



THE FREE STATE FOUNDATION
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**The Free State Foundation's
Lunch Seminar**

"IF I WERE THE FCC CHAIRMAN..."

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National Press Club
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MODERATOR:

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PANEL PARTICIPANTS:

GAIL MACKINNON, Time Warner Cable

CRAIG SILLIMAN, Verizon Communications

GIGI B. SOHN, Public Knowledge

CLOSING REMARKS:

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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: Welcome. I'm Randy May, President of the Free State Foundation, as most of you know. I'm really glad you're here with us today. This is another in our series of lunch seminars.

Many of you have been here before. I'm especially excited about today's program. It looks like a lot of you are excited, as well. You might have seen the seminar's title and thought that the FCC Chairman is going to be here, but that's not true. It's a great turnout, and we appreciate it. By the way, in my view, any one of these speakers who I'm going to formally introduce in just a few moments, in my book is well-qualified to be the FCC chair. That doesn't mean that I would agree, necessarily, with everything they say.

I wasn't just looking at Gigi when I said that, but...

(Laughter.)

MR. MAY: Okay. Now, before introducing today's program, regulars of Free State Foundation seminars know that we're often in the First Amendment Room here. And many of you have heard me say before that I like to be in the First Amendment Room. Of course, the First Amendment

has been in the news a lot here recently. I like to be here, because one of our missions at the Free State Foundation is to advance First Amendment-friendly and First Amendment-protective policies.

So the First Amendment has been in the news. Of course, we've had the news about the Department of Justice subpoenas to reporters, and that raises First Amendment issues.

But closer to home, at least work-wise for many in the audience today, we also have D.C. Circuit Judge Brett Kavanaugh's opinion in the so-called Tennis Channel case. As some of you may know, Judge Kavanaugh declared that the FCC's determination that Comcast had violated the Communications Act by refusing to move the Tennis Channel to its preferred location, its preferred distribution tier, violated the Communications Act. And Judge Kavanaugh said that because Comcast and other video providers lack market power in the video market, the FCC's action would be violative of the First Amendment.

I expect that some of our discussion today would touch on the First Amendment. And that will make us feel right at home, as I always do in the First Amendment Room here.

So with respect to today's program, we don't know

exactly when, but we do know that we will have a new FCC chair in the not-too-distant future. We're pretty sure we know who he's going to be. And I'm pretty sure that he's going to be interested to learn what we say here today. By the way, by referring to "he," I don't mean in any way to diminish the importance of Chairman Clyburn's interim chairmanship, because this is an important period, as well.

I'm sure a lot of the advice that we hear today from our distinguished speakers probably will apply to whether we have in mind Mr. Wheeler or Ms. Clyburn.

We have a super line-up of speakers. I'm going to introduce them in a moment. But just a couple of housekeeping things before that.

First of all, the calendars turn. It's now June. I know a lot of you are probably beginning to think about your summer reading list and what you're looking forward to reading this summer. I know that Dan Brown has a new book out. And some of your frivolous friends, some of those types of people, might be reaching for Dan Brown's new book.

But for those of you in the room, people that want really exciting reading, this may be the last time I can point out that you can still get the Free State Foundation's book, *Communications Law and Policy in the*

Digital Age: The Next Five Years. You can get it from Amazon, Barnes & Noble, and Carolina Academic Press. So if you want to be at the beach and impress those people next to you who are reading Dan Brown, this would be a good way to do it.

One other housekeeping thing. I'm pleased that FSF has hired a new staff person. She is Sarah Leggin, who just graduated a few weeks ago from the law school at American University, the Washington College of Law. And Sarah's going to be starting with us in September, and here is Sarah right here.

(Applause.)

MR. MAY: We're excited that Sarah's going to be joining us. And I'd be remiss if I didn't actually just take this opportunity to acknowledge Seth Cooper. All of you know Seth and the great work that he has been doing, continues to do, for the Free State Foundation as Research Fellow. Seth, we appreciate everything that you do.

Our normal photographer that many of you have seen is Mark Van Bergh, who's usually here, and he has the day off. He's doing something else, so I had to draft Seth into taking a few photos. But what he's best at is turning out the good work that we do at FSF.

