

**DISSENTING ORAL STATEMENT OF  
COMMISSIONER MIGNON L. CLYBURN**

Re: *Restoring Internet Freedom*, WC Docket No. 17-108.

Mr. Chairman, I will have a longer statement for the record, but at this time, I wish to share few impressions about WC Docket No. 17-108.

Last Wednesday, I took part in a public listening session in Skid Row. For those unfamiliar, Skid Row is a Los Angeles community, housing one of the largest homeless populations in the United States. It was there I met a fascinating woman who calls herself “Frenchie.” She would stop me about three times over the course of the evening; first going on about how much I looked just like my picture; next letting me know, how happy she was that someone like me would not only visit, but listen; but the third time turned out to be the most telling.

I was moments away from politely but firmly asking to be excused, when Frenchie said something that made me pause: When she was without a home in the traditional sense, she was able to secure an address, a stable, personal email address, which helped to ground her and enabled her to keep in touch with the world, through the power of the internet.

That continuity, that identity, that stable electronic footprint, was at times the only permanent presence she had when much in her physical life was in turmoil. She got through the hardest times, she said, thanks to an open internet because those very same connections, led her to the services that appear to be providing her a more stable life.

I also heard from Marco that night. The former filmmaker lost his family, his livelihood, and for a time, struggled with mental health issues. He lived in Skid Row, but the doctor who made the greatest headway with his recovery was more than 200 miles away in Fresno.

Rather than having to spend hours on public transportation, he was able to Skype with his therapist, and along with a friend in Argentina who spoke his language, and a clinician who was willing to pronounce his name correctly, he has gotten through the hardest of times, thanks to the power of an open internet.

Denise, an artist, writer and mother of six, felt separated from the world because of the challenges of being a stay-at-home mom. She first turned to blogging as an avenue of expression, but that blog eventually became a retail outlet for her artistic work, as well as a source of income, that has enabled her and her husband, to support their family, thanks to the power of an open internet.

These are just three of the millions of examples of those whose lives have been uplifted by one of the most enabling platforms for speech, commerce, and innovation of our time. Like the nearly four million voices who weighed in on the previous proceeding just over two years ago, these three individuals asked that this agency keep the internet open and free.

We can get hung up on semantics, debate classification, or whether the internet is a luxury, but broadband is a necessity in the 21<sup>st</sup> century and access to it allows the most vulnerable among us to hold on during our darkest moments, and lift ourselves up to a brighter tomorrow.

For those of us who are fortunate enough to have broadband access at home, and do not have to trek to a library and wait for a free terminal or troll for free Wi-Fi on street corners or fast food establishments, not only are you fortunate, but you know that it is among the first utilities you make sure is working, right after your electricity and water. And just what does one expect when you get connected? That you can run your online business, access content over the internet, and exercise free speech, without your service provider or anyone else getting in the way.

Those expectations, it pains me to say, are now, at risk.

Today's Notice of Proposed Rulemaking, more appropriately known as the *Destroying Internet Freedom NPRM*, deeply damages the ability of the FCC to be a champion of consumers and competition in the 21<sup>st</sup> century. It contains a hollow theory of trickle-down internet economics, suggesting that if we just remove enough regulations from your broadband provider, they will automatically improve your service, pass along discounts from those speculative savings, deploy more infrastructure with haste, and treat edge providers fairly. It contains ideological interpretive whiplash, boldly proposing to gut the very same consumer and competition protections that have been twice-upheld by the courts. And it contains an approach to broadband that will throw universal service money to broaden its reach, but abandon users, when something goes wrong, particularly if they are faced with anti-competitive or anti-consumer practices. It jeopardizes the ability of the open internet to function tomorrow as it does today. But if you unequivocally trust that your broadband provider will always put the public interest over their self-interest or the interest of their stockholders, then the *Destroying Internet Freedom NPRM* is for you.

I find it ironic, however, that many of the voices who support this item, including the majority at the Commission, said that it should be Congress's place to decide the future of broadband regulation. If that is so, then why are we debating this today? Just why is it, that the majority proposes to undo a twice-affirmed classification, and twice-affirmed rules? Is it so Congress can act? A vacuous assertion.

