The Free State Foundation's
Lunch Seminar

"A NEW FCC OR THE SAME OLD, SAME OLD?"

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National Press Club
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MODERATOR:

RANDOLPH J. MAY, The Free State Foundation

KEYNOTE REMARKS:

CONGRESSMAN BOB LATTA, Vice Chair, House Energy and Commerce Committee's Subcommittee on Communications and Technology

PANEL PARTICIPANTS:

JAMES ASSEY, National Cable & Telecommunications Association

WILLIAM KOVACIC, George Washington University Law School and Former FTC Chairman

JIM SPETA, Northwestern University School of Law

ROBERT QUINN, AT&T Services

CLOSING REMARKS:

DEBORAH TAYLOR TATE, Distinguished Adjunct Senior Fellow, The Free State Foundation, and Former FCC Commissioner

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* This transcript has been edited for purposes of correcting obvious syntax, grammar, and punctuation errors, and eliminating redundancy. None of the meaning was changed in doing so.

P R O C E E D I N G S

MR. MAY: I think we are going to get started now, if I can have your attention, please. It is really great to see another really tremendous crowd. That's exciting. I'm Randy May, President of The Free State Foundation. I want to welcome you all here.

This is one of the series of lunch programs that we do. When I look around, I see that many, many of you have been here many times before. I appreciate that. I always see some new faces. That is something that pleases me, of course. Welcome to all the new faces.

The program today is titled "A New FCC or Same Old, Same Old."

By the way, I was going to mention this later but I should mention it now. The Twitter handle, I think it is on your bio sheet, is #ANewFCC. Of course, feel free to Tweet away. Other than Tweeting away, don't do anything else with those smartphones but listen today.

To set the stage for the discussion today, I am just going to read the way I described today's program in the promotional announcements sent out, because I think that's really the prompt we want to use for the discussion.

I said, "With Tom Wheeler and Michael O'Rielly likely to arrive shortly as the new FCC Chairman and Commissioner, the FCC will be back to its full five member complement. With a newly reconstituted FCC in place and with ongoing dramatic changes in the communications and Internet marketplace occurring almost daily, this program will explore questions such as: Should we expect to see long overdue institutional reforms at the FCC?

"What specifically should be done if anything to reorient the agency consistent with these dramatic marketplace and technological changes that I mentioned?

"What reforms can be implemented without congressional action by the agency? If congressional action is needed, are there measures short of a comprehensive overhaul of the Communications Act that should be enacted more quickly?"

As I said, I know some of you were with us in June when we had another excellent program in this same venue. That program was titled "If I Were the Chairman." Like today, that program was premised pretty much on the notion that Tom Wheeler and Michael O'Rielly would arrive at the FCC sometime fairly soon. That is still my hope.

In the prompt for the June program, I asked the panelists what they would do if they were the new FCC

Chairman. In many ways, of course, that is just another way of asking the question, a new FCC or the same old, same old?

If Wheeler and O'Rielly don't arrive at the FCC fairly soon, then I'm probably going to run out of titles … (laughter) … for what in many respects is essentially the same program.

By the way, I think much of the discussion that we are going to have today in some ways probably will mirror the discussion that took place yesterday at the House Committee hearing concerning the IP transition. The official title of that hearing was "The Evolution of Wired Communications Networks."

To my mind, it basically was all about what new policies we should have as we transition from the old legacy networks to broadband networks. I'm sure in many ways, that will be at the core of some of the things we are talking about today.

As you know from reading the announcements, Congressman Bob Latta was supposed to deliver opening remarks. The bottom line is he is still going to be here. That is what I was just informed a few minutes ago. They are having a House Commerce Committee hearing this morning on ObamaCare, if I can use the shorthand, and I guess for

some reason and for some people, they think that is more important than the IP transition or the things we are going to be talking about today.

He is going to come, and when he does come, depending on the time, we may interrupt. I've reversed the order, and with the indulgence of the gentlemen up here, we may have to interrupt and have Congressman Latta speak.

We will tell him that we already read the really long bio that is on his website, and we are just going to do the really short version.

Speaking of bio's and a short version, what I am going to do is now introduce the panelists. I think we will just go down the row here in the order in which the panelists are seated.

I have asked them to limit their initial remarks to no more than six minutes. I think that everyone but Bill Kovacic has appeared at one of our programs at one time or another, and they know I'm a meanie in this regard. I'm going to enforce the six minutes, just like Chairman Walden enforced the five-minute limit at the House hearing. We will do that. We will play by the House rules.

After their initial presentations, we are going to have an interactive discussion. Hopefully, the panelists will be responding to each other. I'm going to ask them to

do that. I'm sure I will have a few questions, but this is where you guys come in. I'm going to make sure we have some time for questions from the audience as well, so we can have an interactive discussion.

I'm going to do the introductions, giving you the two-sentence highlight version. First, we have James Assey. James is Executive Vice President of the National Cable & Telecommunications Association. He has been in that role since early 2008. James is the second most senior executive over at NCTA, and before that, he was a long-time senior official at the U.S. Senate Commerce Committee.

Next, we will hear from Bob Quinn. Bob is Senior Vice President -- You see we have a lot of "seniors" here -- I qualify by virtue of age. These guys, by position.

Bob is Senior Vice President, Federal Regulatory and Chief Privacy Officer for AT&T. He leads AT&T's federal regulatory group, and he's also responsible for customer privacy policies at the international, federal, and state level across all their businesses. That pretty much covers the whole world, doesn't it? International, federal, and state.

Next, we are going to hear from Jim Speta, Professor James Speta. Jim is the Class of 1940 Research

Professor of Law at Northwestern University School of Law. He doesn't look that old to be the Class of 1940. I'm sure that was a very special class that endowed that chair. Jim is also Senior Associate Dean for Academic Affairs in International Initiatives, and Director of Executive LLM Programs at Northwestern University. That is quite a string of titles that Jim holds.

Probably most important of all, he's a member of the Free State Foundation Board of Academic Advisors. Jim has appeared at a number of our previous programs.

I'll just add, I don't know whether it was on the website, someone else put this together for me, but I know Jim has won the Outstanding Teacher Award in the law school a number of times.

Finally, we are going to hear from William Kovacic. Bill is a Professor of Law in Public Policy and Director of the Competition Law Center at George Washington University Law School. He's a recognized expert in the fields of antitrust law and competition policy, as well as in government contracts law.

I think importantly for our purposes today, Professor Kovacic has served as general counsel, Commissioner, then Chair of the Federal Trade Commission -- That trifecta. I think Dick Wiley did that over in our

realm a long time ago. That is obviously unusual and quite a distinction to serve in those three capacities.

I might add that in the past few months Bill was named a non-executive director -- I want to get this right -- of the United Kingdom's new Competition and Markets Authority.

When he assumed that post, he informed me that on the condition of accepting that position, which is obviously a high honor, he had to drop off the Free State Foundation's Board of Academic Advisors. I was puzzled by that choice that he made. (Laughter).

When he gets through serving over in that position at the U.K., hopefully he will rejoin our distinguished group of academics.

With that introduction, we are going to first turn to James for up to six minutes, and then we will move right down the line. James?

MR. ASSEY: Thank you, Randy. I'm going to start my stopwatch, but feel free to give me the hook, I'm used to it.

It's great to see everyone today. I will try to start from the questions that you posed, although maybe I'll change it around a little bit.

I'm sure neither Tom Wheeler nor Michael O'Rielly

needs my advice as far as how to organize the Commission, and certainly, it doesn't really matter the titles you have, or the organizational work flow you have -- What matters is how the agency reacts and behaves with respect to the issues of the day.

From my perspective, since I'm the predominant video guy up here, I'll speak from the perspective of the video industry today. I don't really necessarily think of it as a reorientation that the FCC needs to approach. I think of it more as a rededication to what we have experienced over the past few years on a bipartisan basis, and that is a consumer-centric, market-driven approach to regulation.

I think any new Commissioner, any new Chairman that comes into the Commission has to immediately take stock of the major trends that are occurring in the communications space, much as Julius when he came in and started with a national broadband plan.

I think there are some important trends that give us great hope. We have incredibly robust competition in communications markets, both horizontally but also vertically as well, as players in different parts of the communications stack are competing to provide consumers with the services they are increasingly demanding.

We see substantial and ongoing investment from major network providers who are constantly trying to out-do each other and out-do themselves, increasing both the capabilities and reach of their networks.

We are seeing an inexorable evolution to a software and IP technology world that is driving faster and faster innovation cycles which sometimes strain belief if you look back, say 20 years, at how long it took the cable industry to bring a product to market versus what happens today.

In each of those cases, I think the result is indisputably positive for consumers. We have better quality services. We have greater improvements in service capabilities, greater choice in the devices on which we can consume communications and entertainment services, and as I said, we have these faster innovation cycles.

