



THE FREE STATE FOUNDATION

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"The FCC and the Rule of Law"

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“A Fireside Chat with the FCC Commissioners”

MODERATOR:

- **RANDOLPH J. MAY** – Co-Author and President, The Free State Foundation

PARTICIPANTS:

- **MIGNON CLYBURN** – FCC Commissioner
- **MICHAEL O'RIELLY** – FCC Commissioner

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

PROCEEDINGS

MR. MAY: I'm really excited to have both Commissioner Clyburn and Commissioner O'Rielly back at the Free State Foundation Conference. Each one of them has participated before and I think in both cases we've had a lunchtime conversation, and that was fun, right?

MS. CLYBURN: Very much.

MR. MAY: It was fun.

MS. CLYBURN: Very much so.

MR. MAY: And so this should be twice as much fun, right? I think we'll have twice as much fun.

MS. CLYBURN: If you say so.

(Laughter.)

MR. MAY: I do. It'll be fun.

MS. CLYBURN: Where's the fire?

MR. MAY: You took those words out of my mouth. Now, this is not fair.

MS. CLYBURN: Oh no, I promise I didn't.

MR. MAY: Look, that's a good question because here's what I've written down in my notes, believe it or not, and I don't think Commissioner Clyburn looked. I said I know this was billed in our promotional materials as a fireside chat. We're definitely going to chat, but as you can see, there's no fire. I'm hoping that Travis LeBlanc, the FCC's rather active enforcement chief, doesn't come after me for uttering a half-truth here.

(Laughter.)

MR. MAY: I'm going to count on you for that.

MS. CLYBURN: I've just got a feeling when it's all over, even if I don't see the fire, I'll probably feel the fire.

MR. MAY: Okay.

MS. CLYBURN: And that's a song those of you who know it, yeah.

MR. MAY: "Light My Fire" or something like that. Well, they're probably a bunch of them. Again, thanks for being here.

We're going to get started right now. I'm going to try and save just a couple minutes as we did in the first session at the end for questions. But to get started, I wanted to ask this. Each of you has been on the Commission now for quite a while. I know Commissioner Clyburn for a longer period. I want to ask you, if I might, how serving as a commissioner differs from the way that you imagined it would be before you actually assumed office. There must've been some surprises. Just tell us, if you could, the one or two ways that you think it differs, please.

MS. CLYBURN: I'll let the junior go first.

MR. O'RIELLY: Oh, no. Please, please, please.

(Laughter.)

MR. MAY: This is going to be some type of act, I can tell.

MS. CLYBURN: I know. For me, I came from the state. I spent 11 years as a state regulator and so I had a certain feel for regulation in a smaller pond, of course. But I had a mindset. At most state commissions, you have evidentiary hearings, which I found fabulous because you could hear everybody. It's almost like putting on a case. You can have everybody's viewpoints being aired at one time.

The challenge for me coming up here, and it remains a challenge, is that that is not necessarily the case in terms of access, in terms of opportunities, in terms of those who might have opposing viewpoints having the capacity to express themselves. So sometimes you have to dig a little deeper in order to find a balance or, if you want, a counter point of view.

For me, just listening to your question, that has been a part of the challenge. It was a little bit of a surprise because when I was speaking to people in this space, I was, like, what? If we don't have evidentiary hearings, how do I find out? What do I do in terms of point and counterpoint? And they say: you do the very best that you can.

So I don't know if you know this. And some do. I spent the first 30 days of my service up here not taking any meetings with any CEOs. So I missed a lot of CEOs in our first 30 days when they come in and try to get to know you. I met with staff. I met with public interest groups. I met with those who do not have, oftentimes, the ability to come up on a regular basis. And that was my baseline, where I set things. So that's the biggest part of the challenge or surprise for me.

MR. MAY: After those 30 days were up and you started meeting with the CEOs, I bet you wish it had been 60 or 90 days, right, that you had taken probably?

(Laughter.)

MS. CLYBURN: Well, just in case there are a couple of CEOs that are still in place, I won't answer that question.

MR. MAY: Hey, listen, I didn't really do a formal introduction of the two Commissioners, but they know you and it's in the brochure. So I'm just going to say this. Commissioner Clyburn did have the state PSC experience, which she alluded to,

and you've got her biography. And Commissioner O'Rielly, of course, had extensive experience on the Hill in senior positions.

So, Commissioner O'Rielly, can you answer that question about surprise?

MR. O'RIELLY: Sure. So I know we'll get into some of the process issues later on, so I'll save an answer for there.

Probably two things that come to mind. One piggybacks off my colleague's good comments. And that is, I found and still find that the information I was able to get on Capitol Hill, in terms of what people actually would tell me, was more fulsome than I get at the Commission. I think there's a worry about what has to be disclosed in *ex partes*. So you can actually delve into things more as a staffer and have more in-depth conversations, in my experience on Capitol Hill issues. You could actually solicit ideas from folks without the worry of that idea being exposed to the entire world and being attributed to somebody. Some of those things just make the operations challenging.

The second, and it's maybe just an old-time habit that has since changed and I don't know the answer, but the way it was always explained to me in my days in doing FCC oversight on Capitol Hill was that while all five commissioners couldn't sit down, and three of them couldn't sit because of the Sunshine Law, that the staffs did all sit down at once. And the staffs got together – whether it was weekly or biweekly – and really tried to hash out issues and tried to work on through some problems. And staff does meet. I think it's biweekly. But it is not for that purpose. And it doesn't actually get to what I think people envisioned in the old days, how it was explained to me in the olden days, and how things worked in terms of “How do you take problems off the table?” The five staffs don't get together regularly to do that and that's just a change that

I suspected coming in.