Now I'm going to introduce the speakers. Here's

the format we're going to use, so all of you will know. I'm going to ask the speakers to take no more than five minutes, initially, to speak as if they were going to be the FCC chair and tell us what they would do as the FCC chair. I asked them to list their top five priorities to channel the thinking.

They're going to do that in no more than five minutes. Then I asked them to listen carefully to their fellow panelists. I'm going to come back and give each of them three minutes to either agree or disagree with anyone and use that time to accentuate the issues for us. After that I'm probably going to ask some questions, myself. In fact, I know I will. But I want you to think of questions, too, because I'm going to give you a chance to ask questions, as well.

Finally, you've got our Twitter handle. "IfFCCChair" is the Twitter handle. Tweet away, and even after you leave here today, I'll be checking that, of course. So keep sending along your ideas at IfFCCChair.

Okay. Now I'm going to introduce the panel in the order that I'm going to ask them to speak. I'm going to do as I usually do, the short version, because we handed out for everyone the brochure that has their entire life history on it. So I'm just going to give you their title,

and then we'll jump right into it.

First, it's going to be Gail MacKinnon. Gail is Executive Vice President and Chief Government Relations Officer for Time Warner Cable. In that capacity she oversees the company's Washington, DC, public policy office, responsible for the company's legislative and regulatory strategies. And she started her career working on the Hill with Congressman Jack Fields, doing telecomm work for him.

Next, we have Craig Silliman. Craig is the still fairly newly installed Senior Vice President for Public Policy and Government Affairs at Verizon. In that capacity he is responsible for Verizon's global public policy, federal legislative affairs, federal regulatory affairs, strategic alliances, and national security. When I was looking at Craig's bio this morning, I was reminded that you went to that university down the road, as we refer to it. "We" shall remain unnamed.

Last, of course, we have Gigi Sohn. You all know Gigi. She is President and CEO, and co-founder of Public Knowledge, a non-profit organization that addresses the public's stake in the convergence of communications policy and intellectual property law. Some of you probably know there are some positions Gigi articulates that I don't

necessarily agree with. But I always like to have her here. And we're longtime friends, I would say.

In fact, I told Gigi outside, when I saw her, that other than myself on this podium, she may be the person who's appeared at FSF programs more than anyone else.

When I said that, it caused me to worry a little bit.

(Laughter.)

MR. MAY: But I think it's true, and I'm happy to have her here.

So, with that, I'm going to turn it over to Gail, initially.

MS. MacKINNON: Thanks, Randy. It's nice to be here today and see so many friendly, familiar faces. I can't speak for Craig and Gigi, but I'd be happy to forego any questions so we can actually get out and enjoy this beautiful day today.

(Laughter.)

MS. MacKINNON: I do have some prepared remarks.

With the new leadership at the FCC it's a great time to be looking at what's been done in the past and to strategize about a course for the future. The marketplace and industries regulated by the FCC are constantly changing, with new competitors, new technologies, new

business services, and new consumer demands all developing very rapidly.

The FCC's rules have failed to keep pace. The result is an uneven playing field for direct competitors in a regulatory framework that is not flexible enough to adjust to these new developments. As FCC chair, I would direct the agency to analyze existing regulations and eliminate or modernize ones that are no longer working. And I would also look through that lens in considering new rules going forward.

Here are the first five steps I would take:
Create certainty for infrastructure providers to continue to invest in high speed data networks by closing the Title II net neutrality proceeding. The Title II proceeding, examining whether broadband Internet access service should be reclassified as a common carrier service, was opened in June 2011 after the D.C. Circuit struck down the FCC's attempt to regulate ISPs' network management practices. It remains open more than three years later, in spite of the Commission's adoption of the *Open Internet Order* in December 2010. Although these rules are under appeal in the D.C. Circuit, regardless of how the court rules, I would move to close down the Title II proceeding.

An open Internet is a concept embraced by all

parties and participants in the Internet ecosystem, including broadband ISPs. Since former FCC Chairman Powell articulated the four Internet freedoms in 2004, broadband ISPs have demonstrated a commitment to meeting consumer demand for unfettered access to Internet content and service.

