REGULATORY REFORM AT THE FCC: WHY NOT NOW?

April 12, 2011

U.S. Capital Visitor Center
Congressional Meeting Room North
Washington, D.C.

MODERATOR:

RANDOLPH J. MAY, President, The Free State Foundation

PARTICIPANTS:

JAMES M. ASSEY, Executive Vice President, National Cable & Telecommunications Association

STEVE LARGENT, President & CEO, CTIA-The Wireless Association®

EDWARD P. LAZARUS, Chief of Staff, Federal Communications Commission

WALTER MCCORMICK, President and CEO, USTelecom

MICHAEL WEINBERG, Staff Attorney, Public Knowledge

---

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

P R O C E E D I N G S

MR. MAY: I'm going to ask the panel members to come right up now.

While they're doing that and getting settled in, Kathee Baker is the Events Coordinator for the Free State Foundation. I try and get some good speakers here and think about what we're going to do in terms of the intellectual content, but she does all the rest for us.

So can you just join me in thanking Kathee Baker, our Events Coordinator, too?

(Applause.)

MR. MAY: Okay. We are going to dive right into our panel. And as I alluded to earlier, we're fortunate to have such a distinguished group of panelists.

Because they are such a distinguished group, I'm not going to waste much time trying to reset the topic -- I think we all have it in mind -- or to spend an inordinate amount of time in introducing these panelists.

Again, you have your bios. What I want to do is just say a sentence or two about each one. And if they will listen carefully, I'm just going to then ask them to speak in the order that I introduce them. I've asked them to speak initially for just five minutes. Some of these guys have been on Free State Foundation panels and at events before, and they know, even as distinguished as they are, that I will even cut them off.

(Laughter.)

MR. MAY: So that's just the way it is.

Okay. We're going to start off with James Assey. James is Executive Vice President of the National Cable and Telecommunications Association.

As most of you know, he's been filling in ably in the interim between the departure of Kyle McSlarrow and Michael Powell joining the Association as President.

James began his tenure as Executive President for NCTA on February 1, 2008, and as the second most senior executive at the Association, he's involved in all aspects of NCTA's work on behalf of the cable industry.

James is a graduate of Georgetown University Law School and an adjunct faculty member at Georgetown University Law School.

Next we'll have Steve Largent speak. Steve is President and CEO, of course, of CTIA, the Wireless Association. Steve became President and CEO of CTIA in November 2003, and prior to joining CTIA, Steve represented Oklahoma's First Congressional District in the U.S. House of Representatives from '94 to 2001.

His bio doesn't mention this; but I'm going to do it, darn it. He is, I think most of you know, in the NFL Hall of Fame as one of the NFL's all-time great receivers for the Seattle Seahawks.

Next, that's obviously not Gigi Sohn we're going to hear from. I think the tent card may still say Gigi Sohn. But Gigi is serving on a jury today.

When I invited her, she knew she had jury duty. But she told me there was about a 90 percent chance, the way that things worked in the District, that she would actually not have to serve for the second day. But there's always that ten percent.

So Gigi couldn't be with us, and sends her regrets. She also sent Michael

Weinberg to fill in. And he's a full-time staff attorney at Public Knowledge. He also served two years as a law clerk and student intern at Public Knowledge, and received his J.D. from Georgetown University Law School.

After Michael, we're going to hear from Walter McCormick, President and CEO -- have you noticed we have a lot of "President and CEO's" here? And anyone who's not is equally distinguished. Don't worry about that.

Walter is President of the United States Telecom Association, representing broadband service providers, manufacturers, and suppliers.

Prior to joining USTA, as we still call it, in 2001, Walter served as President and CEO of the American Trucking Association. He also served as General Counsel to the U.S. Senate Commerce Committee.

Since I said that, then, I should point out also that James served and had a distinguished career with the Senate Commerce Committee as well.

And then finally, last but, as we say and absolutely mean it in this case, we're fortunate to have with us, Edward Lazarus. He's Chief of Staff of the Federal Communications Commission. Eddie was named Chief of Staff at the FCC in June 2009, previously co-leader of the firm-wide litigation practice at Akin Gump, and a member of their Management Committee of 800 lawyers. Can you imagine being on the Management Committee with 800 lawyers? That would be like herding cats, as they say.

I just have to pick out one more thing -- he also was a Law Clerk for Supreme Court Justice Harry Blackmun.

So with that, we're going to start, as I said, with James, and go right down that

line. Each one of these distinguished gentlemen will offer their ideas about regulatory reform and institutional change.

And then we'll have a good discussion, and also get your ideas as well. James?

MR. ASSEY: Sure.

Thank you, Randy. And thank you for hosting this forum on a topic that is very important, and as someone who spent 14 years in government service, not at that agency, but at least in the halls of Congress, one that's near and dear to my heart as well.

I was struck as I was getting up this morning, listening to the radio, as they announced that it's the sesquicentennial of the first shot fired on Fort Sumter. I'm a South Carolinian, a native.

It reminded me of all my wonderful Lincoln quotes that all of us probably learned at one point or another, and in particular the one that goes something like "The dogmas of the quiet past are inadequate for the stormy present. As our case is anew, so we must think anew and act anew, we must disenthrall ourselves."

And the Civil War has absolutely nothing to do with regulatory reform.

(Laughter.)

MR. ASSEY: Let me, for our television audience, say that. But it at least jogged a crazy connection in my brain that I think goes to the point of how difficult regulatory reform is.

We are all, I think in some way, shape, or form, creatures of habit, and we fall prey to doing things or planning to do things in the future in the ways that we have always

done them in the past, whether or not that is the greatest good or the most benefit for consumers.

So to take Lincoln's charge, we must figure out what it means to disenthrall ourselves with the ways that things have always been done, when it makes sense to do so. And that is, at least, my epigraph for where we start.