But what I find particularly troubling, is that this proposal has the potential to damage our authority to help provide broadband for the poorest and most remotely-located Americans, unless the underlying goal, is to actually weaken our ability to support broadband through our universal service programs.

I must vociferously dissent from this NPRM, because it has all the indicia of a political rush job. Month after month, I listened to repeated calls from the current leadership about how economic analyses were missing from the last administration's items, how troubling that was, and because of the absence of analysis, we were jeopardizing our ability to make sound decisions. But unless I missed it, and I would welcome a correction if I am in error, there was no FCC staff economist or technologist consulted during the drafting of this item. If they were, and I majored in Banking, Finance and Economics, but admittedly, I am out of practice, I cannot find any evidence of it given the dearth of economic and technical depth in this NPRM.

The only real factual question, about the effects of the *2015 Open Internet Order*, that the majority keeps trying to drive home, is their assertion that it has harmed investment. But the NPRM presents at most one third of the economic picture of the market. You see, from reading the item it would be reasonable to assume that the key open internet policy question is whether a policy increases or decreases broadband provider capital expenditures. It is a relevant question, but the only econometric analysis that the majority cites for support clearly states, that it is "inappropriate [to] use . . . investment as a policy objective."

Even if I accepted the majority's premise that the key question is investment, the analysis fails to take into account what entrepreneurs invest in their internet business, what funds venture capitalists plow into the internet and telecom market, and what consumers pay for, and how they use all of these services to create economic value. It even fails to account for broadband investments, made beyond narrow capital expenditures including spectrum purchases and M&A, both of which are indicia of a robust and profitable market for broadband services. The majority seems willfully blind to these aspects of broadband investment.

And even if we were to ignore all those points and narrowly focus on the affirmative case that the majority puts forth, it is lackluster at best. As I have mentioned previously, I have yet to see a credible analysis that suggests that broadband provider capital expenditures have declined as a result of our *2015 Open Internet Order*. But of course, that does not keep those dead set on dismantling open internet protections as we know them from repeating the same tired, unproven talking points.

The most recent analysis on the market actually suggests, that total capital investment by publicly-traded ISPs, was up five percent since the *2015 Open Internet Order* was adopted. Edge investments are up. Broadband revenues are up.

This trend makes perfect sense, since *no broadband provider, has ever told Wall Street, or the Securities and Exchange Commission, that the 2015 Open Internet Order, was responsible for decreases in capital expenditures.*

So just why do we appear to be stuck in a literal he-said she-said exchange on this issue? One analyst articulates, that “It’s impossible to tell whether the open internet rules have affected investment. There’s no way to provide a serious answer, that rises above simply trying to reverse engineer the answer you want to find.” There simply has not been enough market experience with this framework in order to tell what caused what.

So what then, should we look to, for answers?

With all of the assertions, about how burdensome and draconian the current framework is, what should be instructive is that the Title II framework that the FCC adopted for broadband in 2015, was actually less intrusive than the one that was applied to mobile voice in the early 1990s. Now we all know how much of a bust that wireless industry has been, right? Between 1993 and 2009, the mobile industry invested more than \$271 billion in building out networks. During the same time period, industry revenues increased by 1300 percent and subscribership grew over 1600 percent. So answer this: why is it that the leadership is now proposing to get rid of what is essentially the same legal framework that we know was the highly successful driver in the mobile industry context.

What is becoming increasingly clear is this: that the majority is willing to read the definition of telecommunications service out of the Communications Act entirely—not just for broadband, but for all consumer telecommunications services.

Why do I assert this? *Show me one modern consumer service, that the majority will unequivocally say, is a telecommunications service, and that its provider should be regulated as a common carrier.* Broadband, VoIP, VoLTE, messaging—all of these I suspect, the majority would say are either unequivocally or most likely information services. There is much sound and fury about applying the Communications Act to modern communications services, but none about applying the Revolutionary-Era First Amendment to speech on the internet. The point is this: technology-neutral definitions do not, or it saddens me to say in this context, should not ever become obsolete by advances in technology.

But, let me turn to broadband specifically. Those in lock step with the majority seem to be on board—at least so far—with a whiplash about-face on Title II and net neutrality.