The challenge for the FCC, I think, is roughly three-fold. First, how do we continue this positive story? We have created a virtuous cycle of investment and innovation. What strategies can we adopt as a Commission to ensure that continues for the foreseeable future? Secondly, how can we adapt the statute we have to reflect changing market conditions? And then lastly, what are the gaps where we need the government and the FCC to step in

when the market will not meet the social goal that we are trying to reach?

I'll just mention, in a couple of different respects before turning over the microphone, a couple of places I think we ought to start.

First, too bad Congressman Latta is not here for me to plug his bill, but in the video space, I think he has done a great service in identifying an FCC rule with respect to the integration ban in his bill, H.R. 3196, that has demonstrably outlived its usefulness.

We are talking about a world in video that is more competitive than it has ever been before. We have evolved from a market in which in 1992 cable operators controlled 98 percent of video distribution. Today, that number is down to 55 percent and falling, and yet we are left with a rule that essentially requires the cable operators, and I should say cable operators alone, among its video competitors, to go to the FCC and ask permission to innovate.

Apple just launched its iPad or made its new iPad announcement yesterday. Apple didn't have to go anywhere to ask permission to innovate. It seems the only thing we are doing in maintaining a rule that has outlived its usefulness is really staying true to a history that is no

longer relevant in this day and age.

We are very hopeful that Vice Chairman Latta and Congressman Green who have introduced this legislation will be successful in moving it, and we hope the FCC will take stock of the rules that are in place that impede our innovation.

I think with respect to broadband, obviously we know that we have a net neutrality case out there pending, and without going into the "put-and-takes" on how that will turn out, which others may go into, regardless, one of the things obviously we need to keep in mind is the need for regulatory humility, a policy that was started under Chairman Kennard and has been continued through Republican and Democratic FCCs, and as I said, has created kind of this virtuous cycle of investment that continues to inure to consumers' benefit.

Thirdly, with respect to spectrum, I think the Administration has set out an ambitious goal of liberating 500 megahertz of spectrum, not only for licensed users but also for unlicensed users, and the cable industry of late has put substantial investments into building out outdoor Wi-Fi hot spots.

We have now over 200,000 and counting Wi-Fi hot spots that cable broadband customers can use when they are

outdoors, in parks, wherever people live, work, and play. That is another way in which the industry is continuing to create value and innovate.

Lastly, I think with respect to the social compact and issues like universal service where we recognize there are places where the markets are not going to permit broadband networks to extend, we need to come up with a responsible reformed universal service program that will direct scarce, limited federal dollars to the places where investment isn't.

That is my hope for the FCC. I hope Tom and Mike are over there in good speed.

MR. MAY: A lot of us second that, I'm sure. Thanks very much, James. I just got a message that Congressman Latta is in the car, so I guess they worked out all the problems with the computer system for ObamaCare this morning and he's on his way.

We are going to turn to Bob Quinn next, another one of our senior executives. Bob?

MR. QUINN: I agree with everything James said but I'm going to disagree with his premise. I think the FCC absolutely needs to reorient itself. It is an agency that was created almost 80 years ago to regulate a monopoly wireline voice world that doesn't exist. I think they

adapted to end up regulating what I think they would consider to have been, at the time, a monopoly cable environment. James will tell me that never existed. It certainly doesn't exist now.

I actually think they do need to reorient, and I think it's not just the FCC. I think it's regulation in general in this country. James doesn't have to live with 50 state public service commissions but we do.

I really believe we have to have kind of a whole restart, if you will, on the regulatory mindset, because the regulatory mindset at both the state and federal level was designed to regulate a wireline voice monopoly.

I think it is hard for the Commission to get its arms around the notion of what does it do in this new world, and I think it's going to be very, very difficult. I think the fact that the FCC hasn't really done anything on our IP transition position which will be one-year old on November 7, 2013 is evidence that they don't know exactly how to make this transition into the new world and they are not ready to declare what their role is going to be.

I think the response to the petitions that we got from both the CLEC community and from the state commissions were very telling. The CLEC community says, hey, you shouldn't do any trials on this until you basically go out

and reverse the FCC's decisions -- They have at least three distinct Orders, probably more, where the FCC decided they were not going to take this old Title II kind of carriage regulation and import it into the IP world.

There are at least three distinct cases in which the FCC says, hey, you have to overturn this before you can even consider these issues. In addition to that, I think the CLEC community would tell you that they also want to import all these Title II interconnection obligations, not only into the IP world, but also into the wireless world, in ways that I think are just fundamentally inconsistent with everything the Commission has done up to date.

The state commissions have said the same exact thing. They have said, look, you can't even start this transition. With the panel you referenced yesterday, the state commissioner on the panel, who is currently in charge of the NARUC Telecommunications Committee, said you can't start this thing until the FCC finally gets off its behind and declares VoIP a telecommunications service, like we have been telling it to do for a long time. Because if VoIP isn't a telecommunications service, then the state commissions don't have a role or a clearly defined role like they do under the current Title II world that everybody lives in. I think that is going to be the

biggest issue for people to get over, and the FCC absolutely has to reorient to deal with it.

As an example showing exactly how far we have to go, I'm going to point to the text to 911 issue that we went through with the Commission last year.

When they decided it was going to be really important to have texting capabilities so you could send a text message to 911, the Order that the staff drafted and sent up to the eighth floor said here's what we are going to do: We are going to impose this obligation on the SMS technology that is deployed by the cell carriers.

Leaving aside the fact that my kids don't use the text messaging that is offered by the carriers -- I wish they did, but they don't -- Because the reality is, kids have access to many over the top applications. Yet the FCC was going to define the world by the legacy technology because the FCC is comfortable imposing those obligations on AT&T and Verizon, in this case, on Sprint and T-Mobile, but the FCC is not comfortable trying to understand, to attack this in the new world.

The FCC wasn’t ready to do it. What did the FCC end up doing? The Commission backed off everything and took a voluntary commitment from us. It’s because the FCC is not capable right now of trying to figure out how do we

get our arms around this.

The Commission clearly has jurisdiction over information service providers. There is a whole series of Orders where the FCC deregulated IP-based services. In the Vonage Order, the FCC told the state commissions you can't regulate Vonage like a common carrier. The FCC said, hey, we don't have to decide whether this is an information service or a telecommunications service -- Which are code words for common carriage and non-common carriage under the current law that we have. We don't have to decide because we have jurisdiction over both.

The Commission really has to reorient itself to start thinking about these services not in the way they were provisioned for the last 100 years. The FCC has to start thinking about these services and how they are going to be provisioned for the next 100 years.

I would say there are some hard questions because companies like Apple provide text messaging, and if they want to impose the 911 obligation, they are going to have to deal with the fact that these services over which they have traditionally had jurisdiction are not provided in the same way.

I think it is going to take a complete mindset reorientation for the Commission to be able to get its arms

around that. Did I stay under my six minutes? I came close, I think.

MR. MAY: You were good, and thank you. There was a different emphasis, I think, in your remarks from James in terms of pushing a little bit against the FCC.

MR. ASSEY: I think I'm more of an optimist. (Laughter).

MR. MAY: It could be.

MR. ASSEY: They sent me in to give the good news. (Laughter).

MR. MAY: No, I thought that was unusually straightforward. Here's the deal. I just got a sign that Commissioner Latta -- excuse me. He wouldn't want that position, I'm sure. Congressman Latta is here. Let's give him a big welcome.

(Applause).

MR. MAY: I said Commissioner Latta but I quickly corrected myself. You wouldn't want that position. Welcome. Thanks for being here. I've told the audience there was a hearing on ObamaCare this morning, if I can use that term. I wasn't sure why that would take precedence at all over being here.

Then I got the message that you were in your car, and I told them I assume everything had been resolved in

terms of all the problems with the computer system, and all of that had been resolved.

We are glad you are here. I know your time might be limited. Before you got here, I read your three-page biography. I did that, so I'm just going to summarize the very short version here, and then turn it over to you.

I just want to thank you for holding that hearing you guys did yesterday. I thought that was informative. We are talking about, obviously, some of the same things today.

Congressman Bob Latta is currently serving his fourth term in the House of Representatives following his re-election in 2012. Most importantly for our purposes here today, he serves on the House Energy and Commerce Committee. They have wide-ranging jurisdiction, as you know, but again even more importantly for purposes of our discussion today, he's on the Subcommittee on Communications and Technology, and he serves as Vice Chair of that Committee.

I will just add before turning it over to him, and James just alluded to this, Congressman, before you came, he mentioned one of your bills. I'm just going to say that recently in the past three months or so, Congressman Latta has introduced two bills that I think are important, and I

have to say, I've advocated these, as James knows, for a long time myself in these areas.

