



**The Free State Foundation
Lunch Seminar**

"Ideas for Communications Law and Policy Reform in 2013"

**A Conversation with
FCC Commissioner Robert M. McDowell
and
Randolph J. May, President, Free State Foundation**

October 18, 2012

**National Press Club
Washington, DC**

MR. MAY: If I can have everyone's attention, we're going to get started here. That way, we'll have plenty of time for our program.

Thank you for that tinkling of the glass over there. We appreciate it. Welcome to another in our series of ongoing Free State Foundation programs. I'm Randy May, president of the Free State Foundation, and I'm pleased that you're here, all of you. It's another great crowd. We're excited about that and appreciate it.

We've titled this program "Ideas for Communications Law and Policy Reform for 2013." But don't get me wrong. I'm sure it would be good to get some of the ideas that we're going to talk about today implemented sooner rather than later. So if we happen to be able to do anything in the rest of 2012 that would be good. I don't want to write anything off here.

* 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.

Speaking of good ideas, before I introduce today's program, I want to point out that next Monday is the publication date for the Free State Foundation's newest book. It's called *Communications Law and Policy in the Digital Age, the Next Five Years*. It's published by Carolina Academic Press. Hopefully, you picked up a flyer for the new book when you signed in. They were out at the front registration table.

Now, the book contains a lot of good ideas for reforming communications policy, whether by the FCC itself or by virtue of a new Communications Act on subjects ranging from broadband regulation, spectrum policy and incentive auctions to universal service reform and public media reform.

In addition to myself and FSF's own Seth Cooper, the authors included in the book include Representative Marsha Blackburn, Jim Speta, Christopher Yoo, Bruce Owen, Ellen Goodman, Michelle Connolly, and Daniel Lyons. All of those authors except Congressman Blackburn are members of Free State Foundation's Board of Academic Advisors, and we're very proud of them.

Some of the essays in the book are following works derived from the remarks delivered by the contributors last October at the Free State Foundation's then fifth

anniversary celebration.

And the reason I mention that flyer is that at the bottom of the flyer, there's a special discount code from Carolina Academic Press. If you order the book using that discount code, you get 20 percent off the price of the book.

Back to today's program. If you follow communications policy at all, and I know virtually everyone in this room does, and if you follow the work of the Free State Foundation, then the rationale for today's program is pretty obvious from its title. It doesn't need much elaboration.

I'll simply put it this way to provide a backdrop for our discussion: Many people, including those with much expertise and experience, believe that given the competition and market dynamism that now exists in various communication market segments, there is still way too much legacy regulation on the books. That's not to mention the fact that new regulations are still being proposed and adopted, such as net neutrality, data roaming mandates, new regulations on video providers and so forth.

Here's the key: If it's true that there is more regulation than necessary to protect consumers, this matters. Over-regulation has consequences for investment

and innovation, for consumer welfare and for our overall economy.

If this is true, then what we want to do today is have a good discussion about ideas about things that can be done either at the Commission or, if necessary, through Congress.

Our program today is going to be broken into two parts. To set the stage, I'm going to have a conversation with FCC Commissioner Robert McDowell. I'm sure Commissioner McDowell is going to put some good ideas on the table. Along the way, I'm also sure that our discussion will provide some good fodder for the second part of the program, the discussion by our panel of very esteemed experts.

We're going to take some questions and even brief comments, if you have ideas, at the end of each of the two parts. Notice I said "brief." So please have that in mind as we proceed.

Now, our Twitter handle for the conference is #FSFOctober18ideasforum. It's near the top of that first page on your speakers' bio. Berin Szoka told me that Twitter handle is long. He could be right. But my response is that there are a lot of bright people in this room here, a lot of very bright people.

I'm sure you can handle that Twitter handle. So I hope you'll tweet away during and also after the conference. I'm going to check that to see whether the ideas keep rolling in.

So first, I want to welcome Commissioner McDowell. Thanks first of all for coming. I appreciate it. You see you've obviously helped us draw a capacity crowd here today.

You and I had a conversation similar to this back on February 4th 2011.

COMMISSIONER MCDOWELL: Seems like yesterday.

MR. MAY: Yes, so it's probably emblazoned in your memory, right? But just in case it's not, I've got the transcript right down here at my feet.

COMMISSIONER MCDOWELL: Thank you, Candy.

MR. MAY: See, he's good. This is the way it was last time. He's very good.

Now, you had the same job back then when we did that. And, of course, you were with us back in May when we were talking about the upcoming World Conference on International Telecommunications conference. I introduced you then and went through a lot of your bio. You're still an FCC commissioner.

Anything else changed in your life that we ought

to know about before we get started?

COMMISSIONER MCDOWELL: Not unless the Senate has impeached me since this morning. Are we good, Senate staffers, no impeachment? Okay. Good.

MR. MAY: I know. You were confirmed unanimously, if I remember correctly.

Anyway, I'm not going to go through all the stuff on the bio. But it's all there. And that's true for all of our speakers when we get to the panel.

One thing I have done every time that we've been privileged to have you with us is point out that both you and I did attend a very good undergraduate school, right, at least a good basketball school, together.

COMMISSIONER MCDOWELL: I notice that you were having something published by the Carolina Press.

MR. MAY: It's in Durham, North Carolina, though. It's called the Carolina Academic Press, not the University of North Carolina Press. In fact, it's located a few blocks from the Duke campus, rest assured.

COMMISSIONER MCDOWELL: Perfect, very good. Just checking.

MR. MAY: Back in February of 2011 when we were doing our conversation then, Blair Levin happened to be sitting in front of us, and I said, "I can foresee

scenarios where you would be chairman before Blair gets to be chairman."