MR. MAY: Just to follow-up on that, Commissioner, when I was at the Commission three or so decades ago and I think after that, at least at different times, there was a sense that the staff was actually available. I'm talking about the heads of the bureaus and so forth. They were available to and worked for all the commissioners and so that was a useful way to understand things. Is that still true with the staffs?

MR. O'RIELLY: Yes, the bureau chiefs are available. They're gracious to give time to me and I suspect to the other commissioners as well. I meet with them regularly. Sometimes our schedules conflict, so we'll change up the dates, but I do meet with them regularly. There's only so much they're going to say and they're professional about it. I respect the obligations that they have. They've been picked by the Chairman, so I respect that. But they try to share as much as they can and try to explain things as best they can. So I do meet with them and find that somewhat valuable, yeah.

MR. MAY: Okay. Almost everyone in the room here knows that there's been a lot written in recent months or maybe the last couple years the increased number of 3-2 votes on a partisan basis. I know there are an awful lot of items that are adopted by the Commission that are done on 5-0 votes and I appreciate that. But there have been some studies done which show there's an increased number of divided votes on important items. Along with that, there are discussions about the collegiality among the commissioners and what that's like. So this is just a great time when we're all sitting here together and a bunch of friends in the room, just a few friends.

I want to ask you really how you would describe the collegiality quotient among the commissioners. One reason I do this is that I've devoted a lot of time to the administrative law field aside from communications law. Of course, one of the things

that administrative law scholars always talk about with respect to the multi-member of commissions – and there's a lot of literature on this – is that if there is a higher degree of collegiality, then, in general, you get sounder decisions.

Now the Sunshine Act has had some effect here, which I appreciate and I've been an advocate for changing that for a long time. Anyway, I want to ask you about the number of divided votes, what you might want to say about that and collegiality at the Commission.

MS. CLYBURN: I'm trying to be nice and let him go.

MR. O'RIELLY: Oh, I'll go. Sure.

MR. MAY: See, they're very collegial, as you can tell.

MR. O'RIELLY: No.

MS. CLYBURN: At least on stage.

MR. O'RIELLY: I believe and hopefully, I think it's true, I get along with my colleagues very well on a personal level. Commissioner Clyburn and I worked together on a number of issues and I have a great deal of respect for her work and so I do get along with my colleagues. I don't know about whether the rest of my colleagues get along with each other, but I think that I have a good relationship with them.

So I think the personal relationships are good, are fine, and that's healthy. But there have been an increased number of 3-2 votes. That is, at least, as you highlight some of the studies. I think it's fair to say that it reflects a couple different things. One is the agenda the Chairman has put forward, which I have some difficulty with a number of different pieces, and then also the process that underlines those items, which I too have articulated problems with going forward. That increases the tension level.

I try to vote on an issue and set it aside and not let it color the next issue

that comes forward because I don't know where the particular lines may draw on the next issue. So I try to set things aside. Sometimes it can be more difficult than others, but you do the best you can.

MR. MAY: What would you add, Commissioner Clyburn?

MS. CLYBURN: Well, on that front, I look at my role as a commissioner as a continuum. It's hard for me to disconnect from when I was sworn in '98. When I was sworn in, in '98 as a state commissioner, I have to say those 11 years are probably among the best in terms of my professional life. Because my joke about NARUC, which is our association of state regulators, was that there's no politics when it comes to electrons. And so I could not tell the party affiliation of some good regulatory friends. I can't say that's the case right now. I'm going to be honest with you.

I think the floor has gotten more deeply divided from a partisan standpoint. It may or may not be reflective of the entire nation or the Capitol Hill experience, but I've seen shifts in the last couple of years. Personally, I'm not as comfortable. I'm very open about that. But professionally, I do every day rise above it and do my best to serve the American people and try to bring about consensus. At the end of the day, whether I'm as happy as I was 10 years ago, is irrelevant. What's relevant here is good policy.

MR. MAY: Okay. Well, this next question follows a bit from that discussion in a natural way. It's about process reform because the process that you use or the one that prevails, to me at least in institutions I've been involved with, often has something to do with the degree of collegiality.

So I want to ask this question. If you were chairman of the FCC -- and, by the way, Commissioner Clyburn was Acting Chair of the FCC for many months, and at

least to my recollection, I seem to recall things running pretty well there and a successful tenure. -

MS. CLYBURN: Thank you very much. I'll use you as a reference after.

(Laughter.)

MR. O'RIELLY: Not sure that's going to help you.

MR. MAY: I'm always here for you.

MS. CLYBURN: Thank you.

MR. MAY: Look, what I want to do is ask: What is the one change in which the way the FCC conducts its business that you would implement if you could do it without congressional action? And I know you've each talked about this in different places, but talk about it here with our group. I may ask you about congressional action later, but try and focus specifically and succinctly on one change that you would make.

MS. CLYBURN: I was going to say age before beauty, but I'd get both, right?

(Laughter.)

MR. MAY: I'll tell you what, we'll keep alternating to be fair. Why don't you take this?

