



**The Free State Foundation
Lunch Seminar**

"Ideas for Communications Law and Policy Reform in 2013"

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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: Well, we really do have a panel of experts. I know sometimes people say that, and it's a nice thing to say. In this case, it's true. So if I can have everyone's attention, we're going to delve right in.

Someone pointed out that when I announced the program, I identified the program as "Ideas for Communications Law and Policy Reform in 1913." Is that true? That's probably because there are times when I think that we're still stuck in 1913. But that was not deliberate.

So here's what I'm going to do. I've asked each of the panelists to speak initially for no more than seven minutes. We want to have a dialogue, back and forth, and then again with the audience for any questions and comments.

Even if they're not able to lay it out with a 100 point plan, what I'm hopeful they'll do is get some ideas on the table. I'm going to introduce them in the order that they'll speak here. I'll go down the line.

You've got the speaker bios. I'm just going to

tell you their current positions and not much more than that.

First will be Rob Atkinson. He's president of the Information Technology and Innovation Foundation. Rob has a new book out, too, and I've heard a lot of good things about it. So after you order that new Free State Foundation book, be sure to take a look at Rob's book. I'm just kidding. His is out. You should get his book.

James Gattuso is senior research fellow in regulatory policy at the Heritage Foundation. He has been following telecommunications policy for a very long time and not only is knowledgeable about that but regulation across the board. Today, we're going to focus on communications policy.

Next would be David Honig. David is president and executive director of the Minority Media and Telecommunications Council. And I'll just say, David, that I'm really pleased you're here. Obviously, with his organization, David has a focus on increasing opportunities for minority in the media. I think that's an important perspective and important voice to be heard.

Over the years I've gotten to know David better. He's not only knowledgeable about those issues of particular concern to the minority community but has some

good ideas about telecom reform in general. That's another reason I'm happy he's here.

Finally, Adam Thierer. Most of you know Adam. He's one of the real experts in the communications policy area, especially in the media area but others as well.

And Adam, we've been mentioning books. One thing I'll say about Adam: He's a prolific book reviewer in addition to authoring his own books. I'm hoping he'll take a look at our new book when it comes out.

We're going to start with Rob and take five to seven minutes, get some ideas on the table, and then we'll go from there. Rob.

MR. ATKINSON: Thank you, Randy, for having me. It's always a pleasure to be at your events.

I have seven minutes to completely rethink U.S. telecom policy, so I'll start right in. The problem is that in '96, we had an Act that, in some ways, went down the wrong path. It was an Act focused largely on telephony, on the PSTN. And it really had a view of the world revolving around competition which I think was unrealistic and, as we've seen, never really played out.

We have to recognize that that world was never realistic, and we've got to focus on what the world really is, not how we think it should be. The world really is a

world of inter-modal competition with IP-based networks. And we should just recognize that's what it's going to be.

We shouldn't be trying to get excess competition. We have competition. It is what it is. And I think it's working pretty well. So with this whole focus on more competitors being better, I don't believe that's the case.

We need to think about what broadband is, and what broadband IP networks are in that context. Those were pretty clear arguments we heard from Commissioner McDowell and others. They're not Title II, but I don't think they're Title I, either. They're something beyond or between those two things. They're not exactly the same as a piece of software, so I think we have to recognize that. They're not Title I or Title II.

I'd also argue broadly that we need to be committed to inter-modal competition and not let the desire for intra-modal competition get in the way of doing important things that are cost-saving measures, like retiring the copper network and phasing out the overall PSTN network, just because we think there might be a little bit of intra-modal competition that can ride on it.

We've got to recognize that competition works, but it really only works if we don't allow price discrimination. Oftentimes, people will say: "How can you

say that competition works if you only have one provider in a market?" And the reason is, as long as that one provider is charging the same price in that part of the market where there's only one competitor that they have to charge in the part of the market where they're disciplined by competition, you don't need multiple competitors in every marketplace. But if you change that, then you have to go down a different road. So I think competition generally works as long as we have that particular provision.

Broadly, we have to recognize that more pipes mean more costs. This is something a lot of people disagree on, but building more pipes to get more competition fundamentally raises prices. Building a pipe costs money.

Now, if somebody wants to do that, like Google, to their credit, in Kansas City, great, good for them. But we shouldn't have a policy that says: "Let's get more pipes, let's subsidize over-building." I think that's a mistake.

Secondly, we've got to figure out how to get USF reformed. The Commissioner McDowell talked about how USF contributions are increasing. In some ways, the fund is unsustainable. And I think the Commission generally got it right in their reform order. We have to think about both nomadic and fixed services in the USF world.

But we've also got to bite the bullet and say that

there's no reason users in high-cost areas shouldn't be paying as much as or more than other users in low-cost areas. The idea that we should be subsidizing high-cost users through low prices is a big mistake.

We've got to recognize that we're not going to ever provide broadband to everybody in America, at least non-satellite broadband, in the foreseeable future. We're not going to be able to do that, and as a nation we have to accept that that's okay. We don't have to have fiber to the igloo to make this a successful project for our country. And, therefore, the projects that have some reasonable cost-benefit ratio should be the ones we focus on and not the ones where that just doesn't make any sense.

