



**The Free State Foundation's
Seventh Annual Telecom Policy Conference**

***"The Future of the Internet: Free Market Innovation or
Government Control?"***

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MODERATOR:

RANDOLPH MAY – President, Free State Foundation

PANEL PARTICIPANTS:

RICK BOUCHER – Honorary Chair, Internet Innovation Alliance, and former Chairman, House Subcommittee on Communications and the Internet

MAUREEN OHLHAUSEN – FTC Commissioner

DEBORAH TAYLOR TATE – Distinguished Adjunct Senior Fellow, Free State Foundation, and former FCC Commissioner

* 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

PRESIDENT MAY: We're going to get started again. For those of you that weren't here at 8:30 this morning when I went through, very briefly, the agenda, let me just summarize what's going to happen for the rest of the day.

After this distinguished panel that we have before you, we're going to have one more panel before lunch of industry experts and Gene Kimmelman from Public Knowledge.

And then around 12:15 or so, we're going to break for lunch, and that wall is going to be removed over to my left and we've got a really nice buffet lunch. Last year it was terrific. I thought maybe it exceeded that at my daughter's wedding, but don't tell her that. But we have a nice buffet lunch.

And then about 12:45 or 1:00, sometime around there, I'm going to have my conversation with House Majority Whip Steve Scalise. Then Senator Ron Johnson is going to speak after that. And Commissioner Clyburn will be back to close it out.

So that's what's going to transpire.

Now, as for this panel, I'm really grateful that we've got a panel on which there's such diverse perspectives and different experiences, but most importantly of all, such distinguished panelists. So with the usual caveat that you've got their full bios in the brochure, I'm going to give you the really quick version before we jump right in.

Commissioner -- I still always call her Commissioner -- Deborah Taylor Tate: Debi not only, of course, served on the FCC with distinction; more importantly than that, probably, if not in her mind, in my mind, is she's a Distinguished Adjunct Senior Fellow at the Free State Foundation.

And also, she's so many different things, but I'll just mention that her new position that many of you know about, back in Tennessee as the Director of the Administrative Office of the Courts in Tennessee. And she's an ITU World Telecommunications Information Society laureate. So Debi, I'm really glad that you're here, of course.

Then next I'm going to introduce Maureen Ohlhausen. Maureen, as you know, was here last year, which I appreciated, and gave a wonderful keynote address. And I'm glad you're back this year. Maureen is a commissioner at the FTC, so we'll get the perspective from the FCC's sister agency across town.

And I just pick out these things from your bio, but I want to mention this because it's important to me. I know when you were at the FTC before, and I know you spent many years there, but one of the things you did, you were a clerk for FTC Commissioner Orson Swindle, who I had a chance to get to know. And I think as some of you know -- many of you don't -- he was one of the longest-serving POWs, I think, from the Vietnam War.

COMMISSIONER OHLHAUSEN: Yes.

PRESIDENT MAY: And I think a remarkable person. So I'm sure that was an important experience.

And then finally, I'm really pleased that we

have Congressman Rick Boucher. See, I'm going to still use those titles. Chairman, I should say, Chairman Rick Boucher. Rick is the former Chair of the House Communications Subcommittee. I know that the name has changed a little bit over the years, but he chaired that committee for a long number of years. And he is presently honorary Chair of the Internet Innovation Alliance and a partner in the Washington, D.C., office of Sidley Austin here in town.

Rick, I think when you were Chair, when you served in Congress for all those years -- how many years was it again?

MR. BOUCHER: Twenty-eight, as I recall. I'm a little less certain than I used to be.

(Laughter.)

PRESIDENT MAY: But do you remember this? The district that you represented, wasn't that called the Fighting 9th?

MR. BOUCHER: It was, and for a while it wasn't, and now it is again.

PRESIDENT MAY: Well, what I was going to say

-- because whenever I think of you, honestly, I knew that that was what the district was called. You always seemed to me, when I was watching from my perch, to be such a gentlemanly person and congressman that it always seemed a bit incongruous to me that you were from the Fighting 9th. And I thought they should have called it maybe the Gentlemanly 9th. But anyway, I always admired the way you approached your work in Congress, even if at times I may not have agreed with your positions.

We called this panel "Observations and Reactions," I think, with the notion that having heard from Chairman Walden early on and then Commissioners Pai and O'Rielly and just being observers in any event on all that's been going on, that that title might be appropriate.

