



The Free State Foundation's Sixth Annual Telecom Policy Conference



Panel II

***"A New FCC and A New Communications Act:
Perspectives from Academia, the Hill, and the FCC"***

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MODERATOR:

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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.

P R O C E E D I N G S

MR. MAY: I'm going to turn it over to Debi Tate, Distinguished Adjunct Senior Fellow at the Free State Foundation and former distinguished FCC member.

MS. TATE: Thank you all so much, and I hope you all will gather after you have gotten some refreshments and have a seat.

Randy keeps referring to this as Panel II, and I really enjoyed the first panel with all the CEOs. But this is the really important panel because these are the people who think, write, publish, and get things passed. And in addition to that, the first panel did not have an ambassador, and I have an ambassador on my panel.

(Laughter.)

MS. TATE: So we're going to stop referring to this as Panel II. And I do want to introduce the ambassador first for those of you who haven't had the chance and the opportunity to get to know Ambassador Phil Verveer. I actually have spent more time with him in other parts of the world than I have in Washington, so it's fun to be able to be with him here, and we appreciate you very

much for being here. I didn't think anybody could keep up with Ambassador Gross' schedule, but I bet that your frequent flier miles show that you have. So we certainly welcome you.

To my right is, as many of you all know, Professor Christopher Yoo. We have a long history because he was part of my kitchen cabinet which existed of two people -- Chris and me -- when I was the Chairman of the State Commission. And in addition to that, obviously, he also serves on the Board of Academic Advisors for the Free State Foundation and is the John Chestnut Professor of Law and also runs the Technology, Innovation and Competition Center at Penn. I'm very sad that we lost him from Vanderbilt, but very happy that he has his own institute.

Dr. Nicol Turner-Lee, I hardly know where to begin. You all, she has a whole page of her bio because she's been very many places, but we are very excited. I also serve on the board of MMTC here in Washington. I'm very excited that she's now the Vice President and Chief Research and Policy Officer, and we will be talking a lot about the new task force and about the possibility of a new Act with her because MMTC has certainly been a leader in

that.

David, thank you so much for being here. I know it's hard to get off the Hill, and I know at any moment, you could get a phone call and be out of here, so I'll try to get on with you. You all know that he is the Majority Chief Counsel of the Subcommittee on Communications and Technology for Energy and Commerce. And prior to that, of course, worked at CTIA, so I'm sure that you can talk with both of those hats on.

Daniel, I have just now met him, but I want you all to know that we've changed his bio. He is now a recently tenured professor, so let's all give him a round of applause.

(Applause.)

MS. TATE: For any of us in academia, we really know what that takes. So obviously, he specializes in all the topics that we're going to be talking about today, and we appreciate your being here so much.

Gus, you all will love this story. I only know two Guses my life. The other one is a two-star general and I was trying to hitch a flight on a military plane, but Gus got that e-mail the other day. So I think I might have

missed my flight. He is the Assistant Professor of Law at the University of Nebraska College of Law and another one of my colleagues here at the Free State Foundation.

And then, certainly last but not least, Shawn Chang, who's the Chief Democratic Counsel for the Communications and Technology Policy Subcommittee for the Energy and Commerce Committee. Formerly, you all may remember that he also worked with Chairman Waxman and then was also the Deputy Policy Director of Free Press, so you may want to jump in at any moment or shoot Randy after this.

But, anyway, I wanted to follow up obviously with many of the same questions that we started with on the earlier panel because I think that you all can really help us delve into those a little bit more. And so I'll start with just a very quick question. We'll just run down the whole thing, and that is, what is the single most important priority for the FCC right now, this year, in the next few months? And if we'll just run down the panel, that would be great. Chris.

MR. YOO: I would say the enormous sucking sound you hear at the portals is the incentive auction pulling

every single member of the staff into its ambit. It's essentially consuming almost every bureau and every part of the organization.

I actually think, thinking through the IP transition, whether it's a regulatory one or a statutory one, the transition is probably more important as what Chairman Wheeler stakes his legacy to. And I just hope that the large political exigency of the incentive auctions doesn't stop the Commission from achieving its other goals.

MS. TATE: Ambassador?

MR. VERVEER: Well, I certainly agree with Professor Yoo, that it is -- in terms of input, in terms of contributions from all over the agency, that the incentive auction is a very, very important activity at the Commission these days.

MS. TATE: Dr. Turner-Lee?

DR. TURNER-LEE: Yeah, this is tough. I think last year when we were here, we were focused on broadband adoption, so it's kind of hard for me to put one single most important thing, but I will say something that I think has been a common theme from MMTC. That is increasing minority ownership -- and if I could piggyback on what was

said about the auctions -- We can't go another auction without improving minority ownership and increasing the opportunities for minorities to be more engaged in the auctions as well as in every part of FCC decision-making. There should be an undergird of how it's going to impact consumers and owners of color.

MS. TATE: So we'll come back and talk more about that when we talk about auctions.

David.

MR. REDL: I would agree with what Ambassador Verveer and Professor Yoo said as well. A little self-serving since Shawn and I both worked on that project for our bosses, but the incentive auction is definitely Priority 1, 2 and 3 and should be Priority 1, 2 and 3 at the Commission.

We've said before we hope that they can take care of the broadcast issues. The wireless industry is used to dealing with the auction process at the FCC. The broadcast industry is not. So the sooner the FCC can answer the questions and solve the question marks in the equation for the broadcasters, I think the sooner we'll be back on track to get this thing done in a timely manner.

MR. LYONS: Yeah, I don't disagree that the incentive auctions are incredibly important. I'd put a spotlight on one other thing going on behind the scenes at the FCC and that's universal service reform. This is a really important transition time as we move away from just voice-based communication and begin to start thinking about how to close the digital divide. It's a very difficult question. It's one the FCC has done a lot of work on, and I encourage them to continue doing that going forward.

MR. HURWITZ: I'll say first what it is not. It is not network neutrality, despite the fact that that's where most people in the popular world focus their attention. It's not a serious priority in many ways.