The other place where I think we start is that it's important that we from the outside recognize that regulatory reform is really not a criticism of this agency, any previous agency, or any non-communications agency.

But it really stands as an opportunity to recognize that the world that we live in is very different from the world that was created when various regulations, or in many cases the statutes themselves were enacted.

And in many ways, regulatory reform is a celebration of the fact that we no longer have to rely on the government to set norms, because the marketplace and social norms have graduated to the point in which they are able to guide the marketplace in a way that maximizes consumers' benefits.

We look at that and we look at the regulations we live under and the statute we live under. We can go back just to the 1996 Act, but if we're true to our word, much of what still stands in the statute even predates the '96 Act, going back to 1992 and 1984.

And I just looked up the statistics in our industry, where we've been. We have 545 cable networks today. In 1984, I think we had 49.

In 1996, we had very few, if any, telephone customers, and today the cable industry serves 24 million customers.

In 1996, most people, if they knew what the Internet was, they knew it just by the virtue of the sound the modem made when they picked up the phone, as they were connecting on dial-up.

And today, we're talking about over 40 million cable broadband customers, with speeds meeting or exceeding 100 megabits in many cases.

So, we are in the presence of a new age. And it's important for us to disenthrall ourselves and think anew as to how we approach that new age.

And to its credit, this FCC has started with a very ambitious task that the Chairman, along with Blair Levin, led in constructing the National Broadband Plan in an effort to, at a very high level, zoom out, look at where our nation was, where it needs to be, and to try and chart a course to reach that future.

That's certainly not an easy task. Any of us who've spent any time reading that National Broadband Plan, whether we agree with parts of it or disagree with parts of it, have to tip our cap to the effort that was made.

Particularly important in the Plan was the emphasis on how critical private capital was going to be to achieving our goals, and a recognition that we were at a time where command-and-control regulation really needs to recede from the foreground into the background, so that we could unleash and continue unleashing the dynamic investment that has made such a difference already, and will continue to do so in the future.

It has also teed up some critical issues. One that I would be remiss if I didn't mention is universal service and intercarrier compensation reform, where the Gordian Knot has been tied so tightly. Teeing that up for actual action is one of the most important parts of

the Plan.

That's not to say everything is perfect from the perspective of industry, and there is not more that can be done. This is obviously so as we think not only about the regulations that are on the books but also regulations that we may face in the future.

It's important to have a strong regulatory screen that counsels against regulatory intervention. Particularly where we see areas of rapid development in the marketplace, we need to be very careful before we decide to jump in because of the costs that are imposed by false positives and the fact that the marketplace often will sort stuff out. And in the lumpiness and bumpiness of progress and innovation, there are tremendous consumer benefits that we don't want to stall.

I've talked for a long time, so Randy, we are waiting for you.

MR. MAY: I was close, I was real close.

MR. ASSEY: I'll stop there.

MR. MAY: That will work out and we'll both be able not to get in a fight about it.

MR. ASSEY: Keep the schedule.

(Laughter.)

MR. MAY: Steve, you're next.

MR. LARGENT: Thank you, Randy. Thanks for having me here this afternoon too. It's been a pleasure to be with you here at this Free State Foundation event and to follow Cliff Stearns.

Both of you have been consistent voices for free markets and limited

governments a long time.

So this is a perfect setting to talk about President Obama's recent Executive Order designed to remove or prevent unnecessary regulation. And let me say CTIA strongly supports the President's initiative.

As some of you may know, on January 18, 2011, the President issued an Executive Order entitled "Improving Regulation and the Regulatory Review Process."

The Order directed federal agencies to review existing rules and to consider whether new proposals create barriers that unnecessarily burden businesses and the economy.

Specifically, the Executive Order in relevant part requires each agency to -- and I quote -- "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs, recognizing that some benefits and costs are difficult to quantify"; and "tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the cost of cumulative regulations."

This is exactly the right approach. It is one that will allow private companies, like those in the competitive wireless industry, to focus on innovating and developing new products and services for consumers.

We also strongly support Chairman Genachowski's directive to the Commission to follow the executive order. We applaud this choice.

Chairman Genachowski has stressed that -- and again I quote -- "One thing government at all levels can do is ensuring efficient, effective regulation. We need rules that serve legitimate public needs, without creating or erecting costly unnecessary barriers."

"The National Broadband Plan identified red tape as a significant obstacle to Broadband deployment."

Let me read that again: "The National Broadband plan identified red tape as a significant obstacle to Broadband deployment."

Overly burdensome rules and regulations can slow down deployment and raise costs. It also can limit business's ability to invest in new technologies and hire new workers.

We interpret those two directives to mean two things:

First, do no harm.

Second, identify areas where there is current harm, and work to remove those regulations.

As for the first precept, "Do no harm," we believe the Commission has initiated several proceedings, including the bill shock proceeding, the transparency requirements of the net neutrality item, and a few other areas, that could cause harm. And we're working with the Commission to address these potential harms.

As for the second prong, identifying areas where there is current harm, this is an important area as well.

One area where the Commission can reduce government barriers to innovation is in the area of spectrum policy. The Chairman, Eddie, and folks at the Commission have been leaders in this area, working hard to free up more spectrum for flexible use, so that it can be used for mobile broadband services. And that is essential.

For example, current rules limit the use of spectrum in the broadcast

television bands to provide over-the-air broadcast television services. This despite the overwhelming demand for additional spectrum for mobile broadband services, and dwindling consumer demand for broadcast television services.

That is why the FCC's effort to create a more flexible framework that could ultimately accommodate a reallocation of portions of the underutilized TV bands is so important.

Government has a key role in coordinating spectrum rights. But the wireless industry also has a tremendous record of investing, innovating, and meeting consumer demand.

It has delivered unparalleled benefits to consumers and businesses across the country, with consistently lower prices and new and improved services.