And you didn't respond at all then. I'll just repeat that. Do you have any response you want to make at this time?

COMMISSIONER MCDOWELL: Was that in the same conference where Blair had compared me to Karl Marx?

MR. MAY: It might have been.

COMMISSIONER MCDOWELL: Why don't we just move on from that?

MR. MAY: We'll move on from there.

So we're going to jump in and talk about reforming communications policy, looking at what the FCC can do itself. I'm particularly interested in that, but I understand that you're bound by the statute in certain ways. So I'm interested, too, in what Congress ought to do. And maybe towards the end, we'll even talk about that in a macro sense, about what a new act would look like.

But let's start by focusing just for a moment or two on what I would call the administrative or the pure process types of issues. I recall that in the summer of 2009 when Chairman Genachowski first came onboard, before he even had a chance to unpack his bags, you sent him that six-page letter with some of your reform ideas. There were

some good ideas there. I don't want to rehash all those things. But you did send that letter. And now it's three years later.

Just talk to us a bit about whether, in the main, those things were done. What remains to be done or what could be done from a process viewpoint, in terms of how the Commission operates and functions that still ought to be done?

COMMISSIONER MCDOWELL: Excellent question, very open ended. First of all, thank you for having me. It's great to be here. Had I known you were going to have such a large and distinguished audience, I would have prepared better for this.

MR. MAY: We always do.

COMMISSIONER MCDOWELL: I'll just open my mouth and see what falls out.

In that regard, I just want members of the press to know that, hopefully, I'm not going to say anything new or controversial. So you can just put down your pens and turn off your tape recorders.

And to the people in the cheap seats like Jim Casserly, good to see you. I'll lean over this way every now and then so you can see me from around the column. Did you get a discount for the obstructed view ticket? Okay.

We're ruminating here. But on your first question, I sent Acting Chairman Mike Copps a similar letter in January of '09. Then I updated it to send a new one to Chairman Julius Genachowski. I think it was July of 2009.

Based on my three and a half years at that point at the Commission, there was a lot we learned. One of the things I suggested was to do an audit; that is, an operational audit, financial audit, and ethics audit of the Commission. That would include a financial audit of things like USAC, the corporation that oversees the universal service program and things of that nature, to find out exactly what we're dealing with.

If you have a major change in management of a corporation or if you buy a corporation, you're going to do your due diligence. That still needs to be done. I know Julius did some of that on his own. But we should do one that's more transparent.

Now, that audit is somewhat bound by the cost of doing it. For those who have worked on acquisitions in the private sector, you know it takes a lot of attorneys, accountants, other consultants and experts to pull that off.

The FCC is about a \$340-million-dollar outfit with

1600 to 1700 employees scattered across the country. So there's a lot going on. Of course, we administer an \$8-plus-billion-dollar subsidy program plus a lot of other things. So there's a lot there. And in an era when government budgets should be declining, whether they are or not, we need to think about resources in that regard. That audit would tell us a lot.

We should look at the Code of Federal Regulations. I've talked a lot about reviewing rules to get needless rules off the books. Again, Chairman Genachowski has embarked upon that to a certain degree. By his count, he has more than 200 rules that he says he's taken off the books. We've looked at that in my office. Probably about 150 of those rules are what we would classify as bookkeeping, either cross-references that have been erased or the court struck down something and it just was left in the rulebook, et cetera. So I think we can be more aggressive on that front.

Congress has actually given us a number of tools in this regard. There's Section 10, forbearance, of course. You've written a lot about Section 10. But also, the forgotten sibling of Section 10, right next door, Section 11 requiring us every two years to look at telecommunications rules and determine whether or not they

should stay on the books.

There's also Section 202(h) in the 1996 Act. That requires us to look at our media rules and deregulate as more competition comes online. It's very explicit, actually. It has a deregulatory bent to it.

And there's Section 706 which doesn't provide us with a lot of authority to do anything, but talks about removing barriers to investment. That has a deregulatory bent as well, as did the thrust of everything coming out of the 1996 Act.

So these are all tools that we have currently. We'll probably get into a discussion here a little bit later about possible legislative changes. The caveat I'll say there, especially seeing so many distinguished folks from Capitol Hill here, is that I don't tell Congress what to do. Congress tells me what to do. But I have been asked many times over the years for ideas. And we've tried to provide them. There's a lot that can be done.

MR. MAY: Okay. I'm glad you mentioned Sections 10 and 11. Later, I want to come back to those and maybe tease that out more. But let's just put that aside for now. I want to ask you about one of the process things you mentioned in those letters to Mr. Copps and to Mr. Genachowski. From my experience watching the Commission

and being there a long time ago, I thought it was interesting and important.

You said that you'd like to see options memos in rulemakings given to all the commissioners at essentially the same time or at least early on in a process so that it's not just the Chairman that has those things early and is shaping the rulemaking.

I'm curious as to whether that has been done. If not, would you still like to see it done? Tell us about that.

COMMISSIONER MCDOWELL: Yes, I think that could be done better. No, in most cases, we don't get options memos. It would be nice if we did. There are five FCC commissioners by statute. We're all independent votes. We each get our own staff. And I certainly don't want to interfere with each office's independent collaboration and brainstorming.

The Chairman, of course, is the CEO of the agency and gets access to all 1600 employees. Chairman Genachowski has done a very good job of opening up access to the substantive experts throughout the agency.

If he's brainstorming with his staff, I don't need to know everything. Whoever the Chairman is, I don't need to know everything that they're thinking about. I don't

know what the Chairman receives. But it would be good if at a certain point, we could get options memos outlining different options.

