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**LOOKING FORWARD: WILL CONGRESS
ESTABLISH BROADBAND POLICY?**

Tuesday, October 12, 2010

12:10 p.m.

**U.S. Capitol Visitor Center
Congressional Meeting Room North**

MODERATOR:

RANDOLPH J. MAY, President, The Free State Foundation

PARTICIPANTS:

NEIL FRIED, Senior Counsel, House Energy and Commerce Committee

TIM POWDERLY, Senior Counsel, House Energy and Commerce Committee

DAVID QUINALTY, Professional Staff Member, Senate Commerce Committee

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PROCEEDINGS

(12:10 p.m.)

MR. MAY: I want to welcome everyone here to this Free State Foundation seminar, first off. I'm Randy May, president of the Free State Foundation, and I'm very pleased, to see so many of you here today.

The title of this seminar is "Looking Forward: Will Congress Establish Broadband Policy?" There are still a lot of people who want to know the answer to that question, as evidenced by the crowd here today.

Now, I'm going to introduce our very distinguished panel in just a few moments, but I want to say a few words by way of introduction. First, I want to clear up a bit of confusion about the draft bill that surfaced during the week of September 28 that was prepared under the auspices of House Commerce Committee Chairman Henry Waxman. As you know, there was a lot of speculation and back and forth in the press and elsewhere as to why the draft bill was not actually introduced or even why it was not passed by the House before it went out on recess. Some said it was the Republicans who killed it by not signing on to the bill. Some say it was my friends over at the Free Press organization who killed it because they didn't like it. And I've heard other theories as well.

* 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.

Now, I know the press is here today so I want to set the record straight once and for all. I killed it. I killed it. I called up Chairman Waxman and I said “Look, if you get this bill passed, we're not going to have anything to talk about at this program I'm planning on October 12, so could you just bury this thing for awhile?” And Chairman Waxman responded very graciously. He said, “Randy, I understand completely.” So there you have it. You may not have known that FSF had such power, but that's what happened.

Okay now, seriously, we still need to look forward and answer the question posed by the title of this seminar. It's obviously still very relevant today. I'm going to assume that almost everyone in the room has a pretty good working knowledge of what has transpired over the last year or two to get us to this point. So by way of set up, I'm only going to give you the very bare bones version of key events before I ask the panel to dive in.

Last year at about this very same time the FCC proposed net neutrality regulations that would incorporate into actual rules the four existing open Internet principles and proposed that a new discrimination prohibition and a transparency obligation be embodied in the rules too.

If we jump ahead to April, the D.C. Circuit issued its decision in the Comcast appeal of the FCC's order sanctioning Comcast in connection with the BitTorrent incident. The Court's decision cast strong doubt on the Commission's assertion of ancillary jurisdiction over broadband Internet service providers. Of course, in the October 2009 notice of proposed rulemaking that had been issued, the Commission had based its authority to adopt new net neutrality regulations governing ISP practices on the same ancillary jurisdiction claim that the D.C. Circuit called into question in the Comcast case.

So shortly thereafter, FCC Chairman Genachowski announced his third way proposal, which proposes to classify Internet service provider services as telecommunications

subject to Title II of the Communications Act. As all of you know, Title II contains the common carrier provisions in the Communications Act.

Now, he proposes to forebear from applying many of Title II's provisions, but not some of the key ones, such as the Section 201 requirement that carriers' rates be just and reasonable and the Section 202 requirement that carriers not unreasonably discriminate in the provision of their services. Now, in the eyes of many, including myself, this classification proposal is seen as pretty radical and unduly regulatory and, in fact, backward looking.

A large number of members of Congress, including 70 to 80 Democrats, expressed the view that the FCC should not go forward with a classification proposal absent Congressional authorization. Now, in June and July, meetings were convened on the Hill by the bipartisan staff of the Commerce Committees. These gentlemen that are sitting before you were involved in those meetings and I think a lot of you are familiar with the fact they took place. I participated in a few of those and I thought that was really a useful exercise in terms of exchanging some views and educating, hopefully, the Congressional staff a bit and also the participants who are participating.

Obviously, it wasn't an exercise that led to legislation. I don't think that was the intent, but I think that was a useful thing that perhaps we can even see more of and I commend these gentlemen and their bosses for doing that.

So that was in the summer. And then to bring us to the present, the week of September 28 a draft bill circulated, or surfaced, that was prepared under the auspices of Chairman Waxman. That draft bill surfaced and I thought that bill had some positive elements to it, that it was a useful exercise.

And I also said at the same time that I thought that the discrimination provision that was in the bill, particularly in my view, was problematic.

So now, with that background, that gave us a whirlwind tour of the past year. Let's dive into it. As I said initially, we're really fortunate to have some of the key players who are involved in this process here with us today. What I'm going to do is introduce them all now. I'm going to give you the short versions of the introductions since you have their bios.

I've asked them each to speak for five to seven minutes. And I was bodacious enough to tell them I was going to cut them off after seven minutes so we can make sure we have time for interchange among them, but also, as importantly, some time for question and answers and interchange with the audience.

First, we're going to hear from Tim Powderly. Tim, as you know, is not Bruce Wolpe. Bruce was scheduled to appear and he had a conflict and could not appear. Tim is here as the representative and a very, very able and capable one from Chairman Waxman's staff. So I'm going to ask Tim to speak first. Tim's title is Senior Counsel to the House Committee on Energy and Commerce, and he's working with the Subcommittee on Communications, Technology and the Internet. He joined the committee in 2007 from the Chicago office of the very well known firm of Sidley & Austin and prior to that he was with Covad Communications.

Tim, that was probably more than I'm going to say about anyone else, since you were first.

MR. POWDERLY: I appreciate that.

MR. MAY: Next we'll hear from Neil Fried. As you know, Neil is Senior Counsel on the House Energy and Commerce Committee. He advises the full committee ranking member, Joe Barton, and Communications, Technology and the Internet Subcommittee ranking member, Cliff Stearns, on television, radio, telecom spectrum and Internet issues.

And then after Neil, then let's go over to the Senate and we're going to hear from Daniel Sepulveda, and Danny is Senior Advisor and a member of Senator John Kerry's senior

management team, while also handling Senator Kerry's extensive commerce, trade and business portfolio as Chairman of the Commerce Subcommittee on Communications, Technology and the Internet. He previously led a team that managed relations with USTR on behalf of Congress.

And then last, but not least, as they say, we have David Quinalty. David is a professional staff member on the Senate Commerce Committee. David joined the Republican staff of the Commerce Committee in July of 2009. And I just have to read this because it continues to amaze me. His portfolio of issues includes telecommunications, technology, media, science, transportation, banking, financial services, housing, the environment, natural resources and agriculture.

MR. MAY: So with that, we're going to dive in and Tim, you've got up to seven minutes. Why don't you start?

MR. POWDERLY: Thank you very much and I apologize for not being Bruce Wolpe. Bruce had something come up, so I'm pinch-hitting. The short answer to the ultimate question is there will be broadband legislation, if Randy says there should be, next Congress. So look forward to that.

I thought it may be most useful if I could just talk a little bit about the sort of group meeting process that went on to discuss this issue and then how we got to where we ended up.

I think that Chairman Waxman saw the Comcast decision sort of pointed to the problems that we have with the Telecom Act. And he has said publicly that it might be a good time to review that act and see what direction it might have to go in.