So the way I'm going to start, I think, with the panel is just ask each of them -- we'll just go down the row; I think we'll have first Deborah Tate with her FCC perspective, and then Rick Boucher, and then Maureen -- if they can give their reactions to

the Commission's Net Neutrality decision from having the benefit of your own experiences, please.

Deborah?

MS. TATE: Thank you. And thank you for the kind introduction. It's wonderful to see everyone here.

So I thought I might start out by saying what this is not. I'm usually such a positive person that I can't believe I'm putting this into the negative. I also thought it was very important to mention -- and actually, I think every one of them, Congressman Walden and then both of the commissioners, mentioned one of Brandeis's quotes.

I'm sorry, I was trying to get to a store to buy disinfectant because it is Sunshine Week -- and Congressman Walden started out talking about bad process usually makes bad policy. And so part of the problem is that there was not transparency in this.

The other thing is, this is not about providing broadband to all citizens. That's not what this order did. It's not about trying to reach the

most rural or remote or tribal lands. It really is not about trying to ensure that our schools have the broadband connections that they need for our global educational competitiveness.

It's really not about cybersecurity or trusted environments. It is certainly not about encouraging investment and continued innovation and infrastructure expansion. It is not about streamlining government regulations and making them easier to understand. It is also not about reducing costs, whether it be direct costs or taxes or indirect costs to consumers as the commissioners were talking about and Congressman Walden, borrowing from the USF fund.

It is actually not -- even though there is a lot of data quoted in the order -- it is not about making data-driven decisions. Commissioner Pai had suggested that maybe they should have some economists -- Randy, you would like that -- or some other engineers and persons with expertise to provide some information upon which they could then adopt an order

that would be data-driven. And it is not about being a beacon to the world for independent regulatory actions.

And finally, I guess -- I just want to make a point -- it is not about solving a crisis because there is no crisis. So if you get the gist of my remarks, which follow along directly with Congressman Walden and the commissioners, these are all the things that I believe the Commission should be focused on, whether it's cybersecurity or incenting private investment, ensuring that our education is globally competitive, certainly providing broadband to our entire nation, and, of course, reducing the cost to consumers.

So those are the areas I think we should be concentrating on. I don't think this order does any of these. So that would be my opening. Thanks.

PRESIDENT MAY: Well, it is true that I've never heard Debi use so many "nots" in that amount of time. So I think that's an indication of how strongly she feels about it.

Rick, why don't you give us your reaction to what the Commission did, maybe why you think it did what it did, and of course, with your service on the Hill and chairmanship of the committee, what you see going forward potentially in the legislative arena.

MR. BOUCHER: I'm really not going to try to take apart the reclassification decision and talk about the inappropriateness of Title II as a remedy for whatever is perceived as a problem here. I think I'm just going to endorse the statement that Commissioner Pai made when he said, effectively this is using a sledgehammer to hit a nail.

It's a poor fit for the highly competitive broadband market. It's a set of regulations harking back to the time of rotary telephones, when there was one provider of the service and it was a regulated monopoly. So in today's modern broadband world, multimedia, and many competitors in the space, this is truly a poor fit.

But the real question is, given all of that, where do we go from here? And I want to spend just a

minute talking about that because I do see what I think is a rare legislative opportunity where the leverage between Democrats and Republicans is just about equally balanced.

Each party has the capability now to give to the other the thing that it wants the most. The issues are crystallized. There are really only two moving parts. And in a circumstance like that, legislation truly does become possible. In fact, it is the optimal situation for legislation to pass.

So what is possible, I think, is a very simple bill that does two things. First, it would establish the Net Neutrality principles that emanate from the 2010 Open Internet order. Bear in mind that Democrats have been seeking those assurances for Net Neutrality for a decade; that's how long this debate has been waging, and that has always been the goal-to provide certainty that Network Neutrality principles will be observed and protected.

And in return for giving that, which the Republicans have now offered after a decade of having

opposed legislating those principles, Democrats could give to Republicans the continued treatment of broadband as a lightly regulated Title I information service.

Now, the Republicans have put forward a draft bill that accomplishes those two goals, but it does some other things. And those other things, I would suggest, are really superfluous, and if Democrats object, as they have to a couple of the provisions -- for example, the provision in the Republican draft that says that Section 706 is not to be deemed an affirmative grant of authority to the FCC -- and if Democrats object to that and other provisions, Republicans, in the interest of establishing the principle of light regulation codified in law, should be willing to accept the Democratic suggestion to remove those extraneous provisions.