It is also now extending those benefits to new sectors, with the potential to improve our ability to meet key national priorities, such as education, energy efficiency, health care, and smart transportation.

So we're looking forward to working with Eddie, Chairman Genachowski, and the other Commissioners to create a more business-friendly environment that will allow the many players in the wireless ecosystem to continue to meet consumer demand and to innovate.

MR. MAY: Thank you very much, Steve.

Michael, you're up next.

MR. WEINBERG: Thank you, Randy. And I apologize to everyone who came here expecting Gigi. She sends her regrets.

And she is, as said, in jury duty. Not necessarily excited but was pleased to be doing her duty.

I want to focus on a couple of things. This is a very good opportunity for us. Two years ago, at Public Knowledge, just as the new President came in, and before our current Chairman was appointed, we also took a moment and held a conference to discuss ways to reframe the FCC and rethink the FCC structurally and some sort of regulatory reform general principles.

It's always important after having an event like that to be able to come back and look at what you were thinking then, and see how it looks now, see some of the great strides that the FCC has taken since then, and also see some of the places where the concerns that existed now two years ago are still there.

And I'd like to focus on two of those things just in these opening remarks.

The first is in the FCC's decision-making process. One of the greatest challenges that the FCC faces, especially since the '96 Act was passed, is the way that the Information Age and the Internet has changed what happens at the FCC. There are many more small companies that are not used to dealing with the FCC or "playing" in Washington. They often do not have a Washington presence, and don't really spend a lot of time thinking about what happens in Washington and how they can be significantly impacted by the decisions made by the FCC.

So when we think about reforming the regulatory process, one of the primary goals and one of the primary questions that needs to be asked is not "Does this work for the people we know?" but "Does it work for those companies, those people as individuals, those

communities that we don't know, that aren't used to coming in and filing comments and filing reply comments and monitoring dockets and doing *ex parte* meetings?"

For many of those companies, they think that filing comments is a huge step for them. And for many of those communities filing comments is a huge step for them.

What they don't realize necessarily is that there is a whole 'nother level of *ex parte* meetings, of face-to-face meetings of other things going on.

The FCC did recently announce some changes to the *ex parte* process. But we hoped they would consider going further because a lot of the times an *ex parte* meeting is incredibly beneficial. It's a chance for everyone to have a conversation, flesh out ideas, and really poke and prod arguments.

But other times, it's an opportunity to just repeat arguments over and over and give a structural advantage to those entities that are used to dealing with the FCC. That process is not necessarily an opening for those new communities and those new companies, those innovators that we all talk about, to influence policy and make their voice heard.

The other thing is that sometimes the FCC seems to see its role as mediator, as a remediation commission, to line up everyone's needs, everyone's concerns, and try and split the difference.

And that's commendable. A lot of the time, that is a very intelligent, reasonable way to go forward with policy. But sometimes that's not. Sometimes the right answer isn't the answer that pretty much pleases everyone, or annoys everyone the same amount.

Instead, the right answer is one where, having listened to everyone's argument

and taken an independent analysis and done a true investigation of the issue, you come forward, knowing as an agency that this is something that some people are going to like, some people aren't going to like; but at least you are confident that having analyzed the issue, it seems at the time to you your best analysis is the best way forward.

So this means getting away from that balancing of interests and going more towards independent affirmative decision-making. As someone who's in the public interest, sometimes that would be horrible for us -- and sometimes it will be great for us. But at least it will help us understand what the guiding principles are at the Commission, what is important and what is not important, what to focus on and what not to focus on.

I will try to stay to the five-minute limit -- I don't want to be cut off my first time. The last thing is: the issue of the revolving door.

When people are outside of Washington, they think of the revolving door in this incredibly pejorative way.

And it's true. But inside Washington, many people have a much more nuanced understanding. Agency capture is not something where there are people with cigars in back rooms, with boxes of money being passed around, plotting the demise of the public interest. I mean it simply is not that.

Instead, it is a natural result of the fact that the FCC, or any agency, isn't that big of an agency. The communications bar is not that big of a bar. The larger communications policy world is not that big of a world.

And so over time, you will develop personal relationships with the people that you meet over and over. One of the things that you need to be aware of, though, is that that

can influence decision-making in a way that is not necessarily directly connected to policy.

So one of the things that we had proposed at our original meeting two years ago were bans on lobbying. And bans on lobbying coming and going from the FCC.

If you leave the FCC, you're banned for five years from lobbying the FCC on issues for your company. If you come into the FCC, you have to recuse yourself for five years.

I understand five years is a long time and there's a lot of discussion as to the benefits of those timeframes. But although that will inevitably screen people and may reduce some people's ability to come into government, there are enough people out there who are very talented and passionate about these issues. On balance, it will benefit both the agency and the public to feel like there are people at the Commission who don't have any appearance of being tied to a specific agenda -- whether or not they are or not.

Thank you.

MR. MAY: Okay.

Well, Michael, thank you very much.

MR. WEINBERG: Thank you.

MR. MAY: When you talked about the communications bar, I think you suggested that maybe it's not that large. I hate to show you the gap between our ages. You've probably been to one of those chairman's dinners that are held in if not some stadium in D.C. then in the Hilton.

(Laughter.)

MR. MAY: When I started and went to the FCBA events, they actually could

fit in a room just about this size.

So that's some reflection of how the communications bar has grown. But I guess more importantly, when I started in the mid-70's doing communications law and policy, one thing I'm sure of is the landscape in the marketplace was dramatically different than it is today in a way that's probably even difficult for you to imagine.

But Walter McCormick, thankfully for him, is not as old as I am. But he's been doing communications law for a long time, and policy on the Hill, and with USTA, and so he's probably witnessed a lot of those changes that I have in mind.

