



**REGULATORY REFORM AT THE FCC:
WHY NOT NOW?**

**Keynote Address
Congressman Cliff Stearns**

April 12, 2011

**U.S. Capital Visitor Center
Congressional Meeting Room North
Washington, D.C.**

MODERATOR:

RANDOLPH J. MAY, President, The Free State Foundation

KEYNOTE SPEAKER:

CONGRESSMAN CLIFF STEARNS, Chairman, House Commerce Committee's
Subcommittee on Oversight and Investigations

* This transcript has been edited for purposes of correcting obvious syntax, grammar, and punctuation errors, and eliminating redundancy. None of the meaning was changed in doing so.

PROCEEDINGS

MR. MAY: Well, let's do get started. My name is Randy May. I'm President of the Free State Foundation, a non-partisan, free market-oriented think tank that specializes in communications law and policy issues, as well as Internet issues.

And I especially want to welcome our C-SPAN audience again to our Free State Foundation event, and thank C-SPAN for being here.

Our topic today is "Regulatory Reform at the FCC, Why Not Now?" We're fortunate to have not only a distinguished panel of experts, but also a distinguished representative and chairman of a pertinent House committee.

I'm going to introduce Representative Cliff Stearns formally in just a moment.

But I think this question of "Regulatory Reform at the FCC, Why Not Now?" has been pertinent for many, many years. And as time goes by, with all the development of marketplace competition driven by rapid technological change, the question is more pertinent, and I submit, more urgent than ever.

Since the agency was created in 1927 as the Federal Radio Commission, and reincarnated in 1934 as the Federal Communications Commission, the FCC has undergone little fundamental institutional change.

To be sure, there have been some changes that impact the way the FCC operates and regulates.

For example, in 1982, the number of commissioners was reduced from seven to five. The enactment of the Sunshine Act in 1976 affected the way the

Commission operates and the way the Commissioners interact or, perhaps more accurately, fail to interact with each other.

And compared with its preferred mode of regulating during its first few decades, for almost the last half century, the FCC has regulated primarily through conducting rule-making proceedings, rather than *post hoc* adjudications.

For the most part, though, it is fair to say that in fundamental respects, the FCC functions and regulates much the same way today as it has for the past half century.

This has remained true in the 15 years since the passage of the Telecommunications Act of 1996, which was explicitly billed by Congress as deregulatory, and as "truly revolutionary legislation" by President Clinton.

And it has remained true, despite the fact, as I have said, that there have been unprecedented marketplace changes, resulting in increased competition in all market segments.

Now some of you have heard me say this before, but it is too relevant to today's discussion not to repeat.

In August 1999, then FCC Chairman William Kennard, Bill Clinton's FCC Chairman, released a strategic plan, which he called "A New FCC for the 21st Century."

The first two sentences read: "In five years, we expect U.S. communications markets to be characterized predominantly by vigorous competition that will greatly reduce the need for direct regulation. The advent of Internet-based and other new technology-driven communications services will continue to erode the traditional regulatory distinctions between the different sectors of the communications industry."

His prediction, of course, was correct.

"So as a result," Bill Kennard continued, "the FCC, as we know it today, will be very different in structure and mission."

He called for turning the Commission into "a model agency for the Digital Age."

Since then, there has been some rearranging and renaming of the boxes on the agency's bureau and organizational chart. Here's the most recent example. Just two weeks ago from the FCC, there was an announcement that the Wireless Bureau renamed a division. And the announcement read:

"The FCC's Wireless Telecommunications Bureau announced today that its Spectrum Management Resources and Technologies Division is changing its name to the Technologies Systems and Innovation Division, to better reflect its duties."

Well, there have been quite a few of those box-moving types of organizations.

But the fundamental fact is, while the FCC has moved a few offices here and there, the agency retains in place many of the regulations it adopted decades ago.

And the agency's annual budget has continued to grow, even as competition continues to develop from around \$200 million in 2000 to \$354 million requested in FY 2012.

Without saying any more at this point, it's my view it would be a stretch to claim today's FCC as "very different in structure and mission" than the FCC that Bill Kennard spoke about in 1999.