Now, different chairmen are always concerned about leaks to the press. So if there is an idea in an options memo, they may not want that discussed outside the building because it might be put there as a straw man or who knows. There could be some other motivation. But I think it would really help with collaboration if we could get those. It really helps stimulate thought to hear what the career experts are suggesting from across the spectrum of ideas.

MR. MAY: Right. Now, the House passed a process reform bill several months ago. Basically, it was about the type of things we're talking about, process reform. In the bill, one of the requirements would be for the Commission to undertake in each rulemaking, what I would call a more formal or more structured cost-benefit analysis, as other agencies are required to do.

So without necessarily getting into particular rules or just based on your experience now of over six years, would that be a good thing? Some people that oppose it say it's too much of a burden to do these things and it's going to inhibit the rulemaking. What's your view on cost-benefit analyses?

COMMISSIONER MCDOWELL: For several years now I've called for cost-benefit analyses and bona fide economic analyses to be incorporated before we embark upon rulemaking. That includes market analyses of the rules we might be proposing or the industries we might be regulating.

It's absolutely necessary. Every rule has a cost. Sometimes we are mandated by Congress or maybe a court to have a rule. And sometimes the Commission comes up with rules on its own, for better or for worse. But every rule has a cost. There's no such thing as a cost-free rule.

It's almost a regulatory law of physics that there's going to be an unintended consequence. Even the best market analysis or economic analysis can't predict the unintended, unforeseen consequence because by definition it's unforeseen.

But we need to be thinking about what the perverse effects are of proposed rules before we travel down those trails. It's absolutely necessary. I would support legislation on cost-benefit analyses. And I have said publicly before that that really should be more the rule than the exception.

MR. MAY: Now, I haven't even pulled out that transcript from the earlier session, and I'm not going to

do that. But to set the stage for talking more substantively about regulation and cost, I just want to quote from what you said when I asked you about your regulatory philosophy back in February of 2011.

You said, quote, "You look at the facts of each situation. You follow the laws as to what you actually are enabled to do, what you're empowered to do as an agency, but look for concentrations of market power and abuses of that power. And if you need a remedy to fix it, make it narrowly tailored, hopefully make it sunset, and go from there."

I assume that's still a fair statement of your philosophy in terms of how you approach your job?

COMMISSIONER MCDOWELL: Absolutely, and I would add to that something I was probably thinking at the time but it didn't come out: When you're looking at concentrations of market power and abuse of that power, you have to look at whether that's resulting in consumer harm. That's got to be a question that's asked in every proceeding.

MR. MAY: You often point out, maybe even more than your fellow commissioners, that on 95 percent of the items before the Commission you all agree. And I appreciate that. But it's true that on the five percent of

them you don't agree. That includes some pretty important matters like net neutrality, data roaming mandates, program carriage regulations, program access regulations, and media ownership rules. These are some pretty important matters.

For you, when there's a disagreement, I think that it's usually because of over-regulation or unnecessary regulation rather than you think there's too little regulation. That's correct, is it not?

COMMISSIONER MCDOWELL: Absolutely. Sometimes Congress tells us we have to do something, so we try to be faithful to it. But if we're embarking on new ground, the case has to be made that there's an actual need, a demonstrated need for a rule. Then it has to be narrowly tailored and preferably sunsetted.

MR. MAY: Right. That leads to this important part of the discussion. It's really a foundational thing for what we've already talked about and much of what the panel's going to talk about, that we may talk about that follows.

We both agree that sometimes you need regulation. It's justified in some cases. But when there's over-regulation or undue regulation that negatively impacts investment and innovation. Back in that *Wall Street Journal* op-ed a couple years ago, even President Obama

agreed that was true.

But just explain why that's true. Explain why that regulation impedes investment and innovation. Why is that?

COMMISSIONER MCDOWELL: Congress contemplated that regulation impedes investment with the last major comprehensive rewrite of the Act in 1996 with Section 706. It talks about removing barriers to investment. It actually uses the word "investment." So Congress has contemplated this a bit. You can also read that into Section 202(h) and other places, too.

In the absence of market failure, if you've got regulation, then in a way you're politicizing that part of the marketplace that you're trying to regulate. So here we are, five of us. I love my colleagues. But you have five unelected Washington bureaucrats overseeing perhaps one-sixth of the U.S. economy, having an indirect effect on the rest of the economy because the rest of the economy rides on the rails of the Internet and telecom and communications. And it takes three votes.

So in the instance of net neutrality, what is reasonable network management? Reasonable network management is whatever three unelected bureaucrats say it is. None of us has an engineering degree. And a lot of

these types of decisions are business and engineering decisions.

Bureaucrats start to politicize these types of decisions. That means from every two-year election cycle or every four-year election cycle, investors and market players aren't quite sure what the rules are going to be. That creates uncertainty, so they have to start adjusting or tailoring business plans to these two- or four-year cycles. And that creates confusion, actually inhibiting investment and risk taking.

MR. MAY: About 30 years ago, Richard Posner, who's now the judge, was then writing with his law and economics hat on. He wrote this article, "Regulation as Taxation." Apart from the certainty part, I understand that regulation makes it hard to decide whether to invest.

Suppose the current Chair of the FCC assured everyone and Congress agreed that we're going to put this regulation in place for the next 50 years, and this is what it's going to be. But it was unnecessary regulation. It was too much. If it's unnecessary regulation, how does that affect investment decisions and the decisions that business people make?