The big question, of course, is why would Democrats want to do this? Why would Democrats want to participate in a process, having now already achieved Title II reclassification at the FCC, which

carries with it a stated set of protections for Network Neutrality? Why surrender that in order to have legislation passed that just provides Network Neutrality protection? Well, the answer is the following.

The Title II guarantees for Network Neutrality are highly impermanent. They really rest on a bed of sand. They literally can be swept away in the next presidential election, which in time would create a 3-to-2 Republican majority on the FCC. And one can be relatively certain that an early order of business for an FCC with a 3-to-2 Republican majority would be to reclassify broadband as a Title I lightly regulated information service. I think we could predict that would happen within the first year of a Republican FCC majority.

So the Democrats are, at the moment, celebrating what is a temporary victory. At some point, there will be another Republican President. There will be another Republican FCC. And when that time comes, we could expect to see the

reclassification once again occur.

Litigation could also upset these guarantees. And litigation, I think we all know, is certain. It's only a matter of who's going to sue and how many are going to sue and what circuit winds up getting the case.

But one thing I think the Verizon decision teaches us is that it takes a while for these decisions to be made. The Verizon decision didn't come down until three years after the case was filed. Roll that forward from now, and you're into the next administration. And if you look at the current polling, there's about a 50/50 chance that's going to be a Republican administration. So the Democrats really have a lot at risk in terms of the permanence of their Network Neutrality guarantees.

Now, the one thing Randy did not mention in his introduction is the fact that I am in fact a Democrat, and I've served in Congress as a Democrat for 28 years. I did, as he suggested, represent a pretty contentious district, and today it's pretty

much a Republican place.

But my Democratic principles are firmly intact. And I have always been a Network Neutrality supporter. Back in the early part of the debate, I worked with Ed Markey and others to try to provide statutory permanence for Network Neutrality. The Republicans opposed us every step of the way. And so far, that debate has not led to the guarantees being provided in any kind of permanent way.

But now the Republicans, ten years after the start, have come to the point where they're saying to Democrats, we will provide the Network Neutrality assurances from the 2010 Open Internet order. They have offered that.

And Democrats should seize that victory and say that the goal all along was not reclassification. The goal all along was to obtain permanent protection for Network Neutrality, and here is a way to do it: statutory permanence that is essentially immune from judicial challenge, that can stand the test of time, and put to rest at long last what has been the most

contentious telecom policy debate of the 21st century. We now have that in our reach.

What are the prospects for it happening? I would gauge them at about 50/50. I know that's kind of a copout because you're never wrong if you estimate something at 50/50. But I think there's a real potential here.

The two ranking Democrats on the Commerce Committees, House and Senate, have clearly signaled that they are open to a conversation about a legislative solution. Frank Pallone has said that in his opening statement at the Net Neutrality hearing the House had on February 25th, I think it was -- I was a witness at that hearing so I heard it firsthand -- and Bill Nelson has said the same thing from his perch on the Senate Commerce Committee.

And the incentive for Democrats is great. They can now achieve the victory they've been seeking for a decade, and I very much hope that they'll have the wisdom to do it.

PRESIDENT MAY: I have to say you do get the

sense that without disparaging any present member of Congress at all, I have the sense, listening to Rick, and many of you were here this morning listening to Chairman Walden, that if those two were sitting there together, that maybe the prospects for legislation might be 75/25 or something like that, or maybe nearer 100 percent. And that's not to say that I necessarily would agree with it all, but it is to say that I do have that sense. But we'll see where that goes.

Well, that spurred some questions in my mind, Rick. But I'm going to now turn initially to Maureen. And I should point out on her resume something that I didn't mention that I think is relevant. When she was at the FTC previously, she was Director of the Office of Policy Planning from 2004 to 2008, where she led the FTC's Internet access task force and many of us remember that work. So the whole notion of what the broadband providers are doing and what's happening in the Internet echo system, as we have come to say, was not new to you

even then.

COMMISSIONER OHLHAUSEN: Thank you, Randy.

Yes. I did head up the Internet access task force at the FTC, and we issued a bipartisan report on these issues in 2007 that I'm happy to talk further about. But why am I here today as an FTC commissioner? What are the concerns today that I need to draw to your attention?

