BROADBAND POLICY: ONE YEAR AFTER THE NATIONAL BROADBAND PLAN

PANEL I

Broadband Policy: What's Next After the FCC's Net Neutrality Decision?

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PANELISTS:

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* 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.

MR. MAY: Let's get started. This panel is entitled, "Broadband Policy: What's Next After the Net Neutrality Decision?" In just a minute I'm going to introduce our distinguished panelists.

But since Blair Levin is on this panel, I am going to begin by reading something from the Stifel Nicolaus advisory letter. I want to read from the most recent advisory that I received, because I think it will help set up this panel today.

"Looking ahead to the coming year in telecom, media, and tech policy and regulation, we see 2011 as less volatile than 2010, especially at the Federal Communications Commission. The drama surrounding the unveiling of the national broadband plan, the Title II reclassification, and net neutrality battles, and the mid-term election results will be tough to repeat."

"But the seeds of significant issues have been planted, including on net neutrality and Comcast/NBCU enforcement. And we should expect the unexpected, with more new merger activity. The FCC will basically pick up where it left off before entering the abyss of reclassification, and the intricacies of the Comcast/NBCU review."

When I saw that, in large part, it rang true, in terms of what I thought we would be talking about today. I'm sure we're going to have some discussion of net neutrality for certain. But I also think we will be focusing, post-FCC decision, on some of the issues that now come to the fore.

Now I want to read a short excerpt from a blog that I published

earlier this week, as I was thinking about the conference and where things stand in the aftermath of the net neutrality and the Comcast merger opinions and orders.

I said: "Faced with a choice, the Agency continues to choose to regulate communications and information service providers under broad, ill-defined standards, rather than opting to rely on the discipline of the competitive marketplace to protect consumers. Continually invoking language at the heart of the analog era regulatory paradigm 'public interests,' 'reasonable,' 'fairness,' and 'non-discrimination,' the Commission clings tenaciously to the exercise of regulatory power. Acting under the guise of 'reasonableness' and 'the public interest,' and so forth, it exercises this regulatory power in the name of ensuring fair competition, or leveling the playing field, all the while picking marketplace winners and losers, and all the while disclaiming it is doing any such thing."

I went on to say later in that same blog: "In my view, there are distinctly free market-oriented solutions that should be brought to bear in resolving each of these policy issues."

But I recognize there are other, different views, as well. Today I am sure we're going to hear a range of those views, which is what I want to hear. So let's go ahead and get it going.

Your brochure has everything that you would want to know about the panelists in their bios. What I'm going to do is just give you their current titles for our C-SPAN audience, and perhaps another sentence or two. I'm going to introduce them in the order that I am going to ask them to speak. They have been

asked to speak for no more than six minutes, so we will have time for Q&A. So, have in mind your questions, as they go along. And I am going to enforce that, as they know.

The only exception to the alphabetical order rule is Blair Levin, who, as Commissioner Baker noted, was the Executive Director of the Commission's National Broadband Plan. I'm going to have him speak last, so he can hear what the other panelists have to say.

Our first speaker this morning is going to be Jonathan Baker. Jonathan is Chief Economist at the FCC, and he is also a Professor of Law at the American University Washington College of Law, where he teaches courses, primarily in the areas of anti-trust and economic regulation.

Next will be Jeffrey Campbell. Jeff is Senior Director of Technology and Trade Policy and Government Affairs at Cisco. He is responsible for developing and implementing its worldwide public policy agenda on telecommunications and technology issues.

Following Jeff will be James Cicconi. Jim is Senior Executive Vice President, External and Legislative Affairs, at AT&T. Jim is responsible for AT&T's public policy organization, and he has served in this capacity since November of 2005.

Next we will hear from Joe Waz. Joe, as all of you know, is Senior Vice President, External Affairs and Public Policy Counsel at Comcast. Joe has primary responsibility for the public policy activities of Comcast, including

working with the corporation's federal government affairs, state and local government relations, and public relations professionals. Some of you might not know that earlier in his career Joe was a member of Nader's Raiders, when he worked for Ralph Nader.

Joe, it's not often that you're on a panel that we proceed alphabetically and there is someone that follows you. But that is the case today.

I am fortunate again to have Christopher Yoo, who, by the way, is a member of the Free State Foundation's Board of Academic Advisors. But, aside from that -- perhaps more importantly than that -- he is Professor of Law and Communications at the University of Pennsylvania Law School, where he is also Director of the Center for Technology, Innovation, and Competition.

Finally, we have Blair Levin. Blair is presently a Communications and Society Fellow at the Aspen Institute. Need I repeat once more that Blair was the Executive Director at the Commission, leading that team of hundreds that developed the National Broadband Plan?

You may have noticed Blair is also going to be on the next panel. That means he is getting paid double for doing this today. But I should hasten to add that two times zero is still zero.

(Laughter.)

MR. MAY: With that, we are going to get started. We will hear first from Jonathan Baker.

MR. BAKER: Thank you, Randy, and good morning. I am

speaking for myself this morning, and not necessarily for the Federal Communications Commission or any commissioner. And I would like to talk about merger review at the FCC, because a merger proceeding can be a vehicle for implementing broadband policy, which is what our panel is about.

I would like to use the recent Comcast/NBC University transaction as an example to address some of the concerns I have heard raised about the way the FCC approaches mergers.

To remind you, first, about the transaction itself, Comcast is the nation's largest cable operator and Internet service provider, and it has an interest in a number of cable networks, including regional sports networks. NBC Universal owns broadcast networks, broadcast television stations, a number of cable networks, and a film studio. The transaction was technically a programming joint venture, but it can be thought of as Comcast acquiring NBC Universal.

It was reviewed by two agencies: the Federal Communications Commission and the Justice Department. And it was allowed to proceed by both with conditions. At both agencies, the major competition concern was the risk that Comcast would exploit its control of more programming to harm competing video programming distributors, including online rivals, and create market power for its cable systems.

Now, I have heard some people question the advantages of concurrent enforcement, by which the FCC reviews competition aspects of communications mergers concurrently with an anti-trust agency, either the Justice

Department, as in the Comcast/NBC Universal matter, or the Federal Trade Commission.

Now, I have worked at all three of those agencies over the course of my career, and I can talk about the benefits of multiple agency review from that experience.

The economists at the FCC think about economics the same way as the economists at the antitrust agencies. But the FCC may look at competition issues in a merger differently from an antitrust enforcer for other reasons.

One reason is their complementary expertise. The antitrust agencies major in competitive analysis. The FCC majors in communications policy. And, as a result, the FCC can often, in practice, take a longer view in evaluating potential competition, particularly.

Working together, as the FCC and the Justice Department did in reviewing the Comcast/NBC Universal transaction, makes both agencies more effective. We conducted what was probably the most coordinated communications review ever between the agencies without imposing greater costs on the parties or delaying the process.

Some critics of concurrent enforcement point to antitrust agency review as the gold standard for competition enforcement. Well, if that's the test, it's hard to complain about the competition conditions in the FCC's Comcast/NBC Universal order, because there is little difference between *them* and the conditions that were worked out by the Justice Department.

