Testimony of Randolph J. May

President, The Free State Foundation

Hearing on "Evolution of Wired Communications Networks"

before the

Subcommittee on Communications and Technology

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Summary of the Testimony of Randolph J. May
President, The Free State Foundation

As the transition away from analog narrowband communications services to digital broadband Internet Protocol ("IP") services continues, the fundamental question confronting Congress and the Federal Communications Commission is this: Will the existing public utility-style regulatory framework be replaced by a new free market-oriented paradigm that accommodates and accelerates the ongoing broadband IP transition by taking into account the dramatic marketplace and technological changes that are continuing to occur at a rapid pace? Or, instead, will the regulatory framework be an impediment to progress? The answer to this question has very important implications for the nation's economic and social well-being because there is widespread agreement that IP services, overall, provide consumers with more features and functionalities in less costly, more efficient ways than do copper-based time-division multiplexed ("TDM") services.

My testimony explains *why*, in order to enhance overall consumer welfare, the existing legacy regulatory framework, essentially a public utility-style common carrier model devised based on assumptions of a monopolistic market, should be replaced in a timely fashion by a free market-oriented model. And I will explain *how*, in this new paradigm, the FCC's future regulatory activity should be tied closely to findings of demonstrable market failure and actual consumer harm. In my view, the FCC presently may well possess the authority under the Communications Act to implement most of the regulatory changes necessary to facilitate completion of the digital transition, while, at the same time, safeguarding certain basic public safety and universal service interests. But to the extent such authority either is lacking, or the FCC fails properly to exercise such authority in a timely fashion, then, of course, Congress should be ready to act. And, in any event, aside from any near-term legislation that may be necessary or desirable, to ensure that the benefits resulting from the new marketplace realities that characterize the IP world are preserved without any backsliding, Congress ultimately should adopt a new "Digital Age Communications Act" along the lines I have long advocated.

In the late 1970s and early 1980s, traditional economic regulation of the airline, rail, bus, and trucking markets was largely eliminated, and this deregulation, initiated by President Carter's administration, was accomplished on a mostly bipartisan basis and in a symbiotic process in which Congress and the agencies (the Civil Aeronautics Board and the Interstate Commerce Commission) cooperated productively. The agencies generally initiated deregulatory changes through the administrative process while Congress engaged in oversight. And Congress eventually legislated to put in place consumer-enhancing deregulatory regimes that took account of the marketplace competition. A similar opportunity for positive change now exists.

Finally, I want to emphasize this: The FCC and Congress should not look at the inevitable IP-transition just as an *opportunity* to implement a new free market-oriented regime fit for the digital age. Given the stakes, implementing such a new paradigm should be viewed as a *necessity*.

Testimony of Randolph J. May

President, The Free State Foundation

Mr. Chairman, Ranking Member Eshoo, and Members of the Committee, thank you for inviting me to testify. I am President of The Free State Foundation, a non-profit, nonpartisan research and educational foundation located in Rockville, Maryland. The Free State Foundation is a free market-oriented think tank that, among other things, focuses its research in the communications law and policy and administrative law and regulatory practice areas. I have been involved for thirty-five years in communications law and policy in various capacities, including having served as Associate General Counsel at the Federal Communications Commission. While I am not speaking on behalf of these organizations, by way of background I wish to note that I am a past Section Chair of the American Bar Association's Section of Administrative Law and Regulatory Practice and its representative in the ABA House of Delegates. I am currently a Public Member of the Administrative Conference of the United States and a Fellow at the National Academy of Public Administration. And, in addition to having published over 150 scholarly law review and other articles and commentaries, I am the author, editor, or co-editor of five books on communications law and policy, including, most recently, *Communications Law and Policy in the Digital Age: The Next Five Years*.