I should say I speak only for myself, not for the whole FTC. But I think there's a general sense of concern going back to the organic part of our statute. So the FTC Act has a common carrier exemption. And it's really a bit of a relic.

It was put into place at the time when you had a pervasively regulated monopoly that was pervasively regulated by another regulator. And so it didn't make sense necessarily to have a Competition and a Consumer protection regulator layered on top of that.

But things have changed so much in this area. We've seen such fantastic growth of competition, of convergence, of previously heavily regulated services

really moving into being much, much more competitive. And that common carrier exemption doesn't really make sense today, but it's still in place.

So drawing upon my previous experience of heading up the Internet access task force, as soon as I started to see the words "Title II" bandied about seriously, I started raising concerns to say, this could have a bad impact on consumers.

A lot of this has been discussed as sort of a tug of war between the FTC and the FCC. But I want to put that to rest a little bit because it's not so much a turf battle between two agencies. It's our concern at the FTC to make sure that the protections that consumers have in place today will continue.

So, for example, the FTC is the premier consumer protection agency in the U.S. We're the leading privacy and data security enforcement agency. We've brought more than a hundred privacy and data security cases, including some of the cases against some of the largest players on the Internet. In addition to that, we've also done active outreach to

consumers and to businesses. We hold a host of workshops. We try to engage quite a lot on these issues.

And one of the concerns that I have is, looking now at the Open Internet order, I've tried to delve into it -- I'm sure everyone has tried to delve into it - to try to figure out what now is a Title II service? How big is this bucket that the FCC has created and is everything now Title II?

I'm concerned that moving ahead, it might create some challenges for the FTC to be able to continue to protect consumers online in the way it's so actively and effectively done till now. We brought the first online privacy case in 1999 in GeoCities when I worked for Commissioner Swindle.

Some recent cases that you might be aware of, or not so much, in June 2009, the FTC was able to get a federal judge to close down a rogue Internet service provider that recruited and knowingly hosted and actively participated in the distribution of spam and child pornography and other harmful electronic

content.

We reached a settlement with TracFone recently where they had promised unlimited data services and then engaged in throttling that wasn't based on any kind of congestion. We're in active litigation with AT&T on the same issue.

And my concern is that every time the FTC goes into court in the future to try to challenge these kinds of behaviors that are harming consumers, defendants are going to say, oh, common carrier exemption. The defendant will argue that they're exempt from our jurisdiction.

And while some of these arguments in cases no doubt will be weak, others, given the troublingly very broad language in the FCC's order, will, at the very least, take up a lot of the FTC's resources and perhaps shut us out of some of the very active consumer protection that we've been able to do.

So that's why I'm here today, to raise those concerns and to say I'm concerned about this not as the FTC versus the FCC, but really for consumers.

We've been, I think, doing a very, very good job for consumers, and I'm worried about the impact on consumers if we lose some of those tools or it makes those tools a lot harder for us to deploy.

PRESIDENT MAY: Thank you, Maureen.

I just want to remind people -- I know some of you have been doing it -- but again, we welcome your Tweets. The handle is #FSFInternetFuture. So please do Tweet.

So I'm going to go from the large macro picture -- and we'll get back to some of that -- but I just want to ask this question since it was brought up earlier in the commissioners' section.

This notion of editorial privileges, which at the FCC is so familiar and now a subject of some discussion, Commissioner Ohlhausen, is that practice employed at the FTC, and is it employed so routinely or ubiquitously? Just tell us about that. Then I want to follow up and ask Commissioner Tate a question about her experience with that at the FCC.

COMMISSIONER OHLHAUSEN: There has been a lot

of talk, including in some Hill testimony yesterday, that's comparing how the FCC proceeds with how the FTC proceeds. But I wanted to point out a couple important case-by-case features -- well, a couple important features of the FTC's case-by-case enforcement that provides important limits to our discretion.

Randy, you mentioned the editorial privileges. So at the Federal Trade Commission, staff has to get a Commission-level public vote to file any complaint or enter a settlement. And they cannot take these actions on their own delegated authority.

So we oversee every complaint. We oversee every settlement. And that includes the wording of those things. There's no going back and later rewriting and just kind of giving a general, "it looks okay," and then you fill in the details. We actually work hard and negotiate on all the provisions.

So I have personally engaged in arm-wrestling with my colleagues to make sure that we all agree on

the wording of every footnote, every provision in our orders.