One of them is the bill, and I forget the number, concerning the set-top box deregulation to get rid of the integration ban that currently exists. The other bill Congressman Latta introduced back in July would revise the FCC's forbearance provision, which I happen to think is very important, and is something I've advocated for a long time.

While I still have the microphone for ten seconds, what I would say is going down the line, I'd urge you to think about even broadening that bill a little further to include all of the Commission's regulatees, not only the telephone companies. Nevertheless, I think that is really a commendable effort, too.

All of that is to say Congressman Latta is a very important policy maker in this area, and we are really pleased you are here with us today.

CONGRESSMAN LATTA: Thanks very much. Thank you. (Applause).

CONGRESSMAN LATTA: Thanks very much for having me and I'm sorry I'm late. There is a little hearing going on right now, and the full Energy and Commerce Committee is meeting. Today they were having four of the contractors

that developed the site for ObamaCare, and, of course, on Wednesday of next week, Secretary Sebelius is going to be before us.

Needless to say, you know, there are some hearings where maybe not everybody shows up to, and I think just about everybody's seat was filled, and everyone wanted to make sure they got their questions in on the Republican and Democrat side.

Again, I do appreciate it, and I'm sorry I'm late. I always hate being late. I know years ago when I was in the Ohio legislature, I was in the General Assembly for 11 years, and I chaired two different committees. I always said I'm bringing the gavel down, I don't care, even if I'm starting as a subcommittee of one, we're going to get started, so I'm sorry I'm late. I really appreciate it.

Again, I just want to thank Randy and the Free State Foundation for inviting me to speak here today. I also want to welcome all of the distinguished guests and leaders, and thank you for all you do to promote innovation and investment in the information and communications industry.

I'm particularly pleased to be speaking here today, and I want to acknowledge Randy's and the Foundation's work in the area of FCC reform, and thank you

for your effective advocacy on free market reform in communications policies.

Within the last three decades, we have entered a digital age of communications and witnessed the emergence of multi-modal competition in a dynamic Internet ecosystem. This is quickly replacing the public switched telephone network and the TDM switching technologies with IP based platforms.

In 2011, 34 percent of American households cut the cord, choosing to forego landline telephone services and rely only on wireless service, and by the end of 2012, that number of residential copper landline subscriptions will have declined by 70 percent since 2000.

Additionally, mobile and broadband investment has exploded, creating more than one million jobs over the last five years -- And that is something we ought to keep bringing up over and over, is how many jobs are being created in this sector. When you look over those last five years, this sector has enabled the more rapid rollout of 4G LTE wireless technology across the United States. This advanced technology has not only spurred innovation in the communications marketplace, but it has also promoted growth and innovation in many other industries as well, including health care, transportation, and energy. In order to

continue to build on this technological process and innovation, it is important to review laws and regulations and make sure they reflect today's marketplace and don't impede further advancements in communications and other sectors of the economy.

I think we are very, very blessed that we have Fred Upton chairing the full committee, and we also have Greg Walden as the Telecommunications Sub-Chair, because I think they both truly have the same mindset that you don't want to put those laws on the books or have those regulations out there that are going to impede growth in so important a sector.

It is clear that we need to comprehensively review the outmoded 1996 Act and develop a new policy framework to address the modern communications of the 21st Century and a rapidly evolving Internet economy to ensure that outdated and unnecessary legacy era regulations don't stifle current and future investment, innovation, economic growth, and consumer choice in the digital age.

When you talk about those regulations that are out there on the books, one of the ones that comes up in Committee quite often, that we are out there talking about, is that the FCC has got to generate a report -- to do what? -- to talk about how the telephone and telegraph industries

are really in some kind of a competition out there. I'd like to see that report. Is it a one-pager? Or is someone writing a book about what that competition is today?

When I came in today, I noticed the old teletype machine that is out there, and as many of you might know, my dad was in Congress for 30 years, and in the Speaker's lobby, it was set up where they would have the three teletype machines and it would bring in all the newspapers from around the country. I think it worked a little better back then because members were talking to each other a lot more, because everybody stood there as things were coming off the teletype machines. But we are not there anymore. You look around today and you have members, who shouldn't be doing it on the floor, who have their hand-held devices out there, and this is where we get information.

When I was sitting in Committee this morning, I thought this was kind of interesting – and I put in "breaking news" and, by George, there we all were, sitting in committee. So I thought, should I read about what we're doing? No, I better listen to what we're saying here today. That is how fast this is moving, it's a lot different.

So again, you don't want to stifle that investment, you don't want to stifle that innovation,

things are changing and we have to keep up with that. That is one of the things that we've said, that in many cases out in the industry, you might be two, three, four steps ahead of us before we can ever get a law written.

Everything that you see today -- They come out with a new product -- The last thing I ever do when I buy a new product, especially dealing with something on the technological side, I do not look about a week later in the paper to see if this has gone on sale because something new has come out. That is the last thing you want to do. That is how fast it is. Again, that is why I think Chairmen Upton and Walden also see that direction and how things are going. While this may be a considerable undertaking, there are simple steps we can take to make sure that this pro-investment, pro-competition and, most importantly, pro-consumer framework is a reality.

One step is through reform at the FCC: A review of the FCC operations and its role in the communications sector. Again, it is long overdue, especially when we are still looking at the competition between the telegraph and telephone systems.

I support Chairman Walden's effort to make sure that the reforms at the Commission are to ensure the agency isn't over-regulating the telecommunications industry, and

again, interfering in that communications marketplace, and remains accountable to the American people.

To that end, we should statutorily reform the FCC to codify best practices, make the agency more transparent, and enable deregulatory procedures to improve regulatory certainty and stimulate increased investment in the economic growth in the telecommunications industry.

Over-regulation, again, it is stifling our ability to innovate and create jobs here in the United States and the cost of regulation to our economy is too great to ignore.

One of the things that we have been saying over and over, is anything we go out and talk about, we should be talking about creating jobs and growth in this country. And again, as I said earlier, this industry has a tremendous growth factor in it, and it is also creating jobs out there for more and more people.

The telecommunications industry drives a significant portion of economic growth in our country. Nearly $250 billion in private capital has been invested in U.S. wired and wireless broadband networks since 2009. There has been more private investment in the information and communications technology sector than in any other sector of the U.S. economy. That is incredible. As

members of Congress, we should make sure that the FCC does not produce regulations that will obstruct this kind of investment.

Earlier this year, as mentioned, I introduced the "FCC 'ABCs' Act". This legislation requires the FCC to conduct a cost/benefit analysis in any Notice of Proposed Rulemaking, amendment to a rule, or final rule, that may have an economic impact -- an economically significant impact.

It is imperative that the FCC demonstrate that the benefits of any regulatory action outweigh the costs. A thorough understanding of the cost/benefit analysis during the rulemaking process will better inform those involved and prevent costly, burdensome decisions by the FCC.

For one that truly believes that we have way too many regulations out there, you might have seen the Small Business Administration earlier this year had to revise what they had put out. We have about $1.7 trillion of regulations in this country. $1.7 trillion worth of regulations that are being imposed on businesses and individuals, farmers, go down the entire list. It was updated so now it is about $1.8 trillion.

In addition to requiring those cost/benefit analyses, this legislation would also modify the

Commission's forbearance authority. It would add an evidentiary presumption to the Commission's forbearance authority as well as to the Commission's biannual review of regulations. This would empower the FCC to reach deregulatory decisions in regard to communications carriers as Congress originally intended.

Technological developments and innovation have promoted robust competition and created a marketplace that is more efficient and better able to protect consumers and government regulation. These advancements have rendered many regulations to be outmoded and excessively burdensome on an industry that is absolutely essential to job creation and our nation's economic growth. We should do what we can to prevent these onerous regulations from obstructing future technological advancements, progress, and innovation.

When Congress passed the Communications Act in 1996, attempting to create a retail market for set-top boxes, it did not mandate an integration ban. This was a branch out at FCC in 1998. It was an over-reaching, unnecessary step to satisfying Congress' charge to support retail availability.

The integration ban has forced consumers to pay higher prices for leased boxes. According to figures cited

by the FCC, the integration ban imposes over $50 additional costs on each leased box resulting in over $1 billion in increased costs without any additional benefit. Also based on EPA figures, it has imposed additional energy consumption costs amounting to hundreds of millions of kilowatt-hours per year. In another hearing not relating to this bill, but I also serve on Energy and Power, the new Secretary of Energy brought this issue up.

The FCC's decision intruded on business models and development plans by imposing technical standards that are better left to be determined by the market. This has significantly limited innovation by cable companies seeking to improve their boxes.

Over the past decade, consumers have not warmed to the implementation of the CableCARD, as consumers have only purchased 650,000 CableCARDs for use in an alternative device. In contrast, cable has leased over 42 million set-top boxes with the CableCARDs in them as a result of the integration ban.