At the very time the Commission is updating and modernizing rules like USF and intercarrier compensation, even the suggestion that it would contemplate putting an 80-year-old regime on broadband access service providers and interfere with the Internet's success is really unthinkable. Moreover, if we were serious about convincing other nations to refrain from exerting onerous government rules within their borders, the Commission must lead from example.

The second thing I would do is address the problems associated with the outdated retransmission consent regime by completing the pending rulemaking within six months. The '92 Act imposed a comprehensive set of regulations on cable operators based on the premise they were monopolies. Congress established the right of broadcast stations to negotiate for retransmission consent out of concern that cable operators' bottleneck control would threaten the existence of local broadcast stations.

The FCC then established a series of rules: The network non-duplication rule, the syndicated exclusivity rule, and a number of others, to protect broadcasters from competition. Now, fierce competition exists among distributors. Today, cable competes with DBS, telcos, over-the-top providers, over-builders, and now companies like Aereo.

The courts have recognized the competitive nature of the distribution business, as Randy just referred to, most recently in the Tennis Channel case.

And so while competition has developed on the distribution side, local broadcast stations still do not face competition. The effect has been harm to consumers through threats of blackout, signal loss, and increased fees. In completing the retrans proceeding, I would eliminate network non-dupe and syndex, adopt a rule prohibiting blackouts, consider a dispute resolution mechanism, and clarify the television ownership rules to prohibit joint retrans negotiations by separately owned stations.

Third, I would update all video regulations to better reflect the competitive marketplace that exists today.

Specifically, I would initiate a rulemaking within

60 days to address whether the CableCARD regime should be eliminated. The market for navigation devices is no exception to the vibrant, competitive marketplace that exists today. Consumers can access video on their computers, their tablets, or gaming systems and phones. These new developments were unimaginable when Congress passed the '96 Act with Section 629.

The CableCARD integration ban and related decoding rules are prime examples of technical mandates that may have been well-intentioned at one time, but have long outlived their purpose. The effect of the D.C. Circuit's decision in *EchoStar* is that the CableCARD and decoding rules apply only to cable. This disparate treatment, singling out cable, does not make any sense, nor does applying rules to all MVPDs when the marketplace has achieved the goal of Section 629, which is enabling retail devices like Roku, the iPad, the Xbox, to access MVPD services.

I would address the growing demand for WiFi by expediting two important proceedings: making immediate changes to the existing five gigahertz rules and adopting a band plan in the 600 megahertz incentive auction proceeding that provides a balance between licensed and unlicensed wireless broadband use. The spectrum crisis is not just

limited to licensed spectrum. Congress has provided opportunities and directives for the Commission to address the country's unlicensed spectrum deficit.

Given the growing demand for wireless broadband Internet connectivity, including through the use of WiFi technology anywhere, anytime, on any device, the Commission must expedite two proceedings. The five gigahertz proceeding is considering how to revise existing rules for unlicensed spectrum suitable for outdoor WiFi deployment. By the end of the summer, the FCC can move to make immediate changes to some of the existing five gigahertz rules to provide operators near term access to additional outdoor suitable WiFi spectrum.

The 600 megahertz incentive auction proceeding has developed a robust record addressing the complex issues presented, developing a band plan to accommodate broadcasters, licensed wireless broadband providers, and unlicensed spectrum users. Once the reverse option of broadcast spectrum and the forward auction of wireless spectrum licenses have occurred, the FCC should move forward to make available additional, wireless broadband spectrum, adopting a band plan before the end of the third quarter.

Finally, I would complete, on a timely basis, all

the various reports the FCC is charged with producing, like the video competition report, the wireless competition report, and the biennial review. The FCC must be up-to-date on the state of the industry it governs. So the faster the Commission accurately assesses marketplace realities, the sooner it can produce rules that make sense for the marketplace and consumers.

MR. MAY: Thank you, Gail. That was a good specific agenda as to what you would do.

So now we're going to hear from Craig, for your perspective. Craig?

MR. SILLIMAN: If I were FCC chairman, the first thing I would do is ask to be invited back and see if at that point I could actually get par with Gigi and have my own microphone and my own printed nametag.

(Laughter.)

MS. SOHN: You have to speak many times.

MR. SILLIMAN: I don't know how many times I have to speak before I get my own printed nametag. You have your own nametag.