So working with all of our collective bosses, we convened this bipartisan, bicameral process to listen to views from a lot of people who were in this room on different subjects related to not just broadband policy, but telecom policy generally. We had a series of

meetings, maybe four or five, and a few things emerged. The number one thing that stuck in Chairman Waxman's mind was that there was some support for the idea that a targeted piece of legislation would be a better way to proceed, or at least worth pursuing at this time.

The other real piece of consensus on the targeted bit of legislation was everyone agreed that some kind of transparency for consumers was a good idea. And everybody agreed, at least privately, if not publicly, that Congress should address somehow the universal service issue.

So with that in mind, Chairman Waxman, working with Mr. Boucher -- who has been working on all of those issues for a very long time -- started to get some groups together to talk about what a targeted piece of legislation might look like. And there were negotiations going on at the FCC. They were talking about the same things. Chairman Waxman helped convene this group with Subcommittee Chairman Boucher.

Our minorities and Neil were present, though not participating, at all of those meetings. We went through the process to see what kind of bill we could get consensus on. From the outset, Chairman Waxman's position was that we're not going to do anything unless it's consensus based and unless it's bipartisan.

So as we went forward, we ended up with a product that had support from the large cable carriers, the large phone companies, and had support from the consumer groups, from CFA, CU, CDT and Public Knowledge. It did not have support from other groups on both sides. So from that, he proposed it. The best way to say this is we checked with the Republicans to see what their views were. They came back and said they didn't think they wanted to proceed with this at this time, and that is basically where we left off.

So then looking forward, I think that Chairman Waxman is certainly open to revisiting the issue in the lame duck session. But he thinks that if Congress can't act, then the FCC needs to go forward with what it is going to do on the reclassification issue.

So that's the background of how we got there. Looking forward, I think it's difficult to say what might happen in the lame duck or what might happen next year. I think the one thing we can all take away from the whole process is there are some issues that really do need to be addressed at this level and I think we're all open to continue working on all of those. And that's it.

MR. MAY: Okay, thank you, Tim. Neil, when you speak, maybe you can even explain what it means to be present but not participating. When I was at the FCC a long, long, long time ago, there was a rule that may still be on the books that when we issued an equal time decision on a complaint, the General Counsel actually had to sign off on it. That was in the CFR. But the Deputy General Counsel at the time would come up and he would just sign them "signed but not read," which always was interesting to me. Maybe that's like present, but not participating.

Neil?

MR. FRIED: Thank you, Randy. Republican members have sat for a long time at number of hearings on this topic. Mr. Stearns early on asked that we really engage this a lot earlier in the year. Unfortunately, we didn't start this process in earnest until much, much later and there was no sufficient time to get Republicans sort of comfortable with the approach that was being taken.

As you can imagine, industry was sort of at the table with the gun to their head. The other side wanted the world. To their credit, Mr. Waxman's staff did a really good job of getting those folks perhaps closer on the page, but it also started from a premise that was not consistent with Republican philosophy. It was starting from a status quo of "if the FCC is going to reclassify, that's the worst of all possible solutions." That seems to have been the one

take-away. Everyone seems to acknowledge that's the worst result, which is why there was motivation to do something less than that.

But it wasn't starting from a place that was necessarily consistent with a pro-market philosophy of Republican members. And with insufficient time to really work on figuring out what the consensus position of the Republican members would be, we just didn't feel we could sign on at that point.

So we were present, but again, we were not negotiating over language. We didn't have enough time to get real guidance for what would be consistent with the Republican members. It's symptomatic of the great tragedy on telecom policy, which is how much time we have squandered on this issue. Certainly in the past year, but going back five years, if you think of where we were coming from with the new administration, we were coming off the tremendous success of the DTV transition, clearing lots of spectrum. Now the administration admits that perhaps the single most important thing we could be addressing right now is finding more spectrum for wireless broadband.

Go back to the National Broadband Plan. The two main planks of real substantial important issues we could be addressing were spectrum and USF reform, both of which were in the National Broadband Plan, and both of which there was a fair amount of consensus, on probably all of Capitol Hill, and certainly in the House, among Republicans and Democrats. So we could have been spending this time working on the spectrum issues.

We did do some work on universal service, but certainly the FCC could have had a lot more time to work on universal service had they not been focused on reclassification. That's the great tragedy and we could have made a lot more progress there.

The other real issue that's hanging out there is going to be the broadband stimulus. We've just finished pushing close to \$7 billion out the door in what was fairly rushed legislation.

I think most people realize that it was not quite as organized as it might have been. Just look at the fact that the National Broadband Plan came after the broadband stimulus. There's still a lot of concern over whether this money is really being spent to reach unserved households.

I'm sure you've been hearing Blair Levin talk a lot lately about the Broadband Plan. Again, what everyone agreed to is that 95 percent of the country has access to broadband. Two thirds of the country actually subscribes. We should be focusing on that 5 percent number. Unfortunately, it doesn't appear that that's what the grants have done. Perhaps the insult to injury is that the stimulus legislation was so rushed that it doesn't provide for the actual oversight of the grants.

You're going to be hearing more and more that there is actually now no authority currently for NTIA to continue making sure that those grants they just pushed out are appropriately spent. There's really a terrible concern that we've now pushed all this money out and we're not going to see much for it. Other than USF reform and spectrum, I think a lot of time next year is going to be spent on oversight of that stimulus money.

MR. MAY: Okay, so next we'll turn to Danny.

MR. SEPULVEDA: Well, there's a lot to talk about and respond to in everything that everyone has said. I think I want to take it a step back and take a look at the holistic picture. The administration came in and there hadn't been a national broadband plan for eight years in the previous administration. There had been no real pathway to move forward.

The President did not mince words in his running for the presidency of the United States on his view of telecom policy. You can all go back and look. There was a nine-page tech and telecom vision for how the administration would move forward. The administration has largely held to that, and one aspect of that was the open Internet principles. Chairman Genachowski came out with a notice of intent to move forward with regulation relatively early in

the process and laid out what I believe and I think what most people on my side of the aisle believe is a fairly sensible center on the question, retaining his commitment to principles on what an open Internet constitutes.

The Comcast decision was a key turning point and asked the basic question. It asked the basic question about the FCC's legal authority to regulate the transmission of broadband services over wire and over the air. And that question could not be left out. It just can't be left without an answer.

And so we went through what has been admittedly a very long process of discussion and negotiation, both at the FCC and here in Congress. We had the debate in '96, wrote the Act, and then in 2006 we had a debate in the Commerce Committee and there was a vote on these questions. It was split on partisan lines and the 2006 rewrite never came to be.

We've been talking about this and working on this for a very long time. Will Congress provide a broadband policy? Yes. The only question is when. And sooner rather than later does not make it better rather than worse. There are a series of very serious public policy questions that we need to answer. Right now we are taking some time to differentiate what points we are going to compromise on are going to be.

I think that there is a lot of room for compromise on process. There is room to compromise and negotiate questions on policy. But we need to understand each other's concerns and it's very important that we do that in a transparent fashion. I think that the roundtables that we have had in the Congress are helpful in that direction. These conversations that you all are hosting here -- and I very much appreciate the invitation -- are very, very important. It's not the Arab-Israeli conflict. These are things that we can come together on as a community, recognize what the facts are, what the incentives are for behavior.