I mention the last book I edited not to sell books, but because its title puts me in mind of what this hearing really, in its essence, is all about. As the transition away from analog narrowband communications services to digital broadband Internet Protocol ("IP") services continues, the fundamental question confronting Congress and the Federal Communications Commission is this: Will the existing public utility-style regulatory

framework be replaced by a new free market-oriented paradigm that accommodates and accelerates the ongoing broadband IP transition by taking into account the dramatic marketplace and technological changes that already have occurred and are continuing to occur at a rapid pace? Or, instead, will the regulatory framework be an impediment to progress? The answer to this question has very important implications for the nation's economic and social well-being because there is widespread agreement that IP services, overall, provide consumers with more features and functionalities in less costly, more efficient ways than do copper-based time-division multiplexed ("TDM") services.

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Finally, I want to emphasize this: The FCC and Congress should not look at the inevitable IP-transition just as an *opportunity* to implement a new free market-oriented regime fit for the digital age. Given the stakes, implementing such a new paradigm should be viewed as a *necessity*.

I. The IP Transition Is Well Underway But Not Complete

It is important to understand that the transition away from analog narrowband services to digital broadband services has been underway for well over a decade. Indeed, in the year 2000, then FCC Commissioner (later Chairman) Michael Powell spoke of the "Great Digital Broadband Migration" as already underway, and as already having a "profound effect on the communications industry and on our society as a whole." Here is how Mr. Powell described then the implications of the digital migration that he saw occurring:

> It is not a movement of people, though it will change how people live. Rather, it is a fundamental shift of technology—the arrival of "disrupting technologies" (in the words of Clayton Christensen, the author of *Innovator's Dilemma*). And it is the

> unleashing of the power of "creative destruction," the phrase coined by the late great economist Joseph A. Schumpeter, who is celebrated more and more as the father-figure of the New Economy. Schumpeter saw that technological change "incessantly revolutionizes the economic structure from within." Rather than talk of "reform," a relatively pedestrian, incremental notion, we need to consider the Schumpeterian effect on policy and regulation. That is, what are the implications of "creative destruction" economics on economic-regulatory policy.[1]

Of course, since the turn of the century, the migration to digital communications platforms has steadily progressed, so that the transition process perhaps is even far beyond what then-Commissioner Powell could foresee. I am not going to use this testimony to introduce all the available facts and figures which are not really in dispute that indicate the current state of the marketplace transition, but rather I am going to simply refer to a few of the figures contained in the recently released comprehensive report, "Telecommunications Competition: The Infrastructure Investment Race," by Anna-Maria Kovacs, a Visiting Senior Policy Scholar at Georgetown University's Center for Business and Public Policy.

Ms. Kovacs reports that as of 2012 only 5% of U.S. households still rely only on circuit-switched POTS (Plain Old Telephone Service) lines for their voice communications service, while 38% of U.S. households are wireless only. At the end of 2012, only 34% of U.S. households even subscribed to legacy POTS service. Over 90% of households subscribed to wireless service, increasingly delivered over 4G/LTE broadband platforms. The number of cable and other non-ILEC interconnected VoIP subscribers has increased significantly and steadily as POTS subscriptions have declined. In sum, according to Ms. Kovacs' estimates, circuit-switched traffic amounts to less than 1% of IP traffic today. The FCC itself, in the context of a workshop on the digital

[1] Remarks of Commissioner Michael Powell, "The Great Digital Broadband Migration," Communications Deregulation and FCC Reform: Finishing the Job, p. 12 (Eisenach and May: Kluwer Academic Publishers, 2001).

transition, previously recognized that "broadband technologies…are fast becoming substitutes for communications services provided by older, legacy communications technologies."[2]

Of course, this migration to digital services, including digital voice services, affects, in a substantial way, the use of service providers' existing legacy networks. And, importantly, it impacts the funds available to service providers to invest in new broadband facilities and services. The impact on the use of legacy networks is dramatic. As but one measure, since 1999, the number of circuit-switched local exchange carrier telephone lines in use has decreased by two-thirds, from approximately 140 million lines to approximately 50 million lines.