The other thing that we have at the FTC is generally case-by-case enforcement under Section 5 of the FTC Act, which is power the Congress gave us. We have done some limited rulemaking, but it's very much cabined by what Congress said we should be carrying out in that rulemaking rather than doing very broad rulemaking.

In fact, in the 1970s, the FTC tried to engage in very broad rulemaking, and we were chastised very severely by Congress. We were shut down, literally, for a few days. We lost a lot of funding, and we had some of our authority strictly cabined by Congress in a statute.

Third, all of our decisions are informed by our Bureau of Economics. So we have 100 economists with over 77 PhDs in our Bureau of Economics. And they review and they give their opinions on every enforcement action, and they help inform the Commission's decisions about the consumer welfare

effects of our actions on both the antitrust and the consumer protection side.

For every major action, I get a separate recommendation from the Bureau of Economics -- all the commissioners do -- which I think is very helpful. And then, finally, one other thing I wanted to point out is the remedies that are available to us to help consumers.

So at the FTC, we generally do not get fines unless there's been like a rule violation or an order violation. What we'd get is consumer redress, and we get that money and we give it back to consumers. So in the recent cramming cases that we brought against a number of the carriers, the money that we got back, the \$80 million on settlement, we gave back to consumers. That is not a fine that goes into the Treasury.

So I think that's another important tool that the FTC has to help make consumers better off, to help put consumers back, make them whole again, when there's been deception or unfair conduct towards

them.

PRESIDENT MAY: Debi, just tell us about your experience at the FCC. Were there any times when this question of editorial privileges became controversial and when you had questions about it? Or was it all just pretty much - that's the way things have been done here since shortly before Genesis?

MS. TATE: Well, I did want to congratulate Commissioners Pai and O'Rielly for actually standing up and bringing this to everyone's attention because I think that Randy's right. In many ways this was just so ordinary, so routine, and so ubiquitous, that people hadn't really thought about it a lot.

I did want to speak to a few of the points that Maureen brought up. And that is that most of you all knew this before I got to Washington, but I didn't realize just how unlimited and infinite the chairman's powers were.

When a chairman has a personality type that embraces, whether you're in the majority or in the

minority, different opinions, then that's wonderful. And oftentimes you're really able to have an impact on how a proposed rule looks or how it may be changed after it was voted on with the editorial privileges.

Some of you all probably remember that while I was there, Commissioner McDowell and I actually got to read about a proposed rule in the *New York Times*. When somebody called and said, did you read about the rule in the *New York Times*, I said, no. I don't read the *New York Times* all the time.

I thought that Commissioner O'Rielly's term was really perfect. It is loosey goosey when it comes to what does the public know about the rule, like what did you know and when did you know it?

And then the whole uncertainty. It's very interesting -- I didn't realize that the FTC has to actually approve each of the complaints before they're investigated to start with. So much of that is done on delegated authority. And yet oftentimes, the bureau chiefs are just as confused about how much authority and how far it extends as perhaps one of

the other commissioners was.

So there are many of those examples. Another one is the fines. When I got to the FCC, I was very interested in trying to take some of the fines and actually redirect them back to the particular problem.

In Tennessee, we had done that specifically; for instance, if a gas company was fined, then we took those penalties and put them back into a fund to help people who are indigent, who were unable to -- and about to have their gas cut off, for example.

I was never very successful in doing that at the FCC, but I tried it on numerous occasions because just like Maureen was explaining, if you really want to be pro-consumer, then this is one of the great ways that government can do that.

So I'm just very proud and want to congratulate the commissioners again for bringing this to light.

PRESIDENT MAY: I want to turn back to Rick Boucher. But before I do, I mentioned during the

last session we always try and have questions from the audience at Free State Foundation events, and we're going to do that here. I'm going to make sure we have time. So as we go along, you can think of questions, and we're going to get to a few of those.

Rick, if you'll put back on your congressional hat again, I want to ask you this. It's often said by many congressmen and women on your committee, I think, that the FCC is a creature of Congress. I've seen that many times, and I don't necessarily buy into what that might mean in all of its aspects, but there's a lot of truth to it, of course, and Chairman Walden talked about it.

So I want to ask you what you think, again if you're thinking about this from an institutional perspective, about the White House's, President Obama's, messages to the FCC, the perceived notion, whether true or not, that that caused the Commission to flip-flop from its original proposal, and basically the appropriateness of that in the context of this proceeding. If you can just give us whatever

thoughts you have.