I would also argue that we need to just give up on the notion that small ILECs are some inherently good thing. I've long argued, at least in the last two months because of our book, that the federal government should be size agnostic. We should neither favor big companies nor small companies. But we have this ideological thing in our nation that small is better than big.

Small is usually more inefficient than big. The only area that small companies outperform big companies on is disability payments, workmen's comp and unemployment insurance, which I don't think is a good thing. That's

really true. They pay lower wages. They have lower productivity. They invest less in R&D. They export less. But that's an aside.

My only point to say is we need to have a policy that encourages ILEC consolidation because scale matters.

We should be doing no more over-building. Over-building is a waste of valuable resources. We need to have a policy that puts infrastructure where there isn't, but not over-building.

I've got one minute and 34 seconds left. So I went back and I read 706 recently when the new report came out. I'd read it before, but I'd forgotten what it said.

Section 706 basically has two problems with it. One is it presumes that competition is the answer. I don't think the law should presume knowing the answer. It should say that there's a problem and we should try to fix it. But 706 says more competition is the answer. I don't believe more competition is the answer to high-cost areas not having broadband. In some ways, less competition might be the answer.

And secondly, I would break 706 into two parts and ask: "Have we had timely rollout to places that can have broadband that don't need a subsidy? In other words: "Where you would expect the market to work, has the market

worked?"

Then we have a separate set of households in the U.S. where it's going to cost more than what the price would get. So that's where the market wouldn't work. There we should ask: "How are we doing on that?"

The notion that we're combining all of this together really misses a critical point. So I would redo 706 around that. Maybe it's something the Commission could do on its own.

Two quick things in my 24 seconds. Boy, this is one of the great things. You can use this if you want, James.

On broadband, we need to focus on what the real problem is. The reason why the U.S. lags in the OECD is not because we don't have good broadband. It's because we have people that don't have computers. That really is the problem. Vast numbers of Americans compared to a country like Finland don't have computers. They don't have digital literacy. So if we want more broadband, we've got to do that.

And I give the Commission credit because they're increasingly focusing on this question of digital literacy, digital ownership. That's an important thing to do until we get close to 95, 98 percent adoption.

On spectrum, giving the Commission credit on the spectrum auctions, we've got to do more. The big low-hanging fruit there is with the federal government. We've just got to get tough with the non-FCC parts of the federal government, who are spectrum hogs and are really wasting spectrum. They could give up a lot of it and just choose not to.

Spectrum sharing is certainly one path. But I hate to have spectrum sharing be the sort of thing that gets them off the hook.

And lastly, we need to be reviewing spectrum transactions on the basis of consumer benefit and competitive impact. The public interest is best served by allowing those carriers who are doing the best job of investing in their networks and attracting and retaining customers to be able to acquire sufficient spectrum resources to serve customers well.

Every time we divide spectrum for these other reasons, we introduce inefficiency, and therefore, we should just recognize we're not going to have massive numbers of wireless providers. It's just not the way the market will work. And we need to make sure that the companies that are doing a good job get the spectrum they need.

With that, I am out of time. Thank you.

MR. MAY: Rob, that was really terrific and so good. If you had needed more time, I would have given it to you, but you did that really well. I particularly appreciate, honestly, the way that you are able to explain that just creating more competitors is not ultimately good for consumers or consumer welfare. Frankly, at this particular Commission, more than most or more than it should, there is this notion that they ought to be managing competition to create more competitors. And from an economic point of view, you explained that's not the way it is.

Finally, when you were talking about spectrum you mentioned OECD. In the last two days, there was an item in *Communications Daily*. Did anyone see it? It may have been in *TR Daily*, too. Someone came out with results of a test on the wireless speeds in London and New York. And the speeds in New York for wireless were many times faster. Who knows the answer? Like 20 times faster than in London?

I don't know the outfit that did that. But when I read that, I wanted to be able to get former Commissioner Mike Copps. He pointed to every one of those, always talking about wireless over in Europe. And there in London their speeds are 20 times slower than a download speed for

wireless in this country, if that report is even half accurate.

James Gattuso, you're up.

MR. GATTUSO: Thank you.

And, Rob, I have to say I'm going to use my analog time device here. It has a nice circular motion. It's the newest thing. Everyone's going to have this pretty soon.

This is the debate season in Washington, DC and around the country, so I thought I'd start with a reference from one of the great American debates from the past. I think the question facing the FCC today is the same posed in 1992 by Admiral James Stockdale. "Who am I and what am I doing here?"

Within living memory, the FCC has always had a defining challenge. In the '50s and '60s, it was the fight for long distance competition and breaking up Ma Bell. In the '80s, it was a battle over the consent decree restrictions and the Baby Bells. In the 1990s, there was the endless struggle over unbundling. Speaking of endless, most recently we've had the battle over net neutrality.

All of these have been important issues, issues where the FCC took a key role and where if not settled, the FCC was the decider. It's not clear, however, what is next on the horizon for the FCC. It's not clear what big issue,

if any, will dominate.

Frankly, the biggest communications and tech issues of our day are being fought out or being debated outside of the FCC. It's the Federal Trade Commission, Department of Justice, even arguably the Library of Congress. The librarian of Congress has a bigger role in the tech industries than the FCC.