I'll put a slight spin on everything that everyone else has said. Trying to balance the competing needs of the serious social services that communications platforms enable with the challenge of the economic provision of those services: Those are two divergent goals and the FCC needs to figure out how to converge them. The incentive auction and universal service all go to this basic challenge.

MS. TATE: Shawn?

MR. CHANG: I agree with Steven in terms of the incentive auction being Priorities 1, 2 and 3, but I will disagree with Gus on the point that net neutrality is not a priority for the FCC. In fact, I think we are all eagerly anticipating the FCC's interpretation and the use of its Section 706 authority as it applies to the broadband providers.

MS. TATE: Which leads into absolutely my next question, and that is, post-*Verizon*, what do each one of you see? This is an issue that I know Professor Yoo and I have talked about. In fact, it's so interesting because I think that Rob McDowell and I really thought it was going to be over with the original *Comcast* decision. And obviously, these many years later, we're still talking about it, and on these panels we're still talking about it. And, Shawn, you've got your view that it is very important.

So Professor Yoo, again, if you would start us off with how far the *Verizon* decision goes. Randy mentioned the discrimination against the edge providers, so maybe you can teach us a little.

MR. YOO: I would say there's a legal answer in

terms of what's left or what's open for the Commission to do, and there's the political answer. There are a lot of hidden restrictions and landmines that the FCC has to negotiate around in terms of crafting an order. Common carriage is permissible, so therefore, anything that was permissible in a common carriage regime is essentially permissible under whatever the Section 706 authority is going to be. So if you can do different price classes under traditional common carriage, it would be extremely strange to interpret 706 to permit the FCC to forbid something that was permissible under the common carriage regime.

Cellco Partnership says there have to be individualized negotiations and differential pricing. The ancillary authority jurisdiction puts many limits on what the FCC can do, and they're attempting to tiptoe around it.

And my guess is they're likely to punt all that down the stream by just adopting basically something that strongly resembles the data roaming rules that were previously upheld in *Cellco Partnership* and let the major details be worked out later.

I have an observation. This is not based on any

inside knowledge. I was told that Michael Powell advised Chairman Genachowski that he should be either the Broadband Plan chairman or the network neutrality chairman, and he tried to do both. I believe that Chairman Wheeler is facing the choice of being the IP transition chairman or the network neutrality chairman. And my sense is that he is trying to do something responsive regarding network neutrality because of the political needs, but he's trying to do enough to be called responsive and get it off the center of his agenda because his primary responsibilities lay elsewhere in the incentive auctions and the IP transition.

MS. TATE: Can we skip to the other professors and get your thoughts and then maybe go to our legal counsel?

MR. LYONS: Sure. I don't disagree that there are a huge number of potential landmines that the FCC's going to have to negotiate around in order to be able to get done what it needs to get done. That having been said, one of the things that I think is most interesting about this is the Chairman's own comments about the importance of competition, and I think that's a big change in rhetoric from the previous administration. And if it spills over

into the net neutrality proceeding, as I hope it does, what we may see is less of a focus on *ex ante* prohibitions and much more on a broad standard that we will learn the meat of on a case-by-case basis.

And I think there are a number of models that exist even under the current Communications Act. You can get something like the program access or the program carriage rules that apply to cable where a broad non-discrimination norm is set, and then what that means in individual circumstances becomes clear on a case-by-case basis. So the latest entry was the recent fight between Comcast and the Tennis Channel. The case-by-case approach is beginning to fill out what the legal norm is under the current framework, and it allows a little bit more flexibility for rules to evolve over time.

MS. TATE: And so why would we need anything other than the original principles? I mean, I guess when I was there, I just assumed that we would be looking at these on a case-by-case basis and that we had the principles for that and that we would apply those, just as you said.

So I'm not sure how we've gotten where we are.

MR. LYONS: Well, part of the issue is that the

original policy statement was simply that. It was a non-binding statement of policy.

MS. TATE: Right.

MR. LYONS: And so there was no legal authority for the FCC behind it. So the next attempt was the big thing that the court called out in the *Comcast* decision. You can't make something binding unless you explain beforehand that it's binding in some way.

MS. TATE: Right. Yes, my precise dissent. Thank you.

MR. HURWITZ: A very wise dissent.

I will start by agreeing 100 percent with Christopher. Network neutrality is in many ways an albatross. Chairman Wheeler, I don't think, wants to have it weighing him down. The IP transition is a much more meaty, substantive area to focus on. And I think that the approach to net neutrality we are seeing evolve is a rulemaking to provide some basic rules for the road that will then be filled in on a case-by-case basis. And that's exactly what needs to be done.

To flesh out a little bit of what Daniel said from the initial *Comcast* network neutrality challenge, the FCC

had previously said Section 706 didn't apply. So the FCC had previously tied its hands.

What the rulemaking needs to do is provide some notice of what the legal framework for analysis is going to be, what the legal basis for the FCC taking action will be, and what the contours for the rules of the road will be so that the agency can then avoid fair notice challenges and APA challenges to the network neutrality question.

On the broader question of what the ultimate scope of 706 is, under current administrative law, the Chevron doctrine, and *City of Arlington*, it is incredibly broad, and the FCC will get substantial deference in determining the scope of its jurisdiction. And the biggest bumps ahead could very well be between the FCC and FTC in data security and privacy issues.

MS. TATE: I would agree with that, and we can talk about that later.

Shawn, how about you and David talk a little bit about from your perspective what's going on on the Hill regarding the discussions about net neutrality.

MR. CHANG: Well, certainly, my bosses, Mr. Waxman and Subcommittee Ranking Member Ms. Eshoo, have introduced

their legislation to temporarily reinstate the no blocking and non-discrimination rules until such time as the FCC adopts its new rules.

I think going back to what Gus just said, I find it interesting that what the FCC tried to do back in 2010 under Chairman Genachowski was propose a very broad set of guiding principles or guiding rules that would be applied on a case-by-case basis. I don't see how that was different than the vision that everyone has agreed upon, and, of course, he had the support of the public interest community, major providers. The only entity that challenged the rules based on the FCC's basis of authority reasons, not because of the rules themselves, was Verizon, and look where we are today.