There aren't good guys and bad guys in this situation. There are only good and bad incentives. And our goal is to create as positive a framework to incentivize competition and innovation and to ensure that the service is available and affordable and accessible ubiquitously to everyone in the country.

Now, we have a National Broadband Plan that was laid out to achieve that goal. It included any number of things. On spectrum, for example, we've been working very closely with Ms. Snowe's office and put together a fairly comprehensive spectrum proposal out of Senator Kerry's office with Ms. Snowe. We've been working very closely with them and the Commission as well on unlicensed and wireless issues related to the White Spaces Initiative, which was just completed.

We've all been working and looking closely at consumer protection issues including the development of a consumer protection bureau at the Commission, and the role and relationship between large institutions, large providers of services and consumers. And so all in all, I think at the end of two years what we have is a very vigorous debate taking place, a very vigorous discussion that is starting to lay out and move on action points that were laid out in the National Broadband Plan.

My boss has immense faith in Mr. Genachowski and the staff at the FCC. I think we have a very talented staff at the FCC. We have a very talented commission at the FCC with both the Republican and Democratic commissioners showing real leadership in terms of the tone that they've been taking with each other in discussion and negotiation.

They have very strongly held views and you see the disparity of philosophy, but it has been a generally positive discussion. You don't see them attacking each other as individuals or attacking each other's motives. And I think the way that we're going to get to "yes" on these

questions is through this sort of discussion about what the points of compromise are and what's possible.

We'll see what happens in November, but people have been writing and thinking about this for a long time and we're going to continue to contribute to that conversation. The decisions aren't going to be made by the four of us here. It's going to be made by a community of people. That includes all of you and it includes the academic community. It includes the consumer community.

Contrary to the general handwringing in the community, I don't think things are going that poorly. All in all, there have been some very good discussions and some very good progress and some very good relationships built between FCC staff and industry, FCC staff and commissioners, FCC staff and consumer groups and between members of Congress and their staff. That should reap some rewards in the coming year or two.

MR. MAY: Okay, Danny, thank you very much and now we'll hear from the Senate Republican side with David.

MR. QUINALTY: Thank you, Randy. By way of background, I've been lucky enough recently to give up my broad ranging portfolio and now just focus on technology and telecom for Ranking Member Hutchison. But yes, sometimes we're stretched thin.

MR. MAY: It was an impressive thing to have done anyway.

MR. QUINALTY: Thank you. First off, in terms of going forward, it's impossible to talk about the relation of broadband without looking at Title II. It should be clear to anyone following this issue that the FCC really needs to abandon its misguided proposal to reclassify the Internet.

The majority of Congress has expressly voiced opposition to the proposal and there have been attempts and discussions in both the House and the Senate to address this issue

legislatively to find compromise. Clearly, there's significant attention here in Congress, by offices represented here on this panel, and many others, to address this issue. And frankly, they just see legal authority on the issue as quite questionable at best.

It seems clear that the FCC should act prudently and abandon its plans to reclassify. As Neil pointed out, as we go through these talks amongst our colleagues in a bipartisan fashion, it's not helpful to have a gun pointed to the head of Congress as we negotiate and consider these important issues. As Danny pointed out, sooner is not necessarily better. It takes time to work through these things. And we really only have been working in earnest and in a really productive manner, getting down to the details of this, over the last few months.

The fact that we couldn't come to an agreement over the last three or four months in Congress to pass a bill and get the most contentious telecom policy issue Congress has looked at in the last several years to the President's desk in a matter of months shouldn't be a sign that we are unwilling or unable to address this in the future.

Again, the reclassification issue isn't really helpful, with the threat of the FCC pulling the trigger on something that would really just be misguided and at the end of the day not constructive.

In terms of timing, this year I think Ranking Member Hutchison is certainly open to considering proposals if they come up. But it certainly seems unlikely to get something through before the end of the calendar year. The larger political picture certainly plays into everything else that's going on in members' minds.

This is an incredibly important issue to the Ranking Member and to everyone on the Committee and to everyone in this room. But there are a lot of issues that are incredible priorities to the American public and to the members as well. So we'll have to sort through all those and see how the election plays out.

In terms of what legislation should look like, for Senator Hutchison, it's essential that any legislative proposal embrace the notion that broadband providers must be able to manage their networks and to innovate freely without first having to ask permission from the FCC.

The FCC's net neutrality NPRM seems to suggest more of a "Mother may I?" approach where a set number of practices would be permitted and allowed, but where companies would then have to go to the FCC to basically petition them to do anything else that wasn't in the first listed group of approved activities.

The onus needs to be on the regulators to show that a practice is harmful and to the detriment of the public interest rather than network operators and companies being forced to show that every new idea or activity is not harmful before they implement it. Innovation without permission is a principle. It's a core principle that needs to be protected both for the core and the edge of the network. Any approach that Congress considers really has to start and end there. If you can't agree on that, then it's going to be really hard to find common ground.

I look forward to talking about these issues more with my colleagues. Thank you.

MR. MAY: Thank you, David, and all. I'm going to frame a question. Tim, I'm going to ask you to answer first and then we'll just again go down the line.

As background context, I got a document this weekend put out by the European regulators for electronic communications. Right up on the first page, the European electronic communications regulators say to the European Commission who's considering this net neutrality issue that because the "incidents had been so few and for the most part have been solved without the need for regulatory intervention," then they go on to say, "it would be premature to consider further intervention with respect to net neutrality."

In this country there are people who assert the same thing. I think it's generally agreed by most that there haven't been many incidents, just a couple, and they have been resolved. But the net neutrality proponents generally speak in terms of wanting to preserve and maintain what they consider to be an "open Internet" now.

Hearing what David said about the contentiousness of the reclassification issue and the problematic nature of it from several respects, and also having in mind the National Broadband Report and what Neil said about the spectrum issues and the universal service issues, issues that a lot of people think need attention, why wouldn't it make sense to put aside the net neutrality issue -- but also make it clear the FCC shouldn't move forward -- and have Congress say "We're going to devote our attention to try to focus on other aspects of this issue until the net neutrality issue really begins to create problems for consumers because it's just too contentious now"?

MR. POWDERLY: I think it's tough to draw any net neutrality lessons from Europe because they have a very different competitive landscape over there than we do. They adopted rather than abandoned sort of network sharing requirements. You've got a fair amount of facilities-based competition, so there's always that competitive check on providers not to do anything that might set off the net neutrality red alerts.

I think the other part of that question is that Congress -- God bless it, we all work here -- moves slowly. The effort you saw here was sort of a very abnormal activity. It was very abbreviated and that's not normal. The Telecom Act of '96 took three or four Congresses. Chairman Waxman firmly believes that there ought to be net neutrality protections and the longer we wait, probably the worse it might get.

We can also frankly walk and chew gum. So we can address that and we can address other important issues like USF and some of the other related issues at the same time. So I think it's something that we can do.

MR. FRIED: From my perspective, it's a matter of priorities. There is no great net neutrality problem that needs solving right now. The only problem would be if the FCC were to go forward, and then you would see two years of litigation and lots of consternation on the Hill as we get embroiled back into a partisan fight.