Increasingly, the Commission seems to have lost its purpose. I don't say that like it's a bad thing. It reminds me of the USDA official who's depressed because his farmer had died. Think about it. The FCC was largely established to regulate broadcasters and telephone companies, under very unique market conditions, with very unique and comprehensive regulation that was developed to address those situations.

But traditional broadcasting is shrinking rapidly, and old-fashioned telephone service has become a curiosity. The industries look more like the postal service than the dynamic future industries of tomorrow. Of course, video programming service and telecommunications broadly defined are doing fine. They are growing, but the specific industries and specific technologies that the FCC was created to address are not.

Now, much of the FCC's efforts in recent years

have been addressed to expanding its turf beyond the shrinking industries into the new, growing, innovative technologies that are appearing. But these industries don't require the industry-specific, comprehensive regulation of the technologies of the past. They are certainly not perfectly competitive, but they do not exhibit the monopoly characteristics that the 20th Century industries did.

Competition, consumer protection, and privacy can, I believe, be handled better by other agencies rather than an agency dedicated to those specific industries. Now, this sounds like I'm leading to sunset the FCC. It's not. I've been down that road a couple times before. It's not going to happen any time soon, and I think politically, it's probably a waste of resources to advocate that. The FCC is here to stay.

But I think that instead of looking to expand its turf and develop a role in regulating these new technologies, the goal of FCC regulators should be to draw a line around its own duties. Let it regulate the industries that it now regulates and do no more.

So what would and what should an FCC regulator do? There is quite a bit. Most of these we've discussed already today, but let me just go through the list.

First, the Commission should conduct rationalized merger review. The FCC simply doesn't need to compete with the antitrust authorities in determining whether a merger will help or hurt consumer welfare. Ideally, the goal should be to limit review to a determination that the acquirer is qualified to hold licenses. That fulfills the Commission's duties under the statute and allows the competition authorities to make a decision based upon well-established competition law.

Second, the Commission should start using cost-benefit analysis or, more precisely, regulatory impact analysis, to assess its proposed regulations. Every executive branch agency already has worked under this requirement for 30 years as have most other independent agencies by statute. The Securities and Exchange Commission is subject to regulatory impact analysis requirements. The Commodities Futures Trading Commission is under cost-benefit analysis requirements.

I believe the FCC is virtually alone, perhaps with the exception of the new Consumer Financial Protection Bureau, in not having a program of assessing formally the impacts and alternatives to its regulations. This is a screaming exception to the way the regulation is done elsewhere in the country.

Third, the Commission should drop net neutrality. Now, this is politically a litmus test. Net neutrality, to the telecommunications policy world is like what healthcare is the broader policy world. It's a defining issue. If you're for it, you're on one side of the fence. If you're against it, you're on the other side of the fence.

But I don't think that this need be such an ideological divide. The basic question behind net neutrality rules is competition: Do consumers have choice? Do they have alternatives? That again is a competition question and should be left to the competition authorities.

Generally the FCC should not be the one deciding that. It does not have the expertise. It doesn't have the traditions. It doesn't have the precedent that the competition authorities do have.

By the way, this does not mean that the FTC is perfect, that I agree with everything the FTC does. In fact, I think its recent actions show that it is unlikely to be a paper tiger, that if you're worried about competition, it has the ability and incentive to act.

Just quickly, two other things. The Commission should take down antiquated broadcast ownership rules. As the commissioner pointed out, the last thing in the world we have to fear is a combination of the power of newspapers

and the power of broadcast television. Zero plus zero equals zero, so I don't think that should be a concern.

Lastly, the Commission should open up spectrum. This is one area where the FCC should be more involved. Just associate myself with Rob's comments. The FCC is a government agency. It should go after the federal government and dig out spectrum that is being underused. That may be the most important thing that the Commission can do. Thanks.

MR. MAY: James, thank you.

David, you're next, please.

MR. HONIG: Randy, thank you.

I'm going to find myself in agreement with about 70 percent of what's been said, and I hope I'll have everyone's indulgence on the other 30.

One of the premises that I think all of us, coming at these issues from different perspectives, would or should agree on is the fundamental principle that there shouldn't be regulation unless it's supported by a showing of market failure that harms consumers or imminent failure where the only way to have an efficient, well-functioning, fair marketplace is through regulation.

Something that we often forget when we look at that premise is: What is an example of where there is

market failure? For about the last 60 or 70 years with federal policy, and certainly since 1971 or so at the FCC, with their policy, invidious racial discrimination and gender discrimination that's completely irrational and that distorts in horrible ways the way the market works for people throughout their lifetimes, not only is immoral but unsound economic policy. When you have vast numbers of people who, for no good reason, are denied the opportunity to fully express their inherent creative, managerial, and entrepreneurial abilities in the marketplace it's inherently inefficient.

Labor is an input to production, and in no way would any serious economist suggest that it's okay to simply say we're not going to consider a third, a half, or however much of the market because of some irrational reason. What that does to prices and the consumer welfare is well documented. Again and again, in studies, diverse companies do better in the marketplace, deliver more value to shareholders. So that's important for the Commission to deal with, and it quite rightly has done so.

One of the other things that we as a civil rights organization have to consider is the impact of neutral rules on our constituency, people of color in media and telecom.

