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"THE BEGINNING OF THE END OF THE INTERNET?
DISCRIMINATION, CLOSED NETWORKS, AND THE FUTURE OF CYBERSPACE"
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Thank you, Michael, for that kind introduction. More than that, thank you for the creative thinking you and your colleagues here at New America always manage to impart to the great issues confronting communications. There are a lot of tangled issues to resolve as we work to bring the wonders of the digital revolution to each of our fellow citizens and you bring clarity and creativity to so many of them. So I appreciate being invited back to the Foundation. The last time we were together, on Capitol Hill, we were discussing the critically important issue of media concentration. At that time, we focused on action the Commission was taking against openness, access and competition in the media. Today, the New America Foundation, always on the cutting edge, has enlisted in the next great battle. The next great battle of the same continuing struggle.

The same forces are arrayed on this field as on the last one. Innovators, consumers and competitors once again face an entrenched axis with growing potential to stymie competition, deny consumers access and prevent innovations not under their control. But this time the battle is not over media consolidation. This battle is over the future of the Internet.

Americans take pride in their Internet. From right to left, Republicans and Democrats, rural and urban, we view the Internet as a place of freedom where new technologies and business innovation and competition flourish. For all our other differences, we point to the Internet as an example of how things ought to work. What made the Internet such fertile ground for this success? For openers: freedom, access, and wide dispersal of power. From its inception, the Internet was designed, as those present during the course of its creation will tell you, to prevent government or a corporation or anyone else from controlling it. It was designed to defeat discrimination against users, ideas and technologies.

This freedom has always been at the heart of what the Internet community and its creators celebrate. Anyone can access the Internet, with any kind of computer, for any type of application, and read or say pretty much what they want. No one can corner control of the Internet for their own limited purposes. It sounds good so far, right?

This Internet may be dying. It may be dying because entrenched interests are positioning themselves to control the Internet's choke-points and they are lobbying the FCC to aid and abet them. The founders' vision of the Internet is being exchanged for a constricted and distorted view of technology development, entrepreneurship and consumer preferences. For its part, the Commission has already made serious regulatory

miscalculations that could endanger the freedom and lifeblood of the Internet sooner rather than later. We seem to be buying into a warped vision that open networks should be replaced by closed networks and that traditional user accessibility can be superceded by a new power to discriminate. Let this vision prevail and the winners will be entrenched interests with far greater power than they have today to design and control the Internet of the future. I am not singling out one specific industry here. I am talking about any company that controls a choke-point. They may be doing what comes naturally and they may be doing what they think is right, but the result may well be contrary to the inherent dynamic of the Internet and to the needs of the American people. If these interests get their way, the losers will be innovators, technologists and business users, for openers and -- more importantly -- legions of consumers and citizens who make up the Internet community.

The life-threatening disease comes, strangely, in a prescription bottle. Many in industry and government prescribe closing off Internet openness a cure for telecom's ills. They claim that all they are doing is "letting the market reign supreme," and "deregulating," deploying the rhetoric of Libertarianism to serve their agenda. They are fond of railing against picking winners and losers when they are in fact picking winners and losers themselves. We've been in this same place in other major debates at the FCC over the past two years. The details may differ; the direction is the same. I believe that if the Commission's present mind-set is fully implemented, we will look back, shake our heads and wonder whatever happened to that open, dynamic and liberating Internet that once we knew. "What promise it held," we'll say. If that happens, history won't forgive us. Nor should it.

A funny thing happened as I was writing these remarks. The Ninth Circuit Court ruled in the *Brand X* case. And it vacated the Commission's troubling plan for cable broadband service. But even this important ruling has limited scope. It does not go, because it could not go, beyond cable to encompass DSL and any other technology that could act as a choke-point and give a few people too much control over the Internet. Some argue that because of the ruling the FCC will not rush forward in other areas until the issue is resolved in the courts. I have no such expectation.

Our ill-advised policy impacting the Internet is only one piece of a tectonic shift across the whole wide range of telecommunications and media issues at the FCC. From media to telecom to the Internet and beyond, we appear to be rushing toward breathtaking change in regulatory policy. The Commission strikes me as on course to replace open networks with closed systems. It is permitting, even encouraging, competition to wither in the face of centralization. And it is short-changing its responsibility to protect the public interest.

Not enough people outside Washington have paid attention to the momentous decisions already taken. With the exception of media concentration, wherein the brazenness of what the Commission decided and the stealth process it used to get there aroused the ire of millions of Americans, many of these other proceedings remain inside-

the-Beltway games even though they will cause gigantic seismic shocks all across the country. I don't want that to happen. I don't think most of you do, either.

