



THE FREE STATE FOUNDATION

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

**BROADBAND POLICY:
ONE YEAR AFTER THE NATIONAL
BROADBAND PLAN**

"Conversation on FCC Policies and Processes"

**FCC Commissioner Robert M. McDowell
and
Randolph J. May, President, Free State Foundation**

February 4, 2011

**National Press Club
Washington, D.C.**

MR. MAY: I want to welcome, once again, our C-SPAN audience. We are very pleased that C-SPAN is with us today, and we thank them for that. And I am pleased now to have with me FCC Commissioner Robert McDowell. I am going to give him his formal short introduction in just a few minutes.

As you know, if you were with us this morning, we had Commissioner Meredith Baker deliver the opening keynote address. And it's nice to have, as a bookend to the conference, Commissioner McDowell with us.

Now, I recognize a lot of the audience members from the last two conferences. Commissioner McDowell, I mentioned this morning that this is the third annual Free State Foundation conference. So now I have no compunction about using that word, "annual," because we now have a ring of permanence.

But the first occupant of the chair you're sitting in was Blair Levin, a past FCC chair -- actually the chairman's chief of staff -- and at that time he was on the verge of becoming the broadband czar, the executive director of the Commission's national broadband plan team. And then, last year, we had in your chair Eddie Lazarus, who is the current FCC chief of staff. I was very honored to have both of those gentlemen, of course, and we had great conversations, as many of you can attest.

* 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.

But I guess this is really a step up the ladder for us to have an FCC commissioner here. Wouldn't you agree?

(Laughter.)

COMMISSIONER MCDOWELL: Blair is sitting right there. I don't know if I want to insult him. But I missed the Levin chairmanship. I don't know when that was.

(Laughter.)

COMMISSIONER MCDOWELL: I must have been on vacation that week.

MR. MAY: I was talking with Blair about that earlier, and he said you may just have to wait a little while longer for that.

By the way, how many years have you been on the Commission?

COMMISSIONER MCDOWELL: About four-and-a-half.

MR. MAY: Okay. Do you think you would rather be broadband czar, or rather have been broadband czar, or the FCC chief of staff, or the commissioner?

COMMISSIONER MCDOWELL: I think those first two are completely thankless jobs, and so I am very comfortable where I am right now, and very honored.

MR. MAY: Okay. Well, that was probably a little bit of tongue in cheek. More seriously, we are going to get to your views about the job of an FCC commissioner shortly.

But we probably ought to tell the audience right away that you and I are both Dukies, right? For those who are uninitiated, we are both graduates of Duke University, correct?

COMMISSIONER MCDOWELL: Absolutely. Got my usual Duke notebook here today, just for Blair.

(Laughter.)

COMMISSIONER MCDOWELL: Blair didn't like Duke very much, but he sent his daughter there, so --

MR. MAY: Okay. We may have to actually put a cap, like a spectrum cap, on the number of references to Blair, but we are still under the limit right now, but --

COMMISSIONER MCDOWELL: What is the limit? Blair, Blair, Blair --

(Laughter.)

MR. MAY: We're over the limit. Good job.

I saw on your official bio that you noted that you graduated *cum laude* from Duke. That's very impressive. You know, I didn't do that, I'm sorry to say. But my wife is in the audience, and she was Phi Beta Kappa --

COMMISSIONER MCDOWELL: Well, she should be up here in this chair, then.

(Laughter.)

COMMISSIONER MCDOWELL: Or that chair, maybe.

MR. MAY: But nevertheless, I am a double-Dukie, law school and undergraduate. So I really think that that trumps *cum laude*, being a double-Dukie. And that's a way of saying that I want you to be nice today, and I want you to answer all my questions.

COMMISSIONER MCDOWELL: I'm always nice.

MR. MAY: Okay.

COMMISSIONER MCDOWELL: Sometimes I answer some of your questions.

MR. MAY: Now, everyone in the audience has the official brochure, and we've got your official biography, all the information. I'm just going to mention briefly a couple of things, and then we will get right onto it.

Commissioner McDowell was first appointed to his seat on the FCC by President George W. Bush in 2006, and he was reappointed to the Commission in 2009 by President Barack Obama. So that means your term runs through 2014?

COMMISSIONER MCDOWELL: Correct.

MR. MAY: Correct. Previously, Commissioner McDowell was senior vice president for the Competitive Telecommunications Association, otherwise known as Comptel, and was responsible for advocacy efforts before Congress, the White House, and the executive agencies. He served on the North American Numbering Council, and on the board of directors of North America Numbering Plan, Billing, and Collection, Inc.

COMMISSIONER MCDOWELL: Now, if you keep going, you're

really going to kill C-SPAN's ratings, and they don't care about ratings.

(Laughter.)

MR. MAY: No, I was just going to say, I think with that I am going to stop.

COMMISSIONER MCDOWELL: Okay, good.