If we move past it, I think we make a lot more progress on a lot more significant topics. Type any three words at random into a search engine and you will find whatever you want on the Internet. Nothing prevents anybody from publishing on the Internet. Nothing prevents you from getting anything on the Internet. In fact, it's the opposite problem we have. There's a lot of illegal content that people are concerned about on the Internet.

There is no shortage of the ability to communicate on the Internet. That's not where our time needs to be focused. Rather than continue to fight these partisan battles, my hope is that we move on to things that are concrete issues with concrete solutions and there is bipartisan consensus around them. I just think it's a much more productive use of time to move past those issues.

Because as much as we try and talk and chew gum at the same time, we know from the past year we just don't. We get bogged down. So my hope is we move past it. If we don't, the members will disengage. I just don't know that it's the most productive use of their time.

MR. SEPULVEDA: First of all, there are a couple of different things being confused here. One, the question of reclassification is a question about regulatory authority. The question of the notice of proposed rulemaking as it relates to the open Internet is an application

of that authority. You could reclassify and not complete the notice on the open Internet for another period of time or whatever.

After the Comcast decision, Austin Schlick wrote a blog that made it clear that a whole series of issues in the National Broadband Plan were under threat as a function of the authority question within the Comcast decision. We need to engage and we need to come to some sort of agreement of what the proper regulatory structure is for this sector, what proper behavior is in this sector, how we can ensure that innovation is allowed at the core of the network and that innovation at the core of the network is not the innovation to destroy the ability to innovate at the edge of the network, so that there isn't a "Mother may I?" from producers at the edge of the network to network owners just as there shouldn't be a "Mother may I?" from network owners to government kind of situation.

Once we start talking a little bit more about what it is that concerns you, you get closer to what are the potential rules for ensuring that negative outcomes don't occur depending on your particular area of concern.

So again, my boss has long supported the idea, and has said so repeatedly, that the FCC has the authority to reclassify. They had the authority to classify. They have the authority to reclassify. If the Chairman of the FCC believes that under his responsibility to execute the 1996 Telecom Act he needs to reclassify, that the original classification was incorrect, then he has both a right and a duty to do so.

And then the question becomes: is that the proper regulatory structure for this sector? And if Congress doesn't believe it is, we should write a law to write a different regulatory structure. The idea proposed under the Waxman proposal was a rewriting of Title I of the Telecommunications Act. Some people have talked about creating a new Title VIII for

broadband services, which was also at one point considered by Mr. Gore and his team during the rewrite of the '96 Act.

We voted on this question in 2006 in the Commerce Committee. Came down to an 11-11 vote and it has been put aside. You can continue putting it aside, but it isn't going to go away. And until we just face that fundamental fact -- the fact that we need to deal with this question -- putting it aside continuously isn't going to work and it isn't going to give anyone any degree of certainty, not at the edge, not at the core, not in Congress.

MR. MAY: David, do we need to deal with the net neutrality question, as Danny asserts?

MR. QUINALTY: Sure. First, I just want to make one point. Danny said that the General Counsel to the FCC noted that the *Comcast v. FCC* decision threw into doubt the authority for a number of proposals in the National Broadband Plan. Unfortunately, despite numerous requests, the FCC has never actually identified what those proposals are that cannot get accomplished in light of the *Comcast v. FCC* case, with the exception of perhaps USF reform and they've implied net neutrality.

So I don't know what other parts of the National Broadband Plan can't be accomplished, literally because they won't tell us. In our reading, we haven't really come across many that the FCC can't do or the authority's clearly not there.

In terms of needing to regulate the space, I think Danny's right that there is a lot of ambiguity in the current regime. The *Comcast v. FCC* case certainly raised a lot of questions about that, but as Neil says, the Internet is open. It is working right now. Something that gets lost in this conversation is that the openness of the Internet itself, something that everyone says needs to be protected, is in itself its own best defense.

The openness on the Internet has resisted and beaten down every attempt to date by companies or individuals and even governments to restrict it, to close it off, to put constraints on it. I'm not saying that that is necessarily always going to be and forever will be the case that the openness will endure no matter what, but certainly I think as policymakers we have to be a little bit humble and recognize that the Internet's done a pretty darn good job of protecting itself, of staying open. That's the way it's designed. That's the way people use it. That is now a global phenomenon.

We need to really keep that in mind as we address the neutrality issues, that there haven't really been that many problems and that the Internet itself is extremely durable and resilient and will continue to be for the foreseeable future.

MR. MAY: Tim, I'll just put you on the spot first on this. We just finished talking about whether we need to do anything at all. Now I want to assume that there is going to be a piece of legislation -- whether to stop the FCC from going forward or just because there's a consensus that after the Comcast decision, with its authority called into question and reclassification being a problematic alternative, Congress should do something. Let's assume that it should adopt a piece of broadband legislation dealing with net neutrality and aside from some of the other issues.

You guys put something on the table. And I thought that had some positive elements. Number one, it had an expiration date, which I think could be useful in terms of just allowing the conversation to continue while something was put in place. It had a very strong tilt towards an adjudication model for resolving complaints rather than the FCC issuing a lot of general rulemakings and I think that's a positive thing.

But here's my question. One of the real problematic aspects of it was that the discrimination provision itself leaves in place the possibility that the FCC over-regulate. Over

history if you've watched the FCC a long time -- and this can happen under either administration -- there's a sort of bureaucratic imperative to over regulate. I'm bothered by the discrimination provision which basically would have prohibited, "unreasonable discrimination" on behalf of the Internet service providers.

But here's the further point I'd like to put on that. It seems to me almost inherently contradictory on the one hand to want to stop the Title II reclassification, which I think should be stopped, while on the other hand Title II has as one of its key components the very same provision that you would be enacting into law in that draft bill, a provision prohibiting "unreasonable discrimination." That's a key component of Title II.

So I'm puzzled by the contradiction. And by the way, when I had that conversation with Chairman Waxman that I mentioned before after he agreed to put off this thing, he said, "If there's any way at that session you guys can further this consensus and come a little closer, that would be a good thing to do." So I said "Okay, we're going to try and do that."

So that's what we're going to do. Could you see changing that discrimination provision or eliminating it in a way that didn't give the FCC that authority in retaining the other elements? And I've suggested some standards like a market power test and consumer harm that would be in there. But focus on that element and maybe that will lead to a discussion of whether there's any agreement on some components of that bill.

MR. POWDERLY: I can only address that in a couple of ways. But it's important to remember Danny's point that part of this goes to: what is the FCC's role? Traditionally, on some services it has been the unjust and unreasonable discrimination cop. This whole debate, as Danny pointed out, correctly, is about: what does the FCC do?

This bill, which was intended to be an interim measure, thus the expiration date, approached it from that perspective. The Commission would be there as a cop on the beat to address issues should they arise.

That was the standard that in the context of those negotiations that the folks agreed upon. And this is the standard that was supported by AT&T and by Verizon and by the cable industry, as well as CFA and CU. So I think that at that point in time, that is what everyone had agreed to.

Chairman Waxman said, again, that he's open to discussing these issues in the lame duck as we move forward and certainly you can continue to talk about it.

MR. MAY: We're just going to go down the line. Specifically, I'm just interested in hearing from you about this discrimination issue that troubles me -- whether that's how you feel about that one way or another, or whether it makes any difference to you. It's basically Title II put back in the bill.