And so I think, certainly, that the FCC should move beyond just net neutrality to look at Section 706 as a whole. It is, like Gus has said, a very broad grant of authority. The courts are likely going to give the FCC plenty of deference. So what are the types of issues that the FCC will be able to now look at in the broadband space thanks to the Verizon challenge? It's going to be really curious.

MR. REDL: It will come as a surprise to nobody in the room that Shawn and I disagree on this. My bosses have been very clear that they currently view net neutrality, and have viewed it since its inception as the Open Internet principles way back when, as a solution in search of a problem. The D.C. Circuit remanded the rules in January, and the Internet continues to march on to bring us the things we want. As it turns out, just because those rules aren't in place doesn't mean the Internet suddenly goes away.

Now we've gotten out of the policy and we've all made our citations. From a legal perspective, we've talked about *Cellco* and *Verizon* and *City of Arlington*; What do all these things cobbled together mean? I think the one thing we should all be aware of is it means no one knows what it means. And that level of uncertainty being brought back into the Internet debate I don't think is helpful from a business perspective. And I don't think it's helpful from a social perspective, and as we start to look forward, my bosses would like to see the FCC spend the majority of its time on matters that are solving actual problems or are advancing technology in a way that brings real benefits to

consumers. And we just don't see net neutrality as doing that.

MS. TATE: Nicol.

DR. TURNER-LEE: And I want to echo what David is saying as well. At MMTC we have not taken a strong public stand, but we have written a paper where we agree that light touch regulation has actually created the environment and the conditions in which we've seen the Internet flourish. And if we try to put in additional rules we may see some chokeholds on the type of experimentation and innovation that's particularly benefitted people of color.

And I agree with David. Taking the oxygen out of the air while not addressing how we enhance consumer engagement, how we actually protect consumer interests, and how we make the Internet so vibrant, oftentimes it diverts the attention from the ultimate goal of where we want to see the Internet go, which is to create economic development and a vibrant digital ecosystem which we're seeing now.

So I think that's something to consider as we have this conversation. It's one of the many things that is in the category of answering "what one thing is most important

for the FCC." There are a lot of things that are in the bucket right now. Sort of going to a buffet and not knowing what you want to eat, but this is definitely one that we should not pick because you will be sitting there trying to figure out what part of the meat you want to actually consume versus the other issues that are there.

MS. TATE: So Steve Largent talked about the fact that 98 percent of Americans have the choice of two different providers and that for years, the FCC found that deployment was going along reasonably well according to the statutory language and that somehow the FCC has kind of turned that around and concluded that it hasn't been deployed on a reasonable basis.

So I guess, Professor Yoo, any thoughts on that? And we'll just do this very quickly.

MR. YOO: We're blessed with actually having some wonderful data actually studying this for the first time through the NTIA mapping project and the FCC's semi-annual orders. And simply put, we have a vibrant world in which at the benchmark levels that the FCC has established, somewhere well over 90 percent of consumers have a choice of three broadband providers. The NTIA mapping study says

88 percent of American households have a choice of two fixed line providers, and that's not even counting wireless, which is now achieving 12 megabyte speeds and peaking at 60 in a world where you need 8 megabyte speeds to do HDTV.

And so, what we see is a very dynamic world. I'm doing a study right now comparing the U.S. market to other policy-making approaches. For example, in Europe where they've taken a much more restrictive approach, our penetration of 30 megabyte service or 25 megabyte service is about 86 percent; Europe's is 54 percent. And there are other huge stark differences. I think that we're in a really wonderful world. When you go to Europe, the rhetoric is, "We're falling behind the U.S., what do we do to fix that?" And when we include wireless, there's a dissent by Commissioner Pai that flat out says if you take wireless as a real possibility, the number of unserved households as of a year ago drops to 5.5 million or 1.7 percent. And so you end up, depending on how you look at it, really seeing a tremendous amount of dynamism in the market that's very beneficial to American consumers.

MS. TATE: Not to mention the investment -- \$25

billion a year.

Ambassador, I don't know if you want to talk about -- since we've brought up kind of our global competitors?

MR. VERVEER: Well, first of all, obviously, our European friends confront challenges that we don't. When we talk about Europe, we talk about it as though it's a unified, completely unitary activity, and that's illusory. We're talking about 28 or 29 countries, each of them with national laws, national regulations, and in some instances, countries that are too small to reach minimum efficient scale with respect to a lot of these activities. So the European parliament and the European Commission are trying to find ways to overcome that, but to claim that the United States is doing better than Europe as a unitary entity is a kind of statement that has an awful lot of material footnotes associated with it.

MS. TATE: Thank you. Kind of like rural America?

DR. TURNER-LEE: As I said, to Chris' point, we are doing better as a country. A couple years ago when the Broadband Plan was actually introduced, MMTC did a study where we found that place did matter in terms of having access to high speed broadband in particular or competition

or competitors.

I think the thing that we all have to fear as we go through this conversation is digital redlining and the impact that it will have in terms of the social benefits of broadband if there are still places where people actually do not get access. And I think that's where the promise of the IP network transition and other things that we've talked about so far will allow us to create more ubiquity without leaving people behind. And I think that's a real concern. I think even though we can put on the rah-rah hat and say that we've made progress, we still have to fear that there will be some communities where they'll be built around or where they don't have access to basic resources, which will put them behind. And that's something I know that we're concerned about as we see more projects that maybe are publicly resourced or pet projects of companies that do not tend to look at the social benefit and ubiquitous benefit of broadband.

MS. TATE: Quickly, 706.

MR. REDL: To go back to the original question which was about the report which is to say that this is something we were concerned about on the Energy and

Commerce Committee as well, having seen that report come out and how the FCC failed to make a finding.

It was one of the things that led to H.R. 2844, the FCC Consolidated Reporting Act, which would combine a bunch of those "siloed" industry-specific reports into one market report. It passed the House unanimously. I would be a bad staffer if I did not plug that it would be nice if the Senate would take some action on that unanimously passed bipartisan piece of legislation.