MR. MAY: It's true.

COMMISSIONER MCDOWELL: I am also a member of AAA.

(Laughter.)

MR. MAY: Is that A-A-A, or --

COMMISSIONER MCDOWELL: The American Automobile Association.

MR. MAY: Oh, okay. Now, what I want to do today is talk about some of the current hot topic policy issues on a substantive basis. But I also want to talk about how the agency goes about its work. We did some or both of those things this morning.

On the latter part about how the agency goes about its work, I probably am going to want to talk about how the Commission functions under Chairman Genachowski's leadership, or whether there are some institutional changes you might recommend, and so forth.

So let's talk about some of these process issues first, and then talk substance, as well. Let's do it that way.

Now, you have served as a commissioner. By the way, I can foresee

scenarios where you could be chairman before Blair gets to be chairman, as well.

COMMISSIONER MCDOWELL: Are we over the Blair cap yet?

(Laughter.)

MR. MAY: We're getting close.

COMMISSIONER MCDOWELL: Okay.

MR. MAY: Now, here is my question. You have served under two different chairmen.

COMMISSIONER MCDOWELL: Three. Acting Chairman Copps. He helped us do a very soft landing on the DTV transitions.

MR. MAY: Okay.

COMMISSIONER MCDOWELL: I think you need to mention that.

MR. MAY: Absolutely. How do their different leadership styles affect how the Commission operates, both on a day-to-day basis, and also in terms of how it deals with some of the big issues that come along, like the net neutrality decision or the Comcast merger?

And let's not get into the real substance of those things now, but just talk about the leadership style of chairmen, and how that affects the way the Commission operates.

COMMISSIONER MCDOWELL: It would make an interesting sort of project for an MBA program's organizational behavior class to study the different personalities of each commission and each commissioner and chairman, to see how that does actually influence outcomes and productivity, and all the rest.

We have had different people at the helm with different personalities and different philosophies, and they have each put their own thumbprint on the outcomes that the Commission produces.

So I will talk about what's currently going on today. I have a very high personal regard for Chairman Genachowski, and am looking forward to agreeing with him on a lot of things.

What most people don't know about the FCC is that about 90 percent, or over 90 percent, of what we vote on is not only bipartisan, but is actually unanimous. So what tends to get most of the attention is what is not in that 90 percent, but what's in the 10 percent. And in that 10 percent it's not necessarily partisan. You might have different alliances.

My very first action as a commissioner, in June of 2006, was really a vote that never came to materialize under something called multicast must-carry. And after a few weeks of deliberation, I sided with the conclusion of Commissioner Copps and Commissioner Adelstein, two Democrats on the Commission who had decided to oppose that initiative. And I did too, for different reasons, but we arrived at the same destination by different paths.

So we could talk issue by issue, but the day-to-day management of the Commission doesn't necessarily always involve the commissioners. The chairman is working in an organization that has up to 1,800 people at its fullest ranks, a \$350 million-a-year budget, and there is a lot that goes on that doesn't necessarily directly affect the commissioners. So it depends, really, on the issue.

MR. MAY: Okay. Now, in 1999, before you arrived at the Commission, the chairman of the Commission, President Clinton's appointee, was William Kennard. And shortly before he departed, he issued a strategic plan for the Commission. It was titled, "A New FCC for the 21st Century." I think it was sent up to Congress at the time.

I just want to read you the very beginning of his strategic plan. I apologize for those who were here last year. I actually read from this, Bill Kennard's plan, last year. And I may keep doing it until someone actually gets the message over there at the FCC. Forgive me, but I thought it was important, what Chairman Kennard said.

He said, "In five years" -- remember, this 1999 -- "we expect U.S. communications markets to be characterized predominantly by vigorous competition that will greatly reduce the need for direct regulation. The advent of Internet-based and other new technology-driven communication services will continue to erode the traditional regulatory distinctions between different sectors of the communications industry. As a result, over the next five years, the FCC must wisely manage the transition from an industry regulator to a market facilitator. The FCC, as we know it today, will be very different in both structure and mission."

Now, I was around, unfortunately -- or, fortunately, whichever way you look at it -- in 1979, in 1989 and 1999. And I have to say, to be candid, I don't think the FCC is fundamentally very different in structure and mission now than it was at any of those times.

I know there have been changes, I know the offices have been moved, and there have been some consolidations. But despite the development of competition that Bill Kennard predicted, it seems to me that he was off, in terms of his prediction about the FCC, as an institution, changing.

So I would like to know whether you agree with me or disagree. Then also tell us if you think the FCC should be changed, as an institution, and in what ways, please.

COMMISSIONER MCDOWELL: First of all, any major changes, fundamental changes, really have to come from Congress.

MR. MAY: Sure. I appreciate that.

COMMISSIONER MCDOWELL: I think Chairman Kennard started the enforcement bureau, and Chairman Martin started the public safety and homeland security bureau. And those, I think, did help streamline some FCC functions.