MR. BOUCHER: Congress created the FCC to be an independent agency and to exercise its independence apart from policy positions announced by the administration even when the majority on the Commission happens to align with the Administration's general views and be of the Administration's party.

I'll have to say that in the 25 years that I was a member of the House Energy and Commerce Committee, and served for virtually all of that time on what we used to call the Telecommunications and Finance Subcommittee -- the name of the subcommittee changed a bit over the years but it was always the same jurisdiction -- we always oversaw the FCC.

I can't remember a single time in that quarter of a century period when any president, Democratic or Republican, was as explicitly directive of the FCC as President Obama chose to be. I think it really is extraordinary.

And frankly, I was quite surprised because I had been following the progress that was being made

at the FCC at the time under Chairman Wheeler's leadership to try to address the deficiencies in the 2010 Internet order that had been found by the D.C. Circuit and find a way forward utilizing the Section 706 authority that the D.C. Circuit was quite explicit in noting that the Commission had.

In fact, I think many observers were quite taken with the length to which the D.C. Circuit went in describing just how replete that authority was under Section 706. And Chairman Wheeler, in a very public process for those who read the trade press every day, was fashioning a 706 remedy that would have assured Network Neutrality protections.

Perhaps there would have been some issues associated with the complete prohibition on paid prioritization because I think that was the major fault the D.C. Circuit found in the 2010 Open Internet order, and said that going that far was without statutory authority; but that short of doing that, the FCC could essentially assure the Network Neutrality guarantees that the 2010 Open Internet

order had put forward, but putting that authority squarely under 706.

And Chairman Wheeler was trying to find a way to do that. The way I recall his addressing the paid prioritization question was to say that in the event that a commercially unreasonable harm occurred, such as any Internet subscriber being able to receive a data rate that was less than the subscriber had paid for because paid prioritization was somehow interfering with his ability to receive that level of throughput, that could be found to be commercially unreasonable and prohibited by the FCC.

And in the end, if you sit back and look at it from that perspective, what the end subscriber is always going to get at the very top is the level of throughput that he has paid for from his ISP. And if that's interfered with in some way, then you would have a commercially unreasonable action by the broadband provider which the FCC could sanction.

And the D.C. Circuit, if you go back and read that decision, essentially would have said, I think

most people agree, that that particular formulation that Chairman Wheeler was putting in place would have been all right. He was pretty well down the road to doing that.

My guess is that had it not been for the video that went out from the White House shortly after the election, we would now be looking at an FCC order that did not reclassify but was based on Section 706. That's my guess, now; that's just one person talking. But events lead me to speculate that that would, in fact, have been the outcome.

So I think the White House involvement made a difference. I think it's unfortunate. It is extraordinary. And to come back to the precise question you asked, yes, I think it does put in question the extent to which the Commission is truly going to be able to function as an independent body in those instances where the White House announces such clear determination with regard to any particular issue the Commission is considering.

PRESIDENT MAY: Well, that was one person

talking, but that was the former Democratic chair of the House Telecommunications Committee. And I should apologize publicly to these guys.

I've been so busy -- a lot of times, and it's only the proper thing to do -- you give your panelists questions in advance or at least potential questions. And I've been so busy I didn't do that, and so I'm just springing these questions on them. And I think you'll agree with me that they do a marvelous job of answering them without having seen anything.

So another one, and then I think I'll turn to questions from the audience, maybe. But I'm going to ask Maureen about this, and then, Debi, if you want to add a postscript after Maureen, that would be good. But I'm now just thinking about the ideal world, and so you'll know I'm not delusional, I know this is not a near-term prospect.

But many people think, and especially some in the think tank community in which I operate, that perhaps in light of everything that's transpired in

the last hundred years and particularly the way the FCC is operating now, that maybe the FTC really -- and I understand this common carrier exemption, probably, you mentioned -- but the FTC, which has, as you put it, long experience and expertise in dealing with consumers and protecting consumers against harm, which is the important thing, that maybe they should have the jurisdiction themselves to regulate, really, the Internet providers.

And I'd like your thoughts on that. Could you guys do the job if you were asked?

COMMISSIONER OHLHAUSEN: Going back to the 2007 broadband Internet access report that the FTC did, it was a bipartisan report. We had a series of workshops. We had comments. We talked to lots of people in industry. And we looked at the question of what are these issues that are coming up under the rubric of Net Neutrality, and what are the kinds of tools that we could bring to bear on these kinds of issues?