COMMISSIONER MCDOWELL: Unnecessary regulation is just an added burden, if nothing else. Posner is correct

in that regulations are like taxes. They do impose costs. Those costs ultimately are borne by consumers, either through higher prices or through not getting an innovation that they otherwise would have received through endeavors in the marketplace.

And that's what you can't measure. You can't measure what didn't happen really as the result of a regulation. For instance, go back to net neutrality. If you look at USTA's Capex figure for telecom in 2010, it was \$66 billion. In 2011, it was \$66 billion. Now, I see a lot of economists, a lot of PhDs after their names here. I would love for someone in the room to do some sort of study as to why was that Capex is frozen. Was it due to the December 21, 2010, net neutrality order or not? I don't know if the data exists, or if that sort of study is even possible.

We saw Capex actually go up during the economic downturn of 2008 and 2009 but stall out between 2010 and 2011. We're not done with 2012, so we don't know what that is. But in 2010 and 2011, certainly, interest rates were cheap, with lots of liquidity in markets. So that's probably not it. So what is it?

Another thing that should have been driving Capex is the so-called spectrum crunch. That should be driving

more Capex for the construction of towers, et cetera. So why did it flatten out? Our population is growing. Communication usage is increasing. So why did Capex flatten out?

We don't know, and we may not know. It's hard to measure what didn't happen as a result of a regulation. Maybe it takes anecdotal evidence, taking interviews from CFOs and such of corporations.

But that's the challenge with regulations. Sometimes regulations are needed or mandated. But when they are unnecessary, that is a part of how we can complicate the marketplace to the detriment of consumers, ultimately.

MR. MAY: Now, I'm going to keep talking with Commissioner McDowell for several more minutes here. But then we're going to take questions. So if you have questions, we're going to have an opportunity for you to ask a few. As I said, if you have a brilliant idea, you could even briefly relate that. And I'm going to be the judge of what's brief or not when we get to that point.

But now I want to just talk about a few more specific areas to set the stage. You mentioned forbearance authority, which I appreciate because, as you said, I've actually written a lot about forbearance authority.

COMMISSIONER MCDOWELL: And I've cited it.

MR. MAY: And I appreciate that. Now, here's the thing: Number one, this authority to not enforce a regulation or statute is a very uncommon provision to find in a regulatory statute. I've said for many years, I think it's virtually unprecedented. And no one comes back to me and says, "No, here's another example of forbearance authority."

But the Commission has really underutilized this authority. Frankly, it's not just the current FCC administration.

Are there changes in the way the Commission carries out this forbearance process that would lead to the grant of more regulatory relief? Because that's what the provision is intended to do when it's appropriate and justified. I understand there's a statute. I appreciate that, and the statute has certain criteria. One of them is that it is in the public interest. Another one is that consumers must be protected.

But these terms have a certain amount of discretion inherent in them. So my question to you, Commissioner McDowell, is can the Commission reorient the way it looks at forbearance petitions so that it establishes some form of, say, rebuttal evidentiary

presumptions or some type of evidentiary presumption that would operate towards the grant of regulatory relief? At least in those situations where there's not convincing evidence to the contrary? How can you change the process?

COMMISSIONER MCDOWELL: There is the plain language of the statute, and we have to follow that. One of the things we can do is more *sua sponte* forbearance, to take the initiative on our own to try to erase some of the rules or turn back some of the rules in the rulebooks.

But I like your idea, and I've cited it before. We should be looking at regulation from a different perspective, which is: It should be justified. You have to justify the regulation. That's why I like the idea of sunseting. It would force the Commission to reexamine rules every few years and see if they're really needed.

It's a really dynamic marketplace. Not to sound too corny or trite, but I mean this sincerely: More and more I look at the communications marketplace through the eyes of my kids. I have three kids, ages 5, 11, and 13. They are voracious consumers of communications products.

To my kids, it doesn't matter whether that content is coming over a twisted copper pair or coax or over the air in one way or over the air in another way or licensed or unlicensed. As we see this dynamism in all this

competition and positive, constructive chaos, I really do think it is time to reexamine the statutory construct. We have these silos where it's one set of rules if it's Title II, twisted copper pair, or telecom servers, or whatever. There is one set of rules if it's under Title III one way, and another set of rules if it's Title III another way. There is yet another set of rules if it's over coaxial cable, et cetera, et cetera.

That really is early 20th Century thinking or maybe even late 19th Century thinking. And we've got to distance ourselves from that. We need more regulatory flexibility. So what I said in early 2011 still holds true today. I hope any discussion regarding a new statute would start with looking at concentrations of market power, abuse of that power, and if there is resulting harm to consumers.

That should be all wrapped into definitions of the public interest. The marketplace is moving so very quickly that regulators really can't keep up with the marketplace and shouldn't try unless there's marketplace failure that results in harm to consumers.

MR. MAY: I like the way you stated that. We're going to produce another transcript here, so this will be useful.

COMMISSIONER MCDOWELL: I'm getting my deposition,

I guess.

MR. MAY: You said that if there's a new statute that a fundamental principle guiding the statute should be that the FCC's regulatory activity is tied to market power and consumer harm. And then you talked about that being in the public interest.

A lot of the problems with the current regime stem from the fact that the public interest standard is vague and indeterminate. There's actually 100 different times in the Communications Act that it's there.

I understand you're not going to be rewriting. But when the Congress gets around to rewriting it would you recommend that they just substitute those criteria that you just identified for the public interest standard and not leave that type of vague, indeterminate standard in the Act next time? I want to see whether you agree with this or disagree.

