The Free State Foundation's
Policy Seminar

"REFORMING COMMUNICATIONS POLICY IN THE DIGITAL AGE: THE PATH FORWARD"

June 25, 2014
Capitol Visitors Center
Washington, DC

MODERATOR:

RANDOLPH J. MAY, The Free State Foundation

PANEL PARTICIPANTS:

JOHN BERGMAYER, Public Knowledge

SCOTT CLELAND, Precursor® LLC

ADAM THIERER, Mercatus Center at George Mason University

---

* 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.

P R O C E E D I N G S

MR. MAY: I'm really pleased that we have assembled this group of experts. And I, like Commissioner Pai, want to especially thank John Bergmayer for being here but all the others as well. John, I think you've been at previous events. Gigi Sohn, before she took her exalted office, used to be a regular as well.

I'm going to do the quick introduction so we can get into it. And I'm going to ask each panelist so they can speak for just three or four minutes, initially. Then we're going to hopefully mix it up. To get us started in the conversation, I'm going to ask John to speak first. He may have a lot to say in response to what's been said this morning.

Now you've got these four bios, of course. John Bergmayer is Senior Staff Attorney at Public Knowledge, specializing in telecommunications, Internet, and intellectual property issues.

Scott Cleland is President of Precursor LLC, a Fortune 500 research consultancy specializing in the future of Internet competition, property rights, privacy, cyber security, and cyber ideology, algorithm markets, and communications competition and deregulation.

And then, finally, Adam Thierer is a Senior Research Fellow with the Technology Policy Program at the Mercatus Center at George Mason University. He specializes in technology, media, Internet, and free speech policies with a particular focus on online safety and digital privacy.

With respect to Adam, I'm going to indulge myself with an extra sentence because he's a former colleague of mine. He's written a number of books. The most recent is the book that Ajit Pai just mentioned, *Permissionless Innovation*. It almost fits in your pocket if you have the right size pocket. I'm sure that that's well worth your time.

So with that, John, I'm going to turn to you. I'm hoping that you'll react to Senator Thune and Ajit Pai and obviously say whatever else you want. But just take about four minutes or five minutes to begin with. Then we'll go down the line.

MR. BERGMAYER: Sure. I was taking some notes while they were speaking, so I've got quite a few things to respond to. Of course, right when I'm going to go sit on this panel the *Aereo* decision comes out, which is something that I've been working on. So I'm going to try to focus on

the topic at hand.

MR. MAY: Did it come out?

MR. BERGMAYER: Yeah, just at 10:00 a.m.

MR. MAY: Oh.

A PARTICIPANT: Reversed and remanded.

MR. BERGMAYER: Reversed and remanded 6-3.

MR. MAY: Okay. Well, folks, let's focus on our thing.

MR. BERGMAYER: Let's focus. Let's focus. Let's focus on today's issue. When the 1996 Telecom Act was passed, most consumer Internet access was over a Title II service. Dial-up Internet access existed. It was an information service, yes. But you accessed that information service over your phone lines, which was a Title II service. Almost all of the thinking about telecommunications and Internet access policy at that time, which people keep going back to, happened along the backdrop when a telecommunication service was available to the public. It was only later, really around 2005, when we moved away from that, when it was held that the entire stack, including the wire to your house, was a Title I service. So it's important to remember that the growth of the commercial Internet happened because of Title II.

Dial-up ISPs, the ILECs, went to the FCC. The ILECs wanted dial-up ISPs to be regulated. They wanted to charge them interconnection fees. They wanted to put them out of business. They didn't like these people riding on their wires for free. But luckily policymakers saw the wisdom of saying that the person who's providing infrastructure to your house has to operate it in a non-discriminatory way. And at that time that meant a competitive landscape of ISPs, which we've lost.

In terms of Title II, we've had this explosive growth of mobile phones, which people keep returning to. They are regulated under a Title II service. Not only are mobile phones all Title II services, they have a forbearance statute. The first forbearance statute was enacted for commercial mobile radio services, not for landline Title II.

When you're looking at the success of Title II and what Title II can do, it's actually a very flexible provision that is not narrowly tailored only for the monopoly-era Bell system. It has been applied widely, not just to Internet access but to interconnection and other matters.

When we're looking at Title II, it's also

important to remember the distinction between Internet access and the Internet. Title II advocates are not calling for the regulation of the Internet but for Internet access services.