So I'm interested in hearing how you think these changes might suggest particular reforms and regulatory reforms.

Walter?

MR. MCCORMICK: Randy, thanks a lot. I guess James' comments about the Civil War got you reminiscing.

(Laughter.)

MR. MAY: Yeah.

(Laughter.)

MR. MCCORMICK: I really want to thank you for the opportunity to be here today. The question that you asked, "Regulatory reform, why not now?" presupposes the question of whether or not regulatory reform is important.

I would submit to you that regulatory reform is not important unless it has a core purpose. Regulatory reform is only important if it is aimed at helping to achieve some significant public interest societal benefit.

So in this regard, we think that the FCC has gotten it exactly right. The goal of this Commission clearly articulated has been to expand broadband: broadband investment, broadband deployment, broadband adoption.

And regulatory reform is being viewed in the context of: Does it help contribute as a means to this end of broadband expansion?

We really applaud Chairman Genachowski for this focus on broadband. The National Broadband Plan articulated the importance of broadband to our national competitiveness, to job creation, to our quality of life.

And the Chairman's recent broadband acceleration initiative is, in our view, right on the mark in terms of establishing as the three key priorities to broadband expansion: spectrum, intercarrier comp and USF, and regulatory reform.

We believe that there is nothing more important right now than reform of universal service and intercarrier compensation. These are the financial fundamentals of the industry, they are critical to broadband deployment in rural areas. We commend the Commission for recognizing this and for taking it on.

With regard to regulatory reform, we believe that the recent Commission actions have been very promising. We applaud the Commission: For facilitating access to poles, and assuring just and reasonable rates. This is going to have a direct impact on broadband investment, on deployment, and on cost to consumers; For the Commission resisting calls to regulate and dynamic markets, as it has done in the case of hearing disputes and usage-based pricing models; For paying attention to the importance of gathering the relevant facts before acting, as it is doing regarding competition to serve cell towers and

businesses with high-capacity services; And for reaching out and for inviting everyone in the industry through the broadband acceleration to share new ideas.

We believe that the big challenge is this: The Commission's goal is to advance broadband; but the statute under which it derives its authority is a narrowband statute.

And the Commission's internal structure largely mirrors the statute, a policy-making structure that is built upon distinct analog, narrowband technologies rather than the converged digital platforms of today.

For our industry, as many of you may know, both the statute and the Commission's structure are built upon a frame work that treats incumbent LECs from the standpoint of being dominant providers of voice service.

Never mind that James told us a minute ago that the cable industry now serves 24 million telephone customers.

You can get your voice service from your cable company, from a wireless phone. You can get over the top from MagicJack or Vonage or Jet-Skype or Google Voice. And recently JSI Capital Advisor said that the ILECs account for about 26 percent of the voice market.

Our bureau is the Wireline Competition Bureau, as distinct from the Wireless Bureau, as distinct from the Media Bureau.

And as a result, we have a host of archaic requirements that apply only to us, as voice service providers:

Equal access long-distance scripting requirements; Think MCI. If you sign

up for service, our companies have to read to you a litany of choices that you have with regard to long-distance providers, never mind the fact that by choosing any one of them, you have to pay more money.

Cost allocation rules; Again, eliminated for Bell operating companies, for cable companies. But not for our mid-sized and smaller companies.

Open-network architecture on bundling requirements, tariff and continuing property records reports, state carrier of last resort requirements; Even the whole idea of Title II as it applies to our services, but not to similar services offered by others.

And when it comes to merger reviews, the FCC is in the situation where it's been told, "Review mergers and determine whether it's in the public interest." That's a pretty open-ended question.

This is not something that applies to other industries.

When Google recently did a merger with ITA on travel software, the Justice Department looked at competition harms. It didn't then ask, "Well, is this consistent with transportation policy? Is this consistent with travel policy? Is this consistent with the Internet policy? Is this consistent with what we think is in the public interest?"

Those questions were not asked. And as a result, when those questions were asked in our industry, it leads to greater business uncertainty, it leads to greater delay, it provides the FCC with no real clear guidance as to what the questions are that it's supposed to answer, and it slows the kind of move towards broadband deployment and of scale that we should have.

These are all remnants of economic regulation, and they need to be reformed

now. Because if you look at a recent report from ATIS, which is a leading standards-setting organization, its observation is sobering.

I'll quote: "The U.S. government's goal of universal access to broadband may not be met in a timely or efficient manner, if providers are forced to continue to provide POTS in compliance with legacy federal and state regulatory regimes."

So with regard to the question, "Why not now?" I would suggest to you that now is very, very important. And now is critically related to reform of the statute, as well.

MR. MAY: Thank you very much, Walter.

Well, I'm not going to take his bait about the Civil War and my own experience, too literally, except to note this:

Because I think it is the day that the War started, right? I think it was today that the first shot was fired at Fort Sumter.

Again, it has nothing to do with FCC Regulatory Reform. But when I was growing up in Wilmington, North Carolina, as a kid, periodically there were notices in the newspaper that another Civil War veteran had died.

There were still a few of those. And as I think back on that now, it makes me realize, because I'm not that old, how young this country is, that at time there were Civil War vets around.

Okay. Now that was a way to give Eddie a little more time.

Eddie, I'm not going to ask you to tell us how much time and effort went into this decision to change the name in the Wireless Telecommunications Bureau from Spectrum Management Resources and Technologies Division to Technology System and Innovation

Division.

I'm not going to ask you that.

MR. LAZARUS: Hours and hours, of course.

MR. MAY: Okay.

MR. LAZARUS: In fact, I think there's a record of at least 20 or 30 *ex partes* in my office on that very subject.

(Laughter.)

MR. LAZARUS: Kidding aside, you use that as an example of *status quo* at the FCC. And actually I'm grateful to my fellow panelists, who I think have fairly dramatically indicated that it isn't *status quo* with the FCC.