I have also heard concerns about the conditions that the FCC imposed to ensure that mergers promote the public interest. Let me explain why the competition conditions were necessary in the Comcast/NBC Universal case.

This transaction was primarily vertical between a video distributor and a major programming supplier. Some people say that if a transaction is primarily vertical, there can't be a competition problem. So competition enforcers should just wave it through.

This idea is wrong on two counts. Most importantly, the premise of the theory, the idea that vertical transactions are invariably pro-competitive, is simply incorrect. The antitrust enforcement agencies have always recognized that vertical mergers can harm competition by facilitating anti-competitive exclusion or horizontal coordination. These possibilities were discussed in the merger guidelines issued by the Justice Department more than a quarter century ago during the Reagan Administration, which are still enforced.

In addition, even if a transaction is primarily vertical, and those aspects are ignored, its horizontal elements can still create competition problems. The Comcast/NBC Universal transaction is a case in point because it wasn't just a cable operator acquiring a program supplier; it also combined programming from both firms. The FCC was concerned that this horizontal aspect could lead to higher programming prices, and some of the conditions address that problem.

Now, some people have questioned why the Open Internet conditions that the FCC imposed are related to the transaction. Those conditions

address a specific competitive problem: Comcast's ability and incentive to exclude unaffiliated Internet video programming in an online world in order to benefit affiliated programming. Exclusionary conduct like this is routinely analyzed in the anti-trust review of vertical mergers, and it was identified in the FCC's Open Internet order as a justification for those rules. Not surprisingly, the Justice Department, the agency that's the competition policy specialist, had the same concerns and adopted the same remedy.

Finally, I would like to address the concern that the FCC's conditions prevent merging firms from obtaining efficiencies. That concern is demonstrably false with respect to the Comcast/NBC Universal transaction. In formulating conditions, the FCC worked with Comcast, not to weaken the conditions, but to avoid unnecessarily restricting Comcast's ability to accomplish its legitimate business objectives.

There is no better expert on how well we did than Comcast Executive Vice President David Cohen. After the order was issued, Cohen stated publicly, "I don't think any of the conditions is particularly restrictive." I take that to mean that he thinks that the order addresses the FCC's concerns without making it difficult for Comcast to act consistent with the public interest.

Now, the FCC takes seriously its obligation to assure that mergers promote the public interest. In the Comcast/NBC Universal order, the Commission concluded that the conditions it adopted would mitigate harms to competition, promote broadband adoption among underserved communities, enhance broadband

access to schools and libraries, and increase news coverage, children's television, and Spanish language programming.

No responsible agency can simply assume every communications merger proposed in the free market promotes the public interest, as some critics seem to want the FCC to do. Instead, the FCC evaluates the effects on competition and on other communications policy goals, and imposes conditions as needed to ensure that communications industry mergers serve the public. Thank you.

(Applause.)

MR. MAY: Thank you very much, Jon. I noticed you used the word "nascent" early in your talk. Particularly in the context of the Comcast merger review it struck me how often that word began to be used, usually in the context of the online video market: "the nascent online video market." At some point I thought it even overtook "ecosystem." It was a close race, but it might have overtaken "ecosystem" as the word in our telecom world for this year.

Jeff, you're next.

MR. CAMPBELL: It's really nice that, at least at the Commission, we won't be talking about that net neutrality issue for a little while. Maybe we can start focusing on the National Broadband Plan.

I would open by looking at an observation made by a wise man sitting two seats to my left here, when I came to talk to him once on the National Broadband Plan. He observed, probably very accurately, that, "Here you are, coming in to see me, and you love 90 percent of what's going to be in the National

Broadband Plan. You hate 10 percent of it. And you're here to beat me up about the 10 percent that you don't like." It was true then. And unfortunately, Blair, since this is the Free State Foundation conference, where we are concerned about over-regulation by the government, I am going to focus again on the 10 percent here today.

In particular, I want to focus on the Commission's proposal to significantly change the structure of the set-top box market through creating a system that they are calling the AllVid device. This is meant to be a replacement for the current CableCARD system which the Commission had put into place some time ago in order to encourage the retail availability of set-top boxes and other such devices.

And in the five minutes that I have left, I am going to try and address quickly what I think are the four fallacies that are underpinning this policy that the Commission is moving forward.

The first fallacy is that there is not sufficient competition in the set-top box market. This fallacy is largely predicated on the fact that there isn't a lot of retail sales of set tops today because consumers haven't chosen to go through the retail market. But the reality for actual competition among the box makers is that competition has flourished because of the implementation of the CableCARD system.

You only need to go and look at the series of waivers that all the manufacturers asked the Commission to grant for DTA devices and that the

Commission did grant, wisely. You can see that there are a large number of companies that are engaged in producing set-top boxes in the country today, including significant producers from Japan, Korea, and China, as well as some domestic manufacturers.

If you look at the average selling prices of set-top boxes over the past few years, you will see that it is on a continuing glide path downward, which is another indication of a fairly competitive box market. And we're seeing the major cable providers getting boxes from multiple suppliers in the marketplace.

The second fallacy that the Commission is relying on in pushing its AllVid proposal is that consumers should purchase set-top boxes, that this is an affirmative good, and that this is something that we should have. There are a couple of things that are missing in the analysis here.

There are major benefits to leasing boxes in this kind of world. The first is it requires no outlay of money at the beginning. You don't have to go buy a $500 TiVo in the store. You can pay by the month for the device that you're leasing. The second is that you're protected in your investment. As actually happened to me last December, my non-Cisco set-top box crapped out in the middle of the football season.

(Laughter.)

MR. CAMPBELL: I called Comcast, Joe, and I had a new box, and it cost me nothing. That was great. It was probably warranted by the other manufacturer, so it probably didn't cost Joe, either.

But the point is that it was clearly beyond the consumer warranty period and I did not have to go buy a new one.

The other thing is when you change services. When you want to upgrade to a better service or a new service, you don't have to buy a $300 box, throw it away, and then buy a $400 new box for the new service. Instead, Comcast will swap out for me when I want a new service. I may pay a little more on the lease for the better box, but I am not stuck with the past purchase that goes with me.

To look at this a little more clearly, look at the cell phone market, which is the market that the Commission kept pointing to and saying, "Look at the cell phone markets. All the innovation and competition in the set-top market doesn't have it." Even the cell phone market doesn't really operate on a purchase model.

You go and you buy your cell phone. But you're really not paying the full price for the cell phone. You're half buying it and half leasing it, and you're getting a contract with it. And it's a perfectly good way to go about doing this, because consumers -- as we have learned -- are not interested in the huge outlay of the high costs of the equipment right up front, and are interested in paying for it more over time.