MR. LYONS: The D.C. Circuit commented on the curious timing of the FCC's reversal on the question of whether broadband is being deployed in a competitive fashion.

One thing that hasn't come up yet is satellite, which has made a number of strides in recent years to overcome its latency problem and is becoming a competitive alternative too. Satellite was how we solved the rural problem with regard to cable provision. It was DIRECTV and Dish that were getting the signal out to people where it was uneconomical to run the wires.

MS. TATE: Note to Randy, need somebody from satellite up here.

MR. HURWITZ: So we've kind of merged together a bunch of issues in this topic. I want to say something about 706. It's a 706 question for our Hill staffer friends, and also on the international comparisons and investment question.

One of the important metrics to understand -- and I owe this to one of my colleagues at the American Enterprise Institute -- is that Americans constitute 4 percent of the population of the world and have gotten 25 percent of the total network investment in recent years. And if you look historically -- and Rebecca on the last panel -- I guess we're no longer calling this Panel II, so let's call that Panel Zero -- on Panel Zero, Rebecca noted how the capital is going to follow where it's going to be able to have the greatest returns. In Europe, the investment over the last several years has fallen off precipitously. So that's a very important point to understand.

On the pure 706 question and the question of the 706(b) report, the D.C. Circuit noted the awkward timing or peculiar timing of the FCC's finding. I'm not sure if under current deference doctrine that really would have

swayed the D.C. Circuit's outcome even had the FCC not had that finding. The agency will get very broad deference. So for those who might be involved with drafting legislation here, really greater specificity for what the requirements for the agency are will be an essential characteristic of any legislation. If there's an opportunity for deference, the agency very likely will be able to make use of it.

MS. TATE: Shawn, you really started off the 706 discussion, so you want to close it out?

MR. CHANG: I think it's a complicated issue that requires a lot of unpacking. And to double back with the guys, the court looked at 706(a) and found the FCC had authority there as well. So I don't think it's completely relevant today whether or not there is a finding of efficient deployment.

MS. TATE: So we looked at and heard from most of you all on the previous panel that it's spectrum, spectrum, spectrum, right? So let's have a couple of discussions about that. Our 30-billion-dollar auction while I was at the FCC translated into the U.S. having half of all the 4G users in the world. So it's pretty incredible since we're

only 4 percent of the world's population. I mean, that's pretty staggering to think about that -- what that one auction did. And now many years later, we are at the point of having another very large auction. So if you all would share your notion about some kind of adoption of spectrum caps. There was discussion in the earlier panel about spectrum screens.

Commissioner Pai has said the rules should be simple, transparent, and market-driven. And it looks like this is now going to be part of the May agenda meeting. So if you all could inform the FCC and suggest what should be in that order in the May meeting, we would all really love to hear that.

I know that Professor Yoo, you and I have talked about caps and screens over the years, so I'd love to hear your thoughts.

MR. YOO: Well, it's interesting. I've talked to a number of people in other countries. They're all watching the incentive auctions with tremendous interest because it's a big experiment we've never done before.

There are a bunch of questions. I learned when I had conversations with both David and Shawn when we were on

the Hill, a big part of it is revenue generation right now.

And it's an issue of certain mandates need to getting funded. It's a two-sided auction. You're actually getting a property from one side and flipping it to another. And if you take too much money out in the middle, there won't be enough money to convince the people who have the property to sell to the people who want the property.

And there's an enormous tension here based on the real needs we have in this country for tax revenue and general revenue. But if we do that wrong, what's going to end up happening is the auction is going to fail, and what you start to see is a bunch of different things in tension.

This occurs when we limit certain bidders' ability to participate in the market. That limitation going to create downward pressure and even worsen this problem.

We have two other auctions that have gone on -- the H block and the AWS block -- that are going towards fulfilling the financial obligations that are there. There's some real hopes that, in fact, it will alleviate some of the pressure in the incentive auctions.

The most important thing to me is that the spectrum is made available quickly. One of the reasons we

are among the world's leaders in LTE is we flipped the 750 megahertz spectrum much, much faster than many other countries. And if spectrum is not used, it's a wasted asset -- we've lost it.

Our consumers benefit from getting spectrum in play as quickly as possible. And more than anything else, my observations from around the world are those who do it slowly end up with worse service. There's nothing magic about it.

And so I think we're on a fast track on this part, but I just hope we don't slow down in any way or take any steps that will stop it from being deployed properly.

MS. TATE: Ambassador?

MR. VERVEER: Well, it's certainly the case that it's a very complicated proposition, unprecedented, and an awful lot of people at the FCC are working on it from a lot of different angles.

I will say this, as the professor just said, we've had one auction. We're going to have another that is going to help meet the statutory requirements with respect to contributions. We're going to be very close or perhaps even have met them by the time the incentive auction takes

place.

So there is a very important consideration we need to keep sight of, and that is, we really care a lot about the workably competitive environment in which wireless occurs. We don't want to do something in this auction or in any auction that threatens that.

There's one other kind of nearly extraneous point, but I think it's worth making. The professor makes a very good point about not delaying things, but it is certainly true that, again, if you look at the international environment, an awful lot of countries benefit from the examples that we set and the efforts that we've made. They can go to school on those things.

And very, very often, it enables them, even if they're second or third in line, to overleap certain things and actually do better. So the lessons that are available are going to be very important.

DR. TURNER-LEE: And I'm kind of in between, so I get to kind of come after these guys, and then you guys go back to this conversation because I'm sort of going to say what I always say.

So yes, we're moving very quickly, and I think the

incentive auctions are moving as planned to be a revenue generator for the economy, but at the same token, accommodate this growing spectrum crunch that we have.

And we at MMTC really haven't delved deep into spectrum caps. We're leaving that to these guys to actually look at those issues, right? But what we've actually been most concerned about is what the ecosystem will look like for minority ownership because the incentive auction process is moving so fast.

If you look at the designated entity rules that were mandated under Section 309(j), we have found since 2006 that even with the successful H block and the other successful auctions, that minority entrepreneurs have gotten less than .005 percent of the revenue.