The FCC isn't remotely focused on the things it was focused on in 1999, when Chairman Kennard made his remarks.

We all relentlessly focused on the issues of broadband deployment adoption and bringing those benefits of broadband to all Americans.

And so Walter, I thank you for recognizing that we do have an agenda that is very forward-looking, that is focused on creating the right environment for innovation, for economic growth, and to foster the kind of conversion you are seeing.

That is true that the organizational chart at the FCC is antiquated. It doesn't recognize fully the conversion that we've seen.

But inside the FCC, in the way we do business, it has changed a lot, notwithstanding the category that you see from the outside.

We have all kinds of inter-bureau task forces at work, precisely to reflect the

convergent nature of the environment in which we operate.

If you look at the presentations that are made at our open meetings, for example, the ones on polls and on data roaming, just this month: Arrayed at the table, not representatives from one bureau or even two bureaus, but usually from three or four bureaus, because they've all worked together collaboratively within the agency to reflect the fact that when it comes to broadband, it cuts across almost everything we do.

I'd also like to thank Steve for recognizing that we are in line with the Obama Executive Order. The principles in that Executive Order are very important.

The one thing I'll say is that while the Executive Order came this year, the Chairman has been focused on what I think loosely we call regulatory reform from the very first day that he got to the agency.

From that day, it was a philosophical matter. And based on his experience in the private sector, he has been focused on having open, fair, data-driven processes, and whenever we're considering imposing any new obligations on the industry, we have to be clear of why we're doing it, and what the relative costs and benefits for doing it are.

That's how we've approached everything we do. Now that said, there are going to be disagreements between the agency and the Chairman and industry about how that calculus comes out.

That's the nature of what we do. Those are debates that are really important to have. But we are focused on doing that in a thorough and fact-based and open and fair way.

And I know because I've interacted with at least three of the four of you at the table and Gigi on many, many occasions, that we have those discussions in the most

constructive possible way.

I thank you frankly for being our partners in trying to get this right.

But I'd like to go through some of the things we've done, just to give you a feeling for why I think the processes are getting better.

When I listened to Congressman Stearns, who gave a very important and provocative talk this morning, I think to myself: Well, aren't we doing that?

And I think we are.

We do, as a general matter, publish our proposed rules when we initiate a notice of proposed rule-making.

We do allow ample time for comments and reply comments, and when necessary, we grant extensions, so that parties can participate in our processes.

We give all the Commissioners ample time to review and discuss the draft orders within the agency. We've radically improved the opportunities for public comment, by both small and large players, by holding dozens of public workshops on important rulemakings, and by using a host of new media tools to reach the public and allow them to interact with us.

These include just most recently a complete revamping of our website, which is now under trajectory from being one of the worst in government to being the absolute best.

We've increased the transparency of our interactions by revamping our *ex parte* rules, in order to provide greater disclosure of the industry meetings that occur at the agency.

We've also taken real concrete steps to start lowering the burdens that are

imposed on industry. Take data collections, which has been a sort of traditional source of consternation in industry.

We're in the process of eliminating 20 data collections that we've identified as not being data that we really need, and simply being relics of the past. And we're open to further suggestions.

We are engaged in a retrospective review of our regulations to look at the ones that may be outmoded. It turns out there are some easy pickings when it comes to that.

I think we've discovered that we still have some regulations related to telegraph services, which I don't think actually exist anymore.

But we're really actively working on this. We welcome the ideas, and we've been over to USTelecom to talk about this. We do have this initiative that is very high on the Chairman's priority list for reducing the barriers to broadband deployment and build-outs.

As with the poles item that we just adopted, we're going to be looking for good ideas in that area every day.

When it comes to regulatory reform, we're open for business. We want to get this right. It's not perfect. I won't pretend that it is.

But I also think we shouldn't kid ourselves that when we talk about regulatory reform, sometimes it's code for disagreement over issues of policy and law; disagreements over whether a particular segment of the industry really is as competitive as some of the industry players would like us to think; whether regardless of a market's competitiveness, consumers are getting the protection they need; whether the statute under which we operate provides the authority that we think it does. And I agree with Walter is one where Congress

could well be looking to update the statute.

These are good-faith disagreements. They're important disagreements. But they're not the same as regulatory reform. We shouldn't mistake the two.

Thank you.

MR. MAY: Eddie, thank you very much. And thanks for being here. It obviously enhances our discussions to have someone of your stature from the Commission here. So we appreciate that very much.

Now we want to have questions from the audience, and again, suggestions as well. You've got people here that will listen to you. So be thinking of those. I'm going to again ask the first question, or possibly two quick ones, while you're thinking.

So, the first one is only part of the one that I asked Chairman Stearns. People, as Eddie said, can have different views -- but I think the forbearance provision that was put into the Communications Act has really been underutilized.

I think it was intended to be a tool that could be used to achieve reduced regulation. Frankly, I'm familiar with instances where it has been. But I think there's been an underutilization.

And I notice we have someone here from Qwest right in the front row.

SPEAKER: CenturyLink.

MR. MAY: CenturyLink. Absolutely.

(Laughter.)

MR. LAZARUS: One of the mergers that we did approve in a way that was timely for the parties.

MR. MAY: Right.

But what I have in mind was some of those forbearance proceedings.

Perhaps without changing the criteria that there be competition that exists, that consumers not be harmed, and that the public interest be served, -- which are the substantive prongs of the provision -- it would be useful if Congress could amend the statute to just establish some sort of evidentiary presumption, that would just shift the burden of proof or the burden of going forward.

There are different ways to do it.

But that's not unique in American law. And I think it might make a difference in the ability to use that statute.

Maybe I'm completely off base, but that makes some sense to me. I'll ask Walter first what he thinks of that, because he's familiar with a lot of these proceedings.