The third fallacy is the fact that there is not enough innovation in the set-top market. We look at an industry where it wasn't that long ago we had 60 channels of analog TV coming at us, and where we are today with digital, with HD, with DVRs. More recently, when we look at some of the offerings that are coming

out like TV Anywhere and XFINITY and FiOS and U-verse that are really bringing the Internet and video transmission together in a new and unique way, including making it available on multiple devices, we're really seeing a lot of innovation happening in this space.

In fact, just last month, Cisco announced a new architecture that we're providing in this space that will allow for all devices and all video sources to be operated through a service that's both cloud-based and transport-based. It will completely open up this market, and eventually obviate the need for having set-top boxes by running this in the network and through soft clients and software.

So the innovation continues in this market. I hope that the Commission is looking at these changes that have been occurring even recently in this area as they go forward on this proceeding.

The last fallacy is the biggest one, which is that the Commission has chosen a hardware solution for this problem. They have created a device, an AllVid box, that every multi-channel video provider is going to have to provide, that's going to have limited functionality, and it's going to do certain things.

The problem with this solution is that it's a hardware solution in a world that's about to become a software world. And so, they're going to force these hardware boxes in perpetuity -- or at least for 10 years, which is perpetuity in the Commission's world -- in order to create the market structure that they think is best. This at a time when we're really moving to soft clients, where you're going to be able to run your video programming from your iPad or your PC or on your mobile

phone through soft clients and soft solutions that will be open and competitive.

If you look at the realities of the marketplace versus even where we were two years ago when the Commission started looking at this, there are drastic changes that have occurred. Hopefully, the Commission is keeping up with the technological changes, and is going to adopt a more market-based solution that's going to allow for faster and greater innovation with more consumer choice.

MR. MAY: Thank you very much, Jeff. It will be interesting to see whether Blair, now that he is over at the Aspen Institute, whether perhaps you persuaded him about that 10 percent.

Let me say two quick things. I mentioned that we want to have questions from the audience, which, of course, we're going to have. But I want to invite the panelists, please, to react when we go through these initial presentations of your fellow panelists, if you have reactions. So keep that in mind.

And then, the other thing I wanted to remind you of, we have a hashtag for Twitter for the conference that's on the back of your brochure, FSFFeb4Conf, if you decide you want to Tweet about something that's going on.

With that, Jim?

MR. CICCONI: Thank you, Randy. Really pleased to be invited here today. In fact, I can't tell you how pleased. For five years I have been waiting to be on a panel entitled, "What comes after net neutrality."

(Laughter.)

MR. CICCONI: I think we can all agree that the net neutrality

debate, which has consumed most of the last two years, has been both exhaustive and also exhausting. It's really sucked all the oxygen out of the room. It's a shame in many ways, because it's been focused on a hypothetical problem, and we have real problems out there.

With net neutrality behind us now, it does give us an opportunity to deal with some of these real problems. Blair pointed a number of them out in the National Broadband Plan. One is from spectrum. I know that you're going to be dealing with that in the subsequent panel. The other one, even though it makes many of our eyes glaze over, is the challenge of reforming the universal service and inter-carrier compensation systems that underpin much of our communication system in this country today.

In fact, the National Broadband Plan itself challenges us to fundamentally change the way we think about regulation and universal service in this country. Reforming USF and inter-carrier comp is going to be extremely difficult. I think everybody understands that. But the Plan itself made clear that what many people have been saying for a long time is very true.

If we're going to get serious about 100 percent broadband in this country, if we truly believe that broadband is going to be the economic driver that takes us through the 21st century and beyond -- which I happen to believe -- then we have to reform those policies that currently are in the way of achieving this goal of 100 percent broadband. In order to succeed in this journey, there needs to be agreement on where exactly we're going, and what the goal of 100 percent

broadband entails.

I look out there and I see a world where, if we're successful, everybody in America who wants one will have a broadband connection. Voice and video will be one of many applications that simply ride on a broadband pipe. In fact, that's true of many Americans today. If we're serious about this goal, it will be true of everyone.

We should be funding the most efficient technology to do this if we're going to have a universal service system devoted to broadband. We have to make certain that we're careful and rational with consumer and taxpayer dollars there, as Commission Baker and Randy have pointed out. The contribution factor that goes in everybody's bill today is up to 15.5 percent.

We should only be funding areas where there has been a market failure. And broadband can't be deployed with private investment alone. Specifically, we should not be using public dollars to compete with a company or technology that is deploying adequate broadband without public funds.

We can't afford to support two networks. If we want to support broadband, we must be willing to let the public switched telephone network go away. That means removing the regulatory barriers that are, today, designed to prevent that very thing from occurring. I'm talking about things like carrier of last resort regulation, cost of service, and local voice regulation.

Broadband today is an interstate information service. We all know that. It's not regulated by 50 state commissions. And it has to remain that way.

We have to confront the questions that are entailed in that statement.

I don't think any of this is controversial to the participants who have engaged in this debate for the past 10 years. Each of these concepts has been put forth and embraced in the National Broadband Plan released by the FCC last year, the great work that Blair spearheaded. But getting there is going to entail a robust discussion and some hard decisions.

Where we're going should be the easy part to define. If the FCC doesn't do that in its meeting next week, I fear it's a lost opportunity. And if we have disagreement on these points, like whether the states will have regulatory authority over broadband in the future, then we need to have that discussion sooner, rather than later.

But let's be clear. This transition is already occurring. Three weeks ago the FCC released its local competition report for 2009. That data is already a year old. It showed that between 2000 and 2009, incumbent switched access lines shrunk from 181 million to 107 million, and that's a 40 percent reduction.

The real shocker is over the past two years that reduction has accelerated to over nine percent for the industry on an annualized basis, which means that if the decline last year in 2010 remains constant with the prior two years, we're already below 100 million legacy access lines in this country.

On top of that, a recent poll showed that around 27 percent of Americans have cut the cord entirely, dropping wired phones and going to wireless only. And that's a fact that the FCC's Wireless Bureau stubbornly refuses to

acknowledge or take into account when they're regulating wire-line companies.

So, while end user revenues associated with those lines is disappearing, the cost of maintaining those lines, and the legacy billing and provisioning systems around those lines doesn't go away when the customer goes away. Antiquated regulations require that we continue to incur these costs, continue to maintain these lines, whether people are using them or not, or, in fact, whether they will ever use them or not.

When we get down to 50 million or 60 million access lines, I suspect -- in fact, I posit -- that we won't be able to afford to support the PSTN any longer, let along the public switch network and an emerging broadband infrastructure. We're going to have to make a choice.

The time to act on that is now. In order to get there, though, we must have the courage and the foresight to clearly define our objectives and the end state that we envision. Only if we do that can we then move to the next set of much harder choices that will need to be made. The FCC can start that process next week. If you don't know where you're going, it's awfully hard to get there.

MR. MAY: Thank you very much, Jim. So next we're going to hear from Joe. You may recall that we had one of those high wind warnings a couple of weeks ago. We have had several here in Washington, some of them due to the storms. But the one a couple of weeks ago, it was the day that the Comcast/NBCU merger was approved by the Commission. And it was later determined that that was just Joe exhaling up in Philadelphia. And so that's why that one was shorter

lived.