So what we're going to do today is talk about regulatory reforms and institutional changes that ought to be adopted -- or perhaps in the view of some, ought not be adopted -- to make the FCC into the model agency for the Digital Age of which Bill Kennard spoke back at the turn of the last century.

Now I'm going to introduce our principal speaker. All of you have or hopefully have the printed bios. So as is our usual practice, I'm not going to give, with the Congressman's permission, his absolute full biography. But I am going to give more information about him than the panelists, which you'll note. And they'll understand, I'm sure.

Representative Cliff Stearns was "elected in 1988 to the U.S. House of Representatives, his only elected office," his bio says. Does that include student government...?

CONGRESSMAN STEARNS: [inaudible]

MR. MAY: Oh, everything. Okay.

For the 112th Congress, Representative Stearns is Chairman of the Oversight and Investigations Subcommittee on Energy and Commerce. For our purposes here today, that's most relevant.

And I don't want to steal his thunder from his remarks, but his bio says that -- and I'm quoting -- "As Chairman, I will act to reign in excessive regulations, to hold all federal agencies accountable to the American public, and to increase transparency in the private sector."

So that's obviously key to the subject at hand today.

In addition, Chairman Stearns serves on the Commerce Committee's Subcommittee on Communications and Technology and the Subcommittee on Commerce, Manufacturing and Trade.

In the previous Congress, Representative Stearns was the Republican leader on the Communications Subcommittee, and obviously a leader in the types of subjects that we'll be discussing today.

Chairman Stearns was born in Washington, D.C., one of those rare people, probably even among our audience here today. He attended George Washington University, graduating with a degree in electrical engineering.

He participated in the U.S. Air Force ROTC Program on scholarship, and was honored as Air Force ROTC distinguished military graduate. And then following graduation, he served four years in the U.S. Air Force as an aerospace engineer and satellite reconnaissance during the Vietnam War.

So with that, please join me in welcoming Chairman Stearns.

(Applause.)

CONGRESSMAN STEARNS: Thank you very much.

Randy, thank you very much. And I appreciate that nice introduction.

I am from North Central Florida, which runs from Orlando up to Jacksonville. And we have some wonderful Indian-sounding names: Ocala, my home town; Ocklawaha; we have a small town called Okahumpka; we have another small town called Micanopy.

And some of the farmers introduce me in a little different way, Randy.

They start out by saying, "Stearns was born at a very early age in a hospital to be near his mother Stearns."

(Laughter.)

CONGRESSMAN STEARNS: So that's the kind of introduction I'm used to.

I want to thank you, the Free State Foundation, for holding this event today, and I deeply appreciate this opportunity to be able to speak to you and to share my thoughts on reforming the Federal Communications Commission.

Obviously, this weekend we averted a government shutdown, and we set the stage for, I think all of us believe, much-needed spending reductions.

As Jay Leno said the night after we did this, "A lot of people wonder what a government shutdown would mean to them. But I think a lot of other people are wondering what a government running properly would be like to them."

And in this age of technology and information, new products are coming on the market, new services, and we need a government, as Randy mentioned, that runs smoothly and properly, one that does not hamper innovation but that leads to economic growth.

It's clear that what we now know today perhaps will have little impact upon the future, because it will change. The Internet and computer technology have transformed our age of information. These forces have introduced dynamic changes in how we communicate, do business, educate, and entertain ourselves.

And these remarkable changes have occurred very rapidly. The one thing

we can be sure of is that we don't know today what the future will be in the Information Age.

The fact is that our market dynamics have changed dramatically and we now have simply a convergence in the marketplace, where labels really don't matter anymore.

Where once we had separate phone, separate cable, wireless, and other industries providing very distinct, clear services -- we're now seeing a simple blur of providers all competing against each other for consumers, offering broadband, voice, video services and more, and oftentimes all together.

So here we are, 15 years after the Telecommunications Act of 1996. I was one of the House conferees with the Senate on this bill. Jack Fields was the Chairman at that time. And technology simply has advanced far beyond what anyone could have imagined when we served on that Conference.

Yet, my friends, the simple laws governing these industries have lagged far, far behind. Many are no longer relevant to the new services and the new technologies that have arisen over the past few years.

