements,¹² the Commission has supported a simple principle: The Commission must assure a future of openness on the Internet.

The Commission's concerns were based on fact, not speculation. In 2008, a Republican-led Commission found that Comcast was throttling

⁵ High-Speed Access to the Internet Over Cable and Other Facilities, 17 F.C.C. Rec. 4798 (2002), *aff'd*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

⁶ Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 F.C.C. Rec. 14, 986 (2005).

⁷ Formal Compl. of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 F.C.C. Rec. 13,028 (2008) (Order), vacated, *Comcast v. Fed. Commc'ns Comm'n*, 600 F.3d 642 (D.C. Cir. 2010).

⁸ Symposium, Michael K. Powell, *The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age* (2004), available at <https://transition.fcc.gov/commissioners/previous/powell/speeches.html> (University of Colorado School of Law Silicon Flatirons Symposium).

⁹ Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 F.C.C. Rec. 14,986 (2005).

¹⁰ Formal Compl. of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 F.C.C. Rec. 13,028 (2008) (Order), vacated, *Comcast v. Fed. Commc'ns Comm'n*, 600 F.3d 642 (D.C. Cir. 2010).

¹¹ Jonathan Baker, *Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis*, 25 ANTITRUST 36 (2011).

¹² Eric Bangeman, *Verizon unhappy with 700MHz open access requirements, sues FCC*, ARS TECHNICA (Sept. 13, 2007), available at <http://arstechnica.com/tech-policy/2007/09/verizon-unhappy-with-700mhz-open-access-requirements-sues-fcc/>.

legal peer-to-peer traffic.¹³ In 2013, when Verizon was asked in open court if it wanted to restrict access through special commercial terms, its counsel replied, “I’m authorized to state by my client today that but for these rules we would be exploring those commercial arrangements.”¹⁴

In 2014, we saw disputes over the exchange of traffic between Netflix and major ISPs, and accompanying complaints from Netflix consumers that the Internet service they had paid for was not adequately delivering the content they wanted.¹⁵

In the summer of 2014, Verizon Wireless also announced plans to limit “unlimited” data customers if the subscriber went over a certain amount of data used in a month. I wrote to Verizon inquiring about this policy, and it was ultimately reversed.¹⁶

Today, we are told that the principles of limited regulation and an open Internet are irreconcilable, and that the quest to protect an open Internet is seeking a solution to a problem that does not exist.

I thought carefully about this and, again, I decided that this was, as well, a false choice. The Commission majority agreed. It concluded that by following the terms of the Telecommunications Act of 1996, exercising the power given to us expressly by Congress, we could protect the open Internet without using old-fashioned, utility-styled regulation.

And that is what we have done by constructing Title II for the twenty-first century built on the strong foundation laid by the treatment of wireless voice. I was there when Title II was sought by the wireless industry. I know that the application of Title II to wireless voice services was followed by hundreds of billions of dollars of investment, great innovation, and, of course, enormous benefits to consumers. In other words, we have two false choices and one real choice: to stand with incumbents or with consumers and Internet innovators.

¹³ *Id.*

¹⁴ Brendan Sasso, *OVERNIGHT TECH: NSA spying docs to be released*, THE HILL (Sept. 9, 2013), available at <http://thehill.com/policy/technology/321173-overnight-tech-nsa-spying-docs-to-be-released>.

¹⁵ John Ribeiro, *Netflix won't budge in dispute with Verizon over video quality*, PCWORLD NEWS (June 9, 2014), available at <http://www.peworld.com/article/2361680/netflix-wont-budge-in-dispute-with-verizon-over-video-quality.html>.

¹⁶ Kevin Fitchard, *At the 11th hour, Verizon decides to cancel its controversial throttling plans*, GIGAOM (Oct. 1, 2014), available at <https://gigaom.com/2014/10/01/at-the-11th-hour-verizon-decides-to-cancel-its-controversial-throttling-plans/>.

From this perspective, the Order the Commission adopted in February 2015 can be understood as a calculation of risk and its distribution. The ISPs sometimes say that they no longer have any intention of engaging in any of the conduct that the Open Internet Order seeks to prevent. Moreover, they and their allies have argued vociferously that there were very few incidents that could be thought of as violations of net neutrality. In other words, net neutrality violations should be understood to be very low probability events. The logic of their position is: Why undertake any cost to insure against these low probability events?