But you're absolutely right. Overall, we were reinventing government, starting in 1993. But really, since then, or since even before then, government has only gotten bigger, and hasn't necessarily been reinvented. There are very large, slow-moving institutions here in Washington, and it's hard to pass legislation.

It's hard to pass legislation affecting agencies. It took something like 9/11 for there to be the creation of the Department of Homeland Security as an executive branch agency -- not an independent agency, of course. It's hard to do

that, just the way that the institutions are set up. So, we still have a fairly stovepipe statutory construct, and it's up to Congress to change that. And it's up to us to try to adapt as best we can.

Now, some of those bureaus within the Commission have been renamed. There is also a lot more cross-connect and cross-talk within the Agency than maybe there was back in 1999 when Chairman Kennard laid that out.

But when Mike Copps became acting chairman in January of 2009, I sent him a very long, detailed letter on FCC reform. Then when Julius Genachowski became chairman -- I think it was July 20, 2009 -- I sent him almost the same long letter, with a few revisions to it, outlining some suggestions.

So, how could it be different? First of all, if you really want it to be fundamentally different, Congress has to act.

MR. MAY: Yes. I understand that. But let's put that aside. I understand you're not the chairman. But you wrote those letters. Just put a point on it, if you would. Tell us a couple of ways that, if you could change it, that you would change it, even including what Congress ought to do. Just put a point on it, and be bodacious here. You're among friends here.

COMMISSIONER MCDOWELL: Just among us, and C-SPAN's cameras aren't on.

MR. MAY: Right.

COMMISSIONER MCDOWELL: There has been a lot of debate as to, long term, what should communications regulation look like. I subscribe to the

philosophy that competition supplants the need for regulation. I've said before there is no Federal Clothing Commission, the other FCC, because the clothing market presumably is competitive. So, we should adopt policies that promote competition.

There has been debate, and it's healthy to have this debate every time an FCC reauthorization bill comes before Congress, and even when they're not before Congress, to talk about whether some of the policy decisions should actually come from the executive branch, should there be an assistant secretary for communications, or some such thing. Should the FCC, in that scenario, be more of an enforcement agency, an adjudicatory body?

Those are all good questions to ask. As we continue to look at markets to determine where there are bottlenecks and whether they actually need government intervention to pry them open, then we can look at it from a general competition law perspective, rather than just a regulatory law perspective.

Those are issues which are healthy to discuss before Congress, and should be aired out. But, as we've pointed out, it takes decades to get major reform. Probably the last major reform of the FCC was when they went from seven commissioners down to five. But that was about the extent of it, and that was 30 years ago.

MR. MAY: I mentioned that I was doing telecom policy back in 1979. But when you said "decades," that begins to worry me a little bit about the future and whether I will be around for that.

COMMISSIONER MCDOWELL: You're going to make it. Just eat right and exercise.

MR. MAY: Okay.

(Laughter.)

MR. MAY: Let's really put a further point on this. You mentioned executive branch agencies as one thing to be looked at in the mix, and how they relate.

But just so everyone appreciates what we're talking about, the FCC is one of those so-called independent regulatory agencies. It's a multi-member commission with bipartisan membership and staggered terms. Of course, all of those features were part of the Progressive Era, New Deal construct for the creation of these so-called independent regulatory agencies that would make decisions.

The key notion -- and I'm only over-simplifying maybe a little bit -- is that these agencies would be largely insulated from politics, because of their structure, and that their decisions would be guided by the expertise of the commissioners and the staff.

Now, that's what we have. I'm not going to even ask you whether it's a good or bad thing, initially. But describe for us, so you can help us understand, what's the mixture of politics and expertise, ordinarily, in the FCC decision-making? Or, to put it another way, if the FCC is an independent agency, as I've described, how does politics intrude in your decision-making?

COMMISSIONER MCDOWELL: For those watching on C-SPAN

who may not know, we are all appointed by the President and confirmed by the Senate. By definition, we are appointed by a politician and we are confirmed by 100 others in the Senate. So there is politics there.

Politics does create public policy. Politics can have a dirty connotation. But, at the end of the day, the root definition of politics is a good one.

MR. MAY: But you have a fixed term, just so we can be clear.

COMMISSIONER MCDOWELL: Yes.

MR. MAY: The President can't dismiss you because he disagrees with one of your decisions.

COMMISSIONER MCDOWELL: Exactly.

MR. MAY: Or Congress can't, as well.

COMMISSIONER MCDOWELL: That actually helps tremendously. So we have a fixed term, but we can only be removed from office by impeachment from the Senate. And, thankfully, that hasn't happened yet.

So, that does give you a certain amount of autonomy. Now, Congress can pass legislation, and the President can sign it, to make us do something, or prevent us from doing something, that can restrict our budget to keep us from pursuing a certain goal. So politics is always there. We can be called up to Capitol Hill before relevant committees and be browbeaten, and the directly-elected representatives of the American people can complain and voice their opinions to us. And that is a healthy part of the process.