And I see the conflation of the Internet with the infrastructure providers who provide access to the Internet as akin to giving electricity companies or power companies credit for the innovations that happen in electronics and consumer electronics and appliances. It's ridiculous.

There's a clear distinction between the infrastructure providers and the innovative services that people buy. People buy Internet access, and it's valuable. But it's valuable not in and of itself but for what you can get with it, too.

Finally, on the Title II point it's never been just about monopoly. Common carriage has been about many other things, such as concerns about vertical integration. And it's older than the telephone system. Common carriage rules are older than not only railroads and not only telegraphs. Common carriage principles have been applied to many different technologies at many different times over the years.

The exact application of those broad principles to

new technologies changes over time. But to say that they are somehow obsolete is strange. In the hearing the other day people were trying to say that antitrust is long-established and Title II is new. That's not true at all. Antitrust goes back to about the 1880s, 1890s, and the Progressive Movement. And common carriage is much older than that.

I don't think I'm going to go down every last point. I'll say some of the things that I agreed with in the comments that were made. There were actually quite a few areas where I agree with some of my more libertarian friends. I absolutely agree that we need to free up more spectrum for various uses. I don't believe that spectrum in the long term is scarce, and our policies should encourage spectrum-sharing and new opportunistic uses. The best proving ground for that is unlicensed. We need to have a balance of unlicensed and licensed spectrum.

I also very firmly agree that the area of communications policy that is most ripe for reform is the video regulation. I disagree on the details. But the entire business model of networks to local affiliates to broadcasters to cable companies and the ways they interact is all basically enshrined in law, in statute, in FCC

regulation. That makes increasingly less sense as people want to access more over-the-top video services.

MR. MAY: Okay. I'm taking that as a reservation of some of your time for the rebuttal then.

Scott, you're next.

MR. CLELAND: Thank you. I have to come back and address some of John's points. But I want to say that Senator Thune gave one thoughtful speech. It was very informed. I was very pleased to hear about the support for modernization. He has obviously thought this through and made it a priority.

What we have right now is the most modern part of the economy. There's 184 million of us who carry mobile devices around and several tens of millions of tablets. It's the most modern part of the economy. It is governed by the most obsolete, most out-of-date law. You can't square that circle.

There's a threat to the most modern part of the economy. At the FCC three votes can decide to change policy. Normally, you think the Congress would have pass a bill and the President would have to sign. It's remarkable.

The other thing is a scene-setter on spectrum.

Spectrum management in the government is the least efficient part of the market and part of the government, period. Now why would I say that? Why is it not hyperbole? It's a trillion dollar asset. It's essential to the growth of the future economy. It is the only resource in government that has no one -- and I'm telling you, no one -- accountable for how it's managed.

Basically, it's government by a 1979 executive order that arranged for a committee to talk within the government about how they handle spectrum. There is nobody that can tell the government, "Oh. Wait a minute. You need to move that. You need to do this."

We manage land. We manage all types of federal property, gold, oil. All these types of things have accountability. What a concept. It is scandalous what is going on with spectrum in our country. We have a trillion dollar asset that is being mismanaged, that is desperately needed. It's an area where we just need good government. Modernizing spectrum management should be near unanimous in the Congress if they were focus on it and realize that there is no one minding the spectrum store in the government.

Now, real briefly, John rewrote the history of the

'96 Act and broadband development. I covered it very closely as an analyst. So did other people at that time. Anna-Marie, you did as well.

There are many people here who know it intimately and how it happened. The Telecom Act took a monopoly and said, "Let's go to competition." Surprise, surprise. When it was a monopoly, it was Title II. But it didn't really take off. Internet access took off. Broadband did not.

Modems were invented decades before that time. The FCC was trying to get modems into the world and deployed. But it was all about reselling the slow 56K squeaking service at that time.

What people don't realize is that Title II created incentives for arbitrage. And CLECs came in and said, "Hey, let's do recip com," reciprocal compensation. "Let's have one-way economics where basically the CLEC always wins and the incumbent always loses. That's how we get competition."

And what happened? All CLECs went bankrupt, all of them. About $300 billion in value was just crushed.

Then, of the four trillion tech bubble, one trillion of it was the fiber bubble. We went from three fiber backbones to 16. Remember when Lucent and Alcatel

and all those companies were just sky high? Well, it was because the FCC, under Title II logic, said, "We're going to pick winners, and we're going to pick losers. And competition is redistribution of market share."

What happens when you have that uneconomic thinking is you have enormous distortions and enormous bubbles and messes. The CLECs all went bankrupt. Those fiber backbones almost all went bankrupt.