In fact, the integration ban, rather than creating a market for retail-available set-top boxes for CableCARDs, the FCC has created a market outside of the CableCARD regime. Over the top providers such as Roku, Apple T.V., Google, and X-Box give consumers access to video services

they demand without the use of CableCARDs.

The market is changing faster than Congress can keep up with, as I mentioned. As a recent example of how far the video market has come, Netflix has over 30 million domestic customers, effectively making it the fifth most watched network in the United States. This achievement was accomplished without a CableCARD and is a telltale sign of where the market is heading in an increasingly IP-based ecosystem.

I recently introduced a bill to do away with this integration ban, and again, it is H.R. 3196, and it is a bipartisan bill. Congressman Gene Green from Texas is my lead co-sponsor. The bill would have no impact on cable operator obligations to support CableCARDs in retail devices, and it also specifically preserves the FCC's authority to implement Section 629, but simply eliminates the unnecessary integration ban. Furthermore, cable companies will continue to support CableCARD devices because they must or risk the backlash of current subscribers joining the growing trend of cord cutters.

The integration ban has outlived its usefulness and has cost consumers far more than it has benefitted them. It is time to remove the regulatory barriers and allow the marketplace to drive the next generation of

innovation. Congress must surely get out of the way and stay out of the way.

These issues and others that the Communications and Technology Subcommittees are addressing are critically important to the innovation that fuels our economy. Congress should be encouraging and enabling growth and ideas, not holding back those taking risks and making substantial investments.

Again, I have always had an open door policy. If I don't hear from all of you out there, I can't do my job.

When you said earlier, you said ”Commissioner,” I was a Commissioner, a County Commissioner back in Ohio -- With a little bit different set of responsibilities. I started years ago with that as my main focus: I have got to have my door open to everybody in this room and everybody out there, because I can't make sound decisions, I can't write good pieces of legislation unless I hear from you.

It is both ways, the pro's and con's, but again, I have to hear it. When I'm home, I think from the August work period to the end of this August work period, I did 400 individual meetings in my District. That’s not political events or going to the state fair, it is actually going to businesses, factories, farms, you name it.

I have kids in schools who ask me, how do you come

up with ideas for legislation. It's not from me driving down the highway in my District saying you know, this would be a great idea, I'm going to go back to Washington and get that bill drafted. It always comes from people I am out there talking with and the issues they have. I do really need to hear from you.

Once again, I want to thank you all for having me here. Randy, thanks very much, I really appreciate it. Again, I'm very sorry I was late. Sometimes the Committee hearings last a little longer than anticipated, but today, we figured this one was going to run a minimum of four hours.

Thank you.

(Applause).

MR. MAY: Thank you very much, Congressman Latta. The Congressman has time for a couple of questions. Why don't you raise your hand, and we will bring you the microphone. I'm going to call first on Howard Buskirk from *Communications Daily* for the first question. Howard?

MR. BUSKIRK: I wanted to ask, historically, it's very difficult to get communications legislation through Congress, and you have a couple of things in the hopper right now. What is the outlook that there is going to be any kind of legislative action on anything touching on

communications regulation for the rest of this Congress?

CONGRESSMAN LATTA: You know, we have a little bill we have to get done before the end of next year on STELA. Of course, we are all watching what is going on with spectrum.

I think having worked with Chairman Walden and also the full Committee -- I'm not one of these people that just likes to introduce legislation just to introduce legislation. We want to make sure these things get passed because I think it is important.

It is like everything else in life, you sure don't want to bet the farm on it, but one of the things I truly believe is working with Chairman Walden and the Subcommittee, I think we have a very good opportunity to get these passed.

MR. MAY: Do we have another question? Anyone else? Yes, sir?

MR. BENNETT: Richard Bennett with High Tech Forum.

As long as you are standing next to Randy, it seems opportune to talk about the new Communications Act, without getting into Randy's recipe for it. At some point, it is obviously going to be necessary to update the 1996 Act, and maybe that is only a one-page bill that just

repeals most of it, or maybe it's something more comprehensive.

It's probably a five or ten year process to get that done. At what point should Congress start thinking about what the next Communications Act is going to look like?

CONGRESSMAN LATTA: I will tell you what, Randy does a very good job when he's testifying before us to bring that up.

(Laughter).

CONGRESSMAN LATTA: He does a very good job about bringing it up, and we have had others that have testified on it. Again, we can't have things on the books that are holding people back and holding companies back and holding innovation back.

Again, like I said earlier, everybody out there, is moving so quickly that for us in Congress to try to say we're going to write this law, all of a sudden, we have written a law that's four stages back already or four regulations. The same thing they try on the regulatory side.

We don't want to see things coming out of the FCC that are being promulgated and then they say, okay, this is what we are going to have, but all of a sudden -- If you go

back several years, where was the Cloud at in people's thinking at that time?

When you hear people in Committee bringing up things that have happened in the past, and I'm not going to date myself here, but I will never forget when I was practicing law years ago, I was working in a firm, and one of the firm's senior partners had gotten a car phone. This thing looked like someone's glove box. Remember? They had to drill it into the middle of the floor. It was this huge phone that you had. Who would have ever believed that today -- First of all, I can't believe kids all have cell phones. Everybody has a cell phone. With my kids, if I want to talk to them, I have to text them first, and by George, if I call them, they won't answer me. But if I text them and say call me, they call me. It's a miracle.

That's what we are facing out there. That is why I think when you are looking at a law that seems to be almost 20 years old, you know, there has been a tremendous change out there. That is why I think we have to be looking at these things constantly.

Again, with Greg Walden, looking at the FCC reform, I think that is important. Those are the steps we have to go through. Again, this is all changing before us so rapidly, if we don't do it, we are going to just have

somebody else from some other country coming up with this stuff and not having it happen here.

MR. MAY: Congressman Latta, thank you again. We always try to give our speakers a little souvenir from the Free State Foundation. I have no idea what the latest ethics rules are over at the House.

CONGRESSMAN LATTA: I know, it's tough. (Laughter).

MR. MAY: I do know this costs about $8.00, not much more than that, so if you can take it, I'd like to give it to you.

CONGRESSMAN LATTA: Of course, thank you very much.

MR. MAY: Thanks very much. Join me in thanking Congressman Latta.

(Applause).

MR. MAY: We are going to pick right up now with Professor Speta. I think as a segue, and something we are going to be talking about -- At the House hearing yesterday, there was a lot of discussion, and this goes to Bob's point, and there were some assertions that the current Communications Act is technology neutral -- “Don't change it because it's technology neutral,” or “Be careful how you change it,” -- We heard that over and over again.

I pushed back against that, frankly, myself a few times and said I don't think it is; we often talk about the stovepipe regime, and that's different regulation tied to different technical characteristics.

One place where obviously it is not technological neutral and relates to VoIP -- VoIP came up a lot yesterday -- The FCC, if it classifies it one way, Bob, then its information service, then another way, it's a telecommunications service, and that has different regulatory consequences, I think.

Back in 2004, I wrote a piece -- 2004, that is almost a decade ago -- It was called "The Metaphysics of VoIP." It was all about how the current Communications Act didn't really make sense as you had this technological revolution. Because the consumer, he doesn't necessarily care whether it is information service or telecommunications service.

With that, I am going to turn to Professor Speta, to Jim. I just want to add this: Back in 2005, I think, he and I worked together along with a whole bunch of other academics and think-tankers on a project to draft this model "Digital Age Communications Act." Jim was a co-leader with me on the part of it that was looking at a new regulatory framework. That might be useful to know as he

speaks. Don't forget the Twitter handle, #ANewFCC. Jim?

MR. SPETA: Thanks, Randy. It is interesting, before the Congressman was here, we were talking about the theme of optimism and pessimism, and in fact, my first sentence here restated your question about an old FCC or new FCC as a question of whether we should be optimistic or pessimistic.

I do want to take up Randy's suggestion that he sent to me earlier that I might say a little bit about the DACA Project and whether that has something to say for where we should go next.

Talking about the DACA Project, of course, always creates plenty of opportunity for both pessimism and optimism.

On the pessimistic front, as I looked back over the years of the DACA Project and the fact that I thought we did great work but it didn't penetrate at least into the U.S. Code, the pessimistic take that I had for a while was based on academic wonderment. We wrote this great thing, why didn't it happen?

The answer isn't that the case for a rewrite was poor. The Communications Act still has, as Randy has been fond of calling them, ”regulatory silos.” And those regulatory silos just don't map well onto converged

Internet communications.

So I don't think it was the academic case, but as I've come to think more about it over the years, I think the answer is somewhat different, and here is the optimistic take on why it didn't make its way into the U.S. Code. I have come to the conclusion that the principal reason there wasn't a rewrite at the time was that the FCC had, prior even to the mid-2000s, administratively lifted much of the pressure that should have and would have created the impetus for the reform that we proposed.