So, sure. It's political for all those reasons. But there is that degree

of insulation from it, as well. Everything we do is ultimately public. Our decisions are written and available for the public and available to appeal through the courts. So there are a lot of checks and balances, should the Commission do something it's not authorized to do.

So, there are some building blocks for the basic foundation of the system. Then it's back to that matter of how do different personalities and philosophies shape the Commission. And that ultimately is what decides how each commission acts and how it produces public policy.

MR. MAY: The reference to how different philosophies shape different decisions is an excellent segue into my next question. But maybe before I ask the next question I have in mind, you said you rely on competition as a guide in making decisions. Am I correct? This will lead in to the discussion of all the substantive topics we're going to talk about.

COMMISSIONER MCDOWELL: That's the goal. Let's look at the markets and see what's competitive, see if there are market failures, see if there are bottlenecks, *et cetera*.

MR. MAY: You've actually got the FCC's chief economist here, in the audience with us, Jonathan Baker.

So, my question is, how do you know when a market is sufficiently competitive that you don't want to regulate it?

COMMISSIONER MCDOWELL: Maybe it's a little bit like an obscenity, you know it when you see it.

I don't think there is going to be a strict test. Every situation is going to be unique. You look at the facts of each situation, you follow the laws as to what you're actually enabled to do, what you're empowered to do, as an agency. But look for concentrations of market power and abuses of that power. And if you need a remedy to fix it, make it narrowly tailored, hopefully make it 'sunset,' and go from there. You have to take each case as it comes to you, on its own facts.

MR. MAY: I just want to remind the audience, for those of you who weren't with us this morning, we want to have questions in this session, as we did throughout the morning session. As we're having our conversation, if you think of questions, keep them in mind and you will have an opportunity to have Q&A. So I invite you to do that.

Your last answer leads me to this question. When Chairman Genachowski came in, he put a real emphasis on what he called data-driven decision-making. It had a really nice ring to it, "data-driven decision-making." In fact, he repeated it so much it became what I might call a mantra, almost.

A lot of data comes in to the Commission, as we all know. You and Chairman Genachowski, for example, get the data and you get the same data, generally -- hopefully you have the same data. But that leads him to come to a very different conclusion than you do on certain issues -- say, net neutrality -- when you're looking, presumably, at the same data.

That's puzzling to me, if you've got a data-driven commission, except if you take into account that regulatory philosophy must matter.

So, here is my question. How do you bring together those two ideas? Talk about how they lead you to reach a different decision from your fellow commissioners.

COMMISSIONER MCDOWELL: It's probably like any other collaborative policymaking body, whether it's a Congress, or a panel of judges, or other agencies. Your philosophy is going to have a lot to do with how you look at the facts. But also, you have to look at the law. When in doubt, read the statute. That's always a helpful place to start. Look at the court cases that might govern that particular area, as well, and go from there.

It could be that you completely agree with a policy outcome, but we just clearly don't have the statutory authority to do so, or a court may have said otherwise.

MR. MAY: But let's put aside those, because those are pieces of data that probably everyone knows. The statute is the statute, and the court decision you might agree on. But talk about it a little bit in terms of market data, or predictions about the future, or whatever type of factual material that the Commission considers when making decisions.

COMMISSIONER MCDOWELL: It could be that sometimes a commissioner or a chairman comes in with an agenda, and they look for facts to help support that agenda. There are other times when there is a new issue brought to their attention, and they will open a record, and they will balance the facts.

I will challenge your primes a little bit. It's hard to set aside the

statute and the courts; that's what gets the Commission in trouble on appeal. And I try to make sure that I am as faithful to the statute as I can be.

MR. MAY: Let's move into a discussion of some of the substantive issues, because I think we have got an appreciation of how you approach decisions and your philosophy.

Surprise, surprise, the first issue I want to talk about is net neutrality. Frankly, I have been talking about net neutrality for seven or eight years. And I don't see any reason to stop right now, right at this moment, even though I know the Commission has just reached a decision.

But now, everyone in the audience -- I'm sure in this audience -- has read your 33-page dissent to the Commission's net neutrality decision, maybe even memorized parts of it, for all I know.

COMMISSIONER MCDOWELL: Hopefully not.

MR. MAY: But let's talk about it. Now, just to set the stage, you called the FCC's action "one of the darkest days in recent FCC history." Do you really believe that, or were you just taking some poetic license for dramatic effect, after having just quoted Shakespeare a few sentences before that?

COMMISSIONER MCDOWELL: When you're writing a 30-page dissent with 130 footnotes, you have to put something in there to keep the reader's attention. So, a little bit of rhetoric doesn't hurt every now and then.