MS. CLYBURN: The one thing internally that I am an advocate for is owning your own edits. We have an item circulating. There's been more than one occasion I wonder where an edit came from and got no answer. I think we need transparency internally and externally. So the one thing that you will hear me speak about is that if you want the edit, own up to it and get three votes for it.

MR. O'RIELLY: So I love that change. I endorse that. I think that's a great idea. I haven't spoken about that yet.

I've put probably about 15 ideas on the table.

MR. MAY: You can do two if you want.

MR. O'RIELLY: No, I'll pick one. I know it's not winning the day as of yet. But I believe that making the documents available, certainly for the items that go on the open meeting, would change our *ex parte* conversations and we would have a more thoughtful dialogue without disrupting them. I have no interest in disrupting our internal deliberations, which are only so much depending on the item. So that part, I think, can be accomplished. We could actually have a more fulsome discussion from every interested party on a particular topic.

One of the problems we have today is that the people who are the insiders, those who may have worked at the Commission a certain time, actually have a better chance of knowing what's going on with an item than the American people. That, to me, is problematic. The American people should have the same information as anyone in D.C. and shouldn't have to hire their own lobbyist to figure out what's going to happen between an NPRM and the final order.

So I believe we should make the document available and then let people have a fulsome discussion about the particulars.

I'm completely comfortable owning any changes that are made. I think that we can do this. In the past, the Chairman has argued that this would violate the APA or violate FOIA. There's a bunch of different things that have come forward and I've walked through those different arguments and they just aren't true. He doesn't have any interest in doing this and I think that's problematic.

MS. CLYBURN: I mean, we had an interesting conversation about it. And those of you who know me, I'm not trying to sound nasal sexy here. I have cherry

blossom fever is what I call it.

(Laughter.)

MS. CLYBURN: So I'm with you. So I'm sounding a little bit more based than my usual.

You know, when we talked yesterday, this is one of the things I pointed out. It's so easy to point out some of the things that are flawed. And I think we should do that because, again, we should always attempt to get better. But when you go around the world and you say, "FCC people stand up and take notice" – why? Because they know that we have a process that's among the most inclusive in the world. Can it get better? Yes. Will it get better? Yes.

And when you have a notice of any type, an inquiry of any type, it doesn't happen in a vacuum. Parties, individuals, or people out there say: "We've got an issue that we think we need to address." And that is how all of this is formed and there are so many places along that pendulum that you can weigh in that make it interactive.

So I hear what you're saying. I understand the frustration. Believe me, there are certain items that you know I care about that I would love to be able to read chapter and verse. But there's nothing preventing me from talking about the high-level principles and objectives and items – any item – and get feedback from parties. Nothing prevents me from doing that.

MR. MAY: I had this dream while Commissioner O'Rielly was going to talk, that you were just going to essentially say you were sympathetic to that point and that you two are going to march back in to Chairman Wheeler's office --

MS. CLYBURN: Uh-huh.

MR. MAY: -- you know, and say --

MS. CLYBURN: Well, keep dreaming. You know, keep hope alive, all of those things.

(Laughter.)

MS. CLYBURN: You know, just keep on. You might have to alter your expectations on some things, but just keep moving.

MR. O'RIELLY: Well, I endorsed her idea, so maybe we can march in later on.

MS. CLYBURN: So we'll endorse. You know what, you have a beautiful child. Can we cosign that? Here we go. Agreement on stage.

MR. O'RIELLY: I could've used you at three in the morning.

(Laughter.)

MS. CLYBURN: I don't change diapers.

MR. MAY: Well, on that note about changing diapers, let's move on now.

MR. O'RIELLY: Oh, that's a segue, huh?

MR. MAY: Yeah. So you may have been here earlier when Congressman Blackburn was talking, but I pointed out initially that the theme for this year's conference is "The FCC and the Rule of Law." I basically said that all of these issues that we're going to be talking about can and are and should be discussed as matters of policy. But it's of course true that they also raise questions about the legal authority of the Commission and the rule of law.

So here's the question. In the context of your job as an FCC commissioner, how do you define the rule of law and how do you think about conforming your actions to your understanding of the rule of law?

MR. O'RIELLY: Okay. Is that to me?

MR. MAY: Eventually it's going to be to both, but you can go.

MR. O'RIELLY: All right. I'll start. So some may say I'm conflating a couple issues, but to me the rule of law starts with faithfully understanding and interpreting a congressional statute, and from that flows fairly and non-biasedly implementing and executing and enforcing those rules that flow from the statute. That's my definition. That's what I try to do on a daily basis.

I happen to have experience from my previous life in terms of what I believe the statute means in a number of different places. Certainly not the '34 Act stuff, but some of the stuff that has come more recently. And I try to articulate that as we go forward.

MS. CLYBURN: So on that baseline, we agree. Our authority flows from the Communications Act in terms of our processes and our procedures from the APA. So on that, we agree, that framework and how we conduct ourselves. But laws are made about people. They're codified and they funnel up by the will of the American public. And part my compass, so to speak, is serving the public interest. So how do we look at those laws and work within that framework? Where laws may have some ambiguity, a lot of times that's for a reason. If you have ambiguity that is subject to an interpretation, that's why Congress created agencies like ours, to interpret that. And not only to interpret that, but to look into, evaluate, and modify that, to seek suit on national priorities or the needs of the people at the time.

So when we talk about law, it's not a static. You can't just say this is the law and that's it. A law is a governing concept that we apply in order to bring about the just and reasonable expectations that we have for our nation. And that, to me, again, is my driving compass in what I attempt to achieve.