That is, the rollback of unbundling requirements, the rollback of tariffing, rate regulation and the like, eliminated much of the burden of the traditional common carrier system. And the innovation of classifying Internet services as information services exempt them not only from Title II but then began to exempt the converged services built on top of the Internet services from much of the consequences of silos.

Can anyone doubt that had the developing broadband Internet been subject to full-blown Title II regulation in the mid-2000s that we would have had more pressure for legislative reform?

What do we take from that for today or what do I take from that for today? In general, some cause for

optimism, as already said, wireless markets are fairly vigorous, the general Internet ecosystem is quite vigorous, there continue to be many interesting stories of the development of adjacent market competition, which I think has been one of the great success stories of the Internet. I will temper that by saying if not either optimism or pessimism *per se*, there is some cause for caution for it is undeniable that there are certain market and business model developments that can pressure what have been the fundamental norms of Internet openness on which this vibrant ecosystem depends.

As to DACA specifically, I still think this framework has a ton to recommend it in two senses. The first sense is what I have just adverted to, the fundamental assumption that DACA starts with: That networks, at least networks in what we call the Internet ecosystem, should be interconnected, but recognizing simultaneously that that interconnection is largely provided by the market; and then second, in the sense that DACA demands a fairly clear theory of anti-competitive consumer impacts as a predicate to much administrative action.

I think that predicate is substantive and it is important to say that it is a substantive predicate because

frankly as a matter of administrative law, and here I might be saying something more controversial, I don't think that the framework that the FCC works under is fundamentally broken nor should it be burdened with additional requirements of formal hearings or steps in the analysis and the like.

Why is that important? Because if we are talking about the administrative context of the way in which the FCC operates, what DACA largely suggests, at least superficially, is that it is borrowing the FTC's law. It is borrowing a competition framework, and so the superficial question might be, well, why not just let the FTC take over? And that is a question that is in the ether out here and has even penetrated us in Chicago.

I would say the FCC under DACA or some other framework in my view continues to be quite necessary by virtue of its ability to make predictive judgments and to offer persistent forward-looking regulatory solutions in those cases in which they are necessary.

To make this a little more concrete, and of course, a little more contemporaneous, I would take as an example the Open Internet order and what might have been different or what in fact might have to be different if we are required to look at it again, were the framework I have

in mind to apply.

At one level, of course, the Open Internet Order does seem to be operating in large part against the backdrop of competition theory, but the discussion of that competition theory is not in my view closely enough tied to findings about the market structure. And the regulatory requirements are not explicitly tied to market characteristics in the sense that they are not tied either to a carrier's dominant position or the carriers being vertically integrated into content or services.

Nor has the FCC taken up any of the subsequent questions that are strongly suggested from the competition theory that it puts forward in that Order; steps that might include – "might" is an important academic word -- For example, a more directed proceeding on data caps and tiers and things like that.

I'll wrap up here, but let me conclude by answering my own question, which is to say I'm largely optimistic based on my reconstruction, and by saying, although I may have suggested too much by saying administrative law is fine, I view the FCC's ability to make predictive judgments not as a license for loose theorizing, but as an opportunity for rigorously constructing a more concrete notion of competitive markets

and regulation that is clearly tied to those market consequences.

MR. MAY: Thank you, Jim. You guys can see why I enjoyed working so much with Jim back during that project. I always called it ”DACA,” and he calls it ”DACA,” but we were working on the same project.

Jim, I'm an optimist, really a flat-out optimist. Because yesterday, at that hearing, as the Congressman alluded to, I had an opportunity to actually promote DACA. I think it has only been about ten years. In congressional time, that might not be too long. But there will be comprehensive communications reform in our life times, I'm sure.

Now we are going to turn to Bill Kovacic. He might not really know all the details of DACA, but one thing I'm sure he does know a lot about, an awful lot about, is the nature of the institutions, the FTC and the FCC, and how institutions run, and might be made to run better, and so forth. He may even say for all I know that he thinks the FTC should take over all of the FCC's jurisdiction. Bill, it's up to you.

MR. KOVACIC: Thank you, Randy. Dhaka, of course, is a fascinating city in Bangladesh.

(Laughter).

MR. KOVACIC: My comments will focus on two of America's most extraordinary regulatory archipelagos, and the issue as Randy suggests: Who should do what?

The first deals with what I think is the most contentious and significant matter of economic regulatory policy in the international sphere and then in some areas of domestic policy making, and that is data protection and privacy.

If we look today at who does what in that field, it is easier to list the institutions that do not have a policy mandate than to list those who do: Both at the national level, the collection, the mosaic of federal oversight; at the state level, the extraordinary role that state governments play; at the county and municipal level, right down to local police stations, the astonishing array of public institutions that have a hand in shaping policy is something to behold.

Partly by accident, partly by design, in the past 20 years, the Federal Trade Commission has evolved as the principal U.S. data protection authority.

In discussions about the future of data protection, it is often assumed that the FTC will continue to evolve in its role using its own mandate to be the national data protection regulator under a more coherent

and uniform federal scheme.

There are many obstacles to doing that. It is impossible to imagine the FTC playing that role, and impossible to imagine the U.S. having a coherent national data protection policy if a stunningly important part of the information services sector is not subject to its oversight.

How will the United States achieve a broad set of coherent, consistent data protection rules if the common carrier exception remains in place?

I'm not going to press the point to ask you to accept its abandonment across the board, but I just want to suggest to you that so long as that part of the information services economy -- Mind you, those service providers have some role to play in data security and privacy policy -- The United States will not achieve anything faintly approaching the more coherent, consistent, and rational platform for policy-making that is seen as indispensable if it is to have sensible policies at home as well as a coherent voice abroad.

We were talking about the 18th anniversary of the 1996 Act. Next year is the 100th anniversary of the Federal Trade Commission Act. That could be a good occasion, not insisting on annual reviews, but how about

once every 100 years.

(Laughter).

MR. KOVACIC: We go back to ask whether the quaint assumptions, now quaint in light of past experience, about who should do what might be subject to change.

Topic two. The second archipelago is merger review. If there is a telecommunications merger, who gets to play? Well, it's the Department of Justice Antitrust Division, not the FTC, because of that other limitation I mentioned.

The Federal Communications Commission, as you know, conducts an independent review of competition issues plus public interest considerations. We go to our state governments, and each of our state attorney generals have competence under the law to apply the national anti-merger control mechanism, and the state public utility commissions, as Bob just mentioned a moment ago, get to play with respect to activities affecting their own jurisdictional borders. And if all of the national and state authorities stand aside, there is still the possibility of private suits, even though those aren't easy to bring.

You can stand back and make the case that the sum number of enforcement authorities greater than one has

benefit. That number though, is widely regarded as an optimal choice to be short of infinity. And in the spectrum of policy-making activity, we are a lot closer to infinity than we are to one.

When you look at the role that other jurisdictions are playing to get the regulatory framework right, who stands alone in its indifference to the regulatory architecture? We spend so much time talking about the feasibility of making bullet trains with no discussion in the regulatory arena about the adequacy of the infrastructure.

The United States could buy trains that go 250 miles an hour but they would still have to go through those tunnels between New York and Washington and slow down to 40. It won't work.

We talk about larger policy reforms. We don't talk about the regulatory infrastructure over which policy must travel.

Let me give you one suggestion if we don't want to address that head-on. How about a policy of transparency which the FCC could adopt, which clearly identifies measures that are adopted only pursuant to the public interest mandate, that denominates clearly the matters that are relevant to competition policy but where the Venn

diagrams of analysis don't overlap, to spell out precisely the remedial measures that are adopted pursuant to the public interest mandate and explain how they advance the public interest, not to shroud them with a larger set of considerations associated with the competition policy mandate.

What about giving the entire mandate to the Department of Justice, so we don't go back to that common carrier exception? Why not give the entire competition mandate to the Department and leave the FCC to do the additional public interest review perhaps in association with the Department of Justice?

My interest in the U.K. assignment that Randy mentioned is that so many other jurisdictions are taking very seriously the question of how to establish a policy-making infrastructure that promotes coherent national results in the expectation that if you achieve a better policy-making infrastructure, you will increase the possibilities for delivering good economic results for your citizens. The United States complacently is missing a good game.

MR. MAY: Thank you very much, Bill. There is a lot there to think about. Here's what we are going to do now. I'm going to ask the panel to think about questions

they might want to ask their other panelists. I'm going to give them an opportunity to do that. Then I may ask a question or two. I'm going to see whether there are questions from the audience as well. I apologize for not doing this before -- I'm going to ask my distinguished Free State Foundation colleague, Deborah Taylor Tate, to come up and having served on the FCC, I'm sure she has a lot of thoughts as she listens to this discussion. Maybe Debi, you can give us three or four minutes of reactions as well.