And as we've said so far, the competition-based approach is very inclusive of all the stakeholders. Because when you have that type of competition, it also lends itself to the economic development that we want to see in this country.

Paying attention to minority spectrum ownership at this time is even more critical.

We've gone before the FCC and talked about looking

at reforming the designated entity ["DE"] program. And for those of you that don't know, that includes collectively small businesses, rural telcos, minority and women-owned businesses. There are rules right now that are in place that stifle their participation based on some of the pitfalls in the 2006 rules that were pretty much compromised by the FCC.

So we'd like to see that process reinstated, particularly getting rid of that awful attributable materialization rule, allowing secondary market transactions to actually occur, and increasing the bidding credits. I would love to say that back when we saw more DE participation the bidding credits were a little higher, and it allowed more regulatory certainty for minorities and DEs to actually participate.

So I put that out there as a conversation where we talk about the incentive auctions. We've told the FCC this is not about compromising or creating a consumer welfare program for people of color, rural telcos, and small businesses to stifle the development of revenue that we're all seeking in this country.

This is about having a conversation to promote

meaningful DE participation and ensuring when the next auction comes up. I just had to put that out there. H block, there were no DEs that participated in H block. It went to a single bidder. We were very happy to see that auction fund FirstNet, but at the same token, we didn't see an eligible minority entity actually compete in that auction.

So as we look at the AWS auction, as we look at the incentive auctions, it's really important that we actually figure out ways to bring people into the process so that when we talk about competition, we're talking about it in a fuller sense and not just designated to one area.

That's my plug, but I know these guys will come back to this. But I had to put that in there because I think it's really important.

MS. TATE: Thank you, and that's why you're here. We're glad you are.

MR. REDL: On Spectrum caps and spectrum screens, I think Chairman Upton and Chairman Walden have both spoken on this at length in our hearings and other venues. And so it should come as no surprise that we are opposed to the idea of spectrum caps, and that includes the use of a

screen as a *de facto* cap.

One of the greatest pro-innovation, pro-job moves the FCC made was having the humility to recognize that spectrum caps weren't working and removing the spectrum caps in the early 2000s. That's when the wireless industry started to really invest. That's when the wireless industry started to really take off in America, and it's one of the reasons we have such a vibrant marketplace now.

I hope that the current FCC will learn the mistakes of FCCs past as they look at this issue and not put any caps on the *de facto* ones in place.

MR. LYONS: Generally, you adopt an auction mechanism because you're putting trust in the price mechanism to guide a scarce resource to its highest and best use. And any time that you attach conditions to that which limit the ability of players to participate in the market you're distorting the ability of price to do that.

We saw that with the C block auction. There have been a number of studies that have shown the open access condition that was placed on Verizon's spectrum meant that the auction price wound up being much less than -- I don't really know the number, but less than it otherwise would

have gone for. And that's money that came directly out of the Treasury, money the Treasury would have gotten that we spent in order to be able to have that open access condition.

So if you're going to put conditions on an auction, you need to make sure it's for a good reason. I'm not convinced that "I bet poorly on YMax" or "I've not been very good using at my current spectrum" is a good enough reason.

We've heard a lot of rhetoric during the AT&T/T-Mobile merger discussion about the importance of robust competition among four or five national wireless providers. And that's true with regard to end users and consumers. It's also true with regard to competition for spectrum. The more you limit that competition, the less efficient or less optimal the result will be.

MR. HURWITZ: So for spectrum caps and screens, my answer is simple: Antitrust, antitrust, antitrust. Screens are a traditional approach in antitrust analysis to creating safe harbors. We can say we're not concerned about activity below this threshold. So if a screen is being used to create a safe harbor, that's a sound

approach.

Beyond the screen, we don't want to say if you're above the screen, it's going to be a problem. We want to say ordinary antitrust, ordinary competition, ordinary economic principles apply. So we then will look at how much spectrum individual actors control and ask does this raise competition concerns?

On the incentive auction, I'm actually somewhat surprised about the amount of optimism I'm hearing about the incentive auction. The auctions historically, they've been proceeding at a great speed, a great clip which is wonderful.

I'm really far more skeptical about the viability of the incentive auction and whether or not it's going to be a success, whether or not the spectrum owners are going to come to the table. I think the --

MS. TATE: If you say something long enough, it becomes the truth.

MR. HURWITZ: Right. The greatest goal I think that we should have for spectrum ownership is a liquid, vibrant, secondary market where we don't have this one-off, one-shot opportunity to sell your spectrum that gives

everyone an opportunity to collude or come together and say, okay, this is our one chance, or we don't want to participate, or we only are going to participate with some informal agreement if we get this amount of money out of the process. We should be thinking about how to transition to a more liquid secondary market for spectrum.

I'm going to also add another component to the spectrum discussion that I don't think is on many folks in our areas' radar screen yet, which is millimeter wave spectrum. This is even higher frequency spectrum which is being used to do all sorts of really great stuff at the engineering and research and development stage right now.

It may not be very well suited to mobile wireless, but for fixed wireless, you could be talking about 10 to 100 megabit connections over multi-kilometer distances very easily in the next couple of years.

MS. TATE: Have you got a paper that we could understand that you could cite for us?

MR. HURWITZ: I've written about this informally in a Free State Foundation *Perspectives* piece. It's discussed.

MS. TATE: Oh, good. I'll be looking it up.

MR. HURWITZ: And I might be doing future work in this area. The research and development in this area, the next generation of technology in wireless really is incredibly powerful, and I think has the potential to reshape the landscape in ways that hopefully the regulators won't mess up, but ways that will be very, very powerful.

MS. TATE: Shawn.

MR. CHANG: So my boss has not taken a position on spectrum caps, so I don't want to get out in front of him.

But I think it's interesting to look at spectrum caps versus spectrum screens from the perspective of flexibility and certainty. I find it really interesting that people complain about the screen not offering the type of certainty they need for approaching the FCC for transaction reviews on it and so forth, but at the same time, wanting the type of flexibility that a spectrum cap otherwise wouldn't be able to provide.