It is possible that others might provide a slightly different set of figures for the same indicators. But I am confident that any such figures would not cast doubt on the clear direction of the ongoing IP migration or, indeed, the extent to which such migration already has occurred. So, the real questions involve the public policy implications of the transition and the implications of those public policies on American consumers. And

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[2] Public Notice: "FCC Workshops on the Public Switched Telephone Network in Transition" at ¶ 2 (2011), available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1110/DA-11-1882A1.pdf. It is important to understand that new companies and technologies continually enter the market to give consumers greater choice in access to broadband services. For example, in its latest "Measuring Broadband America" report, the FCC recognized that the satellite broadband market has been on the "verge of a major transition" and now provides services offering performance "as much as 100 times superior to the previous generation." Report: "Measuring Broadband America" at 4 (2013), available at: http://transition.fcc.gov/cgb/measuringbroadbandreport/2013/Measuring-Broadband-America-feb-2013.pdf. Satellite operators are offering speeds 40% higher than advertised, and they have reported a more than 25% increase in broadband satellite subscribers. Report: "ViaSat 2013: Taking Center Stage" at 8 (2013), available at: http://files.shareholder.com/downloads/VSAT/2745172919x0x682046/7B22F640-4449-4B9F-AD49-ABD19DB2E0DF/Viasat_AR_2013_web.pdf; *see also* Max Engel, "FCC Report Marks Key Breakthrough for Satellite Broadband," Satellite Today, available at http://www.satellitetoday.com/publications/2013/04/01/fcc-report-marks-key-breakthrough-for-satellite-broadband/.

whether the FCC and Congress will rise to the challenges presented by IP marketplace revolution. This is the subject to which I now turn.

II. The Dramatic Marketplace and Technological Changes Driving the IP-Migration Require Near-Term FCC Actions As Well As Congressional Oversight

In this section, I want to address what the FCC should do in the near term to facilitate completion of the IP migration, at a time when Congress continues to engage in active oversight. But before doing that, it is useful as a preface to set forth briefly some fundamental guiding principles.

A. General Applicable Regulatory Principles: Turn Away from Public Utility-Style Regulation Toward Free Market Competition

When a market undergoes dramatic, competition-enhancing disruptive change – as the voice services and advanced telecommunications market surely has during the past decade – the fundamental regulatory approach to that market should reflect such change. Otherwise, consumer welfare likely will suffer on account of unnecessary legacy regulations that have the effect of dampening new investment and restraining innovative new services or that result in higher prices being charged by service providers. When markets move from a monopolistic to a competitive environment – as is certainly the case when it comes to communications in the last decade or more – regulatory policy should no longer be premised on outdated monopolistic assumptions. This is especially so when markets become competitive due to changes largely brought about by the introduction of innovative technologies and business models – precisely what has transpired as a result of the digital revolution.

Specifically, competitive markets should be subject to a much less onerous regulatory approach than the legacy public utility/common carrier model that historically

has been applied to communications service providers. In today's dynamic environment, taking into account certain regulatory measures to ensure public safety and basic universal service obligations are met, marketplace competition should serve as the primary means for incentivizing and disciplining providers to ensure availability of superior service and price options for consumers. Any remaining regulatory requirements should provide the least intrusive means available to serve statutory objectives, and the benefits of any remaining regulations should outweigh the costs.

B. What the FCC Needs to Do in the Near-Term

As I have said above, in reality, the transition from analog to digital facilities and services, or from TDM to IP if you prefer, has been underway for well over a decade. And, while there has been some recent regulatory back-sliding,[3] the FCC deserves some credit for getting us to this point by virtue of adopting, in the early 2000s, a generally "light touch" regulatory approach for broadband Internet access services. It did this by classifying Internet access services as unregulated information services rather than telecommunications services subject to common carrier regulation.[4] So it is wrong to think in any sense of the FCC now needing to *initiate* the transition. But the agency does need to act to expedite *completion* of the transition. In doing so, it can address legitimate public safety and universal service concerns in the most efficient, cost-effective manner possible. And the FCC needs to act without the delay that so often has characterized its *modus operandi* – which is why I have emphasized "*near term*" when referring to needed

[3] The FCC took a step backwards in 2010 when it adopted net neutrality mandates applicable to Internet service providers in its *Open Internet* order. *Preserving the Open Internet*, Report and Order, 25 FCC Rcd. 17905 (2010).This order is currently on appeal in the United States Court of Appeals for the D.C. Circuit.