So when we went to Title I in 2004, surprise, surprise. What happened? Broadband took off because there was none of this Title II wet blanket put over it. When Title II was lifted off, that's when things took off.

It's no mistake that the smartphone and the iPhone came about in a Title I world. In the Title II world, they wouldn't have seen the light of day.

Why do I say that? Do you know when the cell phone was invented? 1949. Do you know when AT&T asked the FCC to pilot the service? 1949. Do you know when they first approved it? They approved a little bit in 1979, but waited until Japan and Sweden did it first even though it had been invented 30 years earlier.

The concept that Title II is somehow pro-innovation or a good thing or led to growth is wrong. It

was when Title II was lifted off that the Internet, broadband Internet, took off.

MR. MAY: Okay. Scott, thank you very much. John, I will give you a chance to respond, and then we'll mix it up.

Next is Adam.

MR. THIERER: Well, thanks, Randy, and thanks for having me here.

I thought a fun place to start would be by mentioning to the crowd that you and I were reminiscing before the show started. The first time we met was back in the 1990s. I guess it was '98, maybe '97. And we were talking about all of the same issues we're talking about here today. You came to me looking to get into the think tank world.

And Randy was just bubbling with excitement at that point about the exciting opportunities to get into this field and do telecommunications and media policies at that time. And why not? These were the heady days of the mid-'90s when we thought we were going to do some really bold things in a very short amount of time. Randy was as giddy as a schoolgirl about to meet Justin Bieber, I would say. He was so excited to get in the field; he was asking

young Adam Thierer for a job, in fact, in the think tank world.

Thankfully, he finally found one. But I think demoralizing to both of us is the fact that we are basically talking about the exact same set of issues here today that we were talking about at that lunch table at the Occidental in 1997 or '98. It's kind of sad that things haven't changed that much, at least in terms of the regulatory structures that we're dealing with and policies in this period of time. Those same regulatory roadblocks are alive and well today and, frankly, threatening to encumber new technologies and new sectors.

I would suggest that the most important thing we did back at that point in time -- not Randy and me but all of us in this country -- is decide through a series of policy steps, some intentional, some accidental, to essentially firewall off this emerging digital economy and this thing called the Internet from the long, ugly history of communications and media regulation.

Through a series of policy actions at that time, we decided essentially that software, computing, digital communications, and the Internet economy would not be regulated by the same set of rules that covered those other

sectors.

What we instead did with the digital economy is we embraced the ethos that we now call "permissionless innovation," the idea that you should generally be free to experiment with new innovations and technologies and business models and ways of doing things without having to first seek someone's blessing or prior approval before you offer a new innovative device and/or service.

This really resulted in a blossoming of innovation. It's almost unparalleled in modern capitalist history. So much so that I found a survey recently from Booz & Company [now called Strategy&], about the most innovative companies in the world. Its a survey they do every year and they've done for many years running now.

Despite all the griping people do about American innovation, what's amazing about this list is how, year after year, Americans are dominating. American companies are 9 of the top 10 most innovative companies on the globe in this list. Seven of the 10 on this list are involved in computing, software, and digital technology.

Just last week CNBC came out with its Disruptor 50, its survey of the 50 most disruptive companies in the world. And only five of the 50 on this list were from

abroad; the rest are American. And the number one most disruptive sector was software and computing.

That has to tell us something. We had to do something right policy-wise to assure that result. It wasn't just about other natural market forces. Again, I suggest that it goes back to our embrace of the idea of permissionless innovation, the idea that we can embrace these innovations without having to seek prior approval.

To just give you a quick framing of how this is played out relative to the traditional communications and media sectors, think about modern Internet and digital economy policy relative to traditional spectrum policy. Think about how hard it is to just start a new wireless venture or platform or service versus starting a new web-based service or digital application.

Steve Jobs didn't need any special regulatory blessings to launch his endless series of innovations over the last 10 to 15 years, iPads, iPhones, iTunes, whatever. He just did it. Google and Microsoft didn't need to file forms with any agency asking how to create innovative search engines, operating systems, email systems, web browsers, or video sharing services, all of which have, in just the last 15 years, radically disrupted traditional

media and communications markets precisely because they didn't have to go through that process.

When Uber and Lyft realized they could offer the public vastly superior transportation services by creating innovative online networking services, they launched those services. They went ahead and did it without prior approval. Of course, now a lot of people are pushing back on that.