MR. MAY: Now, I want to quote again from your decision. Obviously, have no fear, we are not going to have time to explore all 33 pages. A

lot of it turned on your analysis of the Commission's legal authority. You disagreed with the majority, that the Commission had authority to promulgate these rules. We may talk a little bit about that, but put that aside. I just want to give you a quote, and ask you to explain, because I think this quote gets to the nub of the matter, perhaps.

Commissioner McDowell said, "Using these new rules as a weapon, politically-favored companies will be able to pressure their political appointees to regulate their rivals to gain competitive advantages. Litigation will supplant innovation. Instead of investing in tomorrow's technologies, precious capital will be diverted to pay lawyers' fees. The era of Internet regulatory arbitrage has dawned." That's a pretty stiff charge.

COMMISSIONER MCDOWELL: Well, the "dawning" thing actually does contradict the "darkest day of the year" part, doesn't it?

(Laughter.)

COMMISSIONER MCDOWELL: Sorry about that.

MR. MAY: I thought it was all just part of the poetry, myself.

Anyway, there are a lot of different ways to think about it. But that gets to the nub of the matter.

Take a couple of minutes to explain what troubled you so much about the Commission's decision. Again, put aside for now the question of the legal authority, which we appreciate.

COMMISSIONER MCDOWELL: I can't. But we'll come back to

that, it's intertwined.

MR. MAY: Let me just ask. We'll get it out, because even assuming you reached a conclusion that the Commission had authority to do what it wanted to do, under your reading of the statute, would you have been fine with the regulations that were promulgated?

COMMISSIONER MCDOWELL: Let me go back to the first part of your question. The most frequent request we get at the Commission from industry players is: "Please regulate my rival. My rival is running too fast. Could you please slow him or her down?"

MR. MAY: They don't say it quite that way, though, right?

COMMISSIONER MCDOWELL: They don't come out and say it that way.

MR. MAY: Do they usually say, "We just need a level playing field?"

COMMISSIONER MCDOWELL: There are a lot of different ways to say it. But that's at the essence of a lot of requests we get. And it can be couched in terms of: "This is actually going to help consumers, if you regulate my rival," *et cetera*. It usually comes in the context of a competitive marketplace, or else there wouldn't be a rival to regulate.

Part of the concern with legal analysis is that there is no limiting principle in the Commission majority's order of December 21st, no limiting principle on the Commission's authority to regulate.

So, if it's truly unlimited power, to the point of the Commission having the authority to regulate rates, terms, and conditions -- and the Commission has already been on record as saying that Title I gives them that authority -- then there is no end.

It just takes three votes to determine the basis of a complaint. So what we're also doing is opening up the Commission to be a new tool in negotiation strategy, or in competitive strategy. Instead of just knocking the stuffing out of each other in the competitive marketplace, now you're coming to the government to help pick a winner or a loser. That is troubling. And I know that the order is not going to stand on appeal. We can talk more about that in a minute.

The uncertainty that's injected now into the marketplace is all rolled into that quote that you read.

MR. MAY: Maybe this is part of the same thing you're talking about, but let me just ask and have you elaborate.

The Commission seemed to place an awful lot of emphasis on the purpose of the rule -- to protect what they called edge providers, meaning application and content providers, rather than network providers. They drew that distinction. And there was a lot of talk about how one of the chief purposes of the rule was to make sure that the edge providers are protected so they can innovate.

But I want to ask you what you think about this distinction between the edge providers and the network providers. Number one, is it a durable distinction at all? And does it make sense?

COMMISSIONER MCDOWELL: I don't think it is a durable distinction. Let me outline the profile of a company for you that I'm thinking of. It has thousands of miles of fiber optic connectivity. It's got hundreds, if not thousands, of servers and soft switches. It offers video, voice, and data services.

Is that company: A, AT&T; B, Microsoft; C, Verizon; D, Google? The answer is it's all of the above.

So, as consumers are demanding -- and the marketplace is demanding -- more convergence of technology, the law has to respond in kind.

Now, one can make the argument that the difference there is two of those companies have last-mile facilities. And since I've been at the FCC, we've been working hard to try to have more last-mile competition, whether it's our December of 2006 video franchise order to make it easier to get fiber, competitive fiber, into the ground, whether it's trying to free up more spectrum for wireless broadband -- which is the fastest-growing segment of the broadband market, whether it's our white spaces proceeding, which started under Chairman Michael Powell -- and we just made another big break-through on that here recently. All of those efforts try to inject more competition in the last mile.

So, if you can have more market players there in the last mile, does the distinction between an edge provider and a core provider already become an antiquated concept? I put out there that that concept is already becoming antiquated.

MR. MAY: I want to move on to a legal question, which is this. I

have argued myself for about five years that the net neutrality regulations that were being considered could well violate the First Amendment rights of the information providers themselves. I have to say not that many people have listened to me, as I have made that argument. But maybe you will be more persuasive.