[4] *See, e.g.,* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 67 Fed. Reg. 9232 (2002).

FCC actions.

It is been a year since AT&T filed its petition asking the FCC to initiate a proceeding "to facilitate the 'telephone' industry's continued transition from legacy transmission platforms and services to new services based fully on the Internet Protocol ('IP')."[5] Focusing on the retirement of TDM facilities and their replacement with IP-based alternatives, AT&T asked the Commission to conduct a limited number of trials in selected locations to help the agency "understand the technological and policy dimensions of the TDM-to-IP transition and, in the process identify the regulatory reforms needed to promote consumer interests and preserve private incentives to upgrade America's broadband infrastructure."[6] Since then, while the Commission has opened a proceeding, solicited comments, and held a workshop or two, it has not acted with sufficient dispatch, or shown a commitment to do so. Perhaps this hearing, and further congressional oversight, will provide a spur for faster Commission action.

The central reason why near-term action is necessary is essentially grounded in economics, but it does not take a Harvard-trained economist to understand. Indeed, the reasoning was set forth clearly for the Commission in 2010 in the National Broadband Plan ("NBP"), which stated that "requiring an incumbent to maintain two networks…reduces the incentive for incumbents to deploy" new IP facilities.[7] Continuing to maintain the TDM-based network "[s]iphons investments from new networks and services."[8] Three years ago the NBP warned the Commission that maintaining two networks was "not sustainable" and would likely lead to stranded investments as the

[5] AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, GEN Docket No. 12-353, filed November 7, 2012.
[6] Id., at 1.
[7] Connecting America: The National Broadband Plan, FCC, at 49.
[8] Id., at 59.

traffic which the legacy network carries declines precipitously. Because ILEC investment resources are limited, this is axiomatic, and indeed, no responsible policymakers or advocates seriously argue that it makes sense to operate and maintain the TDM network facilities indefinitely. The real questions involve timing and getting in place a proper free market-oriented replacement regime, one that safeguards public safety and provides a certain basic level of universal access in the most efficient manner, but that otherwise abandons the existing legacy model that is based on public utility-style common carrier regulatory requirements.

As for timing, it is important for the Commission, or Congress if need be, to set a firm deadline for completing the transition, that is, retiring the legacy TDM network. As explained above, until the TDM network facilities are retired, the funds required to operate and maintain such facilities are not freed up for investment in new or upgraded IP facilities. Just as with the DTV transition, a firm deadline is needed so that the Commission, service providers and facilities suppliers, consumers, and other interested parties can focus on the tasks that need to be accomplished by the deadline date. From the outset, it should be made clear that the date will not be delayed absent a showing, by clear and convincing evidence, of good cause.

Regrettably, the Commission has been slow to initiate the trials requested by AT&T, or any form of trials. Trials in selected locations likely would prove useful in providing information concerning matters such as consumer reactions to transition notices and cut-overs, adjustments to new IP offerings, and the like, as well as service provider implementation of basic public safety and universal service backstops. But the failure to initiate trials, and if ever initiated to complete them, should not be allowed to

delay unreasonably Commission decision-making and deadline setting. In other words, at some point the costs of undue delay in completing the transition will outweigh the benefits of whatever knowledge is anticipated to be gained from trials in a few markets. This is not to say that trials should not be initiated quickly. But it is to say it is easy to see that, absent a firm commitment by the Commission to oversee their timely completion, those who have an interest in delay may use the trials as delaying mechanisms. So it may become advisable for the Commission to move forward with necessary regulatory actions and regulatory relief absent completion of trials.

In comments submitted to the FCC, the Free State Foundation discussed at some length tools the Commission has available to facilitate the trials, and, as importantly, to facilitate the actual implementation of the transition to completion.[9] These tools include exercise of the Commission's authority under Section 10 of the Communications Act[10] to forbear from applying any law or regulation upon certain statutory showings. The Commission historically has underutilized its forbearance authority since this unique regulatory relief provision was added to the Communications Act in 1996. But certainly the exercise of forbearance authority is a tailor-made tool for facilitating completion of the transition by avoiding claims that the application of existing regulatory provisions stand in the way.