So then maybe Eddie, if he wishes, could also react to my suggestion.

Walter?

MR. MCCORMICK: Yeah, Randy.

Melissa would be a good one to talk to on this, too. But I think that when Congress enacted the law with the forbearance provision, it was meant to take advantage of streamlining. There was an understanding that there was going to be a lot of regulatory reform in the '96 Act, and a lot of proceedings were going to be implemented.

It was intended to give the Commissioner an option to either grab onto forbearance petitions filed and make a decision on the issue.

Or, if it didn't really rise to the level of having them make a decision, just let it

go.

It was also intended to impose some discipline on the Commission, so the things wouldn't lay there for a long time.

The problem is that in recent years, it was viewed as a way of trying to get around having the Commission make a decision. So as a result, that has tended to emasculate the purpose of the original forbearance section.

There is a basic American feeling that when you go to a regulatory agency to get approval that you're paying those public officials to make a decision. They need to make a decision, one way or the other.

In fairness, it's made the agency a little bit reluctant to not go ahead and grab onto these things and actually come to a conclusion to do a full proceeding, because of the fear of being criticized if they don't actually review it.

This is another area where it really is important for Congress to redefine the mission. Because a lot of these things that we filed forbearance on are areas where in our view, it's pretty clear-cut.

Does Congress really continue to want to have one provider of voice telephone regulated pervasively and not have the other providers of voice telephone service regulated? That was the issue in the Qwest review.

Unfortunately, the Commission's given this little area to look at. The Wireline Competition Bureau is their wireline competition.

It's up to Congress to say, "You know what? If there's competition over the top, from wireless, from cable providers, from incumbent LECs, let's get out of the business

of regulating that particular offering."

MR. MAY: Okay.

MR. MCCORMICK: So again, I think some of this does come back to the Congress.

MR. MAY: There are a lot of things that come back to Congress that Congress just doesn't do.

But to take the decision that you mentioned with then-Qwest, they have to do ultimately with how you evaluate evidence, how you weigh evidence.

And that's what I mean when I talk about evidentiary types of presumptions that just shift the burden in a way that would make forbearance realizable.

For the CSPAN audience, when we refer to forbearance, we're talking about the FCC having authority not to apply a regulatory provision or the statutory provision if it makes certain findings.

But anyway, Eddie, do you want to add anything on this particular forbearance subject?

MR. LAZARUS: I guess the only question I'd toss back to you, Randy, is on the issue of a presumption.

It seems to me that forbearance petitions ought to be decided on the evidence. It ought to be a jump ball.

But I'd also say, based on my years as a litigator, that evidentiary presumptions are pretty easy to get around, if that's the result you want to reach.

What really matters is having fair and impartial decision-makers more than it

is setting up a particular set of evidentiary presumptions.

If people are calling it on the facts, you're going to, generally speaking, get good decisions. If they're calling it on predisposed notions of where they want to come out, regardless of the fact, you're not going to get as good decisions.

So while in theory I understand the point you're trying to make, I wonder whether in practice it would make a difference.

MR. MAY: Okay. Actually I appreciate that you would understand it.

Finally I would just say, to wrap that and the theory of this type of thing up is that if things are very close -- and you're getting close to a jump ball, where things could go either way in light of everything that's happened in the marketplace and the developments -- that in those cases the presumption shifts it to the deregulatory direction.

But that's just my view.

Now hang onto that mic because I just want to pose this question to you, and then we're going to the audience. Eddie, both Chairman Stearns and myself mentioned the Sunshine Act. And of course, the Sunshine Act requires that no more than two members of the five-member Commission can meet together in private to discuss issues. There are ways around that, so when the Commissioners do want to communicate, there are a lot of circular meetings among them and their staff. And we're all familiar with that.

Now I know Commissioner Copps has for many years advocated changing the Sunshine Act. And I did a report on that for the Administrative Conference about 15 years ago, suggesting some changes.

I know Michael Powell did, too, and other Commissioners. I don't think that

Chairman Genachowski has spoken to this issue. But I could be wrong.

But if he has a view, maybe you could just tell us what it is. Or if not, what your view is as to changing the Sunshine Act?

MR. LAZARUS: He has not expressed a view on the subject. And he's happy to be a resource to Congress if they want to take that up.

I will say -- and this is entirely based on my own personnel experience -- I've been in two institutions as a staffer that involve group decision-making: The FCC and the Supreme Court, where I was a law clerk.

The Supreme Court doesn't have a restriction on how the justices can communicate with each other. I wouldn't say, based on my personal observation, that having the rule against more than two people meeting, or not having the rule, has ultimately meant that one institution has better internal deliberations than the other.

They both have advantages and disadvantages. But a lot of it is just who the personalities are, how hard they're willing to work at it. And the Chairman meets with great frequency with each of the other Commissioners to make sure that they have ample opportunity to talk about these issues.

The other Commissioners arrange for their own meetings with each other.

It's a cumbersome system. But I'm not sure that it's preventing effective deliberation and discussion within the Commission.

And I've seen situations where not having the rule doesn't necessarily foster great collegiality; it sometimes could create cliques or other things that might not actually foster good decision-making.

So this is one where there are good discussions on both sides. And as I said, I'm really just speaking for myself. The Chairman hasn't expressed a view, and I'm sure he would welcome the opportunity to talk to Chairman Stearns or others about their proposal.

MR. MAY: Okay.

Before we turn to the audience, do any other panel members want to comment on either of these two subjects we just discussed, or anything else that a fellow panelist said?

James?

MR. ASSEY: Randy, I'd just add one thing to forbearance.

The question you pose is a good one, and it is responsive to years of litigation that we have all lived under.

It's entirely appropriate for Congress to consider whether, as a result of litigation, the way that the statute operates is in conformance with what the original Congressional intent was.