MR. FRIED: As I opened my comments, we did not have enough time for me to get direction from the Republican members so I had to be very careful here. I do not have a Republican position that I can lay out here.

I can make two observations. Let's talk about where this came from. It came from Title II. Let's look where we were headed until the net neutrality debate really started. Under Chairman Hunt, Chairman Kenard, and Chairman Powell, we were eliminating the regulations under Title II. All of them were saying if there's no market problem, we are going to deregulate, right? CLEC's were not subject to the same requirements. Even though they were still subject to Title II, CLEC's were not subject to the same requirements as incumbents precisely because they did not have market power.

So even under Title II, before the net neutrality debate, the focus was: "Is there enough competition? Does anybody have market power? Is anybody abusing market power?" And with the answer on market power a "no," you did not apply regulations even under Title II. So if we want to make the announcement on Title II, let's remember where we were and talk about how we apply that going forward.

You mentioned market power. Randy, I think that is an appropriate place to start. Now, in the one place where we do have something on paper from Republicans, Mr. Stearns actually did introduce legislation and that's precisely where he focused. He said no regulation under net neutrality would apply unless an entity had market power and was abusing that power and there was harm to consumers.

Now, again, I do not have guidance from the Republicans at large, but at least that's where Mr. Stearns was comfortable starting and that is consistent with the way both Republican- and Democrat-led FCCs were even before the net neutrality fight started. So if we're going to have that conversation, I think that would be an appropriate place to start.

MR. MAY: Okay, Danny and then David, anything on this question?

MR. SEPULVEDA: Yes. In terms of Chairman Hunt and Chairman Kenard, both were part of the team that constructed the President's proposals going into the campaign and both of which supported, again, the general framework that Chairman Genachowski has been executing.

In terms of discrimination, this is a question about how networks operate. So should Comcast, Cablevision, or AT&T be able to favor one form of an edge provider versus another within the same market? If we are going to eliminate the provisions from any negotiated solution on this question that denies the ability to discriminate in an unjust fashion, then that provision will be taken advantage of.

People will execute on discrimination. Take a look at how the Internet has developed to date and the kind of competition that has taken place at the edge of the network. Take for example social networking. Facebook was not the first social network out. There were a whole series of social networks, such as Friendster, MySpace, and Tried.net, that all started around the same time and tried to achieve basically the same thing.

Can you imagine if there had been a Comcast/ Friendster agreement to favor Friendster over other social networks, given Comcast's market power? What would that have meant for the competition in the market for social networking? What would that have meant for innovation in the market for social networking?

At the end of the day, in a communications market that connects people from one end of the network to another end of the network -- that isn't a push market and isn't a market solely for consumption but a market for creation -- the question becomes: do we allow the people at the center of the network to pick who wins and loses at the edge of that network?

MR. MAY: Danny, let me ask you this, because maybe it's implicit in what you said. You said "given Comcast's market power." Now a lot of us we may have disagreements among us here about whether they do or do not have market power, but let's don't get into that now.

My question is, why wouldn't you be amendable to including in a bill a condition for FCC action on any complaint be a conclusion that the ISP has market power? Or to turn it around, as Neil said, and I think he's correct about this, it's long been the FCC's position that if you don't have market power -- what it referred to as non-dominant carrier -- that by definition they could not discriminate in a way that was harmful. Would you be amendable to that type of addition?

MR. SEPULVEDA: Again, we're not going to negotiate the rewrite of the Telecom Act here.

MR. MAY: Darn.

MR. SEPULVEDA: If you could have a reasonable conversation about what is *de minimis* market power -- that is to say, if there is some Internet service provider out there who should be able to pick winners and losers at the edge of the network and should be able to control access to his or her consumers for edge providers in a way that may determine whether or not that edge provider is successful, I would have to see a case, right?

At this point I don't see one. We just saw the FCC make a determination about the carriage of the Tennis Channel on Comcast networks. And that took two years, maybe longer. There are a series of outstanding program carriage questions on cable networks. The way you opened the question, implicit in that is that you don't believe Comcast has sufficient market power to make a determination.

MR. MAY: No, no, no, I didn't say that. That's not true. For purposes of what we're talking about here, without negotiating any solution to the whole thing, what I was asking about was a concept for the statute. From our perspective it would make sense to include a market power test. And it's the FCC that ultimately determines the answer. If you don't do that, basically you're saying that even if there would be agreement there's a competitive market, every provider, regardless of market power, is still under these old traditional common carrier regulations.

So I'm not trying to decide now whether there's market power, but trying to talk about the construct for the statute.

MR. SEPULVEDA: No, but it's an important question. And the answer to the question is obviously that given that nothing has been written, nothing has been agreed to,

everything is on the table. If we hadn't moved from an intramodal to an intermodal sort of competition framework and there were open networks, then you might have a different sort of argument. If there was a different competitive marketplace, you might have a different way to look at it and there might be some ideas around what kind of triggers would affect a look at the discrimination provision.

I can tell you right now that as the options for a wired connection at home for a significant number of households is one to two providers that it's going to be hard for Senator John Kerry to say "Look, this is a really highly competitive market and, therefore, we should allow players to act as they wish."

MR. MAY: Okay, thank you. So David?

MR. QUINALTY: Obviously the discrimination issue is the hardest one to address when it comes to broadband regulation. Most would agree that you wouldn't want a cable provider who also offers Internet to block YouTube so it can preference its own video offerings in sort of any competitive way. And there are antitrust laws that would block that. But that sort of activity presumably, for purposes of argument, is bad.

That's one type of discrimination. But the word "discrimination" has a lot of different meanings in different contexts. If we're talking about never treating any packet of information differently than any other or not providing some sort of preference to some company serving users or offering some sort of additional services that the end residential user wants, you prioritize, might be a little shortsighted.

I think of the Cisco TelePresence offering. To my understanding, most of these are business-to-business setups and they actually connect the businesses directly to their own backbone. The reason why is because they can't put it over the public Internet because the peering arrangements aren't such that their traffic for the Telepresence can be prioritized.

The prioritization technology exists. It's in the IP layers and all the various engineering things that I don't know much about. They can do it technically. But the peering arrangements between different networks aren't really set up for that. It could be if things were changed, but it can't. So they have to set up everything on their own network and build out those direct connections.

Now, if they wanted to do a residential Telepresence service for folks, it seems reasonable, at least to me, that if Cisco wanted to go to Comcast and say "Hey, these customers are going to want to pay more for this Telepresence offering; will you work with us to try to work out arrangements so that this offering can be the way it's supposed to be -- totally jitter free, lag free, high resolution, high speed, video conferencing communications?" And then if Comcast said, "That's not a bad idea, let's work with our engineers, see if we can set it up for the end user, that we can do that, and we'll work out peering arrangements and interconnection arrangements with other backbone, middle level providers so that we can implement this sort of prioritization framework that again does exist in the technical layers of the Internet," it seems like that shouldn't be that concerning.

Now, whether it's an exclusive arrangement or not is a whole other issue. Consider the notion that not every single packet's going to be treated with the exact same priority and that there may be some sort of arrangement that's allowable at the user's request whereby another company can come in and work with an edge provider or a last mile provider to work out these kinds of arrangements. These are the sorts of innovations, whether you think it's bad or good, that we need to make sure any legislative proposal and regulatory proposal has to consider. You can't just think of the abstract discrimination as bad and then go from there.