Back to the battle at hand. Let me lay out the dangers I see in the Commission's proposals as they relate to the Internet and then offer some alternate thinking that I believe would better protect the vitality, freedom and original vision of the founders.

The Internet has already accomplished so much. It has become an engine of economic growth. A tool of education. A health provider. An entertainer. It will change the ways we govern ourselves and grow to be, I believe, a dynamic force against political oppression in regimes that are now closed. The power of the Internet resides, as its founders foresaw, in its decentralization. There is no central headquarters through which every communication is forced to pass. Millions of dialogues occur simultaneously. People share news, information and experiences from anywhere to anywhere because even if they aren't connected to each other, even if someone tries to interrupt a certain connection, they can route from open node to open node around the globe to find one another. It's more than just empowering. It may be the best and most democratic public forum that has ever existed.

What made it this way? What makes the Internet a place of freedom, technology development, competition and business innovation? What makes the Internet a place that Americans, conservatives and liberals alike, point to as an example of how things ought to work? What regulation, deregulation, unregulation, whatever, made it so that this dynamic and open platform developed as it did? And as the Internet enters its adolescence -- as it matures from the first hesitant steps of its dial-up infancy to the exuberance and freedom of broadband -- how do we keep it this way?

These questions should be our starting point. The Internet developed this way in large part because it was allowed to grow without either governments or monopolies stifling its openness and connectivity. To understand this fully, you need to start with some history. It wasn't that long ago that one network -- AT&T -- ran the whole show in the wireline world. AT&T had the power to decide how the network would be used. When innovators showed up at the door with ideas and new technologies, they were greeted with what I imagine was a courteous but quick "go away." For a long time, the FCC fully supported this type of network, and in fact served as its protector. It was thought that only through comprehensive control by a single company could the quality, safety and scale economies of the network be guaranteed. Bigger was better and uniformity and stability were thought to be worth the price of some lost opportunities for innovation and consumer benefits. This was government at its worst.

All of this began to change 35 years ago when an innovator called Carter Electronics Corporation developed a device that connected mobile radio-telephone systems to the wireline network. This device, called the Carterfone, had a cradle into which a regular handset was placed. It converted voice signals to radio signals without the need for a direct electrical connection. But the entrenched incumbent was convinced

that allowing this innovative and foreign attachment would bring down its entire system, because the incumbent did not build it, sell it and control it.

Despite AT&T's complaints, the Commission changed tack, stood up to the monopolist and did the right thing. It *required* the company to permit this new application that attached to the end of the existing network. Alarms went up that this decision meant the end of network quality and the end of reliable service as we knew it. Of course, the doomsday scenarios never came to pass. Just the opposite came to pass. The idea of having a network that couldn't discriminate against innovators who wanted to improve it started to break the choke-hold that monopoly had on the system.

In the years after the Carterfone decision, as we entered the Internet age, the Commission reaffirmed its policy of openness and competition by protecting freedom on two layers: the access layer and the architectural layer. In its Computer Inquiries, another Commission said that common carriers which own transmission pipes used to access the Internet must offer those pipes on non-discriminatory terms to independent ISPs, among others. With these decisions we preserved competition in the information services market by ensuring that customers could reach independent providers. Congress then moved to protect the architectural layer. In the 1996 Act, it said that local telephone companies with choke-point control of physical infrastructures would have to unbundle their transmission networks.

Now both of these policies – protections on the access layer *and* on the architectural layer – are under attack at the Commission.

Carterfone and its progeny tell a story of how companies that control choke-points on the network have a built-in incentive to restrict and control customer use of that network. But this is also a story about the positive role the FCC can play to ensure that networks are open for innovation -- when we do the right thing. This was government at its best -- limited, yes, but effective.

Through such decisions, the foundation for our early experience with the Internet was laid. We had an open environment where consumer freedom to use the network would be bounded only by the need to prevent harm to the network itself. So when dial-up technology came along, the Internet grew quickly. As dial-up kicked into high gear, e-mail exploded, research on every conceivable subject appeared with a click of the mouse, learning opportunities multiplied and streams of new services and products became available.

That was then. This is now. Today, as the Internet matures from dial-up to broadband, the FCC is positioning itself to change the rules, maybe even to call the game. Some important rules are already gone, others are on the block. If we continue down this path, we will end by undermining the basic end-to-end principle that made the Internet great. Control will have been wrested away from Internet users and given back to those interests that control the bottlenecks, just like AT&T controlled them not so long ago.