I would add one other point to that, which is: For some reason I think we have focused a lot on outdated regulations or statutory provisions in Title II. And I think that that is fair.

But to the extent that we have a tool, something that is a little bit more incremental in the ability to remove statutory obligations or regulations, it makes little sense to me that it be restricted to one particular type of service or another.

We have a number of provisions in Title VI of the Act, whether it's leased access or PEG obligations, that date back well before the Internet was just a science project.

So we have a chance, should Congress either want to address that directly or

through insuring that the tools that are available through the forbearance process, to clarify that we really shouldn't pick and choose between services when we're talking about regulations.

MR. MAY: That's a great point.

Here's another example of a tool, and how sometimes without perhaps the type of presumptions I'm talking about, things go the other way. Section 629 is the navigation device authority, the provision giving the FCC authority to regulate navigation devices;

And, of course, now the Commission has a proceeding in which it's proposing to regulate again -- even as you describe the competitive environment in video -- so that the market will be more competitive.

The point I'd make here is there's a sunset provision right in that statute. It is fairly unique. You don't find it in many other places in the Communications Act, or in other statutes.

So that was obviously put there as a tool. Obviously there has been no sunset of the Commission's authority; although arguably there's competitive developments that mitigate the need for the Commission to be designing navigation devices.

But the point that I'd like you to think about is that that's another example of where you have to accompany those tools, perhaps with just a type of evidentiary presumption; it can be rebuttable, and you can show that you don't have the sufficient competition, or the public interest is not served; but when things are close it shifts it one way.

Steve?

MR. LARGENT: Randy, I just wanted to bet back to the idea about the Sunshine law, if I could?

MR. MAY: Yes, that's the '76 Act. And just to be clear about it for people in the audience, it's not only applicable to the FCC -- that's a government-wide requirement.

MR. LARGENT: The '76 Act, right. The Sunshine Act is something that the FCC needs to look at. It goes to the kind of Commissioner that you would see nominated to those positions, if you were able to meet with your fellow Commissioners, even Commissioners that were appointed under a Republican or Democratic presidency.

And if it doesn't work, then they don't have to meet. But if it does work, they had the opportunity to meet. Commissioner Copps' idea of having a bipartisan group that's meeting is a good thing. You'd find Commissioners that were more in tune with policy that the FCC has responsibility for, as opposed to politics.

And at the end of the day -- because I know working in the wireless communication aspect, it really is not a partisan issue. We don't talk about partisan ideas. This is about moving businesses forward, about competing, about offering innovative services.

And so we can talk to Democrats about that. We can talk to Republicans about it. We don't care. But we want good policy.

They don't have to meet -- but just making it available maybe would reshape the type of candidates that would be looked at for FCC Commissioners.

MR. MAY: That's an excellent point.

MR. LAZARUS: Randy, could I just cut in for just one second? I want to

make one point, which is on this point of bipartisanship.

It is important for the audience to know that well over 90 percent of the orders we adopt at the Commission are adopted unanimously.

One of the greatest things about the telecom space is that most of what we do is something that you can build consensus around.

Now, of course, there are hot-button issues where that's not true, or where there are just very, very strong disagreements between industry segments, and things like that.

But I do think when we talk about this collaboration within the Commission, it is important to know that more than 90 percent of what we do is unanimous.

MR. MAY: Well, since we're talking about the spirit of collaboration following Steve's remarks, as well as Eddie's, Commissioner Copps issued a statement about three weeks ago now. It was issued after a bill that's been introduced on the Hill -- I think it was Anna Eshoo and others -- to change the Sunshine Act provision, along the lines that Steve mentioned -- to have a bipartisan group that could meet.

And Commissioner Copps, right out of the gate, issued a statement praising that. And then I wrote a little piece the next day, praising Commissioner Copps and the fact that he had jumped on this issue.

To be honest with you, I don't have a chance to praise Commissioner Copps that much. We don't agree a hundred percent of the time or considerably less.

But anyway, Commissioner Copps called me later that day, as he does on the rare occasions when I praise him.

(Laughter).

MR. MAY: No, he called me later that day and said, "You know, this Sunshine Act thing," in his view "is important, and we've got to try and figure out a way to get it done." And I assured him that I wanted to do that as well.

Okay. Now let's turn to the audience for questions, or suggestions for reform. Who wants to go first? Now don't be shy. I know actually there are a number of people in the audience who have been doing communications law and policy for quite a while.

Does anyone have a question or a suggestion? Because I've got a couple more that I'm going to ask in a minute, if someone doesn't have any.

(No response.)

MR. MAY: Okay. Well, one thing, and then if not, we'll wrap it up in just a couple of minutes.

Another topic that seems to be high on a lot of people's lists in terms of actions for reform is in the merger review process.

As Eddie Lazarus said, people have different views about it. My own view is that it's an area ripe for reform, if for no other reason than I think there is quite a bit of duplication. I know there are two different standards, and the Justice Department operates under a competition standard, and the FCC, the public interest standard.

But nevertheless, there is a lot of duplication of effort. And as everyone knows, in today's environment, wherever in the government that duplication might be eliminated is something worth looking at.

There are a lot of people who believe that the process that leads to the so-

called voluntary concessions, that usually are put forward very late in the day after what can be a year-long process, that coming so late, when the parties are anxious to get their merger through, that there's something a bit unseemly about that.

But with the Commission operating under this broad public interest mandate, which means whatever three Commissioners say that it means, essentially, there's perhaps no condition that one can imagine that might not meet the public interest test of three Commissioners.

Commissioner Meredith Baker, as all of you know, gave what I thought was a very thoughtful speech, in which she outlines some particular reforms about the shot clock and the commitments.

There seems to be a growing momentum for reform in that area. Does anyone want to tackle merger reform and either support it or oppose it?

Walter?