I can do that with Debi because I've given her so many cups and tee shirts and everything, I don't have to give her anything to ask her to come up and do this.

Do any of the panelists want to react to anything said by your fellow co-panelists? Would you prefer I be the provocateur?

Mr. Assey: Here, Randy, have a cup. (Laughter).

MR. MAY: Go ahead.

MR. ASSEY: I found Bill's statements actually very provocative and started me thinking. Obviously, we have a regulatory architecture here in the United States, whether it was built by considered thought or by historical accident, it is what it is.

The difference in the way the rest of the world

looks at this is obviously important to us as well because many of the companies that we represent are in fact international companies. Particularly as competition gets out of purely kind of horizontal competition but occurs at very different levels, that regulatory architecture matters.

So I wondered if you had a plan or idea as far as in addition to maybe the transparency ideas you set out about how we promote maybe greater consistency while we are in a different regulatory architecture and maybe what you are hearing from our European counterparts as far as either what they can't understand or what they hope to achieve through their own revisions?

MR. MAY: Bill?

MR. KOVACIC: If we were thinking about companies, the typical choice in pursuing an integration through Ronald Coase, through Ollie Williamson, is do you integrate by ownership -- That is by combining functions within a single institution -- Or do you integrate by contract?

I'm aware of the difficulties associated with the legislative efforts to accomplish integration by ownership. That is to move things across boundaries, is extraordinarily difficult.

Legislative committees don't do that unless you

give them something in return. You either need a tremendous regulatory smash-up that creates the urgency to reform or you cannot take from one committee one responsibility without giving them something back in trade. Let's assume for a moment that we are frozen in place with the distribution of authority.

The other alternative is by contract, which means deeper integration across agencies through voluntary cooperation. In the field of competition law, we do not have anything equivalent to a domestic competition network. If you take the nexus of all public authorities, state and federal, regulatory bodies with competition law competence such as the FCC, FERC, and you ask, on what occasion during the year does everyone with an overlapping mandate in the public sphere sit down to begin the conversation about what we are doing, much less the question of what consistent principles should be? That doesn't happen.

There are synapses that link individual institutions. There are cooperative processes. One thing we see and I think can be borrowed from other experiences and a number of jurisdictions that recognize this allocation of authorities is we need deeper integration through cooperation, through a network that promotes the development of consistent standards, identifies anomalies,

addresses them, and not a begrudging as necessary cooperation, but a willing recognition of complementarities.

That similar approach could apply to privacy. There is no comparable privacy network. If I were to take the high ground that needs attention I think most urgently, it is data protection and privacy.

That is you can't possibly go ahead, especially if you look outside the country -- One of the great puzzlements to outsiders is, who on earth does what in your country? That is, who is responsible for what? Is it the health care people over here? Is it the food and drug people there? If it's a telecommunications company, it is somebody else, it is the FTC. Here is the State of California doing something still over here. Who is minding the store?

A way to approach that is at least through voluntary integration of decision-making and discussion to create networks, frameworks, grandiose structures by which those policymakers spend more time talking to each other and more important, the case handlers and managers spend more time talking about what standards should be.

That is my fall back, no legislative change to the basic framework approach. That would not be a bad place to

start.

MR. MAY: I think I do want to exercise the right to be provocative here. I'm going to ask first Jim, since he is the law professor here, one of the two, but probably the one closest to this area.

MR. ASSEY: I used to be an adjunct, does that qualify me?

MR. MAY: Me, too. I am going to ask Jim to predict the outcome of the net neutrality appeal in the D.C. Circuit and tell us what he thinks about that. Then I'm going to ask James and Bob to tell us what they want to see the outcome to be in that case and explain why they prefer that outcome. Jim?

MR. SPETA: I don't know.

(Laughter).

MR. SPETA: Everyone knows where I stand on the issue of what ought to be the outcome. I've written several times that the FCC just doesn't have this kind of authority. I've also written several times that they ought to have this kind of authority, but that is probably something Randy doesn't want me to mention.

(Laughter).

MR. SPETA: That is what I think is the right answer. I just don't think the theories of ancillary

jurisdiction or 706 or any of the other little numbers that get thrown around do it.

That is not what I predict will happen. I predict what will happen is -- I'll put my bartender hat on here -- A continued muddle and it will result in a remand that essentially continues to lack a clear theory of what the Court thinks the FCC's authority is, but it will decide what it did here was a step too far. Maybe even a little more muddied than that, a step too far because not explained adequately.

For my seminar, I had the opportunity to re-read the Order last week and there is a lot of explanation there. That is what I think will happen. It will be a muddle, there won't be a clear D.C. Circuit authority about what the boundary is, but they will say this was a little too much, either on a substantive ground or on an explanation ground, and it will go back again. That is my guess. Don’t place your own money on it.

MR. MAY: Can you envision if that happens that the FCC would attempt to impose Title II regulation in the aftermath of the decision?

MR. SPEATA: I doubt it, but I live in Chicago.

(Laughter).

MR. MAY: That is the outside the Beltway defense.

MR. SPETA: No. In preparing for this seminar, I reminded myself that after the third-way proposal, there was a letter from Congress, I think signed by more than 110 current Senators and Representatives at the time. I don't know what the number would be today. I don't think it would be materially smaller.

MR. MAY: The letter opposed --

MR. SPETA: It opposed the request.

MR. MAY: [The request for] imposition of Title II regulation.

MR. SPETA: Yes.

MR. MAY: That was just to give Bob and James more time to think about their answers.

(Laughter).

MR. MAY: James, what would you say?

MR. ASSEY: My question is what do I want to happen?

MR. MAY: What do you speaking for the entire cable industry want to happen here?

(Laughter).

MR. ASSEY: Sure. I will echo first I have no idea how it is going to come out. There is an interesting irony here, when I look at this case. I think it is incredibly important for communications law students and

incredibly irrelevant for consumers. That is because the cable industry, and I'm sure Bob would say the same, is building an open Internet, believes in an open Internet, and the day after the case comes out, we are still going to have an open Internet.

There are incredibly complicated and very interesting, from kind of a law professor/law student point of view, questions about ancillary jurisdiction and the authority of the Commission. But I think what is most important is that we not lose sight of the tremendous benefit that we have seen from an open Internet, the tremendous incentives that I think network operators have to build Internets that consumers will want to use to provide services that consumers demand. I don't think anything will happen in the D.C. Circuit or thereafter is going to change any of that.

My hope for the future after the decision is handed down is that the FCC, whatever it chooses to do or whatever it is able to do, returns to first principles, returns to that regulatory humility that I spoke of, and that has benefitted consumers immeasurably by launching this tremendous cycle of innovation and investment, and that continues to inure to their benefits and building faster networks as far as the eye can see.

MR. MAY: Before Bob answers, so I understand your answer and maybe to draw it out further, I assume at least in part you are saying if the decision were affirmed, because it has a non-discrimination provision, and a no blocking provision, but part of your optimism or lack of concern is based on a view or a at least a hope that the FCC is going to continue to exercise this regulatory humility that you have talked about. Because if they got regulatory un-humble, then that might be another --

MR. ASSEY: That is fair. In truth, Randy, the cable industry is not part of the lawsuit, and we were not so because we believed there was at least a colorful path for the FCC to continue to exercise that regulatory authority even in the face of the Open Internet Order. That is not to say there is also great danger if they turn and take a different view.

MR. MAY: Bob?

MR. QUINN: I agree with James. I think this is so much ado about nothing, it will make great law review articles, I'm sure, about what the extent of the FCC's authority is.

I don't think it is going to matter a hoot to consumers. We supported the FCC action. We supported the FCC action so we could stop talking about net neutrality

and Title II because it was actually putting this kind of overhang on the investment community and everything that we did had this huge overhang to it, and when we signed up for it, we signed up for it because we didn't have to change a single business practice in order to live within what the FCC was talking about.

My great fear is at the end of this we are going to have a huge disruption again and we are going to have this whole conversation about Title II and everything else, and it is going to suck all the air out of the room when the reality is that James can be optimistic because we have had all these orders where we haven't imported Title II into the IP world, but I live in a world where I can't turn off POTS until the FCC actually says it is okay to turn off POTS. I can't stop investing in the TDM world until then, and if we spend the next two years or three years talking about net neutrality again, we are never going to get to those issues.

I live in a world where I don't think it is going to matter a hoot to consumers. I think the Internet is going to be open the day before the Order comes out, it is going to be open the day after the Order comes out, and it is going to be open a year later as well, and nothing is going to change. But in this town, all of the action is

going to get sucked out of the room because we are going to spend 24 hours a day, 365 days a year, 366 in leap years, talking about net neutrality for the next three years if this all gets disrupted.

MR. MAY: Jim Speta has his hand up so we are going to at least talk about it for another minute here.