COMMISSIONER MCDOWELL: Having that standard can work well sometimes and not work well other times. Now, I had my law clerks count. How many times is "public interest" actually mentioned? 132 times. And does that include the Middle Class Tax Relief Act? That's 132 including that one.

So we have a fresh accurate count for you. It's

codified 132 times, by our count anyway. I hope your research is good, no pressure. They just did that this morning.

MR. MAY: We do have a transcript.

COMMISSIONER MCDOWELL: That's right. Well, I'm caveating it.

So what does the public interest mean? It's in the context of each section and subsection of the statute. Again, what does it mean? It means whatever a majority of the elected bureaucrats we call FCC commissioners says it means.

MR. MAY: Well, that's not a way to run a government, is it?

COMMISSIONER MCDOWELL: Right. More direction from Congress would be very helpful.

MR. MAY: The current forbearance standard authority applies just to telecom carriers. My view is when Congress gets around to rewriting the Act, and assuming it still has forbearance authority along with the other things that we've talked about, that authority should apply to essentially any regulated entity of the Commission. Is that right?

COMMISSIONER MCDOWELL: Absolutely, I think so. Congress could even call for some of these rules to be

reviewed and sunsetted so that they have to be reenacted every so often if they're needed.

MR. MAY: Now I want to turn to merger reviews. Then you and I are going to do a couple more. And then we'll open it up for questions in just a couple minutes.

Merger reviews and license transfers take place under the public interest standard. That's what the Commission is applying.

That leads to the Commission imposing what sometimes look like conditions that are extraneous to the actual competitive impact of the merger through last minute negotiations. And so people are focused on merger review.

But there's one part of it that I just want to ask you about. The Department of Justice and the FTC are reviewing the mergers at the same time you are, generally. I assume most people in this room are concerned about inefficiency in government and wastefulness. So my question is this: Under its public interest standard, which you just said is pretty indeterminate and broad, can the Commission just say that its going to defer to the DOJ or FTC to review these mergers for their competitive analysis? And would you favor that? We're not looking at whether there's rule compliance and compliance with the Act. But for their competitive analysis, could the

Commission say its just going to defer to DOJ? How does that strike you?

COMMISSIONER MCDOWELL: Right. You raise important points. I'm not a bureaucrat who's greedy about jurisdiction. How many layers of review should there be for these transactions? And should there be more of an antitrust review.

That would be very worthwhile for Congress to take a look at. I can't remember the last time DOJ or FTC had a different opinion from the FCC on one of these. And it's rare. So usually, the end result is the same.

Keep in mind that for most of the transactions at the FCC, they're very routine. There are hundreds of transactions every year, some of which are approved within 24 hours. It's the high profile ones we all read about that take time. They tend to be the most complex, and they tend to be the ones that have competition issues surrounding them.

But there's a good argument to make that there should be one agency that looks at these transactions through the lens of competition.

MR. MAY: You mentioned the time it takes to perform one of the reviews at the FCC, which was next on my list. Obviously, the more complex it is, then it takes

more time. I understand that.

They always seem to take as long as however much time is on that shock clock you guys have. Same thing with forbearance, they take as long as the statutory limit.

Is there anything specific that you could offer as to how to speed up these things? The marketplace does move pretty quickly. Or is it just inherent, the nature of the bureaucratic process?

COMMISSIONER MCDOWELL: The Commission has this 180-day shock clock which is observed sometimes more in the breach than in the rule. But sometimes they're highly complex. There are a lot of moving pieces.

I've spoken out many times about it taking too long to get these done. I just gave a speech to TIA back in May, I believe, about this.

The vast majority of transactions are simple. But for the higher profile, more complex ones, it does take too long. More and more the cost of that the review process has to be baked into the cost of the deal. And those costs are then ultimately passed along to consumers.

Perhaps having just one agency review these would help them move more quickly. Let's figure out what a reasonable time frame is for these issues to be examined. In the case of a wireless merger, it's geographic market by

geographic market. Some also want to look at national markets, but there's a lot that does go on. So let's figure out what the reasonable timeframe is, and let's try to stick to it.

In some cases, it has nothing to do really with the complexity of the deal. The first major transaction I voted on in July of '06, and that was the Adelphia Comcast Time Warner deal. We had a 2-2 Commission from March of '05 until I was sworn in June 1st of '06.

Again, most of our issues are not partisan at all. Ninety-five percent of the time, we're unanimous. But this was one of those cases where they were waiting for the third Republican commissioner. It was one reason why that transaction took so long.

MR. MAY: That was sui generis, as we say. But do you get a sense with the current administration, for example, that there's some urgency to get these things done any quicker because of the marketplace changes? Is there anything you can think of now could speed up the way we review these things?

COMMISSIONER MCDOWELL: There's no one silver bullet. But I think it comes from the top. If you have a chairman who says this will be done in six months, barring some major extenuating circumstances, this will be done

within six months.

MR. MAY: I want to ask you about video regulation. We haven't mentioned that very much, and you talked about your kids. In part you were alluding to the fact they have all these different devices they get information and video from. We all know the litany, satellite, cable, and Internet video.

For someone like myself who's been around for a long time and remembers the three television networks dominating, it's incredible. Adam Thierer here has written a lot about media abundance.

So you found yourself disagreeing with the majority at times on some of the video regulations and whether they were still justified. That includes media ownership restrictions that are still in place. Some of these were put in place even before the Cable Act, three decades ago.

The other thing you've done, quite eloquently, is talk about the First Amendment implications. Some people talk about these things and vote on them, but without an appreciation that there's usually a First Amendment interest at stake. And you've recognized it.