MR. MCCORMICK: I strongly support it. If you look historically, the communications model was based on the transportation model. Historically, the Department of Transportation, Civil Aeronautics Board, and then later the Department of Transportation had co-jurisdiction with the Justice Department over airline mergers.

Not any more. Now it's just the Justice Department.

The communications industry and the railroad industry are probably the only two industries that are left, where the merger review inquiry isn't focused on competitive harm. The inquiry is something else, where we find no competitive harm, but ask, "Is it otherwise in the public interest?"

So then people begin to ask the question, "Was that consistent with communications policy?" Well, what's communications policy? What's Internet policy?

We don't really know, going forward, what these things are going to be.

So with regard to merger reform, Meredith Baker's remarks were very good. The inquiry should be narrow. It should relate directly to competitive harms. It should only relate to competitive harms.

I frankly don't think that there should be duplicative merger reviews.

This is an area where I hope that the FCC would exercise restraint. But I also think it's important for Congress to clarify the roles of the agencies and that this is just simply an area where we don't need to have agencies called upon frankly to engage in central state planning or industrial policy in the context of merger reviews.

MR. MAY: Okay. At the end, Michael?

MR. WEINBERG: As the representative of the public interest organization, I will defend the public interest standard a little bit.

The public interest standard is different and important for at least two reasons:

One is that many of these mergers involve unique public resources, and that's spectrum. So there is a unique role beyond "Is this competitive, or not?" for the FCC.

Another thing is that many of these mergers involve crucial avenues for speech. And speech has a special place in our society. It is worth taking a moment to do a special review of some sort of merger that will significantly impact how freely speech can flow.

But that being said, the current merger process is not free of flaws or

problems.

One of the problems is the reliance on these voluntary agreements that hang a number of conditions for the merger.

And at some point, there needs to be a recognition that some mergers cannot be solved with conditions. There is no number of conditions that can make a merger in the public interest.

When we get to the point where we have pages and pages of conditions, especially those conditions that by and large expire after a couple of years, it may be time to look at that underlying merger and say, "In fact, this merger is not in the public interest."

As a corollary to that, sometimes merger conditions are used to impose policy that is not specific to the merging entities. Many people in this room will agree that that really distorts the regulatory universe, it distorts the market.

If a policy is really important enough that we think it should be used in a specific merger and we hope that it will influence the other actors in that field, that's a time when we say: "No, this is not a merger condition; this is something that is important enough that it is going to be an industry-wide practice."

And if it is that important, do it that way. If it's not that important, and the merger is an excuse to try it out, then maybe a merger condition isn't the right place for something like that.

MR. MAY: Good. I agree with that last point wholeheartedly.

Eddie, did you want to say something? I just saw you hit your button --

MR. LAZARUS: I'm a little reluctant only because we have obviously a very

large merger in front of us.

MR. MAY: Oh.

MR. LAZARUS: So anything I say will viewed through that lens.

But I will say this. We have a statutory mandate. There will be arguments made for and against whether that's the right statutory mandate to review whether transactions serve the public interest.

Our job at the moment is to carry out that mandate. It's important for us to do it in a thorough, fair, and open way.

That's what we're committed to. We stand by our record on this, in terms of the transactions that have been conducted so far, under this Chairman.

MR. MAY: That's good. The statutory mandate that you're referring to is to review the mergers under the public interest standard.

That's a capacious enough standard and indeterminate enough that there's room for self-restraint by the agency; maybe a lot more self-restraint than the agency has used in the past.

(Laughter.)

MR. MAY: Without saying more about any particular merger.

Do you have a question?

QUESTION: You keep referring to statutory mandate. I think a great bit of reform would be to actually adhere to your statutory mandate, with regard to decisions like net neutrality, with regard to decisions like data roaming.

You're talking about fact and data-driven decisions versus pre-conceived

notions.

I'm wondering what facts and data drove the FCC to determine if they had:

(a) authority to impose net neutrality or insert themselves in data roaming;

And (b) what data made the determination that (a) we had the authority, and (b) we should be doing this, because the market dictates that it's necessary, or the data determines that we should be doing something like this?

MR. LAZARUS: Time would not permit a full answer to that question. But I would refer you to our website, where you will find the Open Internet order, which contains page after page after page after page of data and analysis to support what were basically *status quo* rules of the road, that amounted to only one page of rules, and that were basically agreed to be reasonable by a wide swath of the industry, as well as tech and other folks.

And on data roaming, when you think about it, was that pro- or anti-business? If you look at the record in data roaming, you will find that basically everyone but the two largest incumbents asked us to do the data roaming rules, and put in the record legal justification.

So I would just welcome attention to the orders themselves, because they contain those justifications.

QUESTION: And what about the statutory mandate to do it? Given the *Comcast v. FCC* decision last year, how do they determine if they have the authority again?

MR. LAZARUS: There are dozens of pages of law in the Open Internet order, explaining exactly where the legal authority comes from.

That will be decided in court, whether we're right or wrong. And with respect

to data roaming the same thing: Title III provides the authority.

We are challenged on authority almost every time we issue an order, and the agency wins the vast majority of the time.

MR. MAY: Okay. We're only going to do one more question, because the panel's been indulgent, if there is a question? Comment?

Okay. If not, I just want to say when we put together this program, my hope was that we would start, or to the extent it's been started, that we would carry on and provoke further discussion on regulatory reform and institutional reform at the FCC, and get out some ideas.

With that hope, now that we're concluding, I can say that my hope was fulfilled, even beyond my expectations. I think this was terrific.

So I want to again thank C-SPAN for being here and the C-SPAN audience for joining us. I hope you here will join me in thanking our panelists here today.

(Applause.)

MR. MAY: And we are adjourned.

(Whereupon, at 1:52 p.m. the meeting was adjourned.)

* * * * *