I am not uncomfortable at all with the basic formulation of the Supreme Court on this, most recently in the 2007 school case. Justice Kennedy's opinion basically said first, state actors must essentially exhaust race neutral means of addressing inequality and discrimination before they can consider race conscious means of doing so. And second, it's okay, in fact, a good thing, to keep track of these things and to look at the unintended consequences of neutral rules, just to see what impact they have on these important social goals and on preventing market failure.

So what does that mean for us in telecom policy? Let me just give wireless regulation as an example because that's something we focus on quite a lot. And the reason we do is that wireless is the first technology in history for which people of color are leading the nation in adoption and in use, about 15 to 20 percent above the level of other Americans. MMTC has given this a name: the minority wireless miracle. And we've also given a name to what we think it will lead to in time, which is permanent first-class digital citizenship.

Now, we've looked at the unintended consequences of rules. Just to give you an example of where we've come out on some of them using this paradigm, we ended up

opposing much of net neutrality. We supported rules against blocking. We supported the initial power principles which were premised on transparency and really didn't see much need for the rest of it.

We endorsed the AT&T T-Mobile merger. And we favored the use of shock clock for municipal towers.

We favor not only having incentive auctions quickly, but we wish they had had them yesterday. That's not soon enough for us. We endorsed having them conclude by December 2013 and don't understand why it should take another year and a half, given the current needs.

Spectrum shortage is real. The spectrum crunch is real and we hope we won't discover this when we start in January experiencing reduced quality of service and calls being dropped.

So the other way that we look at these issues is, of course, the other half of the paradigm. What is the Commission doing to look at race neutral means of addressing this problem? Unfortunately, not very much, I hate to say.

The MMTC and some 49 other organizations have before the Commission 71 race-neutral proposals to advance minority and women participation in media and telecom. Some have been pending for a very long time, including some

over 20 years, virtually unopposed. The FCC's own diversity committee has endorsed most of these.

Just to give you a couple examples, there's a proposal that actually was proposed by the National Association of Black Owned Broadcasters in 1990. Say you've got eight radio stations in a market, that rule was created so that you've had new voices being able to come in if you restricted some of the other ones. So what if that broadcaster causes to come into existence a new voice? Then they can get a ninth station.

All the civil rights organizations have supported this. I think Free Press is the only organization that's opposed it. Twenty-two years, no ruling.

Two-thirds of minority-owned radio stations are in AM radio. We've endorsed, as have some others, taking that heritage technology and migrating it over to Channels 5 and 6. There's an advisory committee looking at it. But there's been no progress in the eight years it's been pending at the FCC.

Foreign ownership is a big subject that's been in the press a lot. Many of you know I lost the Fox case in 1995. I've switched sides because circumstances have changed and I realize that if that case were litigated today, I'd be on the other side of it. The market has

changed, and if we're going to have any intellectual integrity, we have to realize that.

We now support, as an organization, as do virtually all of the other national civil rights organizations, relaxation of foreign ownership restrictions because there's not much access to capital for broadcasting in this country. So let's get some opportunities for foreign capital to come in, which inherently will mean more reciprocity, so that we can expand into foreign markets. It's a global economy, and it's about time we had broadcasters be able to benefit from it in the same way as other technologies do.

Commissioner Copps' approach to all of these pending proposals, was to get the Commission to rule on one every month until they're done. Unfortunately, he's left the Commission, and that hasn't happened.

So I've got about a couple more minutes.

MR. MAY: Just about one more minute.

MR. HONIG: I got one more minute. I wanted to let you know we have a new Telecom Act task force exploratory committee. We're creating this task force. I think some of you in the room are members. And we're studying particular means by which the Act could be reformed in a way that would advance consumer welfare and

particularly for minorities and the underserved.

One is shot clocks with some consequences, so we don't sit around 24 years waiting for a ruling with justifications. Another is forbearance. We certainly are of the view that Title II forbearance is a good thing, and we wish it were extended to Title III and Title VI.

This means that some rules frankly should be let go. We don't understand, for example, the need any more to have most rules supposedly favoring localism in broadcasting. We don't know what it really means any more in today's environment.

Third would be to have merger review occur in one location so that it's quicker, so that money that's put into waiting with bank escrow fees for many billions of dollars for weeks and weeks and weeks doesn't just go there but instead goes to consumer welfare when mergers are dealt with more quickly.

And fourth, having a new member of the Commission's staff, an engineer, in their offices. This is interesting because of who it came from. Rob points out most commissioners aren't engineers. There's never been an engineer who's been a commissioner.

And you think: "Well, my goodness, this idea must have been from some liberal. Let's have another layer of

government and to promote science."

It was Cliff Stearns, my friend, who proposed it in Congress. And to Congress' shame it didn't adopt it, but it should. That's it.

MR. MAY: David, thank you very much. I know it's not much consolation to you nor should it be, but when you were talking about how long some of your proposed actions have been pending, if I had a bit of time, I could probably name 10 or 12 other Commission actions that have been around for years and years.

Actually, Commissioner McDowell, when I was preparing I was looking at the special access proceeding. You wrote a dissent or concurrence, or something or other. But you were talking about how long this thing's been going on, the delay in gathering data. And you said, quote, "The federal government's glacial athleticism is on full display."