MR. MAY: Okay. Let me give you one common definition of what the rule of law means. And it may become relevant as we talk about other things that the Commission does. So that definition is: one, a system of bonding rules; two, of sufficient clarity, predictability, and equal applicability; three, adopted by a valid governing authority; and four, applied by an independent authority. And that's oftentimes what scholars refer to when they talk about a rule of law regime.

Now, without going into the substance of all of the legal arguments in the *Open Internet Order* – we could spend all day on that – I want to ask you about the process in this key respect and relate it to the rule of law, specifically with regard to the FCC. Everyone in the room is aware, of course, that President Obama issued a video and a written statement in which he expressly asked the FCC to adopt the Title II classification. That was subject to a line of inquiry at the D.C. Circuit's oral argument.

So I just want to ask you to talk about the President's involvement in the proceeding in relation to your understanding, whatever it is, of the FCC as a so-called independent agency and the rule of law.

Do you want to go first?

MS. CLYBURN: There are a couple of things that I wanted to go back to if we have time. You know, I'm a paper and pencil gal, so that's why you see this up here.

You talk about equal, in terms of applicability, I want to get back to that. But your core question or what I heard at the end, I think I interpret it from an independent standpoint, and I always say the FCC is an independent agency with a small "i." And when I say a small "i" jokingly, I seriously mean that we listen to public officials, those who head agencies, individuals, and yes, even presidents and vice

presidents and lawmakers, one of which you saw walk out of the room. So we listen to all of them.

We are not in a vacuum. We interpret through the framework which is clearly laid out. But we're influenced by not one, but all of those entities and individuals. At least I can speak freely.

I'm sorry. I was trying to be cute this morning and I didn't dress for a mic. Please forgive me.

(Laughter.)

MS. CLYBURN: Well, you know, I have to believe it, even if you don't. That's the way I look at it.

(Laughter.)

MS. CLYBURN: And so we do this and we are influenced. The President has a right to his opinion. But I want to say about this particular: When it comes to the *Open Internet Order*, Mignon Clyburn has been consistent for years. In 2010, I made it very clear that my preference was to go Title II. I was very clear from the beginning. So I can say that when he got on stage October or November or whenever that pronouncement was of 2014, Mignon Clyburn's concept and ideas were already fully baked.

MR. MAY: Okay. Commissioner O'Rielly?

MR. O'RIELLY: Well, interesting question. I would say this. First of all, I don't make any comments or critiques about the President of the United States. That's not my role and so I make my comments fairly.

And fairly, I do raise and have talked about the Administration in general. Here, I don't have any inside information. I had no interaction with the Administration

beyond my nomination, which was unrelated to this particular item. So I don't have any insight beyond the documents that have come forward since and the reporting by Congress and the material that has come out.

I did see the video. I found it rather unique. It doesn't comport with my past experience with the Administration interacting with the FCC. People like to point out an incident that happened in the '80s with President Reagan. I had a chance to talk to Chairman Fowler about that many months ago and someone else should do the same. In terms of the scope and the breadth that conversation lasted almost a minute and its value was of nothing. So people like to equate the two, but I think it's not really a fair equation. So I find the whole process was rather unique.

I do believe that the Administration has changed the game going forward and that the next administration, whether it be Republican or Democrat, will continue to have a greater role. And it does have an impact on our agency and it will have an impact on the institution going forward. I think that's problematic.

We talked about the word "independent." I've always had the view, and I think it's consistent with how it's been established, that the Commission was created by Congress to be separate from the Executive Branch. It is not responsive to the Executive Branch. They have a means to weigh in and they should use it.

MR. MAY: Really I was asking whether you found the President's weighing in in this case particularly problematic. You did say you thought it would change somewhat how the relationship might be going forward. My own view is the President does have a right to weigh in. And there were issues maybe about what happened at the Commission afterwards in terms of notice, whether there should've been more notice. But it sounds like you weren't especially at all upset the President

weighed in on this subject.

MR. O'RIELLY: No. I believe the Administration has a full right to weigh in. They have historically used NTIA as the tool. We just were written by the NTIA on views on Lifeline, so that has been a tool in the past. I found this to be a unique mechanism and I think it's harmful, though. The precedent set will be used in the next administrations going forward.

MS. CLYBURN: Well, to get myself in further trouble, which I love doing at least once a year, we've got some semblance of job security. So we've got with the term, the ability, if we choose to, and I choose to, to exercise it accordingly. No matter who the individual or what the issue, we have the capacity to weigh it and look at it through a lens and make a decision accordingly.

The President absolutely is one of the most significant citizens of the world, but his opinion I fold with others in the objectives at hand.

MR. MAY: Okay. And your point about the job security, I think you're referring to the fixed term

MS. CLYBURN: Term assignments. Right.

MR. MAY: You know, that's an important aspect, in the way that Congress established these agencies, to give them some independence. So that's a well-taken point.

Just as a very quick aside, Commissioner O'Rielly, one of the things I had written when you talked about independent agency was "Independent from whom?" And I used to notice that frequently when would-be commissioners would come before Congress for their confirmation hearings and in their testimony, many or at least some would recite that, "I understand that the FCC, is an arm of Congress." I would see that

language. And it is to some extent

MR. O'RIELLY: Creation of Congress.