And then on the auctions, I'm one of the people who is cautiously optimistic about the incentive auction. I think the bipartisan basis will construct legislation that builds in a couple other auctions so that we can meet revenue requirements and we can also keep making sure that

spectrum is becoming available and we don't have to wait for the outcome of this uncertain, unprecedented auction to take place before we can actually get spectrum to use.

And the effort on a bipartisan basis that this committee has constructed in terms of 1755 to 1780 band, which ensures that the band becomes available for the AWS-3 band auction is a good example of the commitment that we all have to make to ensure that high quality spectrum is put to use.

MS. TATE: So in this whole spectrum ecosystem, one of the things that James Assey just talked about a minute ago was the unlicensed economy. So licensed versus unlicensed and, obviously, there's been an increasing push to make available more unlicensed spectrum. So I would love for us to just quickly touch on that, those of you who would like to, and if you don't want to, then we'll just move on. And to give you a hint, we're going to talk about mergers next, so if you don't want to talk about this issue, you can be thinking about mergers.

MR. YOO: There's a whole quality to this debate which I think is singularly unhealthy. People go into the camp that everything should be licensed, and other people

go into the camp that everything should be unlicensed. And I think that there's a middle ground where most people would realize that we've had benefits from both, but very few people are putting forth analytical frameworks for understanding how we should make those choices.

One of the things that we're doing at my center is we're drawing on the expertise of the engineering school, and we're actually going to put forth some new proposals and organize a conference here in D.C. in May, to try to start to strike a middle ground in between. I think that we need some fresh thinking here to start to talk about how you make those tradeoffs when there are benefits coming from different approaches like unlicensed so we can understand how much management it needs and what its limits really are to make sure that it doesn't at the same time hurt the benefits of the licensed spectrum which have provided the foundation for much of the success that we've seen in the wireless world today.

MS. TATE: So Chris brings up another good point, and that is that I didn't understand why we needed all these lawyers on our personal staffs, that what we actually needed was an economist and an engineer. And so this is

precisely why we have got to change the conversation that we're not all talking amongst policy wonks and esteemed legal professors but that we also have the people in who can really tell us how this stuff works.

I used to have the engineers at the FCC come in and say, well, which spectrum should be used for what, and let's just redo the spectrum chart. And they were like, oh, dear, she has so much to learn.

Ambassador, any thoughts?

MR. VERVEER: Just apropos of what you said, part of the complexity from the FCC's perspective is the civil service rules that make it much easier to hire lawyers than it is to hire engineers or economists. And I think almost everybody at the FCC would agree that we would like to see that balance shifted, but it turns out to be rather difficult as a result of the prevailing rules.

As to unlicensed, I'm rather hopeful that very soon, you'll see some activity in the 5 gigahertz range.

MS. TATE: Oh, great. Good.

DR. TURNER-LEE: I think you guys should bring some sociologists to staff there.

We've argued for a balanced spectrum approach when

it comes to licensed and unlicensed. I chair the subcommittee on unlicensed spectrum for the FCC diversity committee. And this has been a challenge for us because we know that there are points where we need access in underserved neighborhoods, but we also know you can't do that without ping-ponging to a licensed band. It's not going to work, right?

So we think that we need to really consider ways to balance an approach so that we can have continuous coverage while at the same time respecting the rules around all of this.

MS. TATE: Professor Yoo, I think you ought to add her to your conference.

DR. TURNER-LEE: I've asked him.

MS. TATE: David.

MR. REDL: I agree with what's been said so far in terms of there being a need for both licensed and unlicensed. We had that debate last Congress: What is the role of licensed and what is the role of unlicensed spectrum as we look at new allocations? And how will the Middle Class Tax Relief Act and the spectrum provisions there play out?

As Ambassador Verveer mentioned, the FCC's looking at the 5 gigahertz band. That was part of the Middle Class Tax Relief Act, mandating a look at whether or not we can expand Wi-Fi access in the 5 gigahertz band. Since the numbers are both aspirational, right, an incentive auction has numbers that you can't set in stone as does looking at a band to see how two services can play together, these numbers are a little soft.

But when you look at the potential recovered licensed spectrum and the potential for expanding the 5 gigahertz band for unlicensed use, the Middle Class Tax Relief Act actually had more unlicensed options than it had licensed options. And so certainly, my bosses agree that that was a good approach and something we should be putting into the bill bipartisanly. It passed.

So, I think, without speaking for Shawn and his bosses, I think we all agree that there is a role for both and that both should be looked at going forward.

MR. LYONS: So in my telecommunications law class, I assigned the 2002 Spectrum Policy Task Force Report, which I think deals with the question of licensed and unlicensed spectrum better than anything else I've run

across. And it points out, as the other panelists have mentioned, that there are benefits to both, right?

And it talks about when you want to use one versus the other. The Task Force Report recommended an exclusive use of a more property rights-based model with regard to the beachfront spectrum because it's extremely scarce. It's in high demand. There are a lot of different entities that may want to use it, and transaction costs are probably fairly low in transferring licenses from one to another.

For that to work, you need a good secondary market so that it's not just a one-time allocation, as Gus was suggesting earlier, but instead becomes a robust market that looks a lot like real property.

But unlicensed spectrum is much more useful in the upper band in places where either scarcity is lower because there's less of a use for it or where transaction costs might be a little bit higher. For these reasons, it is a lot harder to use a market-based mechanism in the upper band.

I look at the success of unlicensed spectrum in the areas where we have it, and it reminds me of -- I don't know if this is apocryphal or not -- but it reminds me of

the old Soviet Union in which all the agriculture was under command and control, in the 70s, the Politburo was experimenting with allowing people to privately farm part, maybe a tenth or a little less of the total collective agriculture scheme.

And within five or six years, some disproportionately large amount of all the produce in the country was coming from these little tiny chunks because it's what you allowed to privatize and what you allowed to experiment.

The Task Force made clear that what doesn't work is the command and control system. It didn't work for Soviet agriculture. It's not working for traditional spectrum.

MS. TATE: Maybe you should call Mr. Putin.

MR. HURWITZ: So I'm going to build on Dan's points. Thank you for that.