Mark Zuckerberg didn't need to petition anybody for permission to launch Facebook and voluntarily provide a massive universal service to over a billion people on the globe and offer them a chance to connect at the most awesome, fair, and non-discriminatory price of all time, zero dollars and zero cents. Could anyone have divined that beforehand if we would have sat down and tried to create the world's biggest social media platform, using some sort of title of the Communications Act?

I want to make clear this is not just about the big dogs and their ability to innovate. As Commissioner Pai rightly said, it's people like Chelsea Pickner and all the other small mom and pop innovators out there that are able to offer new services and platforms without asking anyone's permission. Again, permissionless innovation has

worked wonders.

Now compare that to the world of trying to create certain types of new wireless services. There's endless "permissioning" required, endless paperwork, licensing, and permits to be filed and granted. Months, years go by before certain services and spectrum get allocated or reallocated. Armies of lawyers and lobbyists must be hired to get permission for these blessings.

And then there are the layers of state and local authorities that you have to deal with on this front. And then don't forget about the formidable tax barriers. Again, we got the policy right here, too, with regards to the Internet with things like the Internet Tax Freedom Act. By contrast, look at the burdensome and discriminatory way we tax wireless and cellular services in this country. It's insanity.

In closing, what this reflects philosophically is the difference between the imagined public interest and the real public interest. There's a lot of talk in this town about serving the public interest. I believe in serving the public interest. Hey, I'm in the public. I want cool stuff. I want great services. I want it at a fair price. But when people promise it to me, their promises seem

fairly empty when it's imposed by top-down command-and-control regulation.

The reality is that nobody can be a technological Nostradamus, stare into a techno crystal ball, and divine our high-tech future. We have to allow this to play out through the natural interaction of consumers and companies, interacting in a free and open marketplace constantly recalibrating their needs and desires to find new and better ways of doing things.

That has happened with our digital economy precisely because we did not follow the path set forth in an archaic Communications Act that was passed well in the past. That Act is now still threatening to be applied not just to these new technologies but is still applied to all of these other sectors and burdening them. Those sectors could also benefit from the same idea of permission-less innovation. Thank you.

MR. MAY: Adam, thank you very much. You guys in the audience now continue to think of questions. We're going to get to you. I'm going to get to John.

John, I want to come back at you with something that you said. You could discuss this and then anything else you want to for a few minutes. This has always

bothered me, frankly. So I've got you here.

You said during the Title II era -- Let's talk about the late 1990s before the classification of broadband as an information service. With DSL, for example, in that regime the underlying transmission service was regulated as Title II, and then you had the other services on top of it. And you said there was lots of competition among information providers, online providers. You said there was lots of competition.

In fact, back in the day it used to be said in old pleadings that there were 6,000 Internet service providers in the nation, before the reclassification.

There may have been 6,000 firms calling themselves Internet service providers. But 5,990 of them or whatever were not using any of their own facilities. They were just riding on top of the companies that had the underlying facilities, like a Verizon, or AT&T, or whatever.

I had some experience with some of them as some of us older people in the room know. They were just offering pretty much a plain vanilla type of access service. And my question to you is, even if you want to cite this 6,000 number that used to appear, do you really believe that that is real competition that is ultimately benefiting the

consumers, when they're not investing in their own facilities and just reselling a service?

MR. BERGMAYER: Sure.

MR. MAY: You take that, and then you can take another couple minutes if you want to.

MR. BERGMAYER: Sure. I don't think it's true that they didn't provide any of their own facilities. They didn't provide the last mile connection to the user's house. Dial-up ISPs are a model that's very similar to policies that exist around the world called "open access" policies, where you separate out the infrastructure provider from the service provider.

If the service provider can add value on top of the basic connectivity from the user's house to some central facility, open access policies can be done with DSL. They can be done with fiber. They can be done with cable. And they can be done with wireless.

MR. MAY: But they weren't doing any of those things. They were just on top of the telephone company.

MR. BERGMAYER: No, I don't think that's true at all. I subscribed to an ISP myself that did quite a few things that are beyond what other ISPs did. The ISP that I first subscribed to started life as a BBS that offered

quite a number of BBS-type services. They had their own little message board and things door games.

On top of that, it provided me with a UNIX shell account, which I used back in the slow dial-up days. I found using that was more convenient then just doing a direct connection to the Internet. And then on top of that they offered vanilla Internet access. So you're right. A lot of them did offer vanilla Internet access. But even if I grant your point that all they were doing was providing vanilla Internet access, it provided a level of price and quality competition. It kept prices low, and it made sure that they invested and they had the availability where people can use them.