MR. MAY: Yeah, but, honestly, in my own view, I don't think so.

MR. O'RIELLY: It's slightly different than an arm of Congress.

MR. MAY: That's what I was going to say.

MR. O'RIELLY: The Library of Congress is an arm of the Congress

MR. MAY: Yeah. I used to think that really wasn't quite accurate in the way it was stated. It's just related to the notion of independence. But let's move on to the substantive issues and assume you're both independent-minded commissioners, as I know you are.

Now, let's hit on the couple of items that are right at the top of the Commission's agenda coming up. Lifeline reform, I know that's something you've cared about a lot. And you and I have talked about it in previous Free State Foundation conferences. But I know there are differences between the two of you. Now from this point on we're going to be moving pretty quickly. So if I interrupt you, you'll understand why. But I want you to just take a moment. I'm going to let Commissioner O'Rielly go first and summarize, say, the two or three most significant concerns, if any, that you have with the proposal. Then we'll let Commissioner Clyburn respond.

MR. O'RIELLY: Sure. I've put out 10 ideas that relate to Lifeline reform. Obviously – and I've talked about it extensively – it is my desire for a hard budget for the program. It's the only piece of the Universal Service Fund that doesn't have a budget. I would prefer a cap, but I've moved away from a cap to a hard budget. I won't vote for it without one.

MS. CLYBURN: Accountability, discipline, and appropriate levels of

oversight. When we came in, this Administration came in, with all due respect to the previous, it was insufficient. We inherited a program that didn't meet the current needs – information needs – of individuals. We came into a program that was expanded, I think rightfully so, to include mobile. But honestly the proper oversights were not in place.

What we did was: We came in in 2012. We put some disciplines into that program. We got rid of duplicates. We created a database. We said one per household. We got rid of Link Up. We did a lot of accountability. We put some protocols in place that saved this program nearly \$3 billion. You don't see that in headlines.

And so when we talk about how we reformed this program and what the parameters are and how much it should be, let me remind you of two things. One, this is a means-tested program, meaning if you do not qualify, you do not get the subsidy. And two, my thing is treat the program equally as any other Universal program. I have no problem with a budget, but it has to be a budget based on realities, based on the current needs, based on the projection. There are 39 million households that are eligible and we need to take them into account.

MR. MAY: Okay. Now, I want to just follow-up on this question of the budget quickly. If I understood you correctly, Commissioner O'Rielly, you said you moved away from a cap and now you're in favor of a hard budget. I mean, just explain, in your mind, what the difference is between a cap and a hard budget.

MR. O'RIELLY: Sure. A cap has a straight number and it can't be exceeded. A hard budget provides mechanisms that may provide the opportunity, depending on the conditions that are written, where it could be exceeded. We can have a discussion of what those conditions could be. But I agree with a lot of what my

colleague said. I agree with means testing. We both agreed in the past on panels that means testing should be expanded in other places, including high cost.

MS. CLYBURN: I agree.

MR. O'RIELLY: So there are places that we could certainly do more things. But I will suggest to you that the budget mechanism that's been put forward so far, to the extent that the Chairman has allowed me to now talk about items more extensively, is not a budget. You certainly can't call it a hard budget. It's not even a budget. It is a phantom number. It's an idea: "If you want to get there, great; and if you want to exceed it, that's okay too."

MS. CLYBURN: So my interpretation of the item that I can't share to you word-for-word is different from what my colleague just said.

MR. MAY: Well, I was going to ask you: Did Chairman Wheeler allow you to come to the Free State Foundation Conference specifically and talk more freely?

MR. O'RIELLY: Actually, he did it before Congress and so I'm going to take him at his word.

MR. MAY: Oh, okay. Take him at this word.

MR. O'RIELLY: Well, you can't lie to Congress. It's a felony. So I'm in a great standing to say whatever I want now based on his words yesterday.

MR. MAY: Okay. Well, with that, we definitely want to get to some more things then.

So, Commissioner Clyburn, you used the word "duplicates," referring to the work that you've done with Lifeline to eliminate duplicates.

MS. CLYBURN: Right.

MR. MAY: Now I want to talk about privacy regulation, picking up on

that notion of duplicates. Because it does seem to me that there is this question, again just from a fundamental perspective of sound government, about duplication of effort between two government agencies, at a time when everyone agrees there are budget constraints.

There are a lot of concerns about this privacy regulation. Congressman Blackburn talked about some of them. Number one, you've got, in my mind, an efficiency concern about – when no one seems to be arguing the FTC isn't doing a good job – why the FCC needs to duplicate it. And then, secondly, there's the question about what I would call "equity and differential treatment" potentially among participants in the "Internet ecosystem," as we say now.

Also, I might point out that I saw recently that Moody's Investors Service did issue some type of credit warning associated with the FCC's privacy proposal, a credit negative warning. So just talk about the proposal in those terms and just highlight your differences.

MS. CLYBURN: So I would love for us to go back and forth. We often do this and get rave reviews. And so I'll say two words. That could be three depending on how you look at it: Rulemaking authority. So you go next.

MR. O'RIELLY: Oh, okay.

MS. CLYBURN: FTC rulemaking authority, do they have it? Please go. Thanks.

MR. O'RIELLY: They have a different structure in entirety, so it's set up by a different statute. I don't think you can equate the two exactly, but to your point, and I think to Randy's points that were raised, I think both points are valid and I'd throw a third in there and that is our expertise. The number of people at the Commission that

are working on privacy is a handful, maybe two handfuls if I'm being generous. Compare that to what's being done in the decades of work that's been done at the FTC and the number of people that are dedicated to the subject matter.