(Laughter.)

MR. MAY: Joe, the floor is yours.

MR. WAZ: Thanks, Randy. I'm going to let that exhalation be pretty much my comment on the whole transaction today. We are delighted to be done, we're delighted to have it closed. We're delighted to be moving forward and creating a company that we're extremely proud of, that we really do think is going to accelerate the anytime, anywhere digital future that Americans are looking for in a competitive and, really, innovative market place.

So, otherwise, as to the transaction, I think I'm going to watch the shuttlecock fly over my head back and forth, if others want to share their views on it today. But, as for me, I'm just glad that we are moving forward.

What I would like to do today is take a bit of a step back from the immediate policy issues, and talk a bit about the policy process, and the fact that, if there is anything we're learning along the way, it's that we really don't have the right statutes, the right laws, the right institutions and processes for an Internet age.

We have statutes that were written for technologies that came into the market when our parents -- or, as I look around this room, in some cases our grandparents -- were children. We have agency jurisdictions that fail to account for the fundamental different interactions among players in a layered Internet. We don't think consistently about what openness means when we're talking about networks or about applications or devices or operating systems. We don't think

consistently about privacy concerns as they cut across these various categories and various players and the -- I'll say the word, Randy -- Internet "ecosystem."

We have processes and procedures that depend too much on prescriptive rules and the adversarial process. We don't defer enough to the kind of consensus-based problem-solving organizational forms that have worked so well to create the Internet of today. And we have some old, broken-down ways of thinking about how to achieve public policy goals, like the way we promote universal conductivity, as Jim just told us, and I'm sure Blair is going to elaborate on.

So, while I will be talking a lot more about these critical substantive issues in the give and take this morning, I wanted to take a couple of minutes now to talk about how we can improve the legal and institutional context in which these issues get framed and addressed. I think it's time for more experimentation, for finding new ways to address some of these issues to break us out of the old, creaky paradigms.

And let me try to make my point with respect to two issues: broadband adoption, which, of course, is the centerpiece of the National Broadband Plan that Blair led; and Internet openness.

On broadband adoption, as Jim just indicated, we are trying to find a way out of a failed, inefficient system to promote universal service. And we also need to address not just rural issues, but also the urban poor. Some would have us bloat and patch the existing subsidy system. We can't do that. We do need to approach this.

Our company is actually about to try a new approach with regard to low-income populations, something called the Comcast broadband opportunity program, or CBOP, which I've been told is a fairly catchy acronym.

MR. MAY: Joe, who told you that?

(Laughter.)

MR. WAZ: My son. In our NBCU transaction, we said that the goal was to accelerate the anytime, anywhere digital future. As we spoke to the FCC about the transaction, we were reminded that the future is not necessarily within everyone's reach.

So, we took on the responsibility of devising a plan to expand broadband adoption. And we call it CBOP. It has three parts. First of all, the focused community is households in which a child eligible for a free lunch under the national student lunch program resides.

We're taking a three-pronged approach to promoting adoption in those households: by offering a reduced price broadband connection, for $9.95 a month; by offering equipment for $150 or less, and we're working with our technology partners to find a good, reliable piece of equipment that families will want to use in that price point; and to promote digital literacy, because what we really learn is that just talking about price is not enough when you're talking about broadband adoption.

In fact, price of broadband is a barrier for perhaps seven percent of the U.S. population. If you figure 35 percent of American's aren't connected, about

15 percent of those say that the cost of a broadband subscription is the main barrier of adoption, that gets you down to somewhere in the 6, 7 percent range of people for whom cost alone is a barrier.

But what research shows is there are multiple barriers to adoption. Blair's report refers to this, and a lot of the research John Horrigan has done at the Pew and at the FCC joint center show it. Among the factors are lack of digital literacy, lack of relevance, and also the cost of equipment. So, we said, "Let's come up with a plan that attacks as many of these key barriers to adoption as we can." And that's what you see reflected in CBOP.

We think the program we're developing, and that we will implement for the first time coincident with the new school year, will become an important testing ground. We think it could lead to new strategies that will be more effective in promoting broadband adoption than merely arguing about the price of broadband or the subsidy dollar shift from carrier A to carrier B.

We hope other companies will emulate and innovate around our model. In fact, we have already received calls from some other ISPs saying, "We would like to know more about it, and may want to build on it." And we hope the technology community, as well, will step up and help do their part to make this work.

In this program, we hope we might have the seeds of a new and cost-effective approach to broadband adoption, one that was developed in a policy conversation, rather than a government mandate, which I think is an important

point.

Let me turn briefly now to an Open Internet policy. After many years of political and legal wrangling, we now have some FCC rules on the books. How long they remain there will be up to the courts. As for my company, we have said that the rules do reflect the way we run our business. We are prepared to abide by them, and we committed to do that in the FCC transaction review.

But how these rules get interpreted and implemented will matter. And that really brings us to a process point. If Internet openness issues and network management issues are to be determined exclusively for the filing of complaints with the FCC and through the adversarial process, I am concerned the lengthy, all-encompassing, politically ugly process behind the adoption of the rules will only be extended for years to come, with further diversion of attention and resources from the National Broadband Plan.

We need better approaches. We need institutions that are as modern and innovative as the Internet itself. And I am pleased to be involved with such an institution, something called the Broadband Internet Technology Advisory Group, or BITAG. Randy, I'm not sure if that one is as catchy as CBOP, but it's another acronym for the table.

Let me try to summarize what this thing is. During our BitTorrent dispute over three years ago now, we learned about something that our engineers knew well but that our policy team did not know as well. The Internet community today has incredibly successful consensus-based mechanisms for addressing

network management and related issues.

The Internet Engineering Task Force, or IETF -- and if you're not familiar with it, check it out on Wikipedia and online -- is one of those mechanisms. It brings together thousands of engineers from all over the globe several times a year, and lets anyone tee up engineering and network management questions for discussion. The give and take is invaluable. We have played a major role there over the years. It was through the IETF that we tested the propositions behind our fair share network management system, and got terrific input. And what's great about the IETF is that the engineers really succeed, by and large, in leaving their business and dogmatic biases at the door.

Coming out of some roundtables at Silicon Flatirons a couple of years ago, a cross-section of players from all elements of the Internet industry and the user community developed a program to domesticate the IETF, if you will, creating a somewhat analogous organization here at home. We identified a bright and respected leader in Dale Hatfield, who should be known to everyone in this room, to serve as our leader. And it gives stakeholders a place to go to sort through issues in the same kind of fact-based, engineering-driven, consensus-oriented process that the IETF has, but with focused discussions and with expedited time lines.

BITAG's technical working group will meet for the first time later this month, again, with a terrific cross-section of folks representing content industries, network industries, application providers, equipment providers and user

groups, including ISOC. And Public Knowledge and Center for Democracy and Technology are participants. I hope we will soon have proof that this kind of approach can work to expedite problem-solving and bring more clarity to issues.