So I do think that that kind of competition at the service provider level benefits consumers. And it's true. You didn't have competition among different people, all providing wires into the customer's home.

And I would like to just point out something that Senator Thune raised about the level of competitiveness in the United States broadband market. Monopoly versus enough competition is not either/or. According to the FCC's numbers, if you start at a threshold of six Mbps downstream, about 42 percent of Americans have access to

only one provider. And another 40 percent have access to two providers. So here you have a high majority of the United States population that has access, for residential broadband, at most, to two providers.

MR. MAY: To wire line. You're excluding wireless.

MR. BERGMAYER: I'm not including wireless. I'm counting only fixed connections, not mobile.

MR. MAY: Yeah.

MR. BERGMAYER: Fixed connections can include satellite and can include wireless connections. But I use a speed threshold, rather than a technology threshold.

The majority of people who can afford it tend to subscribe to both mobile and fixed services. That's demonstration enough in the marketplace that those are complementary services.

And there's just two final thing I'd like to say Number one, *Carterfone*, a decision that said that people could attach their own equipment to the telephone network was yet another decision that was based on Title II. Title II is a very broad doctrine. And basically, the FCC in the 1960s said it was *per se* unreasonable under Title II for the phone company to tell you what equipment you can and can't use on the phone system.

And I have to just say this again. Every smartphone sold in America is a Title II device. They are all Title II today. Voice service and techs on your iPhone is Title II. The wireless data component is not. But it is not the case that somehow Title II has prevented the explosion of mobile.

For the most part, if you go into a T-Mobile or an AT&T store and ask them to give you a phone that doesn't have a phone connection and is data only, they'll tell you to buy a tablet. Wireless companies won't sell you a phone that doesn't have voice. They still want to sell you that Title II service. It doesn't seem to be an impediment to their investment and growth.

And finally, on the point of permissionless innovation, I want to relate that to T-Mobile's Music Freedom plan because it is not the case that T-Mobile is giving you free music today. They're giving you free music on some popular services. None, by the way, that I subscribe to.

And I would like to know, what is the mechanism by which a local radio station that offers a streaming service of its own, as almost all of them do today, can get its connection also exempted from T-Mobile's data cap? That

seems like quite a burden.

Maybe we would be having a different conversation if T-Mobile found a way to exempt music from its data cap, but it didn't. It only exempted a certain number of popular services with no clear and transparent way for services that are not on the list and not available to be voted on to be included in that. And that's the problem we have. It puts smaller services at a disadvantage almost by the very structure of the way it exempts certain services.

MR. MAY: Just to be clear on that, so you oppose the T-Mobile plan, correct?

MR. BERGMAYER: Yeah, we have some serious concerns with it as we have stated.

MR. MAY: Okay. Scott?

MR. CLELAND: Yeah. Remember there's a smartphone. And remember everything that John said about how the phone part might be Title II. But everything smart about it is not Title II. And we talk about iChat. We talk about all the other services people use on their smartphone. I know the younger folks use it almost never as a phone. I never can get my kids to call me back. It's all "I have to text" or something else.

So this is not a Title II device. This is a Title

I device. Everything that matters and why you have it is because of Title I.

I'd like to step back though. John was mentioning electricity and they were taking credit for everything on top of it. For this Title II discussion, we need to just go back to basics on understanding utilities. Electricity, gas, and water – why are those utilities? Because they do one thing over and over again. It never changes. It's one standard, and it has facility monopoly economics. But it's unchanging. It can't do lots of things. It does the exact same thing every time, and never changes.

Communications is different. Now you can communicate not just over that copper wire. And I must admit, back in '92, '93, '94 when I first started as a telecom analyst, I thought that it was a natural monopoly until I started understanding the technology.

You can do broadband electrically over copper, over a coaxial cable, or a bunch of other types of metal wires. You can also do communications optically over fiber. You can do it electrically; you can do it optically; and then you can do it wirelessly. We know we can do it not only by unlicensed Wi-Fi or wireless. It can also be done by satellite. And you can also do it over

broadband power lines. It hasn't been economic, but you can do it there. There's even sewer and gas where they figured out that they could do communications over it.

It's innovation that can deliver communications in an innumerable number of ways. Now the relevance of that is, if you want Title II, you're assuming it can only be done as a basic service one way. It could be done electrically unlimited ways, optically in many different ways, wireless in an unimaginable number of ways. And so it's not a monopoly service. It can be done by lots of people, lots of startups in different ways. Can it get to scale? That may be a different question.