In addition to forbearance, the Commission has available other tools such as its waiver authority to get the transition completed. For instance, forbearance or waiver grants can be used to clear delays or other obstacles that could result from service

[9] Comments of the Free State Foundation, AT&T and NCTA Petitions on Transition from Legacy Transmission Platforms to Services Based on Internet Protocol, GN Docket 12-353, January 28, 2013.
[10] 47 U.S.C. §160.

discontinuance requirements,[11] notice-of-network change regulations,[12] or state carrier-of-last-resort obligations that are unnecessary or that would hinder the transition to IP-based services.

In some instances, the use of declaratory rulings might prove useful for providing clarification of requirements in an expeditions manner. For example, the Commission should be ready to issue declarations that preempt state or local regulations that stand as roadblocks to completion of the IP transition. The Commission should also consider promptly issuing a declaratory ruling clarifying the inherently interstate status of IP-enabled services, such as VoIP. In prior orders, the Commission has recognized the benefits that result from ensuring that a truly national market exists for such services, free from layers of burdensome regulations.[13] Unlike the old analog networks, it is more costly and less practical, if not technically infeasible, to track the jurisdictional status of IP calls for regulatory purposes. Maintenance of dual regulatory regimes, especially if the states seek to impose any form of traditional public utility regulation on IP providers, is likely to thwart the federal policy of completing the IP transition in a timely fashion. Thus, the Commission's preemption authority may be an important tool.

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[11] *See* 47 U.S.C. § 214(a).

[12] *See* 47 C.F.R. §§ 51.325(a), 51.333.

[13] *See, e.g., In re:* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd 4798 (2002) (classifying cable modem service as "information services" and thereby exempt from potential common-carrier regulation under Title II of the Communications Act), *affirmed*, *NCTA v. Brand X*, 545 U.S. 967 (2005); *In re:* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd 14853 (2005) (classifying wireline broadband services as "information services" exempt from regulation under Title II), *affirmed*, *Time Warner Telecom v. FCC*, 507 F.3d 205 (3d Cir. 2007); *In re:* Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, 22 FCC Rcd 5901 (2007) (classifying wireless broadband services as "information services" exempt from regulation under Title II). *See also, e.g., In re*: Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, 19 FCC 22404 (2004) (preempting state regulation of Vonage's DigitalVoice VoIP service), *aff'd Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

As I have said, a key aspect of the IP transition is replacement of the existing public utility-style regime – with its rate regulation, non-discrimination mandates, and the vague public interest standard at its core – with a free market-oriented model characterized by regulatory intervention only in instances when demonstrable market failure and consumer harm has been shown. Under the new market-oriented model that should govern the IP world, instances of regulatory intervention (other than to implement certain public safety and universal service requirements) should be rare.

It is possible that in rare instances disputes concerning interconnection between two IP service providers might be a cause for some "last resort" form of regulatory backstop, but this is by no means evident now. Presently, Sections 201 and 251 in Title II of the Communications Act, in general, impose an interconnection duty, upon request by one telecommunications carrier to another, at reasonable rates and on nondiscriminatory terms. Without going into details here, suffice it to say that this general interconnection duty is enforced, ultimately, by the FCC's authority, in administrative proceedings long characterized by the trappings of common carrier regulation, to set the rates for interconnection and to define nondiscrimination obligations.[14]

Up to now, the FCC historically has not intervened in interconnection disputes between Internet providers, and it is questionable, in light of the fact that such providers are not common carriers or telecommunications carriers but rather information service providers, whether the agency possesses the legal authority to intervene even if it wished to do so. But it should not wish to do so because, thus far in the IP world, marketplace negotiations have led to agreements to interconnect among the service providers.

[14] Of course, the Telecommunications Act of 1996 uses the term "telecommunications carrier," for example in Section 251, in place of "common carrier." They are essentially the same.