We could give a lot of examples, but I understand what you're saying.

So next we're going to hear from Adam. I hope you've noted that I did not deliberately utter the word "DACA" here or "Digital Age Communications Act," because Adam's a former colleague of mine and he helped develop a paradigm and a statutory framework that is important to be

considered. So I'm not going to say any more and turn it over to Adam.

MR. THIERER: Well, thank you, Randy, and I appreciate the invitation to be here today to speak at this event. And congratulations for everything that Free State Foundation has been doing on this front.

The fundamental problem we face in the world of communications and media policy today is the same problem we have faced now for many, many decades and that we haven't ever cleaned up. This problem is both easy to define and, at least in theory, easy to remedy.

The problem is quite simply that we have what economists and political scientists refer to as an asymmetrical regulation situation or a classic, proverbial unlevel playing field problem. For a long time, policymakers have been imposing differential regulatory treatment in policies on different layers of the information ecosystem.

This goes back again a long, long way. If you want to go back and read Ithiel de Sola Pool's classic work, *Technologies of Freedom* in 1983, you'll see this problem perfectly diagnosed and remedies proposed that are going to sound a lot like what I'm about to say.

Unfortunately, we haven't gotten around to solving

it. But let's be clear about the problems that this asymmetrical regulation situation creates for our economy and for innovation. First, it is blatantly unfair to those players who suffer under the more onerous rules. Second, it threatens to roll those old, more onerous rules, standards, and regulations onto new platforms and new speech and communications technologies. And third, as a corollary to one and two, it creates uncertainty and threatens innovation and investment throughout all of these information sectors. It also threatens free speech indirectly.

So the solution, which again is simple in theory but more complicated in political reality, is that we need to level the regulatory playing field by deregulating down and not regulating up. Now, let's get more concrete about how we might accomplish that. I'm going to suggest two little cute ideas here that I've proposing for about 15 to 20 years, but unfortunately, no one's been listening. So I'm going to repeat them again.

About 20 years ago when I got started in the field of public policy, I was not actually a tech and telecom guy. I was a trade guy. And in the field of trade policy, we know that the revolution in free trade that has taken place globally in the postwar period has been mostly due to

two principles: one called "national treatment" and a second one called the "MFN clause," the most-favored nation clause.

Under most-favored nation policy, basically, you have to accord a trade partner the least restrictive sort of treatment or the least onerous treatment that you would accord to anybody else that has gotten good treatment from your country. So lower tariffs to one country have to be accorded to all, or the lowest tariffs or least burdensome tariffs or trade policies have to be accorded.

We need a most-favored nation clause for telecommunications and media. We need to have a simple principle that says the least regulated sector or industry or company should be the standard we accord to all of the players that it competes against today. Because we do live in a world of media and technological convergence, everybody should be treated under the same low level of regulation and accorded the same equal treatment. An MFN clause would be my first idea.

My second idea is we need a Moore's law for information technology laws and regulations. Moore's law states that it's the general rule of thumb in the computing sector that the processing power of a semiconductor and, therefore, computers doubles roughly every 18 months to two

years.

What we need is a principle that every new technology proposal should include a provision sunsetting that law or regulation after 18 months to two years. If technology is going to move that fast in the information sector, the law ought to as well. And people say: "Well, what if that law or regulation is important?" Well, Congress has the power to go back and implement it again.

And I would apply that retrospectively. I think we should apply that standard to all communications and media laws and regulations. Every 18 months to two years, it should go.

The third principle is a more straightforward one and I know a more radical one. We need not just reform of the FCC, but we need serious downsizing of this agency.

Back in the 1970s when we comprehensively deregulated airlines and transportation in this country, I would remind all of you that was done by liberal Democrats. It was done by liberal Democrats, Fred Kahn, Ted Kennedy, Justice Breyer when he was a clerk in the Senate, and a number of other folks, including Ralph Nader, who wrote probably the most powerful piece on the need for deregulation ever penned. He pointed out the public interest regulation in those fields had become an

anti-consumer fiasco. And they were so convinced of this problem, that not only did the regulation have to go, but the agencies that oversaw these industries needed to go, too, because of the problems of cronyism and everything else that goes along with the sort of regulation that was entailed in those sectors.

They got it done. By 1985, the Civil Aeronautics Board was gone. By the early 1990s, the Interstate Commerce Commission was gone. So we're sitting around here and my old friend James Gattuso has sort of given up on it. But some of us still believe it's a good idea to seriously cut away at the powers of the FCC and to at least limit them more stringently.

Now, it wasn't that long ago that this wasn't such radical thinking. In fact, 17 years ago, James Gattuso and I and many others, sat in a room just across the hall here and released this boring little document called the *Telecom Revolution: an American Opportunity*. It was penned by 12 different think tank analysts, talking about how to seriously downsize and reform the FCC by repealing most of its powers.

Then 10 years after that, we came up with the Digital Age Communications Act project, which was released right over there. Randy mentioned this, and Randy was a

big part of that. He was really the brainchild behind most of this, along with Ray Gifford. And this project also proposed fairly sweeping reform of not just the FCC but of all communications law.