But communications is not like electricity. It's not like water, and it's not like gas. And it shouldn't be regulated like them.

MR. MAY: Okay. Scott, when you started to get down into the sewer there, then I knew it was time that we needed to move on.

Adam, do you want to come back at either of these two on anything before we move on?

MR. THIERER: Very briefly, because I'd love to hear from the audience. It's easy to wax nostalgic about the glorious old days of thousands of ISPs. That market

just wasn't sustainable. There's no way we were ever going to be able to sustain that sort of an environment. A lot of them were fly-by-night operations.

I remember the guy running my first ISP operating out of his garage. There would be hours that would go by where I would wonder, "Is this guy ever going to answer his phone." My little 14.4 modem and Trumpet Winsock just wouldn't always be reliable for me. So it had to become more of a big boy's business. There was going to be consolidation. There was going to be a washing out of some of these companies.

Now as Scott suggested, that doesn't mean it's a monopoly. There are plenty of competitors still. But the reality is that this is a high fixed-cost business. This requires massive investment. And we had that horrendous TELRIC/UNE-P/CLEC experience where we created this Potemkin village competition fiction where we were just propping up empires of paper in the name of competition, as if just more automatically equals better. No, not necessarily. I don't want 15 search engines. We've only really got two big players there and a couple of smaller ones.

The "Rule of Three" dominates all digital markets. After a while there's a washing out period. And I don't

care what layer of the Internet you want to look at, not just communications and media sectors. There's a washing out phase where you get down to the fact that there's a couple of big players in each of these sectors from search to email to storage to other things.

So the reality is that what marketing folks call the Rule of Three comes to settle in. A big dog, a second competitor that's always nibbling at the heels, and then some third smaller niche player that provides certain roles and services. It's the same for the Internet space as it is for traditional communications and media.

We should understand that those are the economic realities of this marketplace. The idea of thousands of ISPs would have only been frozen into place by regulation.

MR. MAY: Okay. Thank you, Adam. We do pride ourselves at the Free State Foundation in giving the audience a chance to ask questions. And this time you can even just make a comment or a suggestion if you want to because it helps us think about these issues and learn. So who has a question or comment out there?

First I'm going to recognize this gentleman up front. Now if you can just identify yourself for the record, we'd appreciate that.

MR. BISLA: Hi. Aaron Bisla from the American Legislative Exchange Council. I have a question for Scott. You were very vocal about supporting unlicensed use of more spectrum, basically freeing it up by the FCC. I was wondering, what's your take on providing more spectrum for licensed versus unlicensed use and what are the benefits to each?

MR. CLELAND: Good question. On the lower bands, from three gigahertz and down to about 400 megahertz, that 2.6 gigahertz is an area where it should be sold and auctioned. There is a huge market for it. That should be licensed, and it should be out there.

You can quibble with three gigahertz. Could it be a little higher than three? There's a lot of consensus around three. That’s the area where the industry would like it to be licensed because there is the economics for it to be a good and large and successful business.

Certainly, above four and five gigahertz for unlicensed makes a ton of sense. Wi-Fi has baby monitors, car door openers, and all sorts of things. Those were unregulated kind of uses. And there is a tremendous amount of use and a tremendous amount of innovation that can happen there.

The way I look at it is that there's a rough number below three gigahertz to about 400 megahertz. That area should be sold. And the amazing thing is, when I first looked at it, I said about 85 percent of that choice spectrum was controlled by the government. And it's at least, two-thirds controlled by the government. And most of it is Department of Defense. And the U.S. Mint has spectrum now, the Bureau of Engraving and Printing. That's one location where I don't know who they need to be communicating with.

But this spectrum was allocated decades and decades ago. They like it, they don't know what they're going to use it for, and most of them don't use it.

So the government is the dominant user of this commercial space. They got it back in a time where there wasn't the possibility of digital communications. It was back in the '70s. They think it's still in the analog world. View it as a scandal. It should be opened up for auction under three gigahertz.

MR. MAY: Senator Rubio has just introduced legislation in this very area. I won't try and detail it. But it deals with these questions, particularly government spectrum and how to repurpose that. So that's worth taking

a look at. As many of you may remember, Senator Rubio, about a year ago, gave his first major speech in the telecom area at a Free State Foundation conference. I'd urge you to take a look at his legislation.