These are real world applications, real world innovations. Obviously the telemedicine example always comes up. The ones that we know, and especially the ones we

don't know, have to be considered in a really hands-on way. Unfortunately, we haven't really had enough time, in Congress, I think most of my colleagues would agree, to work through those very, very fine, difficult, challenging points to find consensus on that. Until we do, there won't be consensus.

MR. MAY: Now, we're going to turn to the audience.

Scott?

MR. CLELAND: Yes, Scott Cleland, NetCompetition.org. With the basic assumption that there isn't any pressing, real problem right now to solve, what's the right order of things on Title II? Should the Congress be giving the FCC direction and deadlines, or should the FCC be giving the Congress direction and deadlines?

MR. QUINALTY: As I said earlier, I don't think it's necessarily all that helpful to have Congress with a gun pointed to its head in terms of negotiating these very delicate, sensitive issues. And given that a majority of Congress in a bipartisan fashion has weighed in on the Title II issue, it does seem more appropriate for Congress to address these issues.

In terms of no pressing issue to address, the *Comcast v. FCC* decision certainly did raise questions that need to be addressed. And I think everyone on this panel -- and please correct me if I'm wrong -- would agree that the FCC's authority is somewhat in question. That's why they've taken the effort to go down the Title II path to solve and to define that authority.

Many Republicans, if not most, would say that that's not the best way to resolve that authority issue.

MR. MOTLEY: Seton Motley -- President of Less Government, and I'm with StopNetRegulation.org. If they reclassify, that preempts any legislation. And my question is directed mainly at Danny because he specifically said that John Kerry thought that the FCC had the authority to reclassify. But he signed onto a letter in '98. And I'm going to read from the

letter. It was sent to the chairman of the FCC in '98: "Nothing in the '96 Telecommunications Act or its legislative history suggests that Congress intended to alter the current classification of Internet and other information services or to expand traditional telephone regulation to new and advanced services."

So he clearly thought in '98 that there was no authority for the FCC to reclassify the Internet to Title II. And I'm wondering what changed. I'd like to direct that to Tim, too, because Chairman Waxman has said that the reclassification path should be taken. But I'm just wondering what changed for Senator Kerry in the intervening 12 years.

MR. SEPULVEDA: That was a Spencer Abraham letter in 1998 and the question was on a decision before the FCC as to whether or not voiceover Internet protocol services should be assessed for universal service fund purposes. And the specific question was whether or not voiceover Internet protocol service should be classified as a telecommunications service for the purposes of its assessment for universal service funds.

At the time, AT&T wrote in a comment asking for it to be classified as a telecommunications service so it could be assessed for universal service fund purposes. The question before the agency at the time was whether or not this completely new and competitive service should be classified as telecommunication services and what affect that would have on competition.

At the time, the Senator thought -- and he continues to believe -- that a pure information service, like a voiceover Internet protocol service that was not the same as traditional telephone service or connected to the Internet in that way and was a nascent service -- should not have been classified as a telecommunication service.

Now, since then we have had a much longer and more contentious debate about whether or not you can separate information services from the transmission services over which

they are carried. That question was posed both to the Supreme Court and it was determined that the classification decision was a function of the FCC.

The question becomes: was that classification decision correct? And could it have been correct at the time and not correct today? Those are legitimate questions for a regulatory agency to ask and answer. The Senator's position is completely consistent, as is AT&T's. So at the end of the day, taking a letter from 1998 wholly out of context for the purposes of this debate is exactly the kind of debate we don't need to have because it doesn't answer any questions.

My boss has been extremely consistent in his position on this. He has been extremely vocal on the role of the Federal Communications Commission in its oversight over communication networks and that debate will continue.

MR. MAY: Adam Bender's up at the mic. As you know, most of you know, he's one of the deans of the communications trade press. Adam?

MR. BENDER: Thanks for the introduction. Neil brought up before the question of overseeing the broadband stimulus program and how important that would be. But up to this point, Congress hasn't provided NTIA any money for oversight.

So my question: is that something that Congress will be addressing soon, perhaps this year? How do you see that playing out?

MR. FRIED: I can't talk to the calendar in the lame duck, being in the minority, but it will certainly be an ongoing issue. Whether or not there is specific funding provided NTIA, I am almost certain that Congress, in a variety of capacities, will be continuing oversight.

These grants are multi-year grants so there will be continued congressional oversight over how that money is being used to make sure there isn't waste, fraud and abuse at the outset, and also just to see what the results were. This is some grand experiment. We've now

allocated \$7 billion, which is about the amount we spend per year on universal service for broadband.

We're going to want to see: what did we get for that money? Did it work? Did it not? And what lessons do we learn from that? As to what the legislative calendar will be in a lame duck, that I can't answer.

MR. BENDER: Does your office believe there can be effective oversight without giving a bit more money?

MR. FRIED: I think we are concerned that the stimulus bill was written in haste and we're going to be interested in making sure that money gets better spent in the future.

MR. SEPULVEDA: Senator Kerry does support ensuring that the NTIA has sufficient funds to conduct the necessary oversight, provide guidance to recipients of grants, ensure that they go out to the field, and ensure that that money is being properly spent and that we have a way to measure outcomes.

It was clearly an oversight in the way that the stimulus grant funding was written to not provide for continuing funds after the spending of the money for the purposes of distribution of grants. We will work, hopefully cooperatively, with the Republican side to ensure that what is a relatively small sum of money is put into place to ensure that a very large sum of money is properly administered.

We welcome a look over time at the results from the broadband stimulus grants. There are going to be thousands of anchor institutions and hundreds of thousands of families and communities that are going to be receiving service that otherwise would not have. And it's part of a general concern and an active, proactive effort by this administration and a Democratic Congress to ensure that not just people who are unserved or served, but that people, including children in urban communities, who don't have access to service at home have access to service

at public institutions, have access to service at public computing centers and have the educational opportunities that kids in other parts of the city or other parts outside the city already have.

MR. KHANNA: My name is Derek Khanna. I'm with Senator Scott Brown's office and my question is directed towards Danny and Tim. You guys have talked about the importance of net neutrality and David brought up a very good example of discrimination being to the benefit to the end consumer.

So I wanted to put forward two hypotheticals to you and see how you thought about those forms of discrimination. One would be perhaps a business idea for an ISP to offer Internet connection for conservative-minded households who don't want their children to access pornography, gambling, *et cetera*, and effectively have a white list of what the Internet would be. That would be a form of discrimination that would probably be prohibited with the current regulations. But this is a new product on the table that the consumer probably should have access to if there was a need.

The second proposal is in regard to Pat Leahy's legislation proposed about two weeks ago to shut down websites like the Pirate Bay and other BitTorrent services. If you gave Comcast and Verizon the ability to not offer those websites, they'd probably do so unilaterally, so perhaps a blunt object of actually going through a court to shut down those websites would be unnecessary by giving ISPs the option to simply not service Torrent or other websites of that nature.

So would those be legitimate applications of discriminatory policy?

MR. POWDERLY: There are no current regulations, so your first example wouldn't be prohibited and nothing stops Comcast from blocking anything right now. The question of the discrimination standard -- and I think actually Q talked about it pretty eloquently

-- is like an ongoing, evolving system right now. Folks aren't exactly clear how it's going to look in the future.