Broadband should be another step in the path of Internet growth. It may fall far short of its transformative potential.

All the signals of where this Commission is heading are there for the looking. It has already voted to place cable modem services into the unprotected and porous world of Title I. Then it turned right around and reached a similar, if tentative, conclusion for wireline DSL providers – an interim decision that was set to be made permanent, I believe, before the end of the year, until the Ninth Circuit intervened this week. I fervently hope that the Court's decision will put the wireline classification vote off until we have more clarity on the transmission issues, but I'm not taking that to the bank yet after reading the Chairman's quick response to the Ninth Circuit vote in which he strongly disagreed with the decision and vowed to appeal it. Remember also that the majority wrote into its cable modem order -- maybe they saw the hand-writing on the wall -- that should the courts overturn them, the Commission will simply forbear. How's that for *chutzpah*? The direction of the current Commission can also be seen in the broadband section of the recent Triennial Review Order where -- in a huge and hugely troubling decision -- fiber is declared the province of the incumbents rather than the playing field for competition and diversity.

Once again this Commission is out-driving its headlights. We are taking gigantic leaps down the road of removing core communications services from the framework that kept the Internet free, open, and non-discriminatory; substituting our own judgment for that of Congress; and playing a dangerous game of regulatory musical chairs by moving technologies and services from one statutory definition to another without having a clue about the consequences.

Before we move all these chairs, we had better understand the far-reaching implications of our actions, because I can tell you this: our actions will have many and serious consequences in addition to stifling Internet freedom and innovation. These involve such critical issues as universal service, competition, pricing, consumer protection, privacy, disability rights, and even homeland security. Here's one example: law enforcement tells us that this reclassification is raising concerns about its ability to protect the country from crime and terrorism. Here's another: the Joint Board on Universal Service recently reported to the Commission that reclassifying broadband transmission as a Title I service would mean that universal service could ***never*** support broadband deployment. Think about what that means for an Internet whose full realization depends upon accessibility to every home. It's a subject for another speech, but I do believe we need a national policy dedicated to high speed broadband deployment for every home and every citizen in this great nation. We're not on that track today.

Until now the big companies that control the bottlenecks have been unable to convert their reach into controlling power over the Internet. But now we face scenarios wherein those with bottleneck control may be able to discriminate against both users and content providers – users and content providers that they don't have commercial relationships with, don't share the same politics with, or just don't want to offer access to for any reason at all. From the not so distant shadows of the past, old attitudes favoring

industry consolidation and limited access are again seeking to reestablish themselves. Free from the dynamic of competition, a favored few interests may try to set up shop as gatekeepers of the Internet. The sign will be posted clearly: "Entrepreneurs Need Not Apply." With the on-ramps to the Internet under exclusive or at least limited control, we the citizenry could be left with an Internet of fenced gardens and walled prairies. Fences may make good neighbors; they do nothing to energize a dynamic Internet.

A *Washington Post* story got me thinking about this recently. Some of you may recall the scenario it depicted of someone trying to phone in an order for a down jacket from Land's End, only to be told by the phone company that the call was being re-directed to L. L. Bean, which had paid the phone company to be the exclusive purveyor of down jackets to its customers. It may sound far-fetched but discrimination in less dramatic guise could soon be legal. Think about what could happen if your broadband Internet provider could limit or retard your access to, say, certain news sources or political sites. Or what if your provider decided that you couldn't make use of new and improved filtering technology to prevent your children from cruising unprotected through the more obscene alleys of the Internet because it wasn't their filter? Or what if it prevented you from using some superior spam-jamming technology that could eliminate all that clutter from your in-box because it could block *their* spam? Or what if your broadband Internet provider decided that it wanted to impose usage restrictions to prevent the use of Virtual Private Networks by small businesses and telecommuters? Or streaming video? Guess what? Some of this is already happening. And I am told there is already a healthy market out there for so-called "policy-based routers" that allow providers to do all this. Is this how the end-to-end principle ends?

Let me try to put this issue into its broader context. The proposals related to the Internet are the third front on the battlefield for control of our communications future. Across almost the entire communications landscape, the Commission is allowing networks to be closed, competition to be undermined and innovation to be stifled. The other two fronts in this war, in addition to the Internet, are equally threatening.