MR. CLELAND: I second. That's a great start in the legislative arena.

MR. MAY: Okay. Gary?

MR. ARLEN: Thank you. Good panel. Gary Arlen from Arlen Communications. Referencing Senator Thune's comment and also the news we've all been reading about, the 6-3 decision in *Aereo*, is the Telecom Act update going to talk about broadcasting and the broadcast spectrum? And the ruling today seems to give broadcasters a little breath of life for a little while. Do you want to talk anything about the future of broadcasting in light of this and other issues about their spectrum usage?

MR. MAY: John, some of us probably haven't read it, but I know John's been involved. If you want to give us a two-sentence version, go ahead.

MR. BERGMAYER: Since the beginning of my interest in the *Aereo* case, I have been at pains to distinguish it from telecommunications because it's a copyright case. It's a copyright case that has implications on the

telecommunications marketplace for sure. But it's about the interpretation of the public performance clause under the Copyright Act.

So as someone who works on both, I try to keep them separated in my mind. I'm aware of the policy overlap, but I don't think it'll have much of an effect on broadcasting. I don't think even Aereo would have had much of an effect because it's not like cable companies could somehow not pay retransmission consent fees if they want to carry the full range of cable programming.

And that's the issue with broadcasting. I think that broadcasters in general are propped up by a lot of regulations that keep their business model in place. But also, from the broadcasters' perspective, regulations keep them from adapting their business model. You don't always hear this from the National Association of Broadcasters. It's not like people have a vendetta against them. It would be great if they had more flexibility to offer new kinds of different services on their spectrum.

As part of our spectrum policies and as part of our media policies we need to find ways to allow the video marketplace to evolve and for companies to find their place in the new reality, which is partly driven by technology,

but partly driven by consumer expectations of what they want out of video.

MR. THIERER: Just very briefly on Gary's question. Regardless of today's decision in *Aereo*, the reality and the good news is we are dealing with video marketplace policy right now. There are quite a few bills out there. We recently released a paper at the Mercatus Center on an overview of video marketplace reform efforts.

Six or seven leading bills are out there, including Representative Scalise's important bill, which is probably the most comprehensive of all of them.

That's the good news, that there's a lot of interest in this. The bad news is there are so many moving parts to this. John mentioned some of the copyright elements, which are obviously part of the *Aereo* decision. But then there's retrans, and there's must carry, and there's media ownership, and there's network exclusivity issues and on and on and on. And because of the multiple overlapping and sometimes contradictory layers associated with video marketplace and compulsory licensing issues, the reality is that there's always something that ends up holding up the process of reform.

The hope with something like the Scalise bill was

always that, by bringing it all together and making it sort of an all-or-nothing kind of deal, we could finally get it done. Boy, I hope that works, but I'm very skeptical that it will.

MR. MAY: Scott, just one minute.

John, let me just follow up with you. We're talking about video now and the question was about broadcasters. In your initial remarks you said that there may be changes in terms of relaxing certain rules in the video area that you're supportive of, or something to that effect. That's something that I've supported for a long time. The Scalise bill, for example, is a model or something I supported.

But here's my question to you. Can you be more specific? Tell us what it is that you would support in the way of deregulation or less regulation in video. I know for myself and I know this is true for Adam and probably Scott as well: A lot of these issues we also see through the prism of the First Amendment, when the marketplace changes, and there may be a less compelling reason to regulate. So let's see how close we can come together here. Tell me what you can about that.

MR. BERGMAYER: Sure. There are various rules

which basically give local broadcasters exclusive rights to certain content that they can enforce at the FCC beyond contract law, beyond copyright law, such as syndicated exclusivity, network non-duplication, things like that. They don't make a lot of sense. It's absolutely true, if you repeal them, they might simply be reintroduced via private contracting and be enforceable through the courts. That would be fine, but having specific FCC policies that say, "This is how the business model for local broadcasting will be," doesn't make a lot of sense.

Another example is the way that cable and satellite companies carry programming. They get a copyright license that's a compulsory statutory license for which they pay a government-determined fee. That clears them for copyright purposes. Then they have to negotiate with the local broadcaster for a signal right, not for a copyright to that content.

Why do we have this layering of something called a signal right on top of copyrights, which we then extinguish with a compulsory license? Why can't copyright itself simply handle the interactions of programmers, broadcasters, networks, and cable companies? It would be very hard to get there because there have been so many

business expectations built up around the current system.