MR. SPETA: I wrote a speech for a conference many years ago that said can we stop talking about net neutrality, and between when I wrote it and had to deliver it was the Comcast reporting, about the Comcast case.

I agree with all that has been said except let me say that I think the case matters a little bit more than for those of us who write telecom case books, and I include myself.

The easiest path to a clean win for the FCC is for the Court of Appeals to say what the Supreme Court said in *City of Arlington* is in fact what they meant, administrative law professors' doubts notwithstanding, and the FCC is entitled the maximize *Chevron* deference any time it decides what its ancillary jurisdiction is.

So you and I are all cool with the Open Internet Order, but that is not what the stakes are about for me in what the appeal is about.

The second issue is yes, I'm optimistic the

Internet will remain open, *et cetera*, but I'm among those who look at some of the developments of integrated vertical business models and the Internet and say to myself, there is some reason to think that our fundamental presumptions of openness that have continued to generate this ecosystem face some pressures.

That is the second part of the stakes that I think this case involves.

MR. ASSEY: I was only going to respond and say I think that is absolutely a fair point. I think we also have to recognize there are other governmental authorities that can deal with that in addition to the FCC. Your "put-and-take" on whether or not you feel the other agencies are up to the task is obviously different people are going to have different views.

MR. MAY: I'm going to ask a final question or put this out there and then I'm going to turn to the audience. Because the nature of the program was to talk about reorienting the FCC and reforming the FCC, we haven't really talked so much about sort of what I would call pure process matters, perhaps.

I'm going to ask James and Bob -- I think Jim said earlier, and I think it is fair enough from his viewpoint, that he doesn't see the need for sort of process reforms

along the lines of the bill that has been introduced, the draft bill by Chairman Walden. That contains, as you know, a number of things that would require the FCC to do rulemaking's differently and conduct meetings differently. It would change the Sunshine Act and all that.

Maybe in a minute or two, if you have reactions to those types of process reforms, let's get those on the table before we go to the audience.

MR. ASSEY: We are very supportive of legislation to look at process reforms. Obviously, you don't always need a law. Sometimes you can just change the processes.

The integration ban bill by Congressman Latta is a great example of an area where historically we have had trouble. The cable industry has had to go seek waiver, upon waiver, upon waiver. We waited a year before we could get a waiver for these very low cost standard definition devices -- the size of basically a pack of credit cards -- That could perform a tuning function on your second or third set. A year before we could do that. When we decided we wanted to also provide that in HD in the same form factor without the CableCARD, we had to wait another 15 months after that.

Those decisions, we can laugh about it, but they do have consequences in the sense that our industry was

trying to get those out there in an effort to go all-digital, to be able to reclaim analog bandwidth, and to improve the capabilities of our networks. If we have to wait two plus years to go through a waiver process that can kind drag on and on, that is not good for consumers, that is not good for innovation, and that is a process that we ought to take a look at.

MR. MAY: Bob, do you have any comments on process reform?

MR. QUINN: Legislation in this area, I think, could be helpful, but I don't think it is necessary. The FCC has an obligation under the existing law to get rid of obsolete regulations. They have to do a review of everything every two years. Despite having done seven of those, we still had some telegraph rules on the books. The FCC took 15 months before they could decide to get rid of the telegraph regulations. I don't know, my telegraph works great.

(Laughter).

MR. QUINN: Just me. Maybe other people are having problems. I don't think legislation is necessary. The FCC actually -- The way the current Act is structured, the FCC has the power under the Act to waive its own rules. At least as it relates to the Title II business, and this

is an area that Title VI does not have, they can forbear from Title II regulation, and they have preemptive authority for the telecom rules to preempt states from doing things inconsistent [to federal objectives].

In terms of the overall reform from a telecom standpoint, I think legislation would be nice, it would be helpful, but it is not necessary because the tools are there for them to be able to engage in that.

I think as we get into the video reforms, our video service is IP, we do not consider it or classify it as a cable service, so I don't have a lot of the same obligations as a cable service provider that James' member companies have, and they would maybe benefit from having the equivalence of forbearance for some of those rules, and that is not in the Act as it exists today. We certainly don't have that for the MPVD stuff.

MR. MAY: Okay. He's probably going to pass back that cup to you on that last note.

(Laughter).

MR. MAY: Bill, do you have a quick comment on this?

MR. KOVACIC: One point on process reform that you mentioned that I think has great stakes for the entire administrative state is the Sunshine Act. If you were

seeking to develop a measure that would go a great way to disable the effectiveness of collaborative decision-making, and you were inimical to the interest of the United States, and you want to encumber the administrative process, I think you would draft something like the Sunshine Act.

You would say I like this measure because it is going to get in the way of the collaborative process working effectively. And when you look at all the assumptions that the administrative law literature has made in promoting the development of the administrative tribunal, that is to have a collectivity, imagine federal courts being unable to spontaneously discuss with more than a quorum matters of interest to them, imagine that you weren't able to have that kind of interaction in adjudicative tribunals on a spontaneous basis.

Again from a comparative perspective, when you do a side by side comparison of U.S. with other agencies and you walk through them, the inhibitions on spontaneous discussions -- Walk into the lunch room at the FTC to talk about a merger, if it is two of your colleagues, they are talking away about it, as soon as you arrive, how about those Cardinals or Red Sox.

The inability to talk about those matters, you look at experience overseas, there is not a single

observer, scholar, or regulator outside this country that does not look at this mechanism and say, you are out of your minds.

I think there is an issue here, a larger question, about the functioning and operation of the collective decision making process as it was intended, thus worth discussing as part of a larger deliberation about the administrative process.

MR. MAY: Thanks for bringing that up. That is a good point. That is another couple of decades-old project of mine as well.

We are going to turn to the question and answer period now. I want to get several questions in. We are going to keep these to questions and not speeches and try to get a few in. Scott?

MR. CLELAND: Scott Cleland, Net Competition. What one thing could prospective Chairman Tom Wheeler do when he arrives to signal he has a modern approach to the FCC?

MR. MAY: Who wants to take that? I think that is a good question.

MR. QUINN: From my perspective, the one thing he could do is he could say by some date certain, we are going to retire all the legacy TDM architecture in this country.

That is one thing he could do.

MR. MAY: Anyone else have any suggestions? I am going to call on Howard for another question.

MR. BUSKIRK: This is a companion question to Scott's question. I just wanted to ask, to what extent do you believe Mr. Wheeler is going to be looking at trying to develop a new paradigm for trying to get regulation to keep up with the IP and the new era, and how is that counterbalanced by the fact that he doesn't have a whole lot of time, and also by the potential of distraction that could be the follow up to the D.C. Circuit's net neutrality decision?

MR. QUINN: As I said before, I fear that if the D.C. Circuit overturns all or part of the Order, we are going to get caught in a swirl really quickly about the application of Title II to Internet services.

To the extent the Administration makes a very fast decision to appeal that to the Supreme Court, I think he creates himself, I think, a window of opportunity because as long as it is not appealed in the Supreme Court, he could have a clean runway. It will be an overhang, but at least he would have a clean runway in which to operate, where he doesn't have to get sucked into the swirl of Title II on Internet services.

He does have a short time frame, getting shorter all the time. I think he obviously has a lot of things he is going to have to accomplish. He is going to have to get the incentive options up off the ground and start it.

He still has the ability to be able to kind of take some of the core fundamental principles that were in the National Broadband Plan, which says, hey, we have to make this transition to start to push that rock down the hill so that it can gain momentum.

The TDM infrastructure is not going to be retired by the time Tom Wheeler leaves the FCC, but he can make an enormous amount of progress by basically saying, hey, this was a core part of the National Broadband Plan, and we are going to implement that. We are going to begin the stage of implementing it, and everyone knows this isn't a flash cut, everyone knows this is going to take time, but we are going to begin that project and we are not going to look back from it. I think the tone at which he attacks that issue can still make an enormous amount of progress, even though everyone is going to understand he can't finish that project by the time he leaves.

MR. MAY: Anyone else want to make a quick response to Howard? If not, we will ask another question. Jim?

SPEAKER: Thanks. My question is for Bob at least at first. Early on you mentioned the example or the proposition that the FCC really is uncomfortable about how to act in the new environment, and you mentioned the text-to-911 situation.

My question is, how do you think at least going forward and maybe not text-to-911 but a future important public safety issue, in such a situation, do you think they should try to reach everybody including the over the top providers, or refrain from reaching anybody, which would have public safety consequences perhaps, or do what I think they tried to do, which was to reach those that they have clear jurisdiction over so they can? What should they do in the future?

MR. QUINN: I think at some point in this country we are going to have to tackle, and I think the FCC is the agency *du jour* that has the ability to do this, but we're going to have to tackle, what are the characteristics of this? And I would say the subset is real-time communications, right? That is really what we are talking about.

