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# THE FREE STATE FOUNDATION

A Free Market Think Tank for Maryland.....Because Ideas Matter

## Media Advisory

May 31, 2019

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## **THE FTC SHOULD USE FORWARD-LOOKING ANALYSIS TO APPLY RELEVANT MARKET DEFINITIONS ENCOMPASSING ALL BROADBAND INTERNET ACCESS PLATFORMS**

**Free State Foundation President Randolph May and Senior Fellow and Director-Policy Studies Seth Cooper submitted [comments](#) to the Federal Trade Commission in response to the Commission's hearing on Competition and Consumer Protection Issues in U.S. Broadband Markets.**

**The complete set of Free State Foundation comments, with footnotes, is [here](#).**

**Immediately below is the "Introduction and Summary" to the comments, without the footnotes.**

### **Introduction and Summary**

These comments express the views of Randolph May, President of the Free State Foundation, and Seth Cooper, Senior Fellow and Director-Policy Studies. The Free State Foundation is an independent, nonpartisan, non-profit free market-oriented think tank focusing heavily on communications and Internet law and policy.

Within the realm of that communications and Internet law and policy work, the Free State Foundation has focused on, and devoted scholarly resources to, researching and writing about public policy-related issues involving broadband Internet services. It is with this expertise and experience in mind that we offer these comments on "Competition and Consumer Protection Issues in U.S. Broadband Markets."

Network convergence is a widely recognized reality of the broadband marketplace, and deployment of 5G and gigabit broadband networks will accelerate competition among competing platforms. However, competition policy lags behind technological developments, and that risks perpetuating an outdated analytical outlook that misses the benefits of innovation and intermodal competition being enjoyed by consumers, both now and in the future. To align with market realities and future developments, the Commission

should apply relevant market definitions that encompass all broadband Internet access platforms, regardless of their differing delivery technologies. And it should apply a forward-looking analysis that factors in the market's technological dynamism.

Delivery of Internet Protocol-based video, voice, and data services through different technologies and the advanced capabilities of next-generation networks increasingly will result in consumers having choices among competing platforms, place downward pressure on prices, and establish a disincentive for anticompetitive conduct by providers.

When assessing competition conditions and potential consumer harm regarding broadband Internet access services, wireless/wireline substitution renders separate product markets for "mobile telephony/broadband services" and "wireline broadband services" too narrow. The Commission's assessments should define the relevant product market to encompass all broadband Internet access platforms providing comparable goods or services, regardless of the differing technologies by which they are delivered.

Furthermore, the Commission's case-by-case evaluations of alleged anticompetitive conduct by broadband service providers should be informed by economic analysis and antitrust precedents. In order to determine whether particular market practices are anticompetitive, the Commission's analysis should be keyed to whether or not there is market power in the relevant market, and it should also weigh the benefits of the evaluated conduct against its costs.

Although the existence of market power generally is a necessary precondition for a finding of anticompetitive conduct, to date no evidence of market power in the broadband markets has been shown. And cross-platform competition among wireless and wireline service providers renders the existence of market power for broadband Internet services unlikely. Furthermore, providers also are less likely to act in an anticompetitive manner in dynamic markets, like the broadband Internet market, in which the introduction of new goods and services may thwart a provider's attempt to engage in such conduct.

Moreover, the ability of broadband market participants to compete and innovate is hindered by restrictive regulations. Legacy telephone and cable regulations reduce providers' financial resources for investment in next-generation broadband networks. Federal agency delays in clearing spectrum for licensed use and lengthy local government processes and excessive fees for infrastructure siting and equipment modification also hinder deployment of broadband services. Potential state "net neutrality" regulation of broadband Internet services, if not prohibited, also will inhibit investment and innovation by broadband service providers. In assessing the competitive conditions of the broadband marketplace, the Commission should call attention to the counterproductive nature of such regulations.

**A PDF of the complete FSF comments, with footnotes, is [here](#).**

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**Randolph J. May**, President of the Free State Foundation, is a former FCC Associate General Counsel and a former Chairman of the American Bar Association's Section of Administrative Law and Regulatory Practice. Mr. May is a past Public Member and a current Senior Fellow of the Administrative Conference of the United States, and a Fellow at the National Academy of Public Administration.

Mr. May is a nationally recognized expert in communications law, Internet law and policy, and administrative law and regulatory practice. He is the author of more than 200 scholarly articles and essays on communications law and policy, administrative law, and constitutional law. Most recently, Mr. May is the co-author, with FSF Senior Fellow Seth Cooper, of the recently released [A Reader on Net Neutrality and Restoring Internet Freedom](#) and [#CommActUpdate - A Communications Law Fit for the Digital Age](#) as well as

[The Constitutional Foundations of Intellectual Property](#), and is the editor of the book [Communications Law and Policy in the Digital Age: The Next Five Years](#). He is the author of *A Call for a Radical New Communications Policy: Proposals for Free Market Reform*. And he is the editor of the book, *New Directions in Communications Policy* and co-editor of other two books on communications law and policy: *Net Neutrality or Net Neutering: Should Broadband Internet Services Be Regulated* and *Communications Deregulation and FCC Reform*.

**Seth L. Cooper** is a Senior Fellow and Director-Policy Studies at The Free State Foundation. He previously served as the Telecommunications and Information Technology Task Force Director at the American Legislative Exchange Council (ALEC), as a Washington State Supreme Court judicial clerk and as a state senate caucus staff counsel. He is an attorney, and he graduated from Seattle University School of Law with honors. Mr. Cooper's work has appeared in such publications as *CommLaw Spectus*, the *Gonzaga Law Review*, the *San Jose Mercury News*, *Forbes.com*, the *Des Moines Register*, *The Baltimore Sun*, the *Washington Examiner*, *The Washington Times*, and *The Hill*.

**In case you missed it...please see:**

- [State Net Neutrality Mandates and the Dormant Commerce Clause: Some Preliminary Thoughts](#), by Daniel A. Lyons, Member of the Free State Foundation's Board of Academic Advisors, May 21, 2019.
- [Getting to "Yes" on Allocating Identified 5G Mid-Band Spectrum](#), by Free State Foundation Visiting Fellow Gregory Vogt
- [Regional Sports Networks, the DOJ, and the First Amendment](#), by Free State Foundation President Randolph May
- [The FCC Should Curb Cap-Busting Fees Levied on Cable Operators](#), by Free State Foundation Senior Fellow Seth Cooper
- [The Metaphysics of Video Competition](#), by Free State Foundation President Randolph May

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**The Free State Foundation's newest book, [A Reader on Net Neutrality and Restoring Internet Freedom](#), by Randolph May and Seth Cooper, is available from Amazon [here](#) in paperback for \$9.95 or for your Kindle [here](#) for \$2.99. And it is available [here](#) from Apple and other booksellers in various e-book formats for \$2.99 or less. Read more about the book [here](#).**

# A Reader on Net Neutrality and Restoring Internet Freedom



Randolph J. May  
Seth L. Cooper

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