MR. MAY: Joe, just about one minute, if you could.

MR. WAZ: Sure, Randy, I'll wrap it up. I was at a meeting here in town last year, when an administration official -- not one who used to run Silicon Flatirons, by the way -- referred to IETF as a near-miraculous institution. We hope to replicate that near-miraculous process for BITAG, and we hope and expect that policy-makers will watch this carefully.

So, to sum it up, as we rethink our statutory and regulatory and institutional frameworks, I think we have to be open to more experimentation and innovation as these two examples suggest. Those are the characteristics, experimentation and innovation, that made the Internet amazing. They can help to make better public policy, too. Thanks.

MR. MAY: Thank you, Joe. And so next we're going to turn to Professor Yoo, also from the city of brotherly love. Chris?

MR. YOO: Thank you very much. I don't mind going at the end because it is the reality of alphabetical order. It's one I'm used to living with, and it allows me to make a small point which I sometimes make, which is -- despite whatever you try, there is no such thing as a neutral principle. There are systemic biases in everything you pick. You will naturally pick alphabetical order. If you choose to try and avoid offending anyone, I guarantee you there is a consistent bias

inherent in that that can be predicated.

(Laughter.)

MR. YOO: I say that as a riff. But what you'll discover when you dig into the engineering, things like first in/first out and all the different routing schemes that we perceive as being neutral actually have understandable, predictable biases against certain kinds of applications with the speed with which they start, how long they run. And one of the parts of the research I am doing now is actually studying something that engineers understand very well but have percolated very little into policy debates as they exist today.

We are going on to the topic of today. Jim liked the idea that we're talking about what comes after network neutrality. And despite some of the forward-looking aspects of what's been discussed, what comes after network neutrality is, unfortunately, a little bit more network neutrality.

We have two major issues brewing. The first is a fight over jurisdiction, and the other is a fight over enforcement. I would like to talk briefly about each of them.

Jurisdiction, the big fight, as we all know, will happen in the courts. The D.C. Circuit has now ruled that it's not necessarily going to happen there, just because the Comcast decision was issued by the D.C. Circuit. They will have a mechanism for deciding which actual venue will address and resolve that issue.

The more interesting question is on the substance rather than on the venue, as Commissioner Baker said. What's interesting is that different people will

have different opinions when they read the order. My own take on it is the FCC's discussion of jurisdiction does not sound confident. In fact, they cite a large number of provisions that they claim potentially support their position.

When I used to work in a company and I had someone come in and say, "I have four great ideas for you," my boss said, "What you're really saying is you don't have a single good idea for me, and you're hoping that I'm going to buy something by throwing a bunch of stuff up and hope it sticks."

If they are hanging a hat on anything, it's section 706, title 47 of the U.S. Code. It has been stated by Commissioner Baker and Commissioner McDowell, in their dissenting opinions, that 706 was intended to be a deregulatory investment-oriented provision, and that they believe it will be hard to turn that into one that becomes an affirmative mandate for instituting regulation. That will ultimately be up to the courts.

I think the final venue here will be Congress. As I said last year in the conference, we can take a great lesson from the history of the cable industry. That is the last time we got a new major technology and tried to shoehorn it into the existing categories given to us by the Communications Act of 1934.

All of you who know the history. We tried to use ancillary jurisdiction. We had a series of Supreme Court decisions saying the FCC can do this, can't do this. Eventually Congress finally decided we needed a regulatory regime that, instead of being determined by how a series of categories designed for a different technology many decades ago accidentally linguistically fall on a

particular technology, we need to think about how we should regulate this. Congress eventually stepped in in 1984, about three decades into the cable industry, and finally gave us a framework. I think that that's a useful model, and it will lead to better results.

What's interesting is how complicated this has become. We missed a tremendous opportunity about a year ago for a congressional solution.

Since that time, House Democrats have weighed in against a network neutrality proposal. About 70-some had written a letter to the Commission, to the chairman. A bunch of state representatives, overwhelmingly Democratic, had opposed it. And there seemed to be some room for some non-partisan discussion. Mayors came in.

We had a very different election. Right now, we have a Tea Party contingent of the Republican Party, which has made opposing network neutrality a major part of their agenda. And in the winds of this, we have a President who has now stated paring back regulation is a goal across the board. The problem is, given his pre-commitments in the Administration and the current commitments of the Chairman, I don't expect that commitment to extend to network neutrality. But it does indicate the larger political context in which we're debating this.

I'm not optimistic about a short-term solution based on the Waxman proposal. It was received relatively well by the industry, perhaps privately so. It was considered a useful starting point. But because of the politics and partly because the timing of the elections it was, basically, a non-starter. Also the

underlying politics have now changed.

The second part of this is not just jurisdiction, it's enforcement. The order attempts to provide guidance, but it actually is very ambiguous in a lot of different ways. For example, the content industry problem was very heightened in the initial proposal. They said part of "reasonable network management" would be curbing illegal piracy of content.

The order did something very strange. It took that language out of the specific definition of "reasonable network management," but qualified it by saying, "But nothing in this order changes the copyright laws, or will stand in the way of someone who wants to regulate" -- to curb illegal piracy. And everyone is left scratching their heads. They also make very clear that "reasonable network management" means you can't block access to legal content.

We're all left with this cipher now to try to figure out. They didn't remove it from the definition for no reason. But we're left with these ambiguous clues about what you can do. There are wonderful ambiguities about whether it's a real harm. They use the word "prophylactic," in terms of regulation, throughout. It's not entirely clear how much harm is going to be required to be proven before you can bring a cause of action.

One of the things that has been overlooked by a lot of people is the real discussion of the enforcement is where the FCC talked about who bears the burden of proof. I have actually favored a case-by-case approach, but thought the burden of proof had to rest on the complainant. That's how we do anti-trust laws.

That's the traditional way we do laws.

They start off saying, "Yes, the burden of proof sits on the complainant, but if they make a *prima facie* showing, now the burden shifts to the broadband access provider to show that their actions are reasonable." This is a very, very different thing than saying the plaintiff bears the burden of proof throughout the proceeding.

Why is that a problem? Ambiguous practices about which we have no data -- which means new practices -- are often going to run directly afoul. Once the *prima facie* showing has been made and the burden shifts, the broadband access provider is going to be under tremendous pressure to prove something for which no data actually exists. And prophylactic harms and the idea of protecting innovation actually were very influential in the order.

I will give you two examples that are happening right now. As most people in this room probably know, there is a dispute going on between Comcast and Level 3. Comcast and Level 3 CDN, Content Distribution Network, had a peering agreement. Level 3 has now become the primary distribution mechanism for Netflix. And the economics changed. From what I understand, Comcast attempted a shift from a peering arrangement to a transit arrangement. It was claimed foul as a network neutrality violation.