The Commission majority seems to accept the notion -- which I think is upside down -- that government-enforced net neutrality mandates promote free speech values, and therefore, they are consistent with the First Amendment. If you think that's wrong, just explain briefly why.

COMMISSIONER MCDOWELL: There is a lot there. I think it is upside-down.

First of all, as a threshold matter, we have to understand the Bill of Rights is actually created as a bulwark to protect individual rights against the intrusion of government. It is not designed to strengthen the power of government. The Bill of Rights was constructed to contain the power of government.

Let's look at the factual situation of the Internet right now. The Internet is open and freedom-enhancing now, and has been since it was privatized. Freedom of expression really abounds. It is really sort of a libertarian heaven in that regard.

When we look around the globe, the concern is not with private sector mischief with the Internet. It is with government meddling with the Internet, and Egypt being the most current example of that.

So, when you give the government more control over Internet

network management, or call it what you will, there are countries across the globe -- be it Egypt or Saudi Arabia, or China, or Iran, or others -- that are trying to justify more control over the Internet, all in the name of serving the public interest. There is a bona fide movement afoot, which is gaining momentum, for the UN to establish an over-arching international regulatory body that would have sway over Internet governance, domain names, Internet network management, and all the rest.

Once we cross that Rubicon into the idea of more government intervention in this space, you start to lose the moral high ground. We then put ourselves into the position of saying, "No, no, no, Other Country," that's acting badly, "don't have the government intervene in *that* way; have the government intervene in *this* way," rather than starting at the very premise which was really a fundamental hallmark of the Clinton-Gore Administration, to say the government just should not be involved with these things to begin with, and that we should continue to let these bottom-up Internet governance groups that are non-governmental in nature and are multi-faceted and have multi-stakeholders running them manage these issues.

We can rely on competition law, anti-trust law, section 2 of the Sherman Act, section 5 of the Federal Trade Commission Act, and others that would address and remedy every single part of the parade of horrors that's brought up by net neutrality advocates.

Back to the First Amendment. I did include a section on that in my dissent -- at the back of the dissent, because courts tend to not address the

constitutional issues first, if they can help it. But it is there. Freedom of expression abounds on the Internet, and continues to do so. What we need is more competition, not more regulation.

MR. MAY: You and I are on the same page on that, and maybe we will convince even more people.

We're just going to touch on a few more issues, and then I'm going to open it up to the audience. As the network anchors like to say: "This will move a little closer to the lightning round." It never seems to work there, but we're going to try it, and then see whether we have any questions.

But I want to talk about universal service and inter-carrier compensation.

COMMISSIONER MCDOWELL: Have they served the coffee yet?

(Laughter.)

MR. MAY: Yes. We did talk about that this morning. There was a lot of discussion, and so everyone understands all the ins and outs of that.

Look, you and I know -- and probably 90 percent of the people in this room would agree -- that reforming the universal service regime, and the associated inter-carrier compensation regime, the way telephone companies pay each other for interconnection, is long overdue. Without going into all the details, there are a lot of subsidies that exist in that system that were intended to achieve universal voice telephone service, which has now been achieved as nearly as it can be. But the money is still being collected. By the way, customers see on their bill a

15 percent universal service fee, so there is a real impact coming from these subsidies.

Now, I don't think we have time to talk about the way it should be reformed with that much precision and all that. But it goes back to my question earlier about the FCC and its role and the role of politics versus expertise. This reform should have been done long ago. How come it hasn't been done before?

This will be the last time, I'm sure, that his name is going to be mentioned, but it was in this context that our friend, Blair Levin, was saying that he could sure use the help of free market conservatives like you and others to really get out front on this issue.

COMMISSIONER MCDOWELL: So it was a compound question there, Counselor. But it was really about why the Commission has not achieved meaningful universal service reform in recent years.

MR. MAY: Yes.

COMMISSIONER MCDOWELL: In the fall of 2008, we were very close to deciding a lot of the thornier issues of universal service and inter-carrier compensation.

By the way, for the folks watching at home, universal service is an \$8.8 billion-a-year subsidy program, one of the largest subsidy programs administered by the federal government. It's money that doesn't go through the Treasury, as maybe farm subsidies do. It really is one kind of telecom user subsidizing another kind of telecom user.

And we were very close in the fall of 2008 to resolving a lot of the issues. There were four commissioners, two Republicans, two Democrats -- I was one of them, Commissioner Copps was another, so two of us are still on the Commission -- and we agreed, in principle and in, sometimes, in detail on a lot of matters here.

It didn't happen, and you would have to ask the chairman at the time as to why that is.

MR. MAY: Did you ask him? You were there with --

COMMISSIONER MCDOWELL: I was there.

MR. MAY: What did he say?

COMMISSIONER MCDOWELL: I don't have an answer, didn't get an answer. We got to deadlines that continued to be moved out until the end of the term, so that was that. That was a missed opportunity in my regard, and so it's a good question.