MS. SOHN: Well, they just keep mine on file.

MR. MAY: In terms of being able to upgrade these types of things, on those brochures I passed out there's a form to make contributions.

MS. SOHN: There you go.

MR. SILLIMAN: Okay. I was hoping that Gigi was going to do the honorary Craig Silliman printed nametag donation.

So thank you, Randy, and thanks for letting me use your microphone, Gigi.

If I were the FCC Chairman. Let me start with a couple of topical issues. I want to start, actually, going from more general to slightly more specific. At the end, I want to talk about something even more thematic and more strategic.

There are a number of things in the inbox right when you come in. I would put right at the top of the list the availability of spectrum. We have had tremendous success in the mobile industry in this country. The growth rates are extraordinary. The investment has been extraordinary. You see more and more stories coming out of Europe right now with European policymakers turning and looking at the U.S.

15 years ago, when I used to travel Europe, they'd say, "Yes, you are ahead of us on the Internet, but mobile telephony is really owned by Europe." Fifteen years later, Europeans are saying, "What went wrong with our policy environment? We need to adopt policies more like the U.S."

Right now in the mobile environment, particularly in the mobile broadband environment, the U.S. is a tremendous success. But with that success comes new needs for new spectrum. The spectrum demands are growing extraordinarily. So one of the top priorities has to be how we continue to get more spectrum out there and available for use. The availability of spectrum is the rocket fuel for innovation in this rapidly growing and rapidly innovative industry.

You have two specific things right on the agenda from the outset. The incentive auction is going to be fundamental to succeed. And success is going to be measured by a variety of things, including raising enough money for the Treasury and to fund the National Public Safety Network. You also need to focus on the 1755 to 1780 band of spectrum. You need to get that cleared. You need to get that out there, available and in use, so that consumers can continue to benefit from the innovation in this space. New spectrum availability in years to come is absolutely fundamental and right at the top of the agenda.

Secondly, I'd be thinking about IP transition. Now, technological transition is going to happen. With innovation and investment, that's what technology does. It continues to update, to upgrade, to move forward. That's

going to happen. As we have opened some of these proceedings on the IP transition, we need to make sure that our studies of this and our hearings on this don't actually slow down the IP transition in ways that actually harm consumers. That's going to be fundamental. So we want to make sure that this natural progression to better and better technologies out there happens apace and isn't hindered by the ongoing proceedings at the FCC.

Third, we have an open special access proceeding. Frankly, I'm not sure the data gathering that's taking place or the proceeding itself has been necessary. Having launched this, we want to make sure that we do this in the right way. We look at all the data, all the evidence, before drawing any conclusions on this. But there's a balance here. We want to make sure we get all the data that we need to make a decision, but we also want to make sure that we don't end up with an open-ended data collection exercise.

I'm mindful of the infamous exercise in the first part of the 20th century when the Interstate Commerce Commission decided it was going to build a comprehensive picture of every asset in the railroad industry in order to get a better view of pricing. They started the process in 1913, and it was finally closed out in 1933. They spent

close to 50 percent of the agency's budget over those 20 years and ultimately produced tomes and tomes of reports that then went nowhere. It's very easy to get into an open-ended exercise when we decide we want to try to understand everything going on in a rapidly moving and competitive environment. That is not a good use of resources.

So make sure we get all the facts on the table; we know what actual competition and potential competition looks like. Then let's draw some conclusions and bring it to a close.

Finally, on a more tactical level, but important symbolically, I would look to streamline some of the current rules. There was a recent petition filed by the U.S. Telecom Association to seek forbearance on a number of FCC rules, including some that go back to the era of the telegraph. One of the items that the FCC has chosen not to take action on was accounting rules, even though the FCC hasn't looked at the data in five years.

These types of things are important to close out, more for symbolic purposes. If you're going to take on huge policy issues, such as the availability of spectrum and the IP transition, it's important to have credibility on the small, easy things like getting rid of reporting

obligations that no one at the FCC actually looks at anymore. It's important we take care of those. If we can't do the easy things, it's going to be harder to build credibility on doing the big things.