I do not know any of the private details. Many people say, "Well, how do I know? What do I know?" Estimates suggest that Netflix is 20 percent of all network traffic. It's a large, large provider. Some estimates suggest that the

change of adoption of Netflix will increase the flows going through Level 3 CDNs by 5 times. I don't know the details of the agreement. But in any peering agreement that I know of, if one side of the flow increases by five times, it's no longer a peering agreement and the undergoing economics are likely to change.

So, there is a surface plausibility of this to me. It doesn't stop the ambiguity and the enforcement mechanisms for people raising concerns. A number of voices have raised exactly those concerns. It causes a tremendous drag, based on what's going to change in the relationships on distribution with CDNs through Level 3.

The second thing that's in the news right now is MetroPCS. Not one of the four largest wireless providers, they are attempting to scale up with very little bandwidth. They're doing something remarkable. They missed 3G and are attempting to move straight from 1G to LTE as a very early adopter.

On their 1G system, they were able to put YouTube, because of consumer demand, by changing Flash into a different protocol called RTSP that needs less bandwidth. They are willing to do that for any provider that providers their content in Flash. But right now, you cannot get all video content on their network, because the limitations of the 1G network.

They carry that limitation to the 4G platform, They have all these problems with dual function phones, because basically they're not completely built out in 4G. So sometimes you're in a 1G cell, sometimes you're in a 4G cell, and they have a huge problem. They don't want you clipping out service based on what

city you're in. And you have to keep track of all that.

This is something that is a natural technical fix for a wireless carrier that has very, very limited bandwidth, not anything close to what the larger providers have. And they stand ready to do this with others in terms of Flash. The question is, "Do they then have to support other video encoding systems besides Flash?" It's hanging over them, and it's caused a tremendous problem. It's one of the reasons they're now challenging the order.

MR. MAY: Christopher, just take about another minute to wrap up, please.

MR. YOO: Happy to wrap up. So we have these questions about how these things are going to be enforced.

The one thing that bothers me the most about the order is that there is a thread in there about hostility towards practices that will let broadband access providers generate more revenue. The reality is -- and I think that Jim is correct -- that one of the downsides of the network neutrality debate is it distracted us from the Broadband Plan.

The filings from the state reps make it clear, though, that there is a deep linkage between the two. I will throw a couple facts at you. The lowest, most conservative estimate for building out 100 megabytes to 100 billion homes I have seen is $350 billion. And if that's not going to get built with government funding -- and I know of no proposals on that scale; there are smaller ones, BTOP and the like -- there is going to have to be some form of revenue enhancement. I am

worried about the language of the order standing in the way of that.

The wonderful example of this also is the difference between FiOS and U-verse. The initial plans reach roughly the same number of homes, about 18 million. One used a heavily-managed solution and one used a big pipe solution. Price tag difference: $24 billion versus $7 billion. That is a technical choice. That's an economic choice, which they are finding out in the marketplace. Wall Street has been on both sides of that fight.

So, what I would suggest is that, yes, build-out is the most important thing. But how we implement the Open Internet rules will have a direct effect on which practices we can use to make that build-out, which will have a direct impact on the cost, which will have a direct impact on the extent to which it's successful.

MR. MAY: Thank you very much, Christopher. And I made a note -- it's right here on my piece of paper -- that next year you are going to go first, okay? It's going to be a non-neutral decision that I have made.

Okay. Next, we are going to turn it to Blair. I am going to hold him to the same time limit. I just want to say, with respect to Blair, as Jeff said, that he agreed with about 90 percent of the content of the Broadband Plan, and just disagreed with about 10 percent of that. That made me think of my relationship with Blair. Honestly, I don't think I approach agreeing with him 90 percent of the time, but I do agree with him on many things.

We have known each other for a very long time, and I have always appreciated having him come to Free State Foundation events. And I think we are

good examples, Blair, of what they talk about a lot in Washington these days where you don't agree on everything, but nevertheless can talk about these things in a way that, hopefully, is useful to people. So, with that, proceed.

MR. LEVIN: Does anyone in this room think it's a good idea to ever have the government use its power to assess consumers, to subsidize a private company, and assure that company's permanent profitability? Anybody want to raise their hand?

(No response.)

MR. LEVIN: Okay. That's what we do today. We spend billions and billions and billions of dollars doing that. It's called rate-of-return regulation. And the result of that means that, in some parts of rural America, we collectively pay the price of creating a Maserati, for which that private company offers a Mercedes, which, because of the subsidy, they can offer it at the price of a Chevy. That's what we do for about half of rural America. The other half of rural America, we say, "Walk." Okay?

It's really dumb. It's really stupid. We have been doing it for years. It's wasteful. Most of you, being conservatives, will find this to be offensive. As a liberal Democrat, I find it offensive that there are millions of people who can't afford broadband who are paying so that Bill Gates's second home can get that subsidy. I find that offensive.

So, I spent a lot of the last fall going to various meetings of rural phone companies. I think I owed it to them and I owed it to the team that I worked

with to explain what we did, and why we said rate-of-return regulation is a bad idea and we ought to change it. There are obviously a lot of transitional issues, but we ought to change it.

And I am sitting there, and I am listening to them come back at me with, basically, arguments like, "We need the money. We need more money. We should tax Google. If anybody anywhere has 100 megabits per second, we deserve the same thing. And you should subsidize it for us." As I'm sitting there, I'm thinking, "Where the heck is Rob McDowell?"

Rob McDowell writes wonderful pieces on net neutrality and other pieces in the Wall Street Journal on free markets, how we have to get rid of these rules, how we have to understand economics, and all this. I am sure he will come here today standing in front of a banner talking about free markets. And sure, he, like every other FCC commissioner, will talk about the bloated and wasteful universal service fund. But he has never, to my knowledge, said, "We need to get rid of rate of return regulation."

Now, I don't know what you would call rate-of-return regulation. You cannot call it capitalism. I'm not saying it's socialism. Though I would say that certainly Karl Marx would agree with Rob McDowell's acquiescence in the passage of billions and billions of dollars under rate of return regulation, and probably -- well, I'm certain it's true -- that under Stalin, the Russian telephone system was built under rate-of-return regulation. And it's also interesting to note that rate-of-return regulation really gained prominence during the Woodrow Wilson

Administration -- you guys obviously don't listen to Glenn Beck enough.

(Laughter.)

MR. LEVIN: But my point is we need a principled conservative to point this out. It should not be my job, that's not really my job. I am willing, by the way, I go to liberal think tanks. I am doing one on Monday. And they will say things like, "We should spend $300 billion," and I will have to point out to them that that's actually not really progressive at all, since it will come on the backs of people and cause rates to go up by $30 a month.

The other day a reporter, a lovely guy, very, very concerned about it, wrote me. He said, "I've done a lot of studies, and I have discovered poor people pay a higher percentage of their income for broadband, and that's outrageous." And I said, "Well, they also pay a higher percentage of their income for, oh, I don't know, energy, food, water, everything."

I will take on the burden of talking to my progressive friends to try to have a rational debate. But I really would like it if I could get a little back-up here, if Rob McDowell would finally become a principled conservative and say, unequivocally, "we need to end it, and we need to end it in a foreseeable future, along a clear path." Again, we can argue about the transition out.