What's wrong with this picture in terms of why the Commission doesn't seem to appreciate the fact that the

marketplace has changed so much and they need to get rid of some of these things?

COMMISSIONER MCDOWELL: I can't explain the motivations or philosophies of my colleagues. But I do think we, in a lot of ways, need to start from scratch. We need to understand that there are producers of content and they want to push their content out over multiple platforms. When it comes to things like the newspaper broadcast cross-ownership ban that was adopted in 1975, as I've said before, it's as outdated as the polyester leisure suits and disco music of its birth year.

If you're a broadcaster, you can push your content out over radio, TV. You can push it out over the Internet, certainly. But somehow if you print it on a piece of paper daily, it all of a sudden becomes a threat to democracy. In the meantime, there are a number of markets where we have waivers or grandfathered exceptions to the cross-ownership rule. And my question is, is there less democracy in those markets as a result of that? I don't think so.

I talk about this perhaps more than most. And some folks will say, "Industry's moved on. Newspapers are dying. Why do you care?" Then my response is, "Exactly." That's why I care. If this is a rule that's completely

outdated with the marketplace, then perhaps we need to get rid of it. The presumption should be that it should be discarded. Over the past few years, we've seen hundreds of daily newspapers go out of business. I don't want to say it's because of the rule. There's a market change going on, of course. But with the market being so fragmented, not only on the consumption side but on the supply side of the market as well, that's only a good thing. There's less danger concentration because of competition.

Back in 1960, when there were three TV networks and essentially one phone company, all of the FCC's regulations neatly fit into 463 pages of the CFR. As of about a year ago, it's about 3700 pages, even though we have markets that are more competitive.

What that shows is from 1960 until last year, the number of pages in the CFR grew by about 800 percent, and the economy grew by a little over 350 percent. So it's an example of how regulation in this area, just by page count, has outpaced economic growth. Some of that is because of congressional mandates, but some of it's not. We need to reexamine that. It's very compelling.

MR. MAY: That goes back to what we were talking about earlier, the relationship between regulation and the impact on investment, transition to the IP networks, and so

forth.

COMMISSIONER MCDOWELL: Exactly. It's no coincidence that investment dollars are flowing more freely to the least regulated areas.

MR. MAY: Right. When you were talking about video regulation, you said at one point that with everything that's happened, there ought to be a presumption. You used that word, "presumption" against regulation.

So here's what I had written down to ask you, and I'd like you to respond. Maybe it's something we can all think about in terms of either how the Commission might change its orientation in the future, or maybe with Congress looking at a new statute as well.

You're sometimes a lonely voice which points out the First Amendment interest at stake with respect to video regs, as I just said. Do you think there's any way that when constitutional rights are implicated that the Commission could at least establish a priori rebuttable presumptions against regulation?

Over the years the Commission often seems to see, that there's more and more competition. But again, because of those 130 public interest delegations and some of this other language, the public interest becomes whatever three

people on the commission say it is. So what I've been trying to focus on is establishing some type of presumptions in light of everything that's taken place in the marketplace. And when you've got constitutional rights at issue, it's even more important.

Does that sound like it might have some appeal to you?

COMMISSIONER MCDOWELL: Sure, absolutely.

I should have said in the newspaper broadcast cross-ownership matter, that there's a First Amendment issue as well. Of course, this is now under the purview of the Third Circuit as our overseer on all this.

Especially in the wake of *Citizens United v. FEC*, you have to ask: When a speaker is barred from speaking on one of many platforms, is that constitutional?

We should have presumptions. We should be assuming and always working in good faith that our rules are not only supported and called for by the statute but the Constitution as well. I'm frequently applying a First Amendment screen to what I vote on.

MR. MAY: I wish you could convince some of your other commissioners to do the same. But I know you try on that.

Now, I'm going to ask you one more question. And

by the way, Commissioner McDowell, as you can tell, answered all of these questions so fluidly. He didn't know what in the heck I was going to ask him. He certainly doesn't know what in the heck I'm going to ask about for this last one. But that's just the way we operate. You've done an admirable job

And he certainly doesn't know what questions you may ask. I'm going to give you a chance in a minute to ask some.

Just a week ago, the Supreme Court granted cert in *City of Arlington v. FCC*. It has to do with the Commission's authority to require certain procedures from the states and localities in the interest of getting towers sited more quickly in light of the spectrum issues we have.

The issue they granted cert on was whether the Commission is entitled to *Chevron* deference on decisions that are characterized by the agency setting the bounds of its jurisdictional authority. As most of you know, that is a highly deferential review standard. At least some people, including myself, have said that depending on what the court ultimately does, that case could impact Commission orders like net neutrality and some others that seem to be at the bounds of its jurisdictional authority.

But do you have any thoughts on that particular

decision? How you would like to see the Supreme Court rule on that? Should the Commission get *Chevron* deference and so forth?

COMMISSIONER MCDOWELL: The underlying order, in essence, preempted localities a bit to get cell sites up and running more quickly. And that's a good thing. I supported that order. Consumers would appreciate that, too.

They're saying it's not going to address the merits, but sometimes you never know with the Supreme Court. On the flip side, indecency has been up there twice recently, and they haven't really reached the First Amendment question. They keep bucking it back to us.

So you don't know where it's going to end up. The circuits are split, and that's one of the tests for whether or not cert is going to be granted. It could be a shaving of *Chevron* in terms of how much authority an independent agency has to determine its own jurisdiction regardless, of the end result.

I've only read the grant of cert. It's a page. There's not much there to reveal what they're thinking. But it's something to watch. So this is for all of you in the AP section of the class today. This is advanced administrative law.