Attempts to classify these new services into outmoded regulations stifles innovation and simply creates uncertainty in the marketplace and diminishes the increase in productivity that is directly attributable to such innovations.

And, of course, contributing, in my opinion, to the problem is the FCC's Byzantine regulatory processes.

As the pace of competition and technological change occur and increase in

communications and markets, a sound decision-making process at the FCC and simple faith in how it makes those decisions becomes all the more important to all of us.

Not only are the issues far more complex, they affect far more Americans and American businesses than ever before in our history.

We need to improve the quality of the FCC's decisions and the country's trust in the FCC, the agency itself.

It needs to alter the way it does business. And one of the first changes could be in its adoption and release of an order.

The FCC often adopts orders after a comment period, and issues press releases with a summary of the orders weeks or even months prior to releasing the order itself.

This is akin to Congress announcing that we'll cut \$38 billion from the budget, but not say specifically where the cuts are coming from.

(Laughter.)

CONGRESSMAN STEARNS: For example, the Triennial Review, which dealt with controversial issues relating to competition in the local telecommunication market, was released six months after it was officially adopted by the Commission.

The FCC should let the public see proposed rules before it adopts them, and should provide everyone with a realistic amount of time to comment.

If the FCC expects the American people and the regulated community to respect its decisions, I don't think it's too much to ask of the FCC to show some respect for them in return.

Not only will this improve everyone's confidence in the FCC's decisions, it will improve the decisions themselves, both because the agency will then be forced to exert more rigor in developing policy and because the public and the regulated community can often be the source of the best ideas. Secrecy breeds both inefficiency and distrust. And of course, the FCC, in my opinion, already has both.

We also need to reform the Sunshine rules under which the FCC operates. Now under the current Sunshine laws, only two Commissioners may meet outside the construct of an official open meeting.

Now, in theory, such a requirement promotes open discussion of issues under consideration. But, my friends, in reality, most Commission business is conducted by circulating drafts of orders for comment to get around these simple Sunshine requirements.

The result is less transparency -- not more -- and this requirement actually hinders discussion among the Commissioners, especially in cases where the disagreement on the draft is very significant.

Reviewing and reforming the FCC's Sunshine laws, I think, would be a great place for Congress to get involved.

The issue of reforming the Sunshine rule is bipartisan. The Commissioners have talked about this on numerous occasions. And recently Communications Subcommittee Ranking Member, the Democrat, Anna Eshoo, from California, has simply introduced legislation, which would amend the Sunshine Act, to allow more than two FCC Commissioners to meet privately to discuss agency business, as long as a Commissioner of

each political party is present, and the content of the meeting is publicly disclosed.

The bill would require that a meeting summary be published within five days. Official actions such as voting would be prohibited, and discussions would be limited to FCC Commissioners and their staffs.

The bill, I think, would go a long way to solving some of the structural problems, without sacrificing transparency.

Another one of the biggest problems with the FCC is the timeliness of their decisions. Some of the basic work of the FCC affects the everyday function of the telecommunications industry. These processes simply take too long to complete.

It is not unreasonable for those that are waiting for a decision to know what resolution will occur and when, and whether it's in their favor or against.

Licensing applications have been sitting at the FCC for years with no action. There is a multi-year backlog at the bureau level, where hundreds of applications have been sitting there for years, just simply gathering dust.

Furthermore, the FCC's internal shot clock to act on merger or license transfers is six months; yet the XM-Sirius merger took over 16 months.

In a rapidly evolving market, particularly in difficult economic times, uncertainty itself can be one of the greatest obstacles to investment and long-term business planning.

We need to set deadlines for actions on the various types of decisions that the FCC intends to make. Such time limits would provide further operational certainty within the industry.

And when the Commission adopts a decision, the text of that decision should quickly become public. The longer it takes for the order's language to become public, the more it appears like the decision was not really made when the FCC said it was, but rather ironed out later through last-minute, back-room deals.

Guilty or not, the FCC is widely suspected of changing its mind between decision and regulation.

Now, one suggestion would be: Give the FCC a strict timeline of days from adoption of a policy to release the actual text of the decision.

As Chairman of the Oversight and Investigations Subcommittee on Energy and Commerce, I plan to engage in vigorous oversight of all agencies under our jurisdiction, including the FCC.