So that's a specific item list. But if I were the FCC chairman, I would look at something even more strategically. This rapidly moving 21st century industry is still regulated under a policy framework that originated with the railroads back in the 1880s and that came up through the 1934 Act. Even the 1996 Telecom Act is now 20 years old. This predates mobile broadband. This predates cloud computing and most everything else of what we're looking at in the industry today.

The FCC is facing an unenviable task of trying to fit square pegs into round holes, given the legislative and regulatory framework under which they're operating today. If I were the FCC chairman, I would stand back and look at this strategically, and look bigger than just that agency and its rules. I wouldn't want to live the next three to four years trying to fit square pegs into round holes, trying to live in a number of ancillary jurisdictions as you're trying to keep relevant with the new technology.

I want to step beyond that and try and lead the broader government policymaking stakeholders into a 21st

century policy framework for this industry. Now, I don't know a lot about the transportation industry, but I do know who Alfred Kahn is. Alfred Kahn was a legend because he was bigger than just the agency or the time that he was in the transportation industry. There's an opportunity here for strategic, policymaking leadership. And I would want to be seen as the Alfred Kahn of the communications industry.

Thanks.

MR. MAY: Craig, thank you very much. Craig mentioned Alfred Kahn. In my book he was a tremendous regulatory economist. One of my sources of pride since I started the Free State Foundation was the fact that he early on agreed to be a member of the Free State Foundation's Board of Academic Advisors. In fact, he's still listed among our academic board listings. So I'm glad you mentioned him.

The other thing you mentioned was the telegraph. That called to mind this piece I wrote called "A Historian for the FCC." It basically looked at Tom Wheeler's avocation as a historian. As you know, one of his books focused on the role the telegraph played in winning the Civil War. And essentially I was making a point that I hope he would look at history and realize we're a long way

from the telegraph and some other things.

Anyway, after that piece was published, I got a nice note from Tom. He just said, "Randy, that piece blew me away." I don't know whether that was good or bad, but he had read it. So one of the questions I'm going to ask these panelists later, probably, would be to put on their historian's hat and, with that in mind, think about the way that they would frame their administration if they were the chairman.

Gigi, you've got five minutes now.

MS. SOHN: So good afternoon, everybody. Randy, thank you for letting me live my dream for two hours. And I think that Craig mentioned Fred Kahn and the telegraph to suck up to you so he would get a regular tent card next time.

{Laughter.}

MS. SOHN: If I was in that big eighth floor office, my number one, and probably number one through five, issue that I would take on from the day I stepped into that room would be moving towards completing the IP transition, completing the rules that will undergird the IP transition. Hopefully, there will be some rules that will undergird the IP transition because, frankly, the transition is taking place now. And people may have been

seeing the little pissing match going on between my organization's Harold Feld and Verizon over Verizon's replacement of their ruined copper in Fire Island because of Hurricane Sandy with VoiceLink.

The transition is happening. That is what I'm saying. And we are in disagreement as to whether VoiceLink is a substantially lesser service than what was there before and whether Verizon should be asking the FCC for permission for lesser service, for replacing the better service with the lesser service. But it's kind of beside the point. The point is the FCC has to take control of this transition. It's important that we not diminish that.

We do strongly believe that Verizon should be filing what they call a Section 214(a) request with the FCC. But the larger point is the transition is happening, whether it be for natural disaster reasons or other reasons, and the FCC has to set some rules of the road.

Now, if I could put my Public Knowledge hat on for just one second, we've laid out what we call five fundamentals - that is, values that should undergird any rules for the IP transition. And they are: service for all Americans, interconnection, competition, reliability and consumer protection, and public safety. So those are the five.

We believe there need to be rules of the road for each one of these. We're not wedded to a particular regulatory system - old, current, or new - but it's not acceptable for these five values to be just left to the free market. For example, interconnection and how you specifically handle it. We're not there yet. We're doing a series of convenings with folks, different stakeholders, including companies like Verizon, to figure out where they're coming from.

Saying that you just leave interconnection to the free market, and there doesn't have to be some basic duty to interconnect between networks, is not acceptable. This is one of the most important communications policy issues of the last 20 years. And the chair needs from Day One to be working on these issues.