And I wish I could get CLE credit for this panel, by the way. Maybe you can work on that next time. Being a Virginia attorney, I need 12 hours a year. It's going to be interesting for us admin law geeks.

The Solicitor General, of course, takes the lead in arguing before the Supreme Court rather than our Office of General Counsel. But our agency will be part of that.

It could have a lot of collateral effects, I think. It's a sleeper issue to watch, for our agency but other administrative agencies as well.

MR. MAY: It could affect every agency. By the way, this issue has been around for years or decades. People have written law review articles on it, and gotten tenure based on writing those articles.

COMMISSIONER MCDOWELL: Cured insomnia.

MR. MAY: So it could be very interesting.

What was that joke that caused my wife to laugh so much here?

COMMISSIONER MCDOWELL: Curing insomnia?

MR. MAY: Oh, okay. She knows about *Chevron*.

COMMISSIONER MCDOWELL: More than she ever wanted to know.

MR. MAY: What I want to do now is open it up for a few questions. Kathee Baker is in the back. She is our

events coordinator and helps make all this work. Let's give her a hand.

(Applause.)

MR. MAY: She has in hand a microphone. I'm going to call on people with questions for Commissioner McDowell. Wait until you get the mic. If the question turns into a comment, keep it fairly brief. That way, we'll have time for a few more before the panel comes up.

COMMISSIONER MCDOWELL: So don't do what you do.

MR. MAY: Dan.

DAN: Just two points. First, I'd like to congratulate the Commissioner. The last time you did this, you required two glasses of red wine. So you're on the right track.

COMMISSIONER MCDOWELL: It's Coke, Coca-Cola, soda.

DAN: Oh, that's okay. It looks red from back here. Of course, I don't want to betray any secrets of the Mays. But many times, Randy will come home and say, honey, is this a *Chevron* one or a *Chevron* two night?

So the question I had for you, Commissioner, is how does the Commission increase preemption and deregulation, assuming Congress doesn't take up a new statute any time soon?

I have often thought that Section 706 gave the Commission more authority than the Commission has stated in its cases and in its presentations to the court. In other words, when you read that, it was clear that Congress said if something is happening to slow down broadband deployment and adoption, then the Commission needs to deal with it. It's a very deregulatory provision.

COMMISSIONER MCDOWELL: It talks about deployment. I don't think it talks about adoption, does it?

DAN: Okay. But deployment is connected obviously to adoption. The two are connected. But the Commission has shied away from using the authority there. I'm wondering if that would be one place where the Commission could take another look at its conclusions about its deregulatory authority.

MR. MAY: Okay. That's a question.

COMMISSIONER MCDOWELL: Section 706, in my view is deregulatory in its bent. What it requires us to do is produce a report. Beyond that, it's not clear what it requires us to do other than to remove barriers with the implication being the removal of regulatory barriers that might be deterring investment. I think it's that simple.

So I don't think it gives us the authority to impose net neutrality regulations, for instance, or data

roaming. Both of those issues are before the appellate courts. But I think it's really quite simple. So we're required to produce a report. That's what's explicit. Then the other bent is to remove regulatory barriers that might be a deterrent to investment for deployment of broadband. And that is if it's not being made available to Americans in a timely fashion.

So from the end of '03, we had 15 percent of Americans having access to at least one broadband provider. A mere six years later, we have 95 percent of Americans having access to at least one broadband provider. That is a spike. So you have to ask yourself: Is that not timely? That's pretty remarkable for a country as big as ours. We're not Luxembourg. It's that simple.

DAN: All I'm saying is it could be a source of deregulation as opposed to the way that it's been sometimes used as a source of regulation.

COMMISSIONER MCDOWELL: Correct, I agree with that.

MR. MAY: Okay. Another question, Scott. And if everyone will, say your name and affiliation for the transcript.

COMMISSIONER MCDOWELL: Blood type, Social Security number.

MR. CLELAND: O positive. Scott Cleland, Net Competition. Briefly, what do you see, when you look at communication law, as the one, two, or three most problematic outdated or obsolete parts of the law?

COMMISSIONER MCDOWELL: From a higher altitude there is the siloing of the various titles. So you can say Title II, III, and VI. Then if I need to do a one, two, three, the most obsolete parts are Titles II, III, and VI.

We need to knock those down and rethink them. They had their historic reasons. Monopoly phone service created Title II. Radio service inspired Title III, although they weren't contemplating initially cellular mobile wireless. Then cable TV service inspired Title VI. And all had very different reasons and different technologies and business plans and market situations.

So my one, two, three would all be at number one, really. We need to fundamentally rethink Titles II, III, and VI and probably some others.

MR. MAY: Okay. Jerry Udwin.

MR. UDWIN: Jerry Udwin with the Udwin Group. After all the time you've spent thinking about this, Commissioner, what needs to happen to move Congress on this? Some calamitous embarrassment for the Commission, have meeting rules changed, or some political technique

that isn't employed?

Even in the last couple years we tried to reform, if you will, the Sunshine Act to allow three commissioners to get together under certain protective provisions. And that couldn't move even though it seemed to have bipartisan support.

What's it take to make some of these changes in the Act that, as you wisely point out, really need to be addressed and dealt with, actually happen?

COMMISSIONER MCDOWELL: I think we should all start fasting, go on a hunger strike.

It took about 10 years to pass the 1996 Act. You need leadership in Congress that's serious about moving legislation. Just to have history be our guide, what happened with the '96 Act is there had to be something in it for everybody, consumers and different industry players. And some parties might have to give up things in order to gain things.