First, I've heard the same story. I don't know if that makes it not apocryphal, but I've heard the same tale recounted as well.

MR. LYONS: We must have the same friends.

MR. HURWITZ: One of the really interesting

questions left unanswered in the Spectrum Policy Task Force Report is what happens when unlicensed spectrum becomes congested, when there suddenly is a need to have it be managed by a single entity or arguably to privatize it. And that poses a really interesting question moving forward if we are going to rely more heavily on unlicensed spectrum and if we are going to see unlicensed spectrum being more substantially developed.

MS. TATE: This leads to mergers.

MR. HURWITZ: Quite possibly. That's a fascinating question, and I should also say I agree 100 percent with Christopher's and others' points that we shouldn't be A or B. We should be in a world that blends A and B.

And I also agree both with your point and Christopher's point, on the importance of understanding the engineering perspective here. One of the most important shifts over the last decade or so in this area is software-defined radio and the ability to put products out which are not assigned to fixed bands based upon the silicon design - - the actual chips in the product.

MS. TATE: And the technology is ever changing.

MR. HURWITZ: Right, exactly. So this means that you could today sell a cell phone that has a radio that could be tuned across a 5 gigahertz range, and then depending upon the geography of where you're operating, depending upon the technology prevalent in that area, you could use the appropriate frequencies. You don't need to have three different cell phones for three different markets, which fundamentally changes the nature of how we use spectrum.

MS. TATE: Shawn.

MR. CHANG: I was just going to make one quick observation, which is we are already facing an unlicensed spectrum crunch, and that's why we are looking at the 5 gigahertz band and the need to open up additional bands so we can provide gigahertz for unlicensed use, and also relieve congestion that we are experiencing already in the 2 gigahertz band. And again, that's a bipartisan effort that David mentioned.

MS. TATE: So STELA, mergers, so many questions, so little time. I know I'm going to get the hook, so before we leave, I really did want to hear from each of you about whether there should be some updating to the Telecom

Act -- and I assume most everyone thinks there should at least be something done. What would be your advice on that? What are the chances that your bosses are going to advocate for a total complete change or just some fixes along the way?

And, of course, as I mentioned before, MMTC has really been leading this with the task force that former Congressmen Stearns and Towns are co-chairing, and I think it's been very successful thus far. And I know they're making their rounds up on the Hill, too.

So, Professor Yoo.

MR. YOO: I think that we are witnessing something very similar to what led up to the '84 Cable Act. We stretched the old statute and nipped and tucked it far enough to the point where we saw ancillary jurisdiction rulings being struck up and down by the courts, and eventually, we decided that cable was just a different phenomenon and we needed to do a one-off, a true regulation that's designed for this new technology.

The problem is there's a lot more consensus on what not to do today than there is on what to do. Everyone says let's get rid of silos. Their content -- we are just

now starting the dialogue on how to fill it.

I do think there's an emerging consensus to separate what I think of as traditional economic regulation, which in a much more competitive world becomes much less necessary, and shift the dialogue to fulfilling certain social obligations -- disaster recovery, emergency response, law enforcement, disability access, and universal service -- just to name a few.

And just look at these mechanisms and to try to create a new dialogue where we're moving past what we're going to replicate in the voice world and port it over directly and to start to think more creatively about how we solve the problems of emergency response and these other things. And I think that's a very important dialogue that's just now starting to happen, thanks to the Committee, thanks to the Commission, and a lot of other leadership among the companies represented in the last panel.

MS. TATE: Ambassador?

MR. VERVEER: The existing act, I think it's fair to say, is serviceable. It's a good thing that it is serviceable because history tells us it's not terribly easy

to amend it let alone replace it.

If we are thinking seriously about doing it in the environment of rapidly changing technology, rapidly evolving business models, and rapidly changing consumer behaviors, we probably need something that is pretty simple and provides an awful lot of discretion for regulators because it will be very difficult to legislate on something that's very specific that will have very long life.

DR. TURNER-LEE: Yeah, I agree, and I'll give -- since David and Shawn are here -- four points. But I think as we go through this update, as opposed to rewrite, we need to ensure that it's a flexible system because the processes and the protocols that we're seeing put in place are changing and they're changing very rapidly.

Who among us would have thought that our smartphones would be so smart and get even smarter day by day? And so I think we have to have an act that has some flexibility, a little bit of certainty but some flexibility for these changing systems.

I would like to say -- and David has already heard me say this -- but as we look at the Comm. Act Update, this is a great opportunity to focus on achieving four goals.

One is it must find ways to advance minority ownership. Looking at the tax certificate program, what I just spoke about with amending 309(j), for further DE participation, this is an incredible time to do that right now. And because we've seen such an increase in minority engagement as consumers, we should also see a way to have an act that facilitates that type of expansion among others who want to be competitors in this ecosystem.

I think also we have this great opportunity to look at the update to enhance first class digital citizenship. Broadband adoption is still a problem. It has not gone away. It may not be one of those big rock issues, but it's certainly one that we have to find ways where this act enables new innovations in healthcare, education, and civic engagement in ways that we've started the discussion about a couple years back. We want to see an Act that actually accommodates that growth rather than stifles that.

I think we still need to protect universal service programs. They were fought for. We cannot let those be vulnerable in this update. Lifeline Link-up is one that we need to really make sure gets preserved in these

discussions.

And I think we need to think of some of the laws that do stifle build-out in underserved communities. There is some clarification that still needs to happen in terms of pole rights *et cetera* that we need to look at.

And this is a great opportunity, I think, as we look at where we're headed with this, that this can be a way to bring people together rather than to polarize the discussion and to sort of go back and relook at where we are. We're at a great time for advancement.

So, David, you're next.

MR. REDL: No pressure. Thanks, Nicol.

DR. TURNER-LEE: Right, no pressure.

MR. REDL: So what we're seeing play out is what my Chairman had hoped for. In December after spending the better part of three years working on issues for the FCC and NTIA that we were a little frustrated that the act was maybe not equipped to handle in a way that we would like, Chairman Upton and Chairman Walden decided that we should take a hard look at the act and work on updating it.