We are a consumer protection agency. We're

also a competition agency. And we examined whether antitrust could reach some of these problems; if there was a problem with a bottleneck or with exclusion, would we have the tools under antitrust?

And we also looked at consumer protection. It's ironic when you look at the part of the Open Internet order, the previous one that was upheld by the D.C. Circuit and the Verizon challenge, it was the transparency requirement that said ISPs need to tell consumers how they're going to engage in traffic management. And then if they violated that, that would have been a fairly straightforward consumer protection kind of case to bring, which we did go ahead and bring against TracFone and AT&T.

So I'm not a person who says, oh, my gosh, there could never be a problem in these markets. Right? There could never be anti-competitive behavior. The question, I think, is how frequent is it such that you need a complete government regulatory structure put on top of what is essentially a free market?

At this point, one of the things we've seen -- I think the whole growth of the Internet and the whole growth of telecommunications is moving away from the monopoly provider towards a more competitive market with more competitive players and more competitive forces.

So I think that antitrust can be a useful tool to address the occasional problems that might arise, and that also consumer protection is an important tool to make sure that the promises that are made by consumers, by their ISPs, and by their carriers, are kept.

PRESIDENT MAY: Debi, do you want to add anything to that?

MS. TATE: Yes. I had actually brought the headline, "The FTC Is Suing AT&T for Throttling." And so the FTC is already involved in many of these issues. They have so much of the expertise, as Maureen so eloquently stated, to be able to protect us, consumers, and that right now, back to my "nots" at the beginning, we're not in a crisis.

We don't really have a huge, entire ecosystem of issues and problems and petitions being filed, and that through their consumer division, through their marketing, antitrust, all of the various expertise that the FTC can bring to this entire issue, again, my concern is like Commissioner Pai's. Where do you start with this order? From the individual to the international, it is causing huge problems.

PRESIDENT MAY: I think we will turn to questions now. But actually, what I want to do -- I just thought about this, seeing Dan Berninger here in the audience. He has put together a group of some of the, really, Internet pioneers, I guess, who actually opposed the FCC's action. And seeing him here reminded me of it.

And it's just amazing, or interesting, I will say, some of the names of people who are very disturbed by what the Commission has done. And they include John Perry Barlow, who's a co-founder of EFF, and John Gilmore, another co-founder of -- Electronic Frontier Foundation is EFF; people like Les Vadász,

who's a former Executive Vice President at Intel; Dave Farber; Ray Ozzie; Jeff Pulver; Mark Cuban -- what is he, on Shark Tank? No, he's done other things, I know, as well.

So they're really a group of Internet pioneers. Sometimes they get lost in the cacophony about all the edge providers. But I think that's a pretty impressive group of people.

That should have given you a second or two to think about a question. So if you raise your hand, I'm going to recognize -- you've got to wait to be recognized. And you want to ask a question, now, not make a statement.

I'll ask Brooks back there in the back. And we want to get in a few, so make sure it's a question.

QUESTION: I'll try to be brief. Thank you. Brooks Harlow, Lukas, Nace, Gutierrez & Sachs. And Commissioner Ohlhausen, it's good to see you again. I really appreciate your questions about where the jurisdictional lines are going to be drawn between

the FTC and the FCC. And this graphic behind you on the screen illustrates my question.

Back in the old days, we Title II lawyers, there was no question before unbundling and deregulation of CPE that that black desk phone was within the jurisdiction of the FCC. But I see, under the Net Neutrality order -- I have read the whole thing, some parts twice -- the handset is a whole 'nother question because all the rules say that basic Internet access service is regulated insofar as a person is providing such a service.

So using the example of applications that carriers, of course, bundle their handsets still with the service, and carriers have favorite applications, and they have financial arrangements with some of the applications that go on those handsets.

So are those applications within the FTC jurisdiction or are they within the FCC jurisdiction? It comes down to the question of whether they come under the "insofar as" they're providing basic Internet access when they bundle those applications

with the service that they're providing. Thank you.

COMMISSIONER OHLHAUSEN: Well, I think you put your finger right on the challenge. Where is the line going to be drawn? And previously, there were some things that were under both. Right? So the FTC and the FCC have worked together in a number of instances.