One of my main goals as Chairman is to increase transparency and accountability across the federal government.

The FCC's regulatory process is in major need of reform. The bottom line is that the agency's processes do not fit with today's telecommunication and technological environment.

Transparency and good management should not be a partisan issue. This is an issue members on both sides of the aisle should be able to get behind and support.

I hope to continue to work with my colleagues within industry, within the Congress, towards public interest in the community, and with the FCC to make Commission decisions as well-crafted and unassailable as possible.

And I think that's a goal that we all share in this room.

So I appreciate your listening to my comments. And I always like to close: May the Good Lord take a liking to you, but not too soon.

(Applause.)

MR. MAY: Chairman Stearns, thank you very much. There were some terrific ideas there, and that's exactly what I was hoping for to get us started on our discussion today.

I think the Chairman has agreed to take some questions. We have a mic in the audience, so what I'd like for you to do is raise your hand and I'll call on you. And, please, if you would just announce your name and who you're with for purposes of identification.

Again, keep in mind we have our C-SPAN audience with us today. We want to get a number of questions, so let's ask a question and not make a statement.

Okay. Who would like to ask the first question?

CONGRESSMAN STEARNS: You can also ask if they have suggestions themselves.

MR. MAY: That's a good point. Chairman Stearns said we ought to ask whether you have suggestions for reform yourselves, or ideas.

And that's good. We want to carry that through actually the whole program. So thanks for reminding me.

Okay. Don't be bashful. I know we've got from a lot of previous events, and I would lying if I said we didn't have some aggressive questioners out there in the audience, whom I know.

Yes? I think that's Dan Brenner.

MR. BRENNER: Randy, you are correct. It is Dan Brenner.

Those were very interesting remarks, Congressman. But one question that comes up, having been at the FCC, is the role of *ex partes* from the Hill, and what role they should play in the processes of the Commission. How do you think members of Congress should participate in rule-makings at the FCC?

CONGRESSMAN STEARNS: Well, we have hearings and we bring all the Commissioners up. We have an opportunity to talk to them about any particular issue.

We had an issue recently with net neutrality, where we had talked to the Chairman and all the Commissioners about it. And of course, all these Commissioners come into our office on a regular basis, so we have an opportunity to convey to them our opinion.

So I think that is a very good sound way to do it. It's an open process, certainly in the hearings. And when they come to meet us and talk about the issues, I am acting in an influential way to convince the Commissioners of some of my ideas, and asking them, in fact, to include them as a priority when they set their agenda. For instance, I've talked to Chairman Genachowski about several issues dealing with spectrum, and told him my ideas of getting more spectrum.

I think that member of Congress can interface that way. Now, if you're not on the Telecommunications Technology Subcommittee, or you're not on the Energy & Commerce Committee, and you have a constituent that indeed has a problem with the FCC, it's going to be a little harder.

But then again, every member of Congress can call a Commissioner to his office. And most likely, they will come. Even if you served on Armed Services or you served on Transportation.

Because as a member of Congress, you have that authority.

So I find that it's easy to talk to them, and it's also helpful in an open hearing to hear all five of the Commissioners talk about an issue, whether it's spectrum or net neutrality, or the D-block, all the issues, you can ask them.

And then, bingo, you get all five of them to tell you in a room.

So I think in a way that's a very nice way for us to influence and at the same time have transparency.

MR. MAY: Chairman Stearns, I have a question. I'm going to use the moderator's prerogative.

Last week I threw out this idea, and I want to get your reaction to it. And you were serving at the time the '96 Act was adopted, as you noted.

In my view, there were two provisions put in the '96 Act, that are not in a lot of other enabling statutes for other agencies, which made the '96 Act somewhat unique, and I think were put there to further the deregulatory thrust and orientation of the Act.

One was the forbearance provision, giving the FCC the authority to forebear from any regulation when it made certain findings.

The other was the provision for periodic regulatory reviews. And in fact, that provision was titled "Regulatory Reform."

So in my view, though, those two provisions have been under-utilized,

without going into today all the reasons why that might be so.