The standard that came out in this discussion draft or draft or proposal was the one that carriers are most comfortable with, "unjust and unreasonable." And this "managed services" bucket that folks have talked about is entirely unspoken to in this bill.

So it's a recognition that no one, least of all us, is ready to cast in stone how everything is going to look going forward.

MR. QUINALTY: Just to clarify real quickly. In my earlier Cisco TelePresence example, I wasn't definitely saying that it's a positive thing for consumers if there were discrimination in that matter, just that it may be something that benefits consumers that policymakers have to consider as they look at the issue of discrimination.

MR. BARBAGALLO: Hi, Paul Barbagallo with BNA. Question for the whole panel. What are your hopes and expectations for spectrum-incentive option legislation, either in the lame duck or in the next Congress, and what are some obstacles to ultimate passage?

Neil, you mentioned there's a lot of bipartisan consensus around spectrum issues. What might slow that bill down?

MR. FRIED: I don't think there's time in the lame duck. But there is bipartisan consensus. And if you think about it, it's really a lot like what we did on DTV. The idea is to clear up spectrum, preferably to auction it to make sure it goes to the most efficient user, which will not only get more spectrum out for broadband but raise substantial sums for the federal treasury that would be welcome right now.

The other thing that there is consensus on is that it needs to be voluntary. That will not be easy to do. There are two sides to that. One is: what spectrum holders are prepared to relinquish their spectrum? But that's really only half the question, because in order for this to

be the most efficient and productive, you actually need channels nationwide cleared. Since that depends on the channels that any particular spectrum holder is on and willing to relinquish, it's unlikely that you'll have the same channel cleared from the start nationwide.

You'll then have to find some presumably voluntary process by which other spectrum holders might then also move. And the question is: how do you do that? There's a variety of ways. It could be done very much like the DTV transition was done itself, where there were successive rounds of channel selections where people chose where they wanted to end up at the final process on their digital allocation.

You could do something similar. The FCC could ask for volunteers on who wants to give up their channel. Once they've identified those channels, they could then ask for volunteers in other markets on those same channels and see if they can actually get a group of voluntary license holders willing to either give up or move to clear a whole channel.

Another way it might be done is within the option process itself. You could actually see whether not only would people be willing to give up their channel for a share of proceeds, but would others be willing to relocate in exchange for a share of spectrum proceeds? There's a whole bunch of ways to do that. They are all very complicated.

The good news is, I think, there is common will to try and get this done. But it will not be easy. It's something I think we should be starting to think about, and we are, thankfully. It's something we need to focus on in earnest very quickly.

MR. SEPULVEDA: Spectrum reform -- looking at spectrum policy and ensuring the efficient and effective use of spectrum and unleashing as much as possible -- is my boss's top priority for the next Congress. From our office's perspective, we've been working closely with Ms. Snowe's office and have constructed a proposal that has some backing from both industry and some consumer groups.

But these are very complex questions. The very manner by which you either free up spectrum or reassess it or reallocate it or ensure it's shared in a different way requires a different set of incentives. The biggest obstacle to success in spectrum reform is the complexity of the question, the technicality of it. But there probably isn't anything we can do. Or at least the consensus that we've seen from talking to people is that there's probably nothing we can do that would have a stronger effect on innovation, driving down costs, increasing competition, ensuring that there's greater participation in the market. There are really not a lot of downsides to the more efficient use of spectrum.

We need as a Congress to wrap around the technicalities of it and ensure that we have some kind of cohesive arrangement by which holders of current licenses are treated fairly and with respect and that the incentives are put into place to ensure that that can be done in a way that's constructive.

MR. QUINALTY: In addition to the mechanical and policy considerations that Danny and Neil bring up over incentive auctions, there are also the fiscal considerations. As of right now, I haven't heard any suggestions or projections over how much money would be raised for an incentive auction, and how much, if any, would be returned back to the treasury for whatever purpose. Presumably Congress would be the one to determine what that share is.

In this fiscal environment, there's no question that found pots of money, in the tens of billions of dollars potentially, could well be an attractive target for folks who have other fiscal priorities, whether it's paying down the debt or other purposes.

I don't mean to speak for Chairman Rockefeller. But he has a bill before the Committee currently that would use the proceeds from an incentive auction to pay for a public safety broadband network build-out, as well as NextGen aviation systems, smart grid technology, and high speed rail. That's just one proposal on the table. We're going to have to address the

appropriations issue before any legislation can really go anywhere. I think it will be an issue of a lot of interest to a lot of folks who might not be as engaged on the sort of spectrum issue itself.

MR. POWDERLY: Just briefly, the only thing I think I would add to what everybody said was the role of the D-Block and the final disposition of the D-Block, and then the role of public safety in this whole process. It will be interesting to see how that plays out.

MR. SEPULVEDA: I just wanted to add one thing to that. There is an administration report. I think it might be about a week overdue. But it will be coming out relatively soon with an idea for what spectrum bands they are looking to free up and hopefully some greater elaboration on their ideas around incentive auctions. They've spoken to that to some degree as well.

MR. FRIED: Actually, Tim reminded me, too, that we actually have current spectrum. AWS spectrum is available now. Under current law, the D-Block is supposed to be auctioned. So there actually is spectrum available now that the FCC could be auctioning. So that also plays into the mix.

MR. MAY: Okay, thank you. David?

SPEAKER: (Off microphone) Obviously, you all can still act in lame duck on some sort of bill relating to net neutrality, but just assume for a minute that you aren't going to. I'd love to hear from the four panelists what your expectations, predictions, hunches or unscientific wild guesses are as to what the Chairman of the FCC will do if you are not able to pass legislation and what you will do regarding net neutrality and reclassification.

MR. POWDERLY: I'm going first because it's easier on that one. But I think no matter what the FCC does, they're going to get criticized roundly from somewhere.

MR. MAY: Can he quote you on that?

MR. POWDERLY: No.

MR. MAY: He probably will.

MR. QUINALTY: Again, as I said earlier, I don't think it would be a good idea for the FCC to move forward one way or the other. I believe most of the Republican members of the Committee have said as much.

MR. SEPULVEDA: I can't predict what the Chairman is going to decide to do. What I would like to put on the table is the idea of whatever he decides to do -- if he decides to reclassify, decides not to reclassify, decides to punt for six months, whatever he decides to do -- that we as a community respond to that in a thoughtful way. It isn't going to be the end of the Internet if he reclassifies and it also isn't going to be the end of Internet freedom if he doesn't.

This is going to be a continuing conversation and I think that we can come together around a consensus position and I hope we're able to do that regardless of what he does. He has a responsibility and that's to execute the law. And he has a responsibility to execute the law in the way that he believes is best for innovation in the sector that he oversees.

We are open to hearing his arguments for whatever decision he makes. And again, we have an immense amount of faith in him. We have an immense amount of faith in the agency and we believe that this is a critical sector. We have disagreements about the best way to regulate this sector, but we do not have disagreements about the importance of this sector to the economy. Nor do we have disagreements about the importance of innovation to the economy.

We have different ideas about what the proper regulatory structure is to encourage the continued growth and development of this particular sector. I hope, again, that we can progress in a way that to some degree reflects the conversation that the FCC Commissioners themselves are having, which has been a fairly restrained conversation relative to the advocate community in general, of which they have every right and role in their advocacy.