When people talk about the ability to do 911, we are talking about some services that are real time

communications. We are not talking about your Starbucks' app on the telephone. But when it comes to real time communications which was the core service we regulated for 100 years, the Communications Act of 1934 is from 1934, but that is the core service of the telephone infrastructure that has been in place in this country for 100 years, and we are going to have to start having a discussion about what the characteristics of services that are taking the place of that are going to have to be, because those are the ones that we are going to attach these public safety types of obligations to.

I think it is a hard discussion to have. Right now, we are playing whack-a-mole, but the way that they were going to approach text-to-911 just didn't make any sense at all because we have hit the tipping point on text messaging services to over-the-top, and you are just going to see a rapid decline of that. And I think it tees up the question to say, if it is really important that you are using a text messaging service that it reach 911, we have to figure out what that service looks like and how we are going to impose that obligation if that is what we choose to do.

That is a discussion that I don't think they are comfortable with. I think it is a really hard discussion

to have. But eventually, we know it applies to interconnected VoIP, so what have we done? Skype is not interconnected VoIP. You have kind of created with interconnected VoIP a regulatory free zone. If you don't have the capability, if your service doesn't have the capability both of making calls and receiving calls, the rules don't apply.

What that does is gives an incentive to not have a lot of interconnectedness. With text-to-911, if you don't have the capability to reach everyone, it doesn't apply. That promotes not having interconnected services. I think it is a hard question.

MR. SPETA: I agree entirely with what you said. I will say that while it is a hard conversation, we are in the position to echo one of Bill's themes, to look around and find some of these definitions. The EU framework has a definition of electronic communications networks. Is it perfect? No. But there have been a lot of other systems that have tried to attend to this question, to add to Bill's "who does what," to add the third prong, "to whom."

MR. MAY: I'm going to call on Seton. Now remember, a question, not a speech.

AUDIENCE SPEAKER: I'm going to address what James discussed, which is a cost/benefit analysis. There is a

law on the books, the Paperwork Reduction Act, and I know for a fact it is supposed to be done before they impose regulations, and I know for a fact it was done after they imposed net neutrality.

My question is, is that insufficient, is that just so completely ignored? Would it be worthwhile to draw greater attention to that as sort of a stop-gap until we get a better cost/benefit law passed?

For some reason, that is sort of an afterthought, it's a 20-year old law. No one seems to point to that as a possible or at least partial solution to the cost/benefit analysis of a regulation.

MR. ASSEY: I'm certainly no expert on the Paperwork Reduction Act, although I can say it’s probably a growth area.

(Laughter).

MR. ASSEY: I think certainly we all benefit from pressure testing the effects of the laws, the regulations, that are created, and I think the greater sensitivity to the impact and the likely cost of some of the rules. And not only of new rules, I think part of the problem we face is that a lot of times, history has a great pull -- We are all lawyers, we love precedent -- But the markets change so quickly, the sands just shift underneath our feet

constantly, and what may have seemed like an immutable axiom at one point in given time is just totally gone.

I think we have to constantly challenge ourselves not to look at the law as it was enacted at the time it was enacted, but also to constantly test the relevance, to constantly assess the costs that are being created by regulation versus the benefits, if there are any.

MR. SPETA: Here is what I worry about with cost/benefit analyses. What work is it doing *sub rosa* on a substantive level, which is to say under all administrative law, you don't have to spend any time at the D.C. Circuit to know, that an administrative agency's decision can only be affirmed if the administrative agency offers a theory as to why it is better than not doing what they could have done instead.

They just have to have a theory. To emphasize what Bill says, that theory could be under our current statute a public interest theory, right? It could be a non-economic theory, *et cetera*.

When we talk about pushing on cost/benefit analysis, I am sure we are making a substantive judgment about (a) what costs and benefits count, and (b) what evidence do we want to require there to be before we permit action.

Just to say that agencies think the benefits exceed the costs, that is administrative law forever.

MR. MAY: Thank you, Jim. Those were all good questions. I wish we could just go on and on. I could go on and on for a long time because they are great questions and the answers were equal to the questions.

What I want to do now, as I said earlier, is ask my colleague, Debi Tate, to come up. She has probably been thinking a bit throughout this whole conversation, "I can tell these people a thing or two about what the FCC should be doing." Just like the others, I'm going to give her a strict five minutes, and then we are going to wrap it up. I'm sure this will further educate all of us.

MS. TATE: Thanks, Randy. It is always nice to be back and especially to be here with the Free State Foundation and my colleagues. It is great to see Bill especially because I haven't seen him in a while and to catch up on him.

I brought a couple of props with me not knowing what people would say but just to remind us when the Telecom Act was written. Usually, a picture is worth a thousand words.

I think it is important just to think about how long these laws have been around and what our country and

our infrastructure looked like in terms of the past, and of course, I loved Congressman Latta talking about the IP ecosystem and the transformation that is going on, and how these legacy regulations really don't fit in an app world, in the cyber world we are in today.

One of you all brought up, and I thought it was interesting -- James, maybe it was you -- Bob, it was you because you all do have to deal with the state PUCs, so I thought I might give you an example of what our Governor in Tennessee did, and that is that the TRA is now a part-time agency, and why should it be? Because they don't have nearly as much responsibility and legal authority as they did when the PUC was originally set up.

I had been very vocal about the fact that as for the responsibilities and legal authority, our state legislature had removed much of the authority. Any time you all want to pay me to go around to the rest of the 49 states and talk about that, I will be happy to. I was pretty successful in Tennessee.

I also really appreciated the fact that everyone talked about kind of this rededication to a consumer-centric market approach. James, I think that was your phrase. I really like it a lot. Because I think that is what we all forget in Washington a lot. We are talking

about either legal issues or appellate court rulings or words like net neutrality that nobody in the public has any idea about, when really all they are interested in is what is the new hot thing, right?

This just came out last week, even though Dick Tracy had one 50 or 60 years ago. I am glad we have caught up with Dick Tracy at least.

Why is it so important, why is it so important that there is regulatory consistency? It is not solely about our economy, although as we know, it is about a fifth of our economy, but it is also about education and entertainment and health care and jobs.

I thought that was really interesting that Congressman Latta brought up the million jobs that are in this sector. That is why that is so important. That is why, as the Free State Foundation says, ideas do matter, they really do matter for this country.

I was very interested in some of Bill's work because we do have to continue to be not only the innovation leaders, not only the economic leaders in this world, but we have got to continue to be the policy leaders. The FCC, when I first started, on my very first trips to the ITU, every time I got introduced, it was as the gold standard for the entire world in terms of

regulation. I don't know if my colleagues are being introduced that way now or not.

This is a yield light, right? I guess my advice to the new FCC when they finally get in place is just to stop for a moment and do precisely what everyone here is saying, every lawyer in the room, and that is, what is your legal authority? Before you take one step toward an order or any kind of policy or regulatory action, what is the legal authority for what you are doing?

Obviously, I feel like during my tenure that we did do a lot to help, that there was robust competition. So the FCC has created some policies -- When you hear about the investment, the investment was made because there were good policies -- But at the same time, we have to think about, is the rule or regulation or policy really necessary or does it stifle investment and competition?

Then if it does, please stop. Stop before you do anything. I cannot believe every time I come back to Washington, we are still talking about net neutrality. All I go back to is in 2009 sitting there and hearing the Bit Torrent Comcast discussion. What was it, a barbershop quartet that got cut off or slowed down? That is what we are talking about.

But stop. Stop over-regulating, stop stifling U.S.

companies' ability to invest. Stop sending more costs to consumers by passing more unnecessary regulations.

I loved the point about forbearance. Stop not using forbearance. Finally, will you please do no harm for all of us.

I have enjoyed being here so much. Bill, I am in total agreement with you about letting the sun shine in on the FCC. That could be a great step. That is one issue that all the Republicans and Democrats agree on, so I don't know why we can't get that done.

Thank you. Thank you, Randy.

(Applause).

MR. MAY: Debi, thank you very much. Thank you for everything that you do for the Free State Foundation. We appreciate it.

Bill, I don't know if you know this, Debi travels all over the world all the time. Sometimes, her time is limited. If you ever need a recommendation over there wherever you are going, for some good restaurant or whatever, I'm sure she has one.

On forbearance, I don't know if you remember this but I would bet you do, it was back in 1995, the Administrative Conference before it was de-funded and then refunded, I actually chaired a committee that issued a

report on reforming the Sunshine Act back in 1995. I think that might get done one day as well.

Listen, like I said, I could go on and on, but you guys probably can't. This was really a terrific panel. Join me, please, in thanking this fantastic panel.

(Applause).

MR. MAY: We will see you next time.

(Whereupon, at 2:04 p.m., the lunch seminar was concluded).

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