So I suggested that Congress, before it gets to a comprehensive rewrite of the Communications Act, might rather surgically amend those two provisions. It might revise those provisions by leaving their criteria the same, but just establish an evidentiary presumption, more or less, in favor of deregulation in terms of how the evidence is weighed.

I don't want to put you on the spot. Do you have a reaction to that type of way to achieve some reform?

CONGRESSMAN STEARNS: Randy, those are two great provisions in the Telecom Act. We had the Forbearance Act dealing with the community banks across this country, dealing with the FDIC. And I think with other federal agencies we should have had both those clauses, particularly one with oversight on regulation and to make amends if it turns out it's highly regulatory. That would influence the development of jobs.

I had a hearing with Cass Sunstein, who is the Czar that deals with all regulation in this country. And I asked him about his criteria for his regulation.

And oddly enough, in all the criteria, not one thing was mentioned about "Will it create jobs?" It was all dealing with distributive income, which is distribution of income, and self-esteem as dealing with environment, and a whole host of things.

But I think what you're pointing out is that the success of the Telecom Act of '96 was in a way premised on the fact that we're going to let this thing roll, without a high amount of regulations, high amount of government involvement.

And I think that's a tribute to those two clauses. Certainly in my opinion

the Telecom Act should be revised, with the confluence of broadband, wireless, and high-definition television. I think there should be a new Telecom Act that would allow us to have forbearance and less regulation over technology in it.

And there are so many ways we can bring in more competition with this confluence, to make sure it can happen in such a magical way that we don't face barriers from large corporations that can prevent it.

MR. MAY: Thank you.

Jerry?

QUESTION: (Off mic.) Thank you. Mr. Chairman, begging the issue just a little bit. If there are certain pieces of reform that would be useful, and might be more easily moved than others -- at least more easily than in a huge package -- could something like that Sunshine Act be moved, if there seems to be general bipartisan agreement that this would be a big improvement? What's the prospect of moving that alone, rather than have it become tangled up in perhaps other more controversial reforms?

CONGRESSMAN STEARNS: Well, you've got Commissioner Capps in favor of it, and you've got Anna Eshoo. I'll mention that to Greg Walden, who's Chairman. That would be a great hearing in which we could pass the bill.

We're looking for things on the Republican side that, shall we say, keep the agenda going in a bipartisan fashion, because, as you can see with this possible shutdown, it got very partisan.

And we still have many people on the Republican side say they're not going to vote for the CR. It's just come out that several people have said that on the Republican

side.

And that has to be passed. Then, of course, we have the debt ceiling increase. After that, we have the budget.

So we're looking for issues that show bipartisanship. I think this is a good example. And so, Jerry, I think that's a great idea, which I'll take back to Greg Walden, and see if we can push that.

MR. MAY: In the back?

QUESTION: Chairman Stearns, I appreciate your remarks about reforming the Sunshine Act, *et cetera*. There is also the Congressional Review Act, which is also a powerful tool for Congress to repeal any government regulation.

However, there is an exception in that statute -- pursuant to the Telecom Act. And I know there's been several resolutions of disapproval, I think even on net neutrality.

But would you be in favor of amending that statute to eliminate that old exception of Congressional oversight in that provision there of the Telecom Act?

CONGRESSMAN STEARNS: Well, I don't know if I want to make a broad statement this morning. But I think your point is well made. I have my legislation director here, and he will make a note.

I think it's worthwhile. Tell me, in your opinion, if that was amended, what would be the impact, the immediate impact?

QUESTION: First of all, I think there is a resolution of disapproval pending right now. I don't know whether it's Congressman Shadegg or somebody that has

that. But at least it would clarify whether that was a valid resolution.

But that would mean the FCC rules or any rule that they promulgated, just like the EPA or the SEC, will be subject to a resolution of disapproval by the House and the Senate.

On the Senate side, you can't filibuster it. You only get 30 votes to get it on the floor. And now they're starting at least on the House side to start using that.

I think it would make sense just to eliminate that one exception in that statute to the Telecom Act rules.

CONGRESSMAN STEARNS: Well, I think all the people, whether you're dealing with FCC or Transportation, or wherever, they would all like that same exception.

And so that's why I would agree with you that, at least philosophically, that would be good. Because also it brings jurisdiction back to Congress. And you don't have these executives and these czars that are running off.