Really, DACA was a bit more of a moderate effort than the earlier Telecom Revolution project because DACA was saying that, at a minimum, the FCC should behave more like the FTC. And specifically what DACA and the *Telecom Revolution* book proposed was the idea that we should replace the public interest standard with more of a consumer welfare standard, that we needed to have well-established sort of anti-trust law and competition law principles governing communications policy. That seems fairly straightforward.

Personally, I think anti-trust officials can do that just fine. We don't need the FCC. But if we're going to have the FCC, rule number one ought to be that we replace public interest with a consumer welfare standard.

Number two, eliminate regulatory silos and level the playing field through comprehensive deregulation. Again, that goes back to my MFN principle and the idea that we've already talked here of getting rid of all these silos that Commissioner McDowell has already discussed in his remarks.

Number three, we need to comprehensively reform spectrum, not just through more auctioning, but by according unambiguous property rights in spectrum licenses. That is so we can move away from the idea that the government is always allocating and dictating what you can do with your license.

Number four, we need to comprehensively reform universal service. My preference would be by vouchering it or devolving it to the states to create an honest-to-God telecom welfare program, which is what it's always been, but we just haven't been honest about it. Or, at the federal level, getting a lot more strict about how we budget it for.

And finally, number five, significantly reforming or downsizing the scope of the FCC. That was part of both DACA and the Telecom Revolution project.

By the way, DACA, 50 nonpartisan academics left and right combined to work on that project. What both of these proposals and everything that I've been advocating here stand for is the proposition of what Richard Epstein has called in his book by the same title, *Simple Rules for a Complex World*.

We can live with things like the common law, torts, the law of contracts, anti-fraud statutes, and

antitrust. We get by with those in every other major capitalist industrial sector. But for some reason we say, "Ah, communications and media is special. It's different."

Well, you know what? I do think it's special and different. So did our Founders. They thought it was so special and different that we got our First Amendment, which says "Congress shall make no law," and for the longest time, that was the standard of our nation. But then the FCC came along and said: "Well, we own the spectrum, and we have to dole it out. We need speech rules and the fairness doctrine." And we go all the way down to things like net neutrality.

We're surprised these things happen. They happen because we didn't get our first principles right when it came to communications and media policy.

Thank you, Randy.

MR. MAY: Adam, thank you very much.

And I appreciate the way Adam brought up the MFN principle and Moore's law because when we talk about communications, we don't talk about it that way. We don't often talk about those ideas. I think they're important. We can envision a three- or four-sentence bill, right? MFN shall be implemented?

MR. THIERER: Right, right.

MR. MAY: And Moore's law? But since that may not happen, I'm glad you brought up DACA. I appreciate the fact we've got a bipartisan contingent of congressional staffers here, the key telecommunications staffers on the Hill. And I'm glad you're here.

I will say that the DACA project led directly to proposed legislation. Senator Jim DeMint actually took it and introduced it as a piece of legislation back in 2005. His chief aide, Hap Rigby, is here, and we appreciate that.

But I'm not sure if Sen. DeMint knew that you described that as moderate, but you did. I'm not sure he would have said that, but he took that piece and introduced it. It was S. 2113, I believe. It's still a pretty good darn model that people ought to look at. So thanks for talking about it.

MR. THIERER: Not only is DACA a great model but combined with the bill that Senator DeMint has introduced along with Representative Scalise on the media front, you have in the makings a really beautiful model for what could be the Telecommunications Act of 2016.

MR. MAY: Right, if you had a piece of tape or something and could put those two things together, you'd have a good bill.

MR. THIERER: Perfect.

MR. MAY: Now, if you have questions or if you have a comment or a reaction, I want you to think about it and ask. I deliberately built in the time.

While you're doing that, I'm just going to ask this quickly. I thought it was a good question before about what needs to happen politically, or whatever it might be, to increase the chances for legislation. So if any of you have anything to add on that or anything to say, it's something we all should think about.

Any of the panelists have anything to say about that?

MR. GATTUSO: I think it's key that the FCC act to deregulate on its own first. We were talking about the Fred Kahn example with the Civil Aeronautics Board. Kahn deregulated the airlines in effect before Congress deregulated the airlines. It was more or less a *fait accompli*. Congress is always hesitant to jump into the unknown even when the argument is clear.

What Kahn did was shine light on how a deregulated market would work. He had it well on its way, and Congress merely ratified that. So the FCC's actions are going to be the trigger, if there is one.

MR. MAY: That's an excellent point, and that's why I was so happy to have Commissioner McDowell here and

answer some of these questions. He obviously has to follow the law when he makes a decision. But there's a lot of discretion in the Act, and a lot of ways you can go either one way or another. And it can send signals to Congress.

There's a great book maybe some of you have read called *Prophets of Regulation* by Thomas McCraw. And he's got chapters on five leading regulators, starting back with Charles Francis Adams in the 1800s. And there's a whole chapter about Fred Kahn that's really instructive on this point.

McCraw quotes from a letter that Fred Kahn sent to President Carter when he really wanted to get things done. And he said, "Send me a few good men."

I'm sure now he would say men or women. And it emphasized that personnel, obviously, are very important in this process as well.

MR. GATTUSO: We need binders.

MR. MAY: We need some binders of men, and don't take offense at that remark.

David.