Although there have been a few instances when interconnection disputes have been brought to the Commission's attention (for example, the dispute between Level 3 and Comcast), to the best of my knowledge these disputes ultimately have been resolved by the parties through voluntary negotiations. The existence of many different IP networks facilitates various transit routing arrangements around a particular direct peering point in the event of stalemated negotiations. Indeed, the existence of many alternative IP networks and routing arrangements almost certainly is the reason why, thus far, IP-to-IP interconnection arrangements have been negotiated so routinely on a voluntary basis without regulatory intervention.

Therefore, the Commission should not decide prematurely to establish any regime for intervening in, or otherwise regulating, the private voluntary negotiations that presently are employed to establish connections between Internet providers. The Commission should determine that, while it intends to monitor the situation, it presumes that IP-to-IP interconnection agreements will continue to be negotiated in the marketplace on a voluntary basis and that, absent clear and evidence of demonstrable market failure and consumer harm, it does not intend to intervene. It is very unlikely that there will be any need to intervene. But in the unlikely event there ever is, the Commission certainly should not revert to a public utility-style common carrier regulatory model. Instead, at most, the agency should devise some form of dispute resolution procedure, perhaps requiring mediation first, and if that fails, some form of third-party baseball-style "last best offer" arbitration.

I have said that the Commission should retain authority to facilitate the provision of a basic level of communications service on a universal basis. It is important to keep in

mind that, in the IP world, cable operators, telephone companies, wireless providers of different kinds, fiber providers, satellite operators, and more, are all, more or less, competing against each other to provide broadband services. For the most part, this competitive marketplace environment, in conjunction with, and made possible by, the existence of the various alternative delivery platforms, means that an acceptable basic level of communications service will be available to most Americans on a ubiquitous basis without the need for regulatory intervention or provision of subsidies. But in those limited instances where this may not be true – in locations unserved by any provider meeting certain basic standards and for low-income persons – there is a role for the Commission to play in ensuring universal service.

Of course, the Commission's USF/ICC reform proceedings have addressed, and are continuing to address, the establishment of a proper universal service regime. The Free State Foundation has filed numerous comments in these proceedings[15] and I will not repeat the points made in those comments here. The design of the proper universal service backstop in an IP-world, which in large part is what the Commission should be aiming to do in the USF/ICC reform proceedings, is a whole subject in and of itself. For now, I will just say that, in the context of those proceedings, I have advocated capping the high-cost fund, gradually reducing the available subsidies, and establishing a sunset

[15] See, e.g., Randolph J. May and Seth L. Cooper, "Comments of the Free State Foundation: Universal Service – Intercarrier Compensation Transformation Proceeding," (August 24, 2011), available at: http://freestatefoundation.org/images/Further_Inquiry_-_USF ICC_Comments_082411.pdf; Randolph J. May and Seth L. Cooper, "Reply Comments of the Free State Foundation: Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime," (May 23, 2011), available at: http://freestatefoundation.org/images/USF_Comments_05.23.11.pdf; Randolph J. May and Seth L. Cooper, "Comments of the Free State Foundation: Connect America Fund, Compensation Regime," (April 18, 2011).

period, say, of ten years for ending the high-cost fund subsidies. And I have advocated maintaining a targeted Lifeline program to provide subsidized service to those low-income persons demonstrated to be truly needy. It is obvious, of course, that the existing Lifeline program is in need of further meaningful reforms to prevent waste, fraud, and abuse, and continued support will be jeopardized if the FCC doesn't quickly take steps to implement safeguards.

III. Ultimately, Congress Needs to Replace the Current Communications Act with a New Digital Age Communications Act

As I have said, in the near-term, and without delay, it is the FCC's job to proceed with facilitating completion of the IP transition in the manner I have suggested thus far, and I believe it mostly has the authority to do so. To the extent particular issues regarding the agency's authority arise, it could become advisable for Congress to adopt certain responsive legislation that is consistent with the principles I have discussed.