The response of the FCC majority can be understood in this way: whether or not they are low probability (and we were not convinced that they would be), if they occur, then they are likely to be highly consequential. As a result, the majority thought it was prudent to provide some insurance. Let me draw an analogy. There is a low probability that you will get into an automobile crash, but the state requires you to have insurance to protect the other person in case that low probability occurs.

The same concept that applies to the Interstate applies to the Internet. I am convinced that we have been able to achieve this insurance at low cost for two reasons. First, we have not precluded broadband providers from doing anything that, at least in the most recent round of pleadings, they indicated they intended to do. Second, through the use of forbearance authority and after-the-fact regulatory tools, we have minimized any direct regulatory costs that a law-abiding ISP would incur.

At the end of the day, the job of a government agency is to make choices. The rules in the Open Internet Order are solidly based on the record before us, but I also know, from my real-life experience as an entrepreneur, that gatekeeper power is real.

Once upon a time, I was part of a new pay-per-view video service. When we would seek to get on a cable system, the first question the cable operator would ask was, "What's our cut?" Access had to be purchased.

Years later, as a venture capitalist in the early days of mobile data, I learned that little had changed. The only way a wireless carrier would let an application provider on its network was for a cut of the revenue. Mobile networks were a walled garden—again, access had to be purchased.

These personal experiences get at why the Internet has been such a game changer, and why openness is essential.

Let us look ahead. We are on the verge of a new reality for video—but it will not happen without Internet openness.

Many people are unhappy with cable rates, and customers are increasingly frustrated and looking for alternatives.

New competition to the traditional cable bundle is being introduced like never before. DISH launched its \$20-a-month Sling TV service in February 2015. Sony has announced a streaming TV option for PlayStation owners. CBS now offers \$8-a-month streaming service. HBO Now is available without cable TV. The over-the-top mainstays, Netflix, Hulu, and Amazon Prime continue to grow, and Apple is expected to launch its own streaming service later in 2015—but these streaming ventures only work if the network is open.

When you sweep aside all the hypotheticals and look at the world we are living in, you come back to the real choice we face. The Internet is the most powerful platform for innovation, commerce, and free speech in human history. We can have a cop on the beat to enforce common sense rules of the road that ensure Internet openness for consumers and innovators, without any retail rate regulation or similar rules that would hamper investment in faster networks—or we can have the people who operate the networks making the rules for the Internet and leave decisions about blocking, throttling, and prioritizing traffic to them.

Put in simpler terms: We can have an open Internet policy that advances the interests of tens of thousands of innovators and millions of Internet users, or we can have an open Internet policy that advances the interests of a few powerful companies.

The choice is clear. And I am proud that the Commission has made the right choice in adopting strong, sustainable, and sensible open Internet protections.

So what are some of the practical effects of our new open Internet rules?

Perhaps most significantly, innovators have certainty that they will be able to get on the networks owned by Comcast, AT&T, Verizon, and other ISPs. Openness without fear of pay-to-play is the key to innovation.

Investors in Internet startups no longer have to worry that their capital will be siphoned off unfairly by the big network providers, or that the companies they are investing in might not be able to reach consumers. The online content-applications-services space is where competition is possible and thriving, and we now have assurance that if someone attempts to put up barriers—tolls or otherwise—that would harm this sector, the FCC is positioned to intervene.

One final prediction: The courts will uphold the FCC's new rules. The D.C. Circuit sent the previous Open Internet Order back to us and basically said: "You're trying to impose common carrier-like regulation

without stepping up and saying, “These are common carriers.”¹⁷ We have addressed that issue, which is the underlying issue in all of the debates we have had so far. That gives me great confidence, going forward, that we will prevail.

When that happens, the big winners will be America’s consumers, innovators, and our economy as a whole. We will finally have strong, enforceable rules that assure us that the Internet remains open now and into the future. That is, I am confident, the right choice.

¹⁷ “The Commission . . . has . . . an obligation with respect to entities it has classified as statutorily exempt from common carrier treatment [to avoid imposing common carrier obligations on those who might not otherwise operate as common carriers], and the issue here is whether it has nonetheless ‘relegated [those entities], pro tanto, to common-carrier status.’” *Verizon*, 740 F.3d at 654 (D.C. Cir. 2014).