We do have a different structure. A lot of people on Capitol Hill have suggested that we replace the FCC structure with an FTC structure. I have, in the past, commented that I don't support that. I wouldn't have come to the Commission if I wanted to completely overturn it with that kind of scenario. But I can understand the arguments and because we are a different structure it doesn't mean that theirs is less effective or efficient.

MS. CLYBURN: That wasn't one of my three to five words in terms of it being less effective. It's different. You used the word efficient, you used the word duplicate. And I used the word --

MR. MAY: You used duplicate too.

MS. CLYBURN: Yeah, I used it in another context.

MR. MAY: Right.

(Laughter.)

MS. CLYBURN: See, that's how journalists try to get you every time -- context versus -- you know.

MR. MAY: Commissioner Clyburn's having so much fun now that I think she wants to be in the moderator's chair.

MS. CLYBURN: You're right. I am more comfortable in a moderator's chair. But in terms of this, when you talk about duplicates, I prefer to use the word "complementary." We've got complementary authority. We work together where they might have shortcomings when it comes to protecting the American people, particularly

when it comes to telecommunications carriers and providers. We work together on cramming and other issues to ensure that your expectations are met and you are protected.

And keep in mind, this dual relationship or complementary or if you want to use the word "overlapping" relationship is not a phenomena that just is singularly an FTC-FCC relationship. The FTC, when it comes to healthcare, they work with HHS. When it comes to financial information, they work with the CFPB, the CFTC, and the SEC. So when it comes to education, they work with the Department of Education when it comes to privacy issues there.

And so this relationship is not just in this space, though we are in this space. This complementary relationship, I believe, when done right – and we strive every day to do it right through memoranda of understanding and the like – it really strengthens the protections that the American public comes to expect. And it's complementary because it recognizes the expertise of each agency.

MR. MAY: Okay. Well, now we're really having some good exchanges. We're getting warmed up and I think we may do this next year, if not sooner. But I want to move on now to set-top box regulation. That's another hot topic. And so this is the FCC's rulemaking. I'm sure most of you know about it in the audience. It's essentially going to mandate the development of a new open standard for set-top boxes or navigation devices for consumers to access multichannel video programming. It seems to have stirred up a real hornet's nest of opposition. You've got market participants that normally compete against each other. All the MVPDs of all stripes, they all seem to be unified in opposing it. You've got the content companies who are concerned about protecting their intellectual property. Congressman Blackburn talked

about that quite a bit. You even have many tech companies opposed to what they seem to think are tech mandates that would set an unfortunate precedent.

So you've got a lot of the world against it and you've got Google maybe in favor of it and public interest groups. But here's the question – and there could be dozens of others. With everything that's going on in the marketplace – that you two are so familiar – in terms of all the ways people access video and through all the different devices through which they do it. I'm not going to name them all. But tell us really succinctly what the problem is the Commission's trying to solve that the marketplace is not already resolving.

MR. O'RIELLY: She'd probably answer this better than I.

MS. CLYBURN: No, no, never.

MR. O'RIELLY: No, only I can't answer your last question. This is the Chairman's agenda and he put this on the item. I didn't agree with where we are. I've said before that we are going in the wrong direction on the set-top box item. We should be moving towards eliminating set-top boxes. The market is going in that direction. Whether we work with the Congress to change the statute or work internally with the companies to try and figure out how we get away from the box, if you want to save consumers' money, let's get rid of the box. So if there's the idea that they're spending X amount of dollars per month, let's get rid of the boxes entirely.

I'm able to use other devices to get video programming today. The Chairman referenced that yesterday. I don't see the problem that he's trying to solve. I didn't agree with the item. But I will try to see where the comments come in.

MR. MAY: What's your response succinctly?

MS. CLYBURN: Quickly, succinctly – that is not in my DNA. But I'd go

back to 629, which was kept intact. Congress envisioned in the Telecommunications Act a robust marketplace when it comes to this and I don't care what it is or what it's called, whether it's an app, whatever the interface is. People and entities have come to us and said, "Look we've got a problem by way of competition." Ninety-nine percent of the individuals rent their set-top box from their provider. If that's your choice that's fine. And nothing in this conversation, I jokingly say, in this notice, is set to necessarily bias that one way or the other.

What we're trying to do is promote competition in alternatives in the market. That is the underlying, in terms of how I interpret this. And I will say this to you: All I want is for those providers, those independent entities who say they can't get a phone call returned and the rest, I want them to have more robust opportunities to be seen, more alternatives, more diversity of content. However we do that, I'm open to that. That is my underlying goal, more access, more opportunity, more openness, more competition.

MR. MAY: You said 99 percent. And I know there's been some discussion about the validity of that number. But if they want to use the provider's box, you said that's fine. Well, it seems like to me there's a presumption in the notice that it's not really fine if 99 percent want to do that.

MS. CLYBURN: Again, part of what we are going to intake, in terms of what will be submitted by the parties, is whether the premise is correct that this is a noncompetitive marketplace. And that is a part of our charge. Whether you agree with the premise or not, whether I agree with the premise or not, I really think it's a conversation worth having and that's why we're moving this direction.