It does become a political issue. But I strongly believe that it's an independent agency, and that it is our job to resolve universal service issues. Congress is set up to where you have the House that's primarily urban and suburban in nature, and the Senate that's more responsive to rural interests. The House, in other words, represents more of the net payers in universal service; the Senate represents, generally speaking, more of the net recipients of universal service. And it's very hard for Congress to actually act on this. It's hard to get any kind of bill to conference that's actually going to be a compromise.

That's our job. I think section 254 of the act, which will be 15 years old on Tuesday, gives us a great deal of leeway, in that it's ambiguous. I think it's ambiguous in the classic *Chevron* deference kind of way.

It's really the purpose of an independent agency to go try to do the right thing, and take the arrows, if necessary. That's our job. We should go forward with it. I am hopeful that we can rekindle that spirit from the fall of 2008. Chairman Genachowski and I have had many conversations about just that, and I am very optimistic that we can go forward.

Having said all that, we are in sunshine, with a sunshine period right now. For the folks watching at home, that actually means a blackout period. But because it's Washington, we call it a sunshine period.

(Laughter.)

COMMISSIONER MCDOWELL: We have a big vote on Tuesday on these issues. So I can't get into the details of that item.

MR. MAY: Okay, okay. Now I'm going to ask if anyone has questions for Commissioner McDowell. While I ask just one more, why don't you proceed to the microphone here, and go ahead and line up, and we can get to those in just a moment.

So, the Comcast/NBC Universal merger, the FCC just approved that a couple weeks ago. There was a year-long review at the FCC.

COMMISSIONER MCDOWELL: Just under a year.

MR. MAY: Just under a year. The Commission approved it. It did

so with 33 pages, or thereabouts, of conditions that it attached to the merger. You and Commissioner Baker, I believe, issued a joint statement. You concurred in the approval of the merger, but you expressed concerns about the process and, I guess, the decision.

Can you just briefly explain what your concerns were about the way the Commission handled that merger?

COMMISSIONER MCDOWELL: I have expressed concerns about other mergers, as well, XM Sirius and some others.

We have a vague and broad duty under the statute, examining mergers under the public interest standard. We only have jurisdiction if there is a transfer of a wireless license.

That broad standard can encompass -- and, at the same time, be interpreted as being different from -- the antitrust review that's either done by the Department of Justice or the Federal Trade Commission, depending on who has got the possession at that point.

I subscribe to the philosophy that we really should only look at specific harms that are produced by the merger, whatever merger it might be, and then what can we do to cure those harms, assuming we can. And if we can, then we attach limited conditions that cure those harms, and move on.

My concern with that particular merger order as laid out in the joint statement with Commissioner Baker, was that there were a lot of conditions and there were some up-front concessions made that really had nothing to do with the

merger. They might be noble goals, they might be good corporate citizenship, but they had nothing to do with the merger.

So expanding broadband deployment, that's very noble. But did that have to become something that's a matter of law, as a result of what was essentially a vertical merger? You had a distributor of content buying a producer of content.

Over the years, the Commission more and more has been looking to resolve or achieve other ends, trying to garner support for other items on a personal agenda or a political agenda when merging companies come before the Commission and are at a pretty vulnerable point. They need that merger to go through, so it has been a cost of doing business for those companies.

If you want to enact policies to encourage those non-merger-specific issues, then go ahead and open a rulemaking. Let's do it that way.

MR. MAY: I agree entirely with that estimation.

Okay, we're going to open it up to questions. Now, we're going to follow the rule we have had throughout the day. I would appreciate your just asking a question in the form of a question, and we're going to try and roll through a few of these. And identify yourself, please.

MS. KRIGMAN: Great. Hi. Eliza Krigman, Politico. In an effort to create some Friday afternoon news here, Commissioner McDowell, could you respond to Blair Levin's challenge about rate of return regulations, and sort of explain your position on it?

COMMISSIONER MCDOWELL: You know what? You're over

the Blair limit, by my tally.

(Laughter.)

COMMISSIONER MCDOWELL: So we're locked out. And actually, I didn't hear what he had to say.

MS. KRIGMAN: So he has essentially said that rate of return regulation, if I understand correctly, as they apply to the rural telcos, is a form of corporate subsidy we should no longer be tolerating, and that a free market conservative such as yourself needs to publicly get behind that. Will you do that?

MR. MAY: Before you answer, I believe, to be fair, he said if you don't do that, then you're putting yourself in the company of Stalin --

(Laughter.)

MR. MAY: -- and Woodrow Wilson. I don't know which one of those you consider that you would rather not be in the company of, but that's the way he put it. So I think this probably will be an answer that makes some news on a Friday afternoon.

COMMISSIONER MCDOWELL: Yes, the Stalin comparison, yes. I get that a lot, Randy.

(Laughter.)