It's going to take that kind of comprehensive effort. Consumer groups as well as industry representatives will come to the table more quickly if they're convinced that Congress is serious about moving legislation, comprehensive legislation, quickly.

I don't think we can wait 10 years. I don't think

we can take as long as we did for the 1996 Act. So I would hope we would move quickly.

PARTICIPANT: Commissioner, would it take having all the commissioners agree on a certain basis, even though the commissioners don't like telling Congress what to do?

COMMISSIONER MCDOWELL: Yes, certainly, this commissioner doesn't. I do wait for Congress. We report to the directly elected representatives of the American people. I'm a strong believer in that.

But when asked to give advice or give observations, I'm happy to do so. I don't know if five commissioners can agree on the details of legislation. So I wouldn't wait for that. It's hard enough for us to agree on FCC rules sometimes. Leadership will have to come from Congress, but we're there to advise and give our opinions.

MR. MAY: Okay. Now we're just going to take one or two more questions. Then we're going to move to our panel. And I want to make sure if any of our reporters have questions that I give them a chance. They probably already have a lot of red meat or whatever, but is that Ted raising his hand?

COMMISSIONER MCDOWELL: They all want exclusives.

MR. GOTSCH: Hi, Ted Gotsch with *Telecommunications Reports*. Hi, Commissioner. Earlier

this year you had expressed the need, you said, for the FCC to attack contributions reform this year. That's your preference, I'm trying to say. Obviously, we're in October. In recent weeks, there's been people on the staff saying that's not going to happen.

I wondered, number one, if you thought that was the case. Number two, I was wondering your thoughts about how that negatively, in your mind, affects the market given that we don't know when it would be taken up in 2013. There's obviously a lot of upheaval with an election and such. It may depend on changes there, but it could delay it further.

COMMISSIONER MCDOWELL: I have not been told by anybody that it won't happen this year. So I'll ask that question. Maybe you've been told by people, so that's good information.

We have a contribution factor that has been spiking out of control. This is a tax on consumers. The pool of revenue from which we draw those funds has been shrinking and will continue to shrink as market trends continue.

Something has to be done. I've been a proponent for many years now of at least examining a hybrid or something involving phone numbers and telecom revenues. I

am not in favor of any Internet tax, or broadband tax, or something that is essentially a broadband tax that might be named something else. And I never have been. So when we talk about broadening the base, it's not into that space. It never has been.

I hope we could get moving on it as quickly as possible. Since January of '07, I called for doing all this at the same time. I wish we had done it when we did distribution reform a year ago this month, but we didn't. So here we are.

MR. MAY: Okay. We got time for one more. I don't see any of the other reporters raising their hands, so I'm going to call on the gentleman back there for a quick question. Make sure you identify yourself.

MR. MILLER: Joseph Miller from the Joint Center for Political and Economic Studies. Hello, Commissioner. Just a quick question. I'm not intending to cast aspersions. I work for a think tank that focuses on African Americans and other communities of color. And I just want to get your thoughts on how you framed having a deregulatory environment after the global financial crisis because a lot of the American people have lost faith in deregulation.

What are your thoughts? What are some of the

arguments that you think are most persuasive in terms of why we should continue to pursue deregulation?

COMMISSIONER MCDOWELL: So in context, just to repeat: Where there's market failure resulting in consumer harm, you need to look at narrowly tailored regulation.

There's debate regarding the financial meltdown as exactly why that happened. You can look at the Community Reinvestment Act, a big federal mandate that had a noble cause which was to lend money to people to buy houses under the public policy goal of more affordable housing. But it also resulted in a perverse unintended consequence of banks lending to people who may not have been creditworthy otherwise.

Then you had some of the risk taken out of the market with Fannie and Freddie, federal creatures, who then packaged bad loans and securitized them and sold them in secondary markets. So I think that is a credible scenario as well.

We hear a lot about market failure. One term we have not really used today, and I should underscore, is regulatory failure. What are the perverse consequences of regulation?

Let's not always assume it's the markets that fail. Let's look at why things happened. Was there some

unintended consequence, some perverse consequence that caused market behavior because of a law or regulation? Let's look at all that. I'm not a financial services expert, by any means. But I do think that's worthy of at least a discussion and debate.

Regulation can really snuff out innovation. If you look at it in the telecom context, I have on the credenza behind my desk my Grandmother McDowell's telephone from San Angelo, Texas. She had this phone until the day she died in 1992. It was the black Bakelite phone from the 1950s that probably could withstand a nuclear bomb dropping. It's very rock solid, but it wasn't terribly innovative.

And that's what she had. That's what the monopoly phone company gave her. That's what the monopoly gave. There were technologies that could have been brought to marketplace long before, but you had a regulated monopoly when you didn't necessarily need to have one.

You never know what you're not getting due to the regulation. You never hear about the product or service that doesn't come to market. So you don't know what you're not getting. But if you look at what's been exploding, what parts of the marketplace that have been exploding in the past, 10 or 20 years, and the last 10 years especially,

it's been in the least regulated areas.

In the Internet space, in terms of information services but also applications and content, those market segments are not terribly regulated. And by the way, they are terrific entrepreneurial ground for everybody, including women and minorities. This was part of my speech, by the way, before the National Association of Black Broadcasters last month when they gave me an award.

There are tremendous opportunities in the unregulated space because in a competitive market, you can have lower barriers to entry. So let's promote abundance and competition rather than regulation and the rationing that comes along with regulation.

MR. MAY: Okay. I'm going to ask the panelists to come up. And while they're doing that, let's give Commissioner McDowell a really big round of applause.

(Applause.)

* * * * *