As I pointed out, the gal who was in the Bush Administration said Mr. Sunstein's approving four thousand new regulations.

I mean, that's what she said. And we talked to Cass Sunstein. All these new regulations have an impact, whether they come from EPA, or whether they come from the Department of Transportation, or wherever.

So I think you mentioned Shadegg? Was it Shadegg?

QUESTION: I don't remember whether it's Congressman Shadegg or --

CONGRESSMAN STEARNS: Because Shadegg's no longer here.

QUESTION: Well, I think there was one.

CONGRESSMAN STEARNS: There was one, okay. Well, John Shadegg, I'll go look at his bill. John Shadegg and I are good friends. He's retired back to Arizona.

And so I'm going to look at that.

But I think, certainly, that would be worthwhile to talk to the Speaker about to make that part of some of these other bills.

I mean, if we feel this strong about net neutrality in the sense that we're doing resolutions of disapproval, then certainly that could apply elsewhere to give Congress the jurisdiction it needs to prevent the Administration from doing things on their own, by edict, which we see a lot of today.

And this would be true for any administration, not just a Democratic but a Republican too. I think there were some complaints about this with technical language that was added under the Bush Administration after the bill was passed.

So I think it's a good idea, and I want to thank you for bringing that to my attention.

MR. MAY: Just one more, sir.

CONGRESSMAN STEARNS: Okay.

MR. MAY: Okay. We're going to just have one more question. Looks like there's one more hand. And this will be the last one.

QUESTION: Thank you – Seton Motley with Less Government. A couple questions on different areas. You talked about the shot clock for merger approval.

I think another perhaps bigger problem is the hold-up of a merger to beat concessions out of it.

CONGRESSMAN STEARNS: Yeah.

QUESTION: The pages and pages of concessions. The seven-year net neutrality provision in the Comcast-NBC regardless of what happens to the net neutrality order.

I think that may be an even more important reform than the shot clock.

CONGRESSMAN STEARNS: Than the transparency, you mean?

QUESTION: Excuse me, yes, the transparency.

CONGRESSMAN STEARNS: Yeah.

QUESTION: And a second note -- because no one's talked about this here yet -- is the Thursday vote on data roaming, which I think is at least as big an overreach of FCC authority as the net neutrality rule was.

And are you going to have to chase them around with nine million Congressional Review Act resolutions, as they keep going forward?

I'd just like to hear your comments on the concessions and the Thursday vote.

Thank you.

CONGRESSMAN STEARNS: This shot clock is very important. It's very intimidating, if you're a small company. And you know, time is money for the small companies.

If you're a larger company, you have so much in reserves, not only just in terms of capital and cash flow, but you have people and lawyers.

And so it's hard to intimidate the big guys. But for all the small guys that

come in and sit there on the shot clock and continue to have to answer questions about technicalities it gets mind-numbing, and it gets intimidating.

A good example of this is in the permitting process in the Gulf for permits to continue drilling. After the moratorium, the President lost in the courts in February, and now he's supposed to issue permits. But he's only issued six permits.

That's 45 hundred wells in the Gulf, and the President's only issued six, and he's delayed it by doing a process of asking more and more questions and going around and around.

So the shot clock is extremely important, because the small companies are going to create the new jobs, and the innovation. And we should allow the shot clock to be terminated, so they can.

The roaming is another example that could affect the smaller companies. And I don't think most members even understand the issue, so at this point it has not been on the radar screen, but I think it should be, because I've had some people talk to me about it.

So I can only say that things move around here sometimes with very little understanding of the implications in the market.

Now I've met a payroll, I had a small business. I had motels and restaurants before I came here, and met a payroll every week. So for me, I understand a lot of what this is going to do to the economy and to the small businesses.

So we just need to get that understanding of what this roaming is all about out to the members.

MR. MAY: Please join me once again in thanking Chairman Stearns.

(Applause.)

MR. MAY: That was a terrific way to start the program. We appreciate it, and we look forward to seeing whether some of these things can happen and be brought about at this Congress.

Thank you very much.

CONGRESSMAN STEARNS: Randy, thank you.

MR. MAY: Thanks a lot.