MR. HONIG: I'd like to try to answer that question as well. If you believe the polls, we're going to have for two to four years divided government. And we really can't wait 10 years to get another new Telecom Act.

So like it or not, we're going to have to try to get this divided government to agree on legislation.

And while people feel very strongly about the way it should go, the way that you get legislation and have always gotten legislation from a divided government is by people being willing to compromise and work together and find ways to accomplish their objectives.

Just to give you a few examples that we've talked about today, maybe it's possible to get Congress to agree on a principle of platform neutrality. They may not agree that the default is the lowest level of regulation or that it probably shouldn't be the highest level. But maybe it's somewhere in between or there's some other way to define it. Or you leave that to the Commission.

Congress may not be able to agree on sunsets because it's hard to get legislation passed. But maybe you can get them to agree on forbearance. And it may not be possible to get Congress to downsize the FCC, but maybe they structure the budget a little differently.

We certainly need more money, quite frankly, spent on the portion of the FCC that does merger review. It takes so long because they don't have enough people with expertise. They actually need more people there. There are other areas where they probably need fewer.

MR. MAY: Okay. Do we have questions from the audience, comments?

Scott, you've had one, so let's go to Paul here. Just identify yourself, Paul.

MR. BARBAGALLO: Hi, Paul Barbagallo with Bloomberg BNA. Question for the entire panel: Do you think Congress can agree on what the problem is in order to move legislation? Because in 1996, one of the problems was lack of competition in telecommunications markets, and one of the main goals of the '96 Act was to open up competition.

Even before Congress gets into really talking about what provisions are going to be in the bill, what is the problem we're trying to solve?

MR. MAY: Go ahead.

MR. THIERER: Well, there's a real problem. I do think they're talking past one another, and I think both sides have to give a little before we're going to get something. On the Democratic side, you have a problem with a lot of numeric counting of like how many competitors are in each sector, or a preoccupation with trying to plan markets preemptively and a misguided notion that the public interest can be planned preemptively from above. I think they have to be willing to give a little and take a leap of

faith the way Democrats did in the '70s and '80s on other types of regulation.

The Republicans have a very different problem. The Republicans all too often identify the principles of consumer welfare and deregulation with what industry wants. And they are interested in trying to balance out interests, trying to figure out what one sector should do versus another and how to make all sides happy. That can't be done. All of those sides are going to have to probably bleed a little in a deregulatory world. That's how we're going to get to a better world. But the problem is Republicans don't want to necessarily let go, either.

Both sides are talking in a different language.

MR. HONIG: There may be two principles that Congress can agree on, or maybe this is aspirational. One of them is that we've got static rules but a very fast moving dynamic economy. In his comments, Adam just nailed that perfectly. We've never had technology move faster. Technology is now moving faster than the speed that regulation can keep up with it. So that is a new issue that hopefully people will understand.

The other one is just to know what market failure means, to define that, and give it some flesh. That is, recognize some areas where they can declare the market has

failed or is going to fail until certain benchmarks are reached and others where they think that it has not failed and deregulation should be the default.

MR. MAY: Okay. James, do you have something?

MR. GATTUSO: Just real quick. We do need to be careful about pushing for a new telecom law as a goal. Congress does not have a good record with writing telecom laws. The 1927 Act started with reducing competition. The '32 Act expanded that. There wasn't another Act for another 34 years. And the most successful parts of the industry after the '96 Act are just those two that were not mentioned, Internet and spectrum.

So we don't have a good track record here. Instead of saying that our goal is to rewrite the Telecom Act and then work out what it includes, I think we need a goal to identify what policy needs to be changed. Then if that takes Congress to do it, then you go forward. But the goal should be the reform, not the new act.

MR. MAY: Okay. I'll just add my own view, and I think the Commissioner identified this. There's a lot of agreement that the smoke stack regime which has different regulatory requirements attached to the different smoke stacks does cause some problems, and if that were eliminated and there were some type of competition standard

that worked across industries, that might be good. But that's just the moderator's point of view.

Do we have another question, comment from anyone?
Scott.

MR. CLELAND: If railroads or buses or trucking or airlines don't need common carrier regulation any more why are people thinking that common carrier Title II is relevant these days? All the other common carrier-regulated industries were deregulated from that 20, 30, 40, 50 years ago.

MR. MAY: Who wants to take that one? Go ahead.

MR. HONIG: I'll get in trouble. Railroads were deregulated and airlines were deregulated because there were other means of transportation. There are still a lot of people in the country for whom their plain old telephone is the only means of communication. Now, when that's no longer the case, then we'll be at a point that you've said.

MR. THIERER: But it was also true that we had certain stops for both airline hubs and railroads that didn't have a lot of competition. And yet we did deregulate and we eliminated most of those common-carriage-type regulations.

There's a preoccupation with trying to achieve some sort of perfect world with the perfect amount of

competition and supposedly no discrimination. The reality is that we have a pretty good-looking world today. We're lucky that we have as good looking of a world considering how much regulation we still have. But I think it could be a better one if we freed up these sectors.

I use the term "leap of faith." We haven't been there for communications. We were there for other economic sectors, and the interesting question, from a political science perspective, is: Why is it that we took that leap and took it under Democrats for those other sectors but then under times of Republican rule, we couldn't get all the way there and take it for communications?