Yes, I am staying. And so I would like to ask you, Randy, to just ask Rob two questions. Number one, does he think it's appropriate to ever have the government use its power to guarantee the permanent profitability of a private company?

And, secondly, if you would please be so kind as to ask him, is there a limit to how much we should spend per year to subsidize a line? We don't have that limit today. It's certainly something that, I believe, we should have.

Now, let me just close by saying that we identified lots of gaps for our country in the Broadband Plan. Three are very affected by universal service: the unserved, the adoption gap, and an institution gap, which I think actually becomes more and more important over time, particularly public institutions that are lacking in sufficient speeds, which are very different than what you would want for residential.

By the way, a bonus question, if you wouldn't mind asking Rob. What did the Kansas Nebraska petition, which the Commission passed, giving more regulatory authority to the states, what broadband gap was that designed to help us solve?

MR. MAY: I thought initially you were going to ask about the Kansas-Nebraska law of 1854, and I was really --

MR. LEVIN: Well, if you give me a couple of extra minutes, I will work it in.

(Laughter.)

MR. LEVIN: I am totally mystified by that. Why they were doing that? I'm not arguing with the substance, I'm just saying it was just an odd kind of moment. But you can ask him that.

But here is the thing. Peter Drucker, the great business visionary,

said, "The danger in times of turbulence is not the turbulence. It is to act with yesterday's logic." The problem we have is that we are constantly acting with yesterday's logic as to all kinds of things. And Joe has talked about it.

But let me just close by saying I really agree with Jim Cicconi. We did a pretty good job of identifying the end point that we have to achieve, which is fundamentally about 100 percent broadband everywhere in the country, having everyone on it, and then working backwards from there to what do we need to do to change that.

In some ways I wish we had been stronger in articulating that vision, but I couldn't agree more that that's really the job of this Commission: articulate that vision, be very clear about it, work backwards, have a plan. You will, of course, course correct.

Let me just say quickly that my favorite line in the plan --

MR. MAY: Quickly.

MR. LEVIN: -- is the opening line of chapter 17 on implementation, "This plan is in beta and always will be." Of course you have to adjust to facts as they change. But the important thing is set that vision, be clear about it, and start in a faster and more passionate way to get to that broadband future. Thank you.

MR. MAY: Blair, thank you very much. If Blair thinks that he is going to get paid more by now giving me questions to ask Commission McDowell, he is probably wrong about that. But I do appreciate him plugging to lunch.

I am not sure whether you linked Commissioner McDowell to

Stalin, but I think you did.

(Laughter.)

MR. MAY: I think you did. So I may have to ask him about that, or get you to do it.

I want all of you to come for lunch. I don't know whether I'm actually going to, myself, link Commissioner McDowell to Stalin personally. But I guarantee you we are going to have, really, a good conversation. It's going to be interesting and enjoyable.

When we did the first annual conference, Blair was the first person that I interviewed. I think he can vouch that we had a good conversation then, and fun, and it's going to be --

MR. LEVIN: Talked a lot about Stalin, as I recall.

MR. MAY: I don't remember. But anyway, it was good. And we are going to have a good one today.

So now, with that, what I want to do is open it up for questions. We have got questions from the audience, and then we can have questions among the panelists, as well. So you can line up at the mics.

If anyone on the panel, after hearing the remarks of the others want to ask a question of a panelist, or if you just want to react to something, I will let you do that first, and then we will intersperse those matters with questions from the floor. Anyone want to say anything?

(No response.)

MR. MAY: Okay. Let's go right to questions from the floor. If you will, please identify yourself by name and the organization that you're with, and remember we want to have questions more than statements here.

MS. KRIGMAN: No problem. I have a question for you. Hi. Eliza Krigman with Politico.

For those of us not as expert on these issues, could you just briefly lay out in layman's terms what rate-of-return regulation is?

MR. LEVIN: Rate-of-return regulation simply means that if the company spends money on various capital expenditures, it gives the bill to the government and says, "Please give me my money back, plus a rate of return," which I believe, if I recall correctly, is 11.75 or 11.25. I read a recent analyst report that said the cost of capital is about eight percent. So we're paying a lot. Let's put it this way: if anybody would offer me a guaranteed 11 I would put all my money there right away.

MR. MAY: By the way, almost everything Blair said is totally within the 60 percent or whatever that I agree with him on. But keep in mind that the universal service tax that results from all of those things that he was talking about -- and I understand legally it's not a tax, but the effect of it is -- is now 15 percent or close thereto.

I think Jon had a comment.

MR. BAKER: I just have a quick academic qualification here or something about rate-of-return regulation.

Of course, wasteful subsidies are something that we all ought to oppose, and that's essentially what Blair is saying. I am not trying to quarrel with that. But just as a matter of history, the point of rate of return regulation isn't to subsidize high-cost activities.

The reason it was introduced historically is we had phone companies, electricity companies, and water companies that we thought were natural monopolies. We thought we would only have one firm because of the high fixed cost and very low incremental costs of production, and that if another firm tried to enter, the first firm would be able to undercut it and force it out. Then we would be left with one firm that could charge very high prices to consumers but with freedom from competition.

So one can imagine a variety of solutions to that -- government ownership, or the like. What the U.S. historically chose was to let private firms own these natural monopolies, but protect consumers and ensure enough return for investment by just capping the rates.

And so, rate of return regulation was a solution to the natural monopoly problem. Over time we have learned to try to tweak this. We have introduced price caps as a way of improving on the way natural monopoly regulation was historically run. But the basic idea of rate-of-return regulation was to protect consumers in settings where there would only be one firm that would otherwise charge a high price, not to subsidize inefficient companies, which is Blair's concern here.

MR. LEVIN: Look, I was kidding about Stalin, just to be clear, as well as Woodrow Wilson. And I hold nothing personally against Rob. Well, that's not true; he went to Duke, I really hold that against him.

(Laughter.)

MR. LEVIN: How can you not?

MR. MAY: We're going to get into that later.

MR. LEVIN: Yes. But the point is that's a historical answer, and that's my point about Drucker's point. We cannot act with yesterday's logic. We have a completely different situation there.

Regarding those companies, I want to be clear; they're good people. They're trying to do a job for their communities. I don't object to that. But we have a system which, like I said, makes us pay for a Maserati, we get the Mercedes, then subsidize it at the cost of the Chevy. We're subsidizing it, and the rest of rural America has to walk.

MR. MAY: Okay.

MR. LEVIN: That's stupid, we've got to change it.

MR. MAY: Okay --

MR. YOO: Blair is right, in the sense that the world is just different. The natural monopoly world and a cord-cutting world don't exist anymore.

The problem is that the old justification has now been put together with rate averaging and other institutions that are going to be the drag. And if we

make a change, there will be winners and losers. The problem is getting all that sorted out. It's become a political coalition among the losers, because someone's rates are going to go up who are currently getting subsidized by a cross-subsidy, even aside from the direct subsidy.