Nevertheless, because of the extent of the dramatic marketplace changes wrought by the IP transition that already have been described, it seems to me that Congress ultimately needs to comprehensively overhaul the Communications Act by adopting a new free market-oriented model that breaks thoroughly with the past. And I want to add here, without addressing the matter in any detail, that it is possible, depending on the time-frame in which Congress ultimately acts, that consideration should be given to whether authority for overseeing competition and consumer protection issues relating to broadband Internet service provider practices should be transferred to the Federal Trade Commission. The FTC has expertise in these areas, and such a transfer might bring a degree of uniformity of treatment to various providers in the Internet ecosystem, some of

which are subject to the FTC's general jurisdiction over all companies in commerce and some of which are subject to the FCC's specialized jurisdiction.

But putting aside the question of any potential jurisdictional shift for now, and I am not advocating such a transfer now, here are some the key points regarding a new legislative Digital Age Communications Act framework. We do not need a replacement regime based on a newer (but nevertheless soon to-be-outdated too) set of techno-functional constructs like the ones that now characterize the Communications Act's current "stovepipe" model.[16] The new model, unlike the current stovepipe one in which the indeterminate "public interest" standard plays such a prominent role, should tie the FCC's permissible regulatory activity closely to a competition-based standard that necessarily requires the agency to base its decision-making on a mode akin to an antitrust-like analysis.

By virtue of adoption of a competition standard grounded in antitrust-like jurisprudence,[17] the FCC would be required, much more than it is today, to engage in rigorous economic analysis that focuses whether there is a demonstrated market failure causing actual consumer harm. As part of such analysis, the agency would need to take

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[16] See Randolph J. May, *Why Stovepipe Regulation No Longer Works: An Essay on the Need for a New Market-Oriented Communications Policy*, 58 FED. COMM. L. J. 103 (2006). For an early discussion relevant to how what I have called the Communications Act's techno-functional constructs are outdated in the IP world, see my essay, Randolph J. May, *The Metaphysics of VoIP*, CNET, January 5, 2004 http://news.cnet.com/2010-7352_3-5134896.html. The issues we are discussing today concerning the need to implement a new regulatory model were evident to me then. Also, I should add that the legislative model that I set forth here is akin to the "Digital Age Communications Act" model which was developed in 2005 in a project which I led at the Progress and Freedom Foundation. The project involved many notable academics and think tank law and economics experts, who made significant contributions.

[17] Note that I am not suggesting the agency would be required to adhere in any strict sense to antitrust law or its precedents. Rather I am suggesting that following a competition-based standard rather than a public interest standard likely would require the agency, if its decisions are to be sustained on judicial review, to engage in a rigorous economic analysis regarding allegations of market failure and consumer harm.

into account the dynamic technological environment that characterizes the digital marketplace. Further, unlike the way the agency mostly now operates, under the new model, the FCC generally would be required to favor narrowly-tailored *ex post* remedial orders over broad *ex ante* proscriptions developed in rulemakings. This would be accomplished by requiring the Commission to determine whether service providers subject to individualized complaints possess demonstrable market power that should be constrained in some appropriately targeted way. So, rather than the FCC embarking on generic rulemaking proceedings that frequently end with the adoption of overly broad proscriptions designed to anticipate harms that may never materialize, regulatory relief most often would be accorded through focused adjudicatory proceedings.

This new competition-based, market-oriented model would force the FCC to focus its attention on market failures and overall consumer welfare, not on outdated regulatory classifications grounded in particular technology platforms or functional characteristics that may happen to favor one competitor over another without any good reason. And the Commission no longer would be able to invoke the highly elastic public interest standard to devise new regulations that have little or nothing to do with existing marketplace realities.

Only with substantial deregulatory changes in communications law and policy will the United States be able to realize fully the benefits that enhanced competition and advanced digital broadband technologies in the communications marketplace can bring to our nation's consumers and to our economic and social well-being. As I said earlier in this testimony, in the late 1970s and early 1980s the airline, rail, bus, and trucking transportation markets were largely deregulated, and this change in regulatory paradigm

was accomplished on a bipartisan basis, with the relevant agencies and Congress engaged in a productive symbiotic relationship. The change in regulatory paradigm that I recommend in this testimony for the dynamic IP world should be accomplished on a similar basis.

Thank you for giving me the opportunity to testify today. I will be pleased to answer any questions.