MR. O'RIELLY: Well, if I were to add to that and the point you started

with, I think, is valid for examination and that is: When you look at 629, my old boss was the author of it. I know there are a lot of people that claim authorship of it. So I spent a great deal of time with it. When you look at the statute itself, it uses the words "converter box, interactive communications equipment, and other equipment." If the Chairman wanted to focus this item on set-top boxes and the old structure and wanted to introduce competition in that old structure to the extent of how long that structure lasts, then that might be one thing that we could have an open debate on. But to stretch it to applications and software that have nothing to do with the set-top boxes and are the future and have no relationship with that old provision to me is extremely problematic. And I just don't see that surviving long term.

MS. CLYBURN: So I'm going to go above this item. Because when it comes to the last thing, what popped in my mind was what you said. We've got laws that are only static based on when they're written. In terms of when it comes to the interpretation, their application, that is a part of the beauty of our structure, that we have the ability to and the dexterity to interpret and change and conform with the times, and so we can look at what something was called. I'm not as hung up as some on the semantics. What was the ecosystem at the time and what have we migrated to, and is there or is there not a problem that needs to be addressed? To me, fundamentally that's what is in play here.

MR. O'RIELLY: Sure. But we must agree that words have meaning. And when Congress writes them, they don't mean "equipment" to be "software applications." It can't be the dexterity you talk about. And I understand your point, and it goes back to our first conversation. It gets to the question of when is the legal gymnastics of the Commission just insulting the statute?

MS. CLYBURN: Look, 1996 – I've changed. You've changed. The world has changed.

MR. O'RIELLY: Yeah.

MS. CLYBURN: So we can discuss whether or not what an update is in need. But again, it's the structure which we have. And how do you use that structure in we have matured and morphed into in terms of our interaction? The principles – underlying principles – of most of these laws are timeless. The application and interpretation – that's the variable. I really think that that is healthy and ripe for debate. I'm going over a minute.

MR. MAY: This is such a great exchange. I wish we had more time. But it's a great exchange. And, by the way, you haven't changed at all since the first time I saw you.

MS. CLYBURN: Well, you know what? Thank my hairdresser.

MR. MAY: No, you're looking great, if I don't get in trouble for saying that.

MS. CLYBURN: Not with me. I take all compliments.

MR. MAY: Look, this is the discussion in a somewhat similar vein that we're going to hear a lot about in terms of our Supreme Court nominee and the difference between a living constitution sitting on my left in that debate and the original meaning over here. So it would be fun to continue it. But we're not going to do that right now.

I'm going to ask about probably just one more item here and I think that may be it. This has been so good, though.

I want to ask about the controversies relating to the so-called zero rating

plans and sponsored data plans. This is just one aspect of the *Open Internet Order*. I said we couldn't talk about all of it. But this is one that I think is important. So here's the way I'll pose this question.

When the order was adopted last year, the Commission said – or the majority and Chairman Wheeler said – that this order was going to create certainty in the Internet environment. I mean, that was one of the mantras that I think we heard about. And there are a lot of people who are sympathetic to the notion that certainty is a positive thing in a marketplace. A lot of people feel that way.

So now we have these different plans that are being offered by different providers. We've got the T-Mobile plan, the Binge On plan. Verizon has a new one, FreeBee. AT&T has had sponsored data and so forth. And I'm sure we'll see others. They're all a little different. And in fact, when Binge On, T-Mobile's plan, was announced, Chairman Wheeler said rather shortly thereafter that it looked to be, quote: "Highly innovative and highly competitive, an offering that would benefit consumers."

So my first question and then I've just got one follow-up. It looks like there's a lot of uncertainty in this space, especially relating to these plans. I haven't seen a lot of surveys, but I think by virtue of the take rates on some of these plans, you see a lot of consumers like the notion of having, quote, "free data."

So what's the concern the Commission has here and are you concerned that a Commission intervention would stifle these types of developments, these types of different plans with differentiation going forward?

MS. CLYBURN: You used the word "uncertainty." But you are migrating into the two words that I wrote down: "flexibility" and "innovation." You mentioned yourself, there was no discussion about sponsored data or zero-rated plans, at

least in the U.S., until the *Open Internet Order*. And I believe that's a good thing.

I believe it's a good thing. One of the reasons I was honestly very vocal inside of our house about not abandoning or not eliminating outright the other possibility for sponsored data or zero-rated plans was because when it comes to product differentiation and the like, that it could be a good thing. It could be a worrisome thing too when it's used in a way which we did not envision. And that's why we said we will look at these things on a case-by-case basis. But you mentioned the possibility of providers being able to offer something, especially on the healthcare horizon or educational opportunities, something that somebody might need, particularly the diabetic in an area that needs to have more communication with doctors.

I met with the CEO for Text4babies. Those types of things not counting against your minutes could be value-added and provide-positive dividends. Where they do not, I think we should look at them in dispatch. But where they do, I think we should allow for that dexterity. You call it uncertainty. I call it the pathway to innovation and flexibility.

MR. MAY: Commissioner O'Rielly?

MR. O'RIELLY: First, I would say that the arguments just presented would fit very well with paid prioritization. So why we'd have a bright-line rule on that when it can be dexterous and beneficial to consumers, I don't know. But you can never have certainty when you create something called the "general conduct standard" and you basically say it has no structure and it is whatever it is whenever we want, whenever we feel it. That is what the Chairman has created under net neutrality rules. It is however he feels.