MR. MAY: Okay. Let's have a question from the floor, please. Go ahead.

MR. HORRIGAN: I am John Horrigan, I am with TechNet, and I also worked on the National Broadband Plan with Blair.

I have a question that I think ties together two sentiments expressed in the morning, one by Joe Waz and one by Commissioner Baker. They seem to be talking effectively about institutional failure, and not market failure, with Joe talking about a need for reform of regulatory processes and Commissioner Baker even seemingly in favor of planning. And I am wondering if anybody on the panel has ideas on what changes to the institutional apparatus are needed to have more effective policy.

MR. YOO: I will make one quick comment, at the risk of disagreeing with Joe. There is a tendency to romanticize other institutions. Those of us who in the room mostly know the FCC. Some FCC scholars that look at the Patent Office think, "Boy, that would be great. Why don't we become more like the Patent Office?" And all the patent scholars are saying, "What are you, nuts?" And there is a patent scholarship that says, "That FCC is a really great institution. Why don't we make the Patent Office more like the FCC?"

There is a thing about this in the IETF. If you talk to engineers, it has historically been very consensus-driven. But as the community has changed, a lot of people think it's very dysfunctional. It's ossified, consensus doesn't work when there is so much underlying heterogeneity. And there are biases in that process, as well.

As you all know with institutional design -- there is no magic design, or else we would have found it a long time ago. We have this very unruly, muddling-through approach about trying to play off different institutional strengths against each other.

MR. MAY: All right. Jim had a comment.

MR. CICCONI: Yes. In practical terms, it's asking a lot to ask any bureaucratic entity to reform itself, or to reconsider the core fundamentals of its existence. Institutions just don't do that. That's why the Congress has responsibility here. It created the agency. It wrote the laws under which it operates. Frankly, if there is going to be a fundamental re-examination of the mission and role of the FCC going forward, it has to come from the Congress.

I can give you two quick examples. One of them, with respect to Jonathan, goes to merger review. I certainly understand his defense of the way the Commission goes about this today. I think the fundamental question is why the telecommunications industry -- almost uniquely -- has to go through two merger reviews to consummate a transaction. In virtually every other industry in America, if you pass the antitrust review -- which is, in essence, a competition review -- then

you can go ahead and close that transaction. And so why we have this extra bar of an FCC approval, which fundamentally stifles economic activity, is a question the Congress ought to be asking.

I think another played itself out recently in the city of Phoenix. Qwest applied, rightly, for relief of regulatory obligations there on the basis that the market is essentially competitive now. They have lost about a quarter of their lines to wireless-only, as almost all of us have. And they have lost about half of what remains to the cable company, in terms of voice service.

The Wireline Bureau, in examining their forbearance petition, essentially declined to consider wireless substitution, which, honestly, is truly unfathomable. It ignores all logic, acting as if the only competition possible is wireline to wireline. Then, in its decision it essentially said that Qwest is going to remain highly regulated in the Phoenix market, the cable companies that compete against them are not going to be regulated at all, and it's just going to ignore the fact that customers of both are free to drop the wireline entirely and use wireless. This makes no sense.

But we can't expect the Wireline Bureau itself to reach a conclusion that, in essence, raises questions about its own relevance, going forward. This is something that the Congress has to do, or at least the five commissioners that govern the Agency.

MR. MAY: All right. Thank you, Jim. Now we just have time for one more question. Then we're going to have to end the session. But it's fair to say

I do have now several more questions for Commission McDowell that probably are better than the ones that I had originally thought of myself. So this has been useful.

(Laughter.)

MR. MAY: Steve, you can ask your question. Remember it's just a question, and we're going to do it very quickly, because I promised our moderator that we're going to get the next panel up and running on time, as well.

MR. EFFROS: Steve Effros, Effros Communications. I just want to wrap up a few things with a simple question.

Do you think the Commission can be adult enough, even in a small way, to look at a piece of its rules and say, "You know, that doesn't make any sense any more, Congress, you ought to change this?" Jonathan gave a great demonstration of that when he said, "Well, we looked at it, and they looked at it. We came to the same conclusions they did. We came to the same rules that they did, except we had 500 pages instead of 200 pages, and 2 sets of lawyers instead of 1 set of lawyers."

So, when is it that the Commission becomes adult enough, as Jeff pointed out with regard to the AllVid proceeding, for instance, where you have rules from 15 years ago? We all know that the world has changed. Blair says you have got to adjust to change. Instead of going on with more rules, does anybody think the Commission could be adult enough to just go back to Congress and say, "That one little provision on regulating or creating electronics we should get rid of?"

MR. MAY: I can let everyone respond, but only if you do it really quickly, and then we've got the panel on spectrum. So, very quickly, if you'd like to respond, you can.

MR. CAMPBELL: Look, they can be responsible enough to do those things. A lot of the statutes that we're talking about here give the Commission flexibility in many areas.

In the past the Commission has certainly acted flexibly with respect to statutory requirements, based upon the markets that they are in. But it is a dual responsibility here. In the case of the set-top box thing, they're living under a statute from 1996, when we had analog cable. And so, there is responsibility in the Congress, too, to recognize that some of these old statutes shouldn't just be left on the shelf forever, that they should either get rid of them or update them appropriately.

MR. MAY: Jeff, in the instance of this particular statute, there is, built into the statute, a sunset provision. That's pretty unusual, of course, in these types of statutes. I assume it was put there so the Commission could make a decision itself that times have changed.

PARTICIPANT: Yes.

MR. MAY: Okay. Jim?

MR. CICCONI: Of course they can be adult enough. It's just a matter of will. The President of the United States has actually given them the perfect charge to go ahead and do that, with his executive order. They recently

received letter from the U.S. Chamber of Commerce calling on them to voluntarily do the same thing that President Obama has ordered every other government agency to do. They ought to do that.

MR. MAY: Okay. Jon wanted to make a remark.

MR. BAKER: I have a brief comment, which is that the Commission has, in the past, exercised its authority to forbear from regulation when it's thought that appropriate. And so the Commission has a good record of doing just what you say, of deciding where regulation is appropriate and exercising it, and thinking hard about where not to regulate. I see no reason why the Commission won't continue to do that, going forward.

MR. MAY: Okay. I just have time for one more. Joe, did you want to say something?

MR. WAZ: Sure. The FCC is under a biennial review obligation, which I think they just kicked off for telecommunications. I think they're under a quadrennial review for media and broadcast rules. They have to get in the notion that it's a perennial review, something that should be ongoing. And the Agency should be open to it. There is probably no better time than now to show that they're committed to it, as Bill Kennard was 15 years ago, when he undertook a top-to-bottom review.

MR. MAY: I am sure the audience agrees with me, that this was an absolutely terrific panel. I hope they will join me in thanking you for that.

(Applause.)

MR. MAY: Now, I am going to ask the next panel to immediately come up and assemble. We're going to get started. Then, at 12:30, we are going to move to the lunch session.

(A brief recess was taken.)