What I'm hoping is that we can come together around some sort of compromise solution. I want to commend Chairman Waxman and his staff for what was really yeoman's work. On the Republican side, they've sat down in good faith with us over the last couple of months, and at some point we are going to have to come to sort of resolution and hopefully the process will allow that to occur.

MR. EDWIN: Jerry Edwin (ph) with the Edwin Group. Maybe since we've moved a little ways off of directly speaking about net neutrality, move into another semi-stalled subject, if we may. What do the panelists think is the prospect of anything happening to resolve the D-Block in view of the conflict between the Rockefeller and Waxman approaches and the fact the FCC is standing still on this? Will anything happen and if so, when and how on the D-Block?

MR. MAY: Okay, that's a good question to pose. Panelists?

MR. FRIED: Under current law the FCC is actually required to auction it. My understanding is that they're working on an NPRM, so in the absence of legislation, I think it gets auctioned and there is no money or spectrum for public safety.

There was, and I think there still is, consensus at least on the House side, in House Commerce, that the best thing we could do is auction it and use the proceeds to build out the network. My sense is that conversation will continue and hopefully we can find the optimal result.

MR. MAY: Tim?

MR. POWDERLY: Yeah, I think Neil's right. The House has a position there and Senator Rockefeller came out with something that differed. But I can say that Chairman Waxman's committed to finding a successful way forward on this and will just continue to do so.

MR. SEPULVEDA: Senator Kerry hasn't taken a position on auctioning versus the Rockefeller proposal. But Mr. Rockefeller had a hearing on the subject. He has put together the Public Safety Committee. The Public Safety Committee has come to talk to Chairman Kerry and to speak to us about their particular concerns with the proposal moving forward under the auction and FCC process.

We're going to continue working with Mr. Rockefeller to see what we can do in terms of ensuring the Public Safety Committee feels that they have what they need in order to be effective in a situation of crisis. So again, the D-Block question is still outstanding. I don't know if we'll see resolution on it anytime before the New Year.

It is true, however, that in the absence of legislation, the law is what the law is and the Chairman will have to auction.

MR. MAY: Okay, did you want to say something?

MR. QUINALTY: For Senator Hutchison, you can refer to her comments at the hearing that the Senate Commerce recently had.

MR. MAY: I'll ask the last question, just to be somewhat provocative, and then we'll have wrapped it up. I'm going to ask Danny this question because you just said the law is what the law is. A couple of times today during your presentations, you've said that if Congress doesn't act, then it's up to Chairman Genachowski or the FCC to "execute the law."

I'm just not sure what you mean by that and I'm puzzled by it. We can all envision specific provisions where Congress says "adopt this rule within 80 days embodying these things" and so forth and so on. Or explicitly in this case with the proposal to adopt net neutrality restrictions, originally the FCC said it was going to do that under ancillary authority. That's now in question and now he's proposing affirmatively to reverse a Commission decision and classify these Internet services differently than the previous Commission did.

So when you've used that term "execute the law" a couple times, I'm just not sure what provision of the law he's obligated to execute in order to adopt these net neutrality provisions. And we'll make that the last question. You can answer that and anyone else can add to it.

MR. SEPULVEDA: My point is that there's been an immense amount of discussion about whether or not the FCC has the authority to legislate. What I would argue is that reclassifying is not an act of legislation, the original classification was an act of a regulatory agency, and the ability to reclassify is within their authority. And it's within their authority and capacity under the 1996 Act, as Austin Schlick and others have explained, and as the case on the debate over the Brand X Decision, which went all the way to the Supreme Court, questioned. And the Court decided that they have the right to classify. I don't know if that means that they also have the right to reclassify, but there's a strong school of thought that that is what that means.

There's a lot that's been said about whether or not reclassification would be an overreach by the agency. I don't believe it is. The vast majority of people on our side of the aisle don't believe it is. That doesn't in and of itself make it the right thing to do.

Then the question becomes what is the Chairman's logic for whatever action he takes going forward? And again, he has taken a very methodical and responsible approach -- too slow for some people -- to hearing from all sides and has engaged in a productive discussion to reach a point where he will be able to initiate some sort of finding on this question.

And we will have to go from there. But again, I would hope that we can all move forward in good faith and get to a place where we have a bipartisan consensus on these issues. It is important that we not flip from President to President or FCC Chair to FCC Chair as to what

the relationship between the agency and the sector is, and what the relationship between government and the delivery of this service is.

MR. MAY: Thank you very much. So this is really the wrap up if anyone else has anything to say to wrap up.

MR. FRIED: I think Danny hit it on the head. What is the underlining logic that would support reclassification? There is still the Administrative Procedure Act, and so the FCC cannot be arbitrary and capricious in its decisionmaking. So it would have to give some reason for changing its precedent for reclassifying. The greatest source of frustration is that the whole endeavor just seems so pretextual, right?

There was no talk of this until the Comcast decision. As David points out, the FCC has yet to fully answer Senator Hutchison's question about what it is the FCC cannot do. And lastly, the General Counsel has himself confessed that reclassification doesn't accomplish what they're trying to accomplish because they would still then have to use Title I to actually impose network neutrality regulations, because getting to the access doesn't solve the thing they're trying to solve.

This is all really just a Rube Goldberg machine to try and create network neutrality. That's the biggest frustration. It's not clear to me that that is not arbitrary and capricious. And that would be the question: can the FCC actually justify its decision to stray from precedent? What is the good sound, reasoned basis, either in fact or law, for changing that precedent?

MR. MAY: Okay, Dr. Q.

MR. QUINALTY: I agree with Neil's comments. As distracting as net neutrality has been over the last several years in regards to almost every other telecommunications policy discussion, Title II classification is an elephant in the room that you can't ignore. It will probably

dominate the top of the conversation for anything we do going forward, whether it be spectrum or virtually anything else on these issues.

The last thing we need to do is to keep that distraction there. It keeps us from doing the good work that our bosses want to focus on when it comes to moving forward in the 21st Century with a flexible and forward looking communications policy.

MR. MAY: Tim, you had the first word and here you go, you have the last word as well.

MR. POWDERLY: I respectfully disagree that this move to reclassify is some way just to get to net neutrality. I think that's not true. I think it's the FCC staring at a statute that is in need of an update and a market where there are almost no telecom services anymore. So they've got virtually no statutory authority to act and to protect consumers. And for the Broadband Plan, at a minimum, the USF provision would suffer under legal challenge.

Then there are privacy issues and a host of other issues that the FCC is facing. So they looked at that and said: "We can do nothing or we can do this reclassification in the lightest way we can, the same way the wireless industry frankly looks. And that's how we're going to do it."

I disagree that the net neutrality is the driver on this. Having said that, I think that it will take up a lot of attention. But the spectrum issues in the D-Block and some other issues are going to get a lot of attention next Congress as well.

MR. MAY: I just want to end with this thought. We think at the Free State Foundation that all of our events, in our view at least, are great events, terrific events. Hopefully, some of you share that. But I have to say that this particular event today really was terrific, highly educational, and maybe even useful in helping to clarify issues.

So I thought it was terrific and it's a great tribute to these staffers. In my view they're terrific public servants and I appreciate all of you coming here today and join me in thanking them for their presentations.

(Applause)

(Whereupon, at 1:44 p.m., the meeting was adjourned.)

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