Second, I would start an inquiry on the use and impact of data caps within two months of taking office. For those of you that don't know what data caps are, they are limits on the amount of data that you could use that are imposed on your Internet access provider. And we've been asking the FCC now for the past year not to regulate them, not to ban them, but to just simply do an inquiry. How are they set? How are they raised? And what is the purpose? Are they being used to discriminate in favor of a

particular service or application or content? But we have been just asking for an inquiry so the expert agency can know what they're dealing with.

Now, I'll be the first one to admit I'm not sure of the right regulatory answer as of yet. But I'll also say if there is one, it would deal with discriminatory caps. Take the situation, for example, that is going on now with Comcast. Their Xfinity service is exempt from their cap with their Xbox 360 broadband service. That, to us, is a clear violation of network neutrality.

I think Randy wants to talk about the discussions over ESPN paying to be exempt from the cap. I would say that while that violates the spirit of net neutrality, it probably doesn't violate the letter of the net neutrality rules because of the wireless exemptions. But that clearly is very troubling. Just having the FCC know what they're dealing with, what the rationale is, and what the ISP's policies are towards transparency and changing those caps is a very good place to start.

Third, I would ensure that the agency has the authority to protect consumers in competition with regard to broadband Internet access, depending on what the D.C. Circuit does in Verizon's challenge to the network neutrality rules. Now, some of you may fall over dead when

I mention that if the FCC were to lose that case, the first thing I would *not* do is run to do Title II. However, I do believe that Title II gives the FCC the firmest legal ground upon which to justify these rules and that they should have done it on that ground in the first place.

The Chairman had a good idea six months before he adopted the rules, to have a Title II-like regime that would not have imposed all the 80-year-old regulations on broadband Internet access. But he chickened out. So we are where we are. And the first thing I would do if the FCC were to lose is seek certiorari to the Supreme Court.

I like that Arlington County case. If you're not familiar with that case, that was a Supreme Court case when none other than Justice Scalia, who angers all his conservative friends whenever he writes about telecom, said that an agency's determination as to whether they have jurisdiction or not is within their discretion under the famous Chevron case, and the Chevron case says an administrative agency has discretion to make a decision unless the statute is clear what the answer is. So if anybody wants a longer lecture on *Chevron*, I'm happy to give it to you.

MR. MAY: Me, too.

MS. SOHN: I would seek certiorari. If cert were

denied, I would go to Congress and say "I have a two-sentence fix." And believe you me, I have one that would give the FCC narrow authority to adopt Open Internet rules, and I would give them six months to pass it on anything, anything that's moving. If they didn't, at that point in time, you need to consider Title II. And that's one of the reasons I wouldn't close the docket.

I don't think it matters whether you close the docket or not. You can always reopen a docket, but that's beside the point. Title II really has to be the absolute last resort. And if we get to the point where cert is denied, I hope my friends to the right will come with me to Congress and say a narrow fix is better than having to go through what some consider the nuclear option of Title II.

Now, suppose the FCC were to be affirmed. I do not think it is likely, but I do think this Arlington County case gives them a better leg to stand on. And it is possible the Court has not put this case for oral argument in anticipation of the Supreme Court's decision there. So if the FCC is affirmed, if their authority is affirmed, I would urge my colleagues to close the wireless loophole.

Now, the wireless loophole and the open Internet rules say that wireless companies cannot block websites. They can't block applications. They cannot block

applications that directly compete with their voice service, *a la* Skype. And the rationale for treating wireless differently than wireline was congestion issues. I do think when you look at this whole ESPN dust-up, it takes the emperor's clothes away on congestion. Why, if your network is congested, would you allow the most bandwidth-heavy application - HD sports programming - to come under your data cap?

It's time to equalize those rules. And if confirmed, in any event, I would do that.

Fourth, I would adopt rules for spectrum caps incentive auctions by Q1 of 2014. I agree with Gail. We need to have a good balance of unlicensed and licensed, and that balance needs to be preserved. That's why this other 600 MHz band plan that's being proposed by the wireless companies and the broadcasters doesn't satisfy that, as far as I'm concerned.

And second, there need to be rules in the incentive auctions and spectrum aggregation rules that prevent Verizon and AT&T from getting most of the spectrum at auction. We agree with the Department of Justice to the extent that they urge the same thing.