On one of those fronts, the battle still rages over the Commission's decision to allow massive concentration in the media world. On June 2, we voted to walk away from many of our media concentration safeguards. At issue in that huge vote was how America's TV, radio, and newspapers are going to look for many years to come. Who is going to control the media? How many -- or, rather, how few -- companies? For what purposes? I think I exaggerate not at all to say that the issue is whether a few large conglomerates will be ceded content control over our music, entertainment and information; gatekeeper control over the civil dialogue of our country; and veto power over the majority of what we and our families watch, hear and read.

As the June 2 vote approached, I saw two divergent paths that the Commission could travel. Down one path was a reaffirmation of America's commitment to local control of our media, diversity in news and outlook, continuing opportunity for competitive entry, rededication to encouraging local creativity and genius through local media and independent programming, and understanding that access to the public's

airwaves is vital for our democratic future. This path beckoned us to update our rules to account for technological and marketplace changes, yes, but without abandoning core values going to the heart of what the media mean in our country.

Down the other path was evermore control over media choke-points by fewer corporate giants. Down this path we surrender awesome powers over our news, information and entertainment to a handful of large conglomerates, empowering the latter to tighten the circle of their control and to deny contrasting news, information and viewpoints the oxygen of distribution they need in order to breathe. Down this path we bid farewell to the days of innovative independent programming, farewell to diversity of viewpoint and outlets, and farewell to preserving time-honored values of localism, diversity and competition.

A majority at the Commission chose the wrong path. Where are localism, diversity and competition in a decision that allows Big Media companies to wield up to three TV stations, eight radio stations, the already monopolistic newspaper, and potentially the cable system and Internet access in the larger markets. *Localism? Try centralization? Diversity? Try uniformity. Competition? Try monopoly, oligopoly and denial of access.* And, shortly, we may bestow similar glad tidings onto Big Cable. Once upon a time, cable was going to save us from too much network control of the broadcast media. Today 90 percent of the Top 50 cable channels are controlled by the same corporations that own the TV networks and the huge cable systems. Then we were told not to worry because the Internet would be the ultimate protection. We looked at the top 20 news sites on the Internet. Guess who controls most of them? The same big companies that provide us with our TV and newspaper news. Some protection.

The third front is telecom. I see here much of the same mind-set that I have described regarding both our Internet and media concentration agenda. While many inside our Beltway world are focused on the outcome of the Triennial Review decision concerning voice competition in traditional telephony, the real story -- and infinitely more important long-term -- is how the majority closed up shop on broadband and data competition. After all, we're headed soon for a world where there is no exclusive voice service, where all services are data and voice is just one of many data functions. And we're arranging the field of play so that real competition won't have a fighting chance. This isn't about new rules for new wires. It's about no rules for old incumbents. It's about putting the fiber of the future under the ever-tighter control of a few major players. No, we won't say it that way, but try to find someone who can go out and raise capital and compete against those who the market will declare the victors in the great FCC policy debate. More germanely, try to find a critical mass of such potential competitors. I believe in my bones that re-monopolization or oligopolization or duopolization -- or whatever you want to call closing the circle of control and access -- are not the cures for telecom's problems.

I fail to see how innovation, technology development, new business models and consumer protections can survive, leave alone thrive, in a world wherein the circle keeps closing. I want to see real competition in broadband. I want to encourage everyone --

not just the big innovators, but entrepreneurs tinkering in their garages and small-business innovators with great ideas and new business models -- to come up with the best technology and the most consumer benefits that the genius of this country can create. I want to focus not just on the architecture of the Internet, but on the architectures of invention and innovation and creation and entrepreneurship and access that have fueled so much of this country's progress in the past and without which the dynamic and liberating potential of all these new technology tools will be denied the chance to do what they can do for America. Our broadband and Internet-centered future must be made to crackle with the myriad possibilities of digital communications. But first we must expand our vision and expand our thinking.

These two decisions on media and telecommunications cracked open the window for me so I could begin to grasp the meaning of this Commission's votes for closed systems, acceptance of discrimination and support of entrenched business models. Then I began to realize we were going down the same road for the Internet. The curtains flew open and light poured in, but the sunshine brought no happiness – only despair. It's all part of the same phenomenon -- whether it is creative artists who are denied play time on the media, or competitors who are being phased out of phone company broadband, or bloggers who could be deprived of their customary freedom on the Internet.

So, yes, I am worried. I think we really are teetering on a precipice. We have already inflicted heavy damage on our media and telecom systems. And we could be on the cusp on inflicting terrible damage on the Internet. If we embrace closed networks, if we turn a blind eye to discrimination, if we abandon the end-to-end principle and decide to empower only a few, we will have inflicted upon one of history's most dynamic and potentially liberating technologies shackles that make a mockery of all the good things that might have been.