So I might advocate for a more nuanced approach than the Scalise approach, which is just "repeal it today and let them figure it out." I might advocate for something a little more slow and staged. But it can be done, and it's a good goal. And it's a good goal that I share with a number of people from across the political spectrum.

It's not only the cable industry. The satellite industry, every five years, has to return to Congress to get one of its provisions renewed to operate, given the overall regulatory environment. One of its copyright licenses expires every five years.

This time, why don't we just renew everything but also say, "In five years the following other things are going to expire," so that you have the political will where it's not just the satellite industry, but maybe the cable industry and maybe the broadcast industry, that have to go up to Congress again to try to get their things renewed. And then maybe that provides an opportunity for reform.

That's one way I've been thinking about it. It's always easier to kick the can down the road, and this five-year expiration seems to be a handy way of doing it.

MR. MAY: Five-year plans are good. That's why we titled our book, *Law and Communications Policy: The Next Five Years*.

MR. CLELAND: I like the idea of having video and broadcast regulation sunset and require reauthorization in order to have any regulation continue. I really like the idea of having regulation go away if it's not reauthorized.

But cable is ruled under the '92 Act and the law as a monopoly. It hasn't been a monopoly for years. Cable has lost 40 percent of the market to DBS and to the telcos. It's just the fact predicate, just like on telecom, where 22 percent still use the phone, as Senator Thune said. Fact predicate, it's not a monopoly anymore; but it's regulated that way.

You have an analog broadcast-regulated industry. It's a digital industry. They only have 10 percent or less getting broadcasts over the air. So that's an obsolete analog model as well.

So those are real thorny issues under the '92 Act. I was hearing what both of them have talked about with this. It's messy, but broadcast has to be updated. And the media ownership rules, that's insanity. We have analog media ownership rules, old media, and then we have new

media that has no rules. So Netflix is international. YouTube is global. Yahoo is global. They don't have any limits about where they can reach or what they can own or whatever. And that's where the innovation is occurring which Adam has talked about.

Without question, the legacy cable monopoly regulation is horrible and distorting. And then broadcast regulation, it's just fiction. It needs to be updated. The broadcasters have a lot of valuable content, and a very important role in the marketplace. But it needs to have a digital modern model, and the law needs to allow it to evolve to that.

MR. MAY: Okay. We are going to have to wrap up here because I don't want to violate any of the Senate rules. But we're going to do it. And I'm going to try and make a historic deal with John Bergmayer right here before your eyes. We'll see what happens because this net neutrality issue's been around for 10 years now. That's when it started, at least 10 years ago, and it's ongoing. It probably may go on for another 10 years, but the FCC's wrestling with it now. And you're all familiar with it, so I'm going to dispense with the background.

But John favors Title II classification of

broadband providers, right?

MR. BERGMAYER: Yes.

MR. MAY: And you've heard all the reasons here this morning why that's not a good idea, right? You may not agree with them, but you've heard them.

Now my position is that, because of a lot of things that Senator Thune said and others, we ought to not do anything to adopt new rules and we ought to defer to Congress and just watch the marketplace. If there's a real market failure and consumer harm, then the FCC could do something. So that's at the other end of the spectrum.

But here's what I want to see. Since I don't think the Commission's going to do Title II and you think the Commission's going to do something, would you support the Commission acting under 706 rather than Title II if the Commission were to adopt the same types of rules that it did in *Cellco*? In the *Cellco* decision the FCC's authority and flexibility was recognized to reach individualized deals under the commercial reasonableness standard.

Now if I said that I would do that if the Commission were to take that approach, would you support that type of approach? And we have to shake on it if you're going to.

MR. BERGMAYER: The commercial reasonableness test that was used in the data roaming order is, to my mind, not enough. At least as the FCC has articulated in the past, it allows exactly the kinds of deals and discrimination that I don't think ought to be allowed under the rules. And then if the FCC changes the commercial reasonableness test and tries to issue it under Section 706, I fear that they would just run afoul of the D.C. Circuit's precedent.

So with the commercial reasonableness test and the *Cello* decision and Section 706, we're crossing between policy and law here. But I don't think that that's quite enough. So I'm afraid I'm going to have to decline your offer.

MR. MAY: Okay. Well, you saw me try. And we'll just have to continue the discussion. I'm sure we will.

This was a really good discussion following Senator Thune and Commissioner Pai. So join me in thanking John, Scott, and Adam, please.

(Applause.)

(The seminar was concluded at 11:00 a.m.)