But they are forgetting that their lodestar for Constitutional and statutory interpretation, would conclude that they are engaging in “interpretive jiggery-pokery.” The late Justice Antonin Scalia’s guiding framework for legal interpretation was that laws should be interpreted based on their actual text and original public meaning. But how quickly people forget when it comes to an issue where they have a preferred policy outcome that diverges from rigorous textualism.

Remember, we have been here before. The FCC went before the Supreme Court in 2005 when it attempted to classify cable broadband as an information service. The majority of the court felt that such an interpretation was within the interpretive discretion of the FCC. But not Justice Scalia. In his withering dissent in *NCTA v. Brand X*, he accused the Commission of attempting to “concoct a whole new regime of regulation . . . under the guise of statutory construction.”

And its attempt to achieve this scheme of non-regulation? Done so “through an implausible reading of the statute.”

Congress in its wisdom tied many of our competition and consumer protection functions to the nature of the service being offered. And indeed, those services are changing but the underlying transmission remains largely the same.

Innovation has, and will continue. We have moved from copper to glass, and from circuit-switching to packet-switching. But using interpretive gymnastics, to shirk competition and consumer protection responsibilities is the antithesis of putting #ConsumersFirst. We should not let broadband providers define the rules of engagement when Congress has clearly entrusted the Commission with that responsibility.

And just to make it absolutely clear that this is an ends-justified rather than a legally-justified proceeding, one need only look to the toll-free numbering database for answers. That *database* is a tariffed common carrier service. If mass-market broadband, which transmits data across the globe in the blink of an eye, is *not* a common carrier service and numbering database access *is*, this classification exercise is just an expedition into whimsical absurdity.

In sum, it simply makes no sense in the era of 21<sup>st</sup> century connectivity to say that we are not dealing with a telecommunications service. Just what are consumers purchasing, when they sign-up for broadband, if not the ability to transmit and receive?

The majority claims it has an eye towards the future, but both feet are firmly stuck in the past, hearkening back to dial-up days where a subscriber purchased both a basic TDM telephony service and a separate dial-up service in order to access the internet. No matter that most of us no longer dial-up to the internet, no matter that consumers buy broadband because all the information services they want to access and use require the broadband subscription as a necessary prerequisite. But I should not be surprised that the majority is peering through the lens of yesteryear, for we just revived a 1985 technologically-obsolete UHF discount, so why not continue to wind back the clock, and base our regulatory structure on a 1990's version of the internet?

As far as the open internet rules go, this is Schrödinger's NPRM: the text devoted to the open internet rules is so open-ended that the rules are both alive and dead until the Commission adopts an order in this proceeding.

Will any of the open internet rules survive this rulemaking? I am doubtful, given both the tenor of the questioning, and the fact that the rulemaking is proposing to get rid of the only authority, that would underpin strong open internet rules. Tellingly, the majority does not propose any provision of law to underpin any of the open internet rules on which it seeks comment.

In fact, it proposes to reinterpret the one provision that has served as a basis of even limited broadband regulation. Of course I am talking about section 706 of the Telecommunications Act of 1996.

While paying lip service to the idea that we could ground open internet rules in other forms of statutory authority like section 230(b)—which, the *Comcast* court, rejected—I am also concerned at the proposal to reinterpret section 706 as merely hortatory.

We have litigated the statutory history, and courts have upheld our use of section 706 as a substantive grant of authority. Walking that interpretation back—particularly in a world where we do not have Title II—is a sure death sentence for any open internet rules.

While the majority engages in flowery rhetoric about light-touch regulation and so on, the endgame appears to be no-touch regulation and a wholesale destruction of the FCC's public interest authority in the 21<sup>st</sup> century.

Undermining the ability of poor people to get broadband, knee-capping funding for rural telecommunications, declining to review an \$85 billion transaction with massive public interest implications, encouraging consolidation and higher prices in business broadband, and enabling massive broadcasting conglomerates to gobble up more local voices. Each action, is a cut against the public interest, and the majority will keep it coming unless Americans stand up, make their voices heard and

challenge the FCC in court, because it is glaringly obvious, with each open meeting, that the willingness and the ability of the majority to protect consumers and competition in a broadband era, has come to a screeching halt.

Nonetheless, I thank the staff of the Wireline Bureau and Office of General Counsel for their work on this item. I may think this rulemaking is a horrible path to go down, but your hard work should be recognized regardless.