Fred Kahn famously noted, in that book by Tom McCraw, *Prophets of Regulation*, that one of his biggest regrets was that he didn't take the FCC job instead of the CAB job. We might have been living in a very different world and having a different conversation if that happened.

MR. GATTUSO: The railroad example is a good one. Unlike airlines and trucking, the railroads were not completely deregulated. The ICC was transformed into what's now the Surface Transportation Board, which is tucked into the Department of Transportation and, fortunately, rarely heard from.

MR. THIERER: But had no powers, right?

MR. GATTUSO: It had some powers but exercises them in a very limited way and is very constrained. That was a way of getting past the objection that there are some pockets where someone doesn't have sufficient choices. And you can always find pockets. No pun intended, but rather than have the whole train of reform stop, the Surface Transportation Board said, "Okay, we'll address those specific problems, but we'll free the rest of railroads and trucking."

MR. THIERER: And importantly, antitrust law wasn't abolished. There have still been cases that have been brought under antitrust law statutes dealing with transportation sectors. So that can still happen for communications and broadband as well.

MR. MAY: Okay. We can take maybe one or two more questions. While you're thinking about it, I have something I want to ask. Anyone can answer it, if they're inclined.

When I was talking with Commissioner McDowell, there were several times when I was asking essentially this question. There's discretion in the Commission regard to so much of its activity under the public interest standard, or even if it's forbearance when you have to look at protection of consumers, or Section 10 competition. These

are terms that are not self-defined. Competition is not defined as three competitors. Obviously, the public interest isn't defined.

Putting aside the need for Congressional action, which I think a lot of people agree on, the marketplace is moving. It's dynamic and so forth. I've thought that with the right Commission, a Commission that was amenable to regulatory relief, that it could establish more presumptions and operate that way. I don't mean that necessarily one side of the political spectrum

And I noticed when the Commission got rid of the program access ban, at least partially. I just read the news release. But for the parts it retained and didn't get rid of, it seemed to establish what it referred to as rebuttable presumptions, which I'm not sure are in the Act but just something the Commission did.

That's what I was thinking about. So I'm wondering whether anyone up here is sympathetic to the notion that the Commission could establish some rebuttable presumptions that the market is competitive absent convincing evidence otherwise? I'm not talking about taking one case, but a general policy.

Adam.

MR. THIERER: I'm usually sympathetic to that, but

I also think it's a tad bit naive.

MR. MAY: That's why I'm in a think tank and he's sitting down.

MR. THIERER: I'm out of George Mason University, where we study public choice economics. One of the first rules of public choice is that regulators don't deregulate or defund or take away their own powers. There's not a good interest in doing so. You aggrandize power as opposed to actually minimizing it or limiting or tying your own hands. You have to have other institutional incentives or other institutional constraints imposed from outside if you want these sorts of reforms to be solid.

I was involved on Capitol Hill in the mid '90s trying to get 706 and a lot more sweeping things pushed through. It was always language we tacked on to the end to say, "Look, what we really need to do is constrain them from right here." But we didn't get done in '96 what we needed to have done. So you've got to have Congress assert some authority here.

MR. MAY: I want Congress to do that. But what I'm saying is that's not going to happen by February of next year. It could be there's a new Federal Communications Commission or maybe there won't be. But they just established in this proceeding what they called

rebuttable presumptions that work the other way towards regulation. In the meantime, maybe there could be some rebuttal presumptions that were deregulatory in nature, given the discretion the Commission has.

Rob, you have a reaction.

MR. ATKINSON: So in my typical, inimical third way that I always try to push, I would say that's probably more of a third way issue framing, Randy. And we agree on a lot of stuff, like particularly, COPA. And if you're interested in COPA come to our event.

I think there is something different about net neutrality. I hate to even bring up net neutrality because we were one of the biggest and strongest advocates that we didn't need strong net neutrality rules.

But at the same time, there is the potential of abuse. These are networks that have a core function in the economy, and there's a potential of abuse. I frankly didn't think there was going to be abuse. I have yet to see any abuse with the exception of one case, and that's Madison River. I just don't think it existed, but it's potential. It's possible, and I don't think anti-trust is a regime that would allow one to deal with that.

Randy's talking about this notion of assuming abuse is not going to be there, assume the market is going

to work, but have some capability of stepping in if one needs to.

Now the public choice argument is a good one. I grant that. But I do think this isn't just simply like other things. I think, generally, the market is working in these cases. We should assume that that's going to continue to be the case, and it probably will be the case. But you never know, and that's why we have an FCC.

MR. THIERER: Do you think we need to return to sectoral regulators for airlines and transportation, surface transportation? Are we not in a better world today because we don't have sectoral regulators that are captured by industry interests and doing misguided things like creating cartels?

MR. ATKINSON: Given the fact that I once rode a Greyhound bus from San Francisco to Florida to visit my parents when I was in college because the airline prices were so high, I'm totally with you.

MR. THIERER: That's awful.

MR. ATKINSON: But I think it's a different industry.

MR. MAY: Okay. Now, I want you to disprove the notion that that Twitter handle was too long. It's "#fsfOct18ideasforum." It's on your sheet.

Thank you, and give this panel a big hand, please.

(Applause.)

(The meeting was concluded at 2:30 p.m.)

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