You read the first press conference that he gave regarding T-Mobile's

offering. You didn't get him to the second one where he then said, "Oh, we're going to start this new inquisition."

MR. MAY: Did he use that word, "inquisition"?

MR. O'RIELLY: That's my word.

MR. MAY: Oh, okay.

(Laughter.)

MR. MAY: Okay. Yeah, we're fair and balanced.

MS. CLYBURN: That's part of my reform. You own up to what you --

MR. O'RIELLY: That's my word and I consider it an inquisition when you sic two bureaus on something you just called highly competitive and innovative, and change your mind in 30 days. Now, my office has been trying to pressure and push the bureaus to make a decision. What is the outcome of your research? What have you gotten from that? Do these carriers have any clarity of what is with regard to their product? We've always been worried they're going to need the Commission's blessing. Do they have any reason to concern? Should they be holding back? Are they now subject to being sent over to the enforcement bureau because the case has been made? They send it over to enforcement for action. I mean, that's what is envisioned in the net neutrality item.

I mean, what is the outcome? So we've been asking: "When are you going to make a decision?" and "Are you going to tell and send people a letter that we've looked at this and our inquisition is done and we're fine or are you never going to do that?" You can never have certainty the way the current structure is. And that's not what the Chairman wants. He wants to be able to involve himself when he wants, whenever he feels it's appropriate.

MS. CLYBURN: So I see a former chairman and a former commissioner and I know they're waiting and we're late.

You know, a lot of things that we are as commissioners --

MR. MAY: You want to be the moderator?

MS. CLYBURN: No, next year I will be. Please vote for me for moderator in your evaluation.

MR. MAY: Go ahead.

MS. CLYBURN: A lot of things that we are as commissioners -- we're informed, we're colorful, we're all of these other things. But we're not all knowing and all seeing. It might cause a little discomfort, but what the flexibility of that standard allows is for innovation, as much as permissionless as possible without being disruptive or harmful to the environment. And so I would love to be able to say, here it is, codified, done. That's stifling.

MR. MAY: Okay.

MR. O'RIELLY: But that's the same thing we did on paid prioritization. There are many cases that have been made that it's going to be beneficial to do paid prioritization, that you need the flexibility and the dexterity to offer some of these things like health, like automated cars. There we decided on a bright-line rule. It just seems to violate that exact comment you made.

MR. MAY: Okay. Well, you mentioned enforcement. Look, I'll just say again I'm glad Travis LeBlanc hasn't showed up because I said "fireside chat."

MS. CLYBURN: That could be changed.

MR. MAY: Yeah.

MS. CLYBURN: That could be changed.

(Laughter.)

MR. MAY: Now, wait.

MR. O'RIELLY: It's still early in the morning.

MS. CLYBURN: Exactly.

MR. MAY: Hey, so here is what I want to do and then we'll wrap it up.

We have a tradition here that I've always tried to maintain of at least getting in a question. I always like to do that and Scott Cleland raised his hand about 15 minutes ago. That's not actually fair. But since you did, you can ask one question and then we'll be able to wrap it up.

MR. CLELAND: Scott Cleland, NetCompetition. A brief question for you, Commissioner Clyburn. It's on set-top boxes. In 1996, cable service was a monopoly. Today, it's lost 50 percent share and the FCC just last year said that cable service was subject to effective competition. So if the underlying service is subject to competition and competitive, why worry about the vertical device that's associated to the underlying competitive service?

MS. CLYBURN: Again, we're looking at it. In some cases, in some people's view, there is must-watch TV. And so the item is open. I am reviewing it. I am looking at the submissions. I continue to do so.

When a consumer, someone out in the ecosystem has an issue, I think we have an obligation to address it. So people have come to us and said that there is a problem in the ecosystem. And it's up to us to determine and not to ignore when someone files or comes to us for either relief or an opinion.

MR. MAY: I didn't really look over there, but there are members of the press. Did any one of you have one question? Okay.

Yes, ma'am? This is the last question.

MS. BEYOUND: Hello, Commissioners. Lydia Beyoud, Bloomberg BNA. This is a question for both of you. But I'm particularly interested in your take, Commissioner Clyburn, given your background as a state regulator. NARUC has come forward and told the FCC that they have some concerns that the Lifeline proposal could remove some of their state regulatory authority, as well as possibly eliminate some of the state Lifeline subsidies that some states offer. What is your opinion or your take on those concerns?

MS. CLYBURN: That is an item that is extremely open and subject for an opinion on the 31st of this month. But I have a healthy respect for and friendships at NARUC. I recognize I sit on the other side of all of this when it comes to their authority. And at the end of the day, the decision we will render will be a reflection of a healthy respect for what our respective strengths are in the market.

MR. O'RIELLY: Well, I took two meetings on this topic and I'm digesting the comments that were made. We'll just see where this item goes.

MR. MAY: Okay. Brad Ramsey, NARUC's General Counsel, is sitting in the audience and he's going to be on the next panel. So we'll probably follow-up.

Look, I just want to say to both of you this was really, I thought, a terrific exchange and I think it was educational. It got to be lively at times and that's a good thing. And I said at the outset it was going to be fun. I'm not sure you believed me, but it was fun and it was good.

So I want all of you to join me in thanking Commissioner Clyburn and Commissioner O'Rielly.

(Applause.)

MR. MAY: Thank you so much. I appreciate it.

MR. O'RIELLY: Thank you.