But the doom-sayer brings more heartening news, too. The good news is that this battle is not over. It's pretty far advanced, no doubt about that. But I do believe we can still correct our course. Good policy can yet prevail.

We have courts stepping into the fray, whether it's the Third Circuit staying the new media ownership rules or the Ninth Circuit correcting our rush to broadband transmission reclassification. Congress is actively involved. Just as encouraging, maybe more so, there are a few flickering signs that a deeper and better discussion may finally be starting. Its focus is on the principles of openness. And I can think of no better jumping-off point for an Internet dialogue than by restating our commitment to the original principle of openness that made the Internet great. We are fast moving to a world wherein so much of our lives will be organized through transactions that have to travel in one way or another along the digital highways of the Internet. To keep these roads trafficked with opportunity, innovation and investment, we need a new principle of nondiscrimination. Those with bottleneck control over the transmission facilities that are the on-ramps to the Internet should have to guarantee -- not a principle, not a best effort, but a *guarantee* --that all comers will be treated equally and that they will not use their power over bottlenecks to discriminate between different content, users or usage. Recent

movement in the direction of openness by a few in the cable industry, especially, is good and welcome news; it is not a substitute for a policy that provides such openness for all to see and understand and possess. Until that happy day when we have a robust and competitive market for access and where there are no longer any dangerous bottleneck facilities on a network, the Commission should be on record that conduits must be accessible, neutral and open to all comers, just as they are in the dial-up world.

In the dial-up world, there is something akin to consumer sovereignty. The consumer has jurisdiction over the applications that prevail. And what power that is! No network owner telling you where to go and what to do. You run the show. This freedom – this openness – has always been at the heart of what the Internet community and its original innovators have celebrated. Anyone can access the Internet, with any kind of computer, for any type of application, and read or say what they want. No one can corner control of the Internet for their own purposes. Why shouldn't this principle be guaranteed in the broadband world? And if some tell us this is going to happen anyway, then why not join together and declare it a principle for all to understand?

Some would prefer to go down the road of open access. Others argue that the solution is net neutrality. Some want both. I'm not ready to endorse either as the exclusive solution. But let me offer a piece of friendly advice: the first need now is for unity in the face of a real threat to the Internet. Let's not be distracted or divided by the "how" until we get agreement on the basic principle. Internet openness and freedom are threatened whenever someone holds a choke-point that they have a legal right to squeeze. That choke-point can be too much power over the infrastructure needed to access the Internet. And it can also be the power to discriminate over what web sites people visit or what technologies they use. So we won't resolve the problem by focusing on one symptom alone and trying to make it go away. We need first to establish, for all to see and understand, that the goal of our policy must be to maintain and even enhance openness and freedom on the Internet and to fight discrimination over ideas, content and technologies. I like to call it "Clear Rules for Old Values," but whatever you call it, it should be Job One for all of us interested in the future of the Net.

So, to close, yes, I am worried that we could be witnessing the beginning of the end of the Internet as we know it. And that maybe we will never experience the Internet as it might one day be. "Over the top," some of you will say. But I worry that too often we just tell ourselves, "That can't happen," or "If anyone tries that, Congress will step in." All I know is that picking up the pieces after the fact is usually more difficult and certainly messier than solving problems before they reach critical mass. A lot of forces are converging out there, including not just new technologies that create opportunity but new technologies that facilitate closure and control. Economic policies that often seem to favor consolidation are converging with regulatory policies that eagerly pave the way. These are powerful currents. Our much vaunted digital migration could end far short of its destination. My concern is all the greater because I see the same policy approach informing so many of our decisions across the broad spectrum of telecommunications and media issues.

I don't come here this afternoon claiming to have all the answers – nor even to suggest that I have raised all the questions that need to be asked. I am here to share my concern that continuing the Commission's present course will bring a heavy cost that we should not pay, have no need to pay, and should be doing everything we can to avoid paying.

I am also here to say that we still have a chance to avoid all this. If we role up our sleeves – if we work together now – all of us – businesses, innovators, technologists, content providers, regulators, legislators, consumers, citizens all – we can make sure that our Internet continues to foster freedom and innovation, and that the original vision that inspired this liberating technology lives for another day and for another generation. Time is not our friend. We are the underdogs and surely this will be a difficult battle to win. But it is a necessary battle to fight. And victory will reward us all with not only better communications, but a better America.

Thank you.