As Randy noted on the last panel, we do go to great lengths to say "update" and not "rewrite" because

we're not sure what the product is going to look like, and that's why we're doing a year's worth of hearings and white papers and stakeholder meetings to figure out what pieces of the act we would like to retain and which ones we would like to modify.

The end result could be none and all of them or anywhere in between, but we're trying not to prejudge what it should look like. And we've gotten such great feedback from folks. We were overwhelmed by the response to the white paper, getting 115 responses to our first one which was essentially a thematic look at the Communications Act from as disparate groups as domestic companies, we had some academics from Europe weigh in as well which was surprising to us. We weren't expecting the London School of Economics to weigh in on our white paper.

But the fact of the matter is as we looked at this, the world is changing. And as I sit there, I have not had a landline for telephone since I left college, but I currently have three mobile wireless broadband devices on me, on the panel.

So clearly, the world has changed in terms of how we approach communications and technology and we're hoping

to spend the next year and the next Congress looking at how we can update the act to be flexible enough to deal with this really fast changing part of our economy but to still give the kind of certainty that consumers and businesses have come to expect.

MR. LYONS: So three points on the Communications Act Update: One, I'm really worried about regulatory arbitrage. Things like Google Fiber not offering voice service in Kansas City. If Google is going to do that, it should be because they've decided it's an uneconomic business proposition, not because they fear the regulation that comes along with it.

Two, I think the statute needs to move the FCC away from a public interest-oriented standard and much more toward traditional antitrust standards. To the extent that the FCC is going to continue to be involved in economic regulation in this area, it needs to recognize that this is a very competitive marketplace, and what it should be looking for are areas where there are market failures and where the market failures are causing actual consumer harm.

And if those aren't occurring, I'm not sure the FCC ought to dedicate a lot of its capital toward economic

regulation. That allows the Commission to dedicate more capital toward things like universal service.

If the FCC is correct that build-out is a problem under Section 706, then the answer seems to me to fund build-out. Things like the Connect America Fund and Mobility Fund, I think, are much more useful dedications of the FCC's time than continuing to tinker around with net neutrality rules.

MR. HURWTIZ: So I think I'm the crazy person on the panel. I helped submit a couple of the sets of comments to the committee, and one of the sets of comments was probably one of the more aggressive proposals that you received, which argues that we need to be thinking long term about rationalizing large portions of the FCC's functions with other agencies.

The FCC's antitrust mission is largely duplicative with the FTC, and the FCC shares a lot of functions with NTIA. We've seen over the course of history with the CAB and the ICC that we ultimately dissolved those bodies and rationalized their functions with other agencies.

I don't know that we need to dissolve the FCC, but we should be thinking about finding redundancies, and

finding ways to rationalize the FCC's functions with other entities. And particularly in the case of shared authority with the FTC regarding competition, Section 706, data security, and privacy issues.

As part of its current mission, the FCC serves a number of very important goals, including the social services and social functions that we've discussed like universal service and similar ilk, and these are all very important. There should be a body that continues to focus on these, and it could be the FCC, but we should disambiguate the antitrust and purely economic questions with the social program oriented questions while not accentuating or diminishing the importance of either.

One other point that I'd like to make thinking about the Communications Act update generally, is the sort of processes and problems that we're addressing today -- network neutrality, Aereo, retransmission consent -- many of the debates in this area are basically about consumers being caught in the middle between content producers and distributors.

There is a similar set of problems that we're seeing over and over and over. We're approaching them with

different groups, different regulatory powers, and different statutes. We should take a step back and try and think seriously: Is there a holistic approach to addressing these problems? Are these problems that we need to address from a holistic perspective?

MS. TATE: My last question, actually, it's so interesting that you brought this up, was if you had a blank piece of paper and we started out with all of the functions -- economic, societal, regulatory -- where would those be placed and would there be an FCC and what would it look like? So it's very interesting that you were channeling, so we don't have time for that.

But, Shawn, I'll let you have the final word, and then I think we're going to have lunch.

MR. CHANG: I was going to just again make a quick observation. It seems to me that we're hearing two different things from Daniel and Gus: One talking about the importance of social services and social functions that the FCC should be able to fulfill; the other placing more of an emphasis on an antitrust-based approach to regulation in which the FCC should be able to step in only to the extent that there's actual consumer harm as a result of specific

market failure.

I think the FCC certainly has those social functions that cannot be executed based on antitrust authority alone, and that's why we do have a public interest standard. And the public interest standard, at least my boss believes, is an important element of any kind of update going forward.

MS. TATE: Please join me in thanking this terrific panel.

(Applause.)

MR. MAY: No one move for just a minute, stay in place, and I want you to join me in thanking Debi Tate. And then still don't move after that, but let's thank Debi.

(Applause.)

MR. MAY: She always does a terrific job.

I just want to exercise the -- I started to say moderator power, but I'm not the moderator of the panel. But sort of thinking of what Ronald Reagan said back in New Hampshire when he was running for President, "I paid for this mic, so I'm going to use it."

So I thought all of the panelists were great, and I appreciate your being here.

I want to especially thank Ambassador Verveer for coming over from the Commission. I learned from the previous Ambassador Gross, who's a good friend of mine, that once an ambassador, always an ambassador so that's why I have to refer to him as Ambassador Verveer.

But I have to tell you, he and I were at the FCC together. Our times overlapped. I shouldn't date myself but I was there from 1978 to 1981, and I was just an Associate General Counsel. But during the time that I was there, Ambassador Verveer was Chief of the Cable Bureau -- when you just hear the names of these bureaus, you realize how much things have changed -- he was Chief of the Cable Bureau and then Chief of the Broadcast Bureau and then Chief of the Common Carrier Bureau, none of which exist in that form today, which may tell you something. But just within that time, he was chief of all three of those bureaus which I thought was pretty amazing. So if I refer to him as "Chief" rather than "Ambassador," you might forgive me.

But I'm glad that Phil was here along with all of our panelists. I appreciate it. It was a great discussion, and thanks.