And finally, and I think I will mostly make Gail happy when I say this, we need to fix the broken video

system. I'm tired. I think Public Knowledge now testified three times on this in front of Congress. We need to make sure that consumers can get the TV they want, where they want, when they want it, on whatever device they want. And we can do this in several ways. Number one is we need to get rid of legacy regulation that does nothing but protect broadcasters - syndex, network non-dupe, sports blackout - the FCC can do away with that right away.

I would also urge Congress to do away with must-carry and retransmission consent. Now, knowing that that's not going to happen, I think Chairman Genachowski and FCC did not have the courage to do what it could have done under its authority, and that is prohibit blackouts and also require a binding arbitration when there is a dispute. And I would move to do that right away. Frankly, if the FCC were to do those two things, consumers would be a lot better off.

The second thing I would do, or maybe the fifth, sixth, or seventh - I think I've lost track - as far as video competition is concerned, I would move forward on the FCC's AllVid plan, which was part of the National Broadband Plan. Now, I agree with Gail. Section 629 is not working. See, I brought my little Communications Act, because it's really been so long since I've actually looked at this

thing. I figured it might be a bad idea to bring it. I also thought it would be intimidating.

(Laughter.)

MS. SOHN: Section 629 requires the FCC to ensure that there is competition in what they called, at the time, "navigation devices." The FCC has utterly and totally failed to do that. So the answer is not to just say to the MVPDs, "You get to keep control of set top boxes and charge a consumer like me." I think I pay \$26 a month for two set top boxes. The answer is to open it up to competition. Unfortunately, the fight is not really over the boxes. It's over who controls the user interface. I really think that's something that ought to be settled, and the FCC should just move forward.

So those are five things.

MR. MAY: Great. Thank you very much. When Gigi said her first reaction would not be to adopt Title II rules and that some people might fall over dead, my first reaction was to ask whether there was a doctor in the house. Now, as I said, I'm going to let the panelists take no more than three minutes. And I know I was lax then, but I'm not going to be this time.

I'm going to be fair all around. So having in mind what your co-panelists have said, I want to try to

sharpen the issues, let you do it in the way you want to, and then I'm going to do it further with some questions to the extent you don't. But it's a good opportunity for you. We're going to go right down the line again. Just take no more than three minutes to react, if you would like, to your fellow panelists.

Gail?

MS. MacKINNON: Okay. All of us have talked about the IP transition. Industry is moving toward a world of IP. I agree with Randy. We need to push the FCC to set the rules of the road. Our company is concerned about certain interconnection protections in this new world. But it is an opportunity for the FCC to be forward-looking and to move swiftly.

On net neutrality and data caps, our feeling is that Title II would be a disaster. So I was very happy to hear Gigi say that she would not initially propose that. We just don't think there's any problem. And services like Google and Amazon and others have flourished in an environment where there haven't been any rules.

With respect to data caps, Gigi mentioned the FCC doing an inquiry. This is another example of where we think the marketplace is working fine. All of us are testing various business models, which I don't think have

been harmful to consumers. Time Warner Cable continues to offer an unlimited service. And then for consumers who don't need to consume as much bandwidth, they can certainly opt for a discounted plan.

So those are my thoughts on IP transition, net neutrality, and data caps. Going back to video reform, Gigi's been a great ally on this issue. And I think Craig's company is becoming more interested in it. The challenge we face with video reform is that a lot of the policymakers that were around in '92 aren't here. There's not a full appreciation for the fact that the video industry has been saddled with all of these rules that no longer make sense in today's environment. In many respects these rules are hurting consumers instead of helping.

MR. MAY: Okay. Good. Craig, three minutes.

MR. SILLIMAN: We've covered a lot of ground here, so, let's see. When I count the 10: Agree, agree, agree, neutral, agree, agree, disagree, disagree.

(Laughter.)

MR. SILLIMAN: Okay. I just touched on two or three. We'll probably have time to get into some of these a little more.

On the IP transition, my concern here is that the technology is evolving very quickly. We should all be very

skeptical about the government getting involved in predetermining technological evolution. And I in no way mean that to disparage government policymakers. It's in no way to suggest that they are any less smart, insightful, technologically savvy than anyone else.