But once something is reclassified as a Title II service, if a court decides that that is a common carrier service, it means then the FTC may be foreclosed. So I think that's where the problem is. And as we're into an environment with lots of convergence with lots of intersecting, intertwined services, it's going to be a very difficult jurisdictional challenge for ultimately a court to decide.

I think that's another thing that really hasn't come out, is even if the FCC were to say, oh, well, we didn't mean to fence out the FTC here, it's ultimately up to a court to decide what's a common carrier service under the FTC Act.

MS. TATE: And I'll just add that the other elephant in the room is we haven't even talked about the jurisdiction of the states once you've applied Title II. So that could be another entire hour of a panel discussion.

PRESIDENT MAY: Yes. But that's really important, and I appreciate you bringing that up, because there are a lot changes when you change that definition. And there have been times when the state regulations of these types of advanced services have been important, and sometimes have been thought to be impediments even to the further development of the services. So thanks for bringing that up. That's important.

Do we have another question? Gary? Wait for the mic.

QUESTION: Gary Arlen from Arlen Communications. You talked about competition a lot. And I just wanted to get your feel about the competition of the Comcast-Time Warner or the AT&T-Direct TV, the other mergers, and how they'll have an

effect on where this competition for Internet access goes.

COMMISSIONER OHLHAUSEN: Is that directed to me? I can't comment on any pending mergers.

PRESIDENT MAY: Anyone have any views? You can see we're unrehearsed, as we should be. Anyone else want to comment on that question at all?

QUESTION: The competition, not about the deal itself.

COMMISSIONER OHLHAUSEN: Well, if your question is about competition, one of the things --

PRESIDENT MAY: Why don't you take it as competition?

COMMISSIONER OHLHAUSEN: One of the things that we looked at in the 2007 report was whether competition was growing in this market or whether it had become static. And what we saw was that competition was growing.

And if you look from 2007 till now, one of the greatest areas of broadband competition that's grown is wireless. Right? In 2007, we mentioned it, but

it wasn't as capable and dynamic and prolific as it is today.

So in an environment where competition is growing, I think that mitigates again against having a heavy regulatory approach and having more of an antitrust kind of approach.

And then I think the other question you need to ask is, the new regulations, will it spur greater competition in these markets or will it freeze, basically, the services that are available today into place?

PRESIDENT MAY: Before thanking the panel, we're going to take one more question if we have one. And then before taking that question, because some people have just come in, right after the next panel - and we're going to start the next panel right after this one.

And then when we break for lunch, we're going to have a nice buffet lunch right over behind that wall, so please stay for that and the conversation with Whip Scalise. Rick, is that the way you -- what

do you call a whip when you see him? Because I have to do this later at lunch.

MR. BOUCHER: Steve.

(Laughter.)

PRESIDENT MAY: That's good.

COMMISSIONER OHLHAUSEN: Even if his name isn't Steve.

(Laughter.)

PRESIDENT MAY: I was wondering whether I was going to conduct this conversation with Whip Steve.

Anna-Maria, a quick question?

QUESTION: Sure. I'm Anna-Maria Kovacs. I'm with the Georgetown Center for Business and Public Policy. And I'm a non-lawyer who has read the order and the footnotes, and one of the major questions for me is the way the order redefines telecom service, or extends the definition.

It seems to me that an awful lot of over-the-top communication platforms like Twitter, for example, or YouTube, or even Facebook, could qualify as telecom services if the courts choose to interpret

in that way if someone brings a challenge, even though the order doesn't make that particular finding.

I'd be interested in any comments any of you might have on that.

PRESIDENT MAY: Rick?

MR. BOUCHER: Well, it seems to me that any application that has any kind of two-way communications component could very well now be classified as a telecommunications service and fall under the ambit of Title II regulation.

So Facebook on its page certainly allows a lot of communication among users. Twitter. There are multiple examples. And if the edge provider community had any sense that the order was only going to be applied to the traditional broadband providers, I think there are going to be substantial questions raised about that, litigation over it, no doubt.

And it's just another of the many complexities that this order presents unnecessarily. And the uncertainty that arises from all of that, I think, is

going to have a major adverse effect on investment, and not just investment in the broadband sphere, but investment among edge providers also to the extent that there's uncertainty about the extent to which, over the future, their applications may be regulated by the FCC.

PRESIDENT MAY:

I'm now going to call up Seth Cooper and his panel for the next session. But join me in thanking this panel, please.

(Applause)

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