COMMISSIONER MCDOWELL: I've got my Bolshevik tie, someone just said. Yes, there you go. It's red and blue, it's a bipartisan tie.

So, Blair, how does it feel to be talked about like you're not in the room?

(Laughter.)

COMMISSIONER MCDOWELL: First of all, let's put all options on the table. Where did you go, Eliza?

MS. KRIGMAN: Back here, typing.

COMMISSIONER MCDOWELL: Oh, okay, great. You're typing. Got it. Want me to speak slowly, so you can transcribe this?

Let's, put all options on the table, Eliza -- make sure you put your own name in the quote.

We're in sunshine/blackout. So I can't go into the details regarding the notice of proposed rule-making we're voting on Tuesday. But there will be ample opportunity -- perhaps to Mr. Levin's delight -- to comment on many ideas just such as that.

Let's put everything on the table, and let's all work together to try to achieve the best result.

MR. MAY: Okay. Next question, please.

MR. COVER: Sure. Matt Cover with CNS News. This was hinted at in some of the questions. For those who haven't read your opinion, I just wanted to ask, does the government have the authority to regulate the Internet? If so, where does that authority come from, and what is it?

COMMISSIONER MCDOWELL: Right. That's a broad question. I assume you mean, by "the government," you mean the government, not just the FCC. Or do you mean just the FCC?

MR. COVER: FCC.

COMMISSIONER MCDOWELL: Just the FCC.

The government does have, broadly speaking, some jurisdiction over the Internet, if there is criminal activity and such going on, or if there are antitrust concerns, *et cetera*. But the FCC has very limited authority.

As we come up on the 15th anniversary of the 1996 Telecom Act here, this coming Tuesday, February 8th, "Internet" is mentioned in that act a few times -- not a lot, but a few. And when Congress did not act to explicitly give authority for the regulation of Internet network management, that was evident.

The bent of section 706 is deregulatory. And 706 has been used, most recently, in the Internet network management order of December 21st to justify those regulations. I think it's clear, both from the plain language of section 706 and its legislative history and the judicial interpretation of it, that it does not give the Commission the authority that the majority was seeking.

The Commission is hard pressed to find the authority to support its rules.

MR. MAY: Okay. This will be the last question, because I have promised Commissioner McDowell that we would end at 2:00. And under FCC time, we're still close. So we're going to do that.

COMMISSIONER MCDOWELL: Has the clocked stopped?

MR. MAY: Lynn, identify yourself, and you get the last question.

MS. STANTON: Lynn Stanton, TRDaily.

COMMISSIONER MCDOWELL: No pressure. This is the last question. And you can't include the initials B.L.

(Laughter.)

MS. STANTON: I am going to not mention the gentleman sitting over here.

COMMISSIONER MCDOWELL: Okay.

MS. STANTON: Assuming that the order adopted in December is ever published in the *Federal Register* and takes effect --

COMMISSIONER MCDOWELL: A little sarcasm there.

MS. STANTON: In the interim before a court rules on it, what would your position be on anyone who challenges something under that order? Would you treat the order as being in effect, and interpret the order, or would you be more inclined to say, "This order should not exist, and I am just going to vote against anybody who" --

COMMISSIONER MCDOWELL: Excellent question, actually. That's a very good question. You have covered me since I got to the Commission, so you will know that until a court says that we don't have the authority to do that, or strikes it down, or stays it -- I think there is a better-than-average chance that it could be stayed if the party moves for that -- that that is the rule on the books. We will have complaints before us, I'm sure, and we will look at those complaints case by case, as Chairman Genachowski has outlined.

At the end of the day, I think the order goes down in flames.

MR. MAY: Okay.

COMMISSIONER MCDOWELL: That was a very good last question, by the way. So, congratulations.

MR. MAY: How many times do you get congratulated for a question --

COMMISSIONER MCDOWELL: For doing your job.

MR. MAY: I think that all of you will agree that this was a terrific conversation. Each year we seem to have a conversation at this conference that gets better and better. I want to thank Commissioner McDowell for coming over.

COMMISSIONER MCDOWELL: Thank you for having me, and congratulations on your success.

MR. MAY: Now, before we give you your final round of applause, I have a Free State Foundation coaster here that I would like to give you.

COMMISSIONER MCDOWELL: Oh, good.

MR. MAY: Commissioner Baker took hers this morning, so I am presuming there is no issue. But I told her that if the general counsel happens to rule that this is impermissible under any or all of the Commission's rules, that I am sure you could donate it to the cafeteria downstairs, or whatever.

But I do want you to take it as a token of our appreciation, and thanks very much for coming.

COMMISSIONER MCDOWELL: Thank you, Randy.

(Applause.)

MR. MAY: So, with that, I want to thank the audience for coming. Once more, want to thank C-SPAN for being with us. And we will consider the conference adjourned. Thank you.

(Whereupon, at 2:06 p.m., the conference was adjourned.)