The simple issue is that the great benefit of a free market system is that a thousand different people can try a thousand different ideas. 999 of them can fail, and only one has to succeed. There's only one federal government, and so the government only has one chance to get it right. That's the real issue here about government trying to predetermine technological evolution and solutions. That's just a hard batting average to maintain for government policymakers.

Some of that comes into the CableCARD and AllVid situation. Note the technology is very quickly moving. You look at how many companies are putting apps on BlueRay devices, on Xboxes, *et cetera, et cetera*. You are already having the market and the technology moving out there and providing these multiple variants and ways to access content that really have bypassed the technology that was predetermined in CableCARD and that I think likely would be in AllVid.

On spectrum, I have to take on the point that's

constantly repeated, this issue about the 700MHz spectrum and that AT&T and Verizon hold most of that spectrum. That is true from the simple fact we bid on the spectrum. Sprint and T-Mobile were not foreclosed from that spectrum. They didn't bid for it. These are companies that control large amounts of capital. Deutsche Telekom is one of the largest telecom companies in the world. Companies are lining up to try to outbid themselves and how much capital they're going to pour into Sprint. These companies have the means to bid on the spectrum that they need. They don't need the government to handicap the auction to give them stuff that they didn't show an interest in bidding the first time.

I'm sure that if they decide this is the spectrum they want, they can bid on it. Or they can buy it in the secondary markets, which they also haven't shown an interest in doing over the last couple of years. And I think we'll get into some of the net neutrality issues a little bit more. I just want to frame this.

With respect to Gigi, on this one my concern is the way this is phrased, which is about keeping the FCC's jurisdiction over this broadband Internet issue. I suggest that that's the wrong question. The question we should be starting with is how do you protect consumers? What's the

best way to do that? And where in the government is the best way to do it?

MR. MAY: I do want to get into that some more, so why don't we hold that thought right there.

MS. SOHN: Yeah. I felt like I had most of my rebuttal in my main comments.

You have to be careful. Technology is changing very quickly, so therefore we should have no rules of the road? There's no magic IP pixie dust. We are posing fundamental values that have underlay our communications system for 100 years and worked pretty well.

How you substantiate that into rules of the road is a different story. We could talk about old regulations and whether they need to go, but the values remain the same. And I don't think that just because technology is changing, we just give up on them.

Number two. On the set top box thing, sometimes it makes me tired to talk about this, but there's no device today that completely replaces the set top box. That's because Section 629 has not been enforced in the way that it should. I don't like CableCARD either. Let's all say together "CableCARD stinks." So let's move to a different solution that's more competitive, and then we'll talk about FTC-FCC later.

MR. MAY: Great. Thanks for all of that. It's already given us a lot of good insights, and you're thinking what you would do. So now we'll even try to probe a little further. And I want to remind the audience that you should think of questions as well. I know we've got some members of the press over here, too. So let's just start and follow up on this net neutrality decision pending at the D.C. Circuit.

We've had the Arlington decision, which some people say possibly might favor the FCC in some ways. And then there is the Tennis Channel case. That's an important case, if you haven't read it, particularly in terms of what Judge Cavanaugh said about the First Amendment. Because a lot of times, when you talk about net neutrality, we forget that Verizon is arguing the rules are inconsistent with the First Amendment. That's still your position. Correct?

And so it's possible, if they happen to lose the statutory argument, the court might even reach those questions.

Here's what I want to do. Gigi, I think, because she wanted to be nice to me, did seem to make this concession that the first thing she wouldn't do if the FCC loses would be to have the Commission adopt Title II again. But she said what she would want to do first is ask the

Supreme Court to take the case.

So here's what I want to know: Look at both sides of this scenario, if the FCC wins or if the FCC loses *Verizon v. FCC*. Even assume that it's going up to the Supreme Court. We're going to go right down the line. Just explain succinctly what you think the Commission should do in that event and why you think it should do it. That involves both assessing where we are now, what the effect of the rules has been since they've been in place, the potential harm. Let's really sharpen that, because, ultimately, it's going to be decided one way or the other. And you're going to have to know what to do as the FCC chair.

Gail, do you want to go first?

MS. MacKINNON: The question for the new FCC chair is, if Verizon prevails, what does he do? He can either say, "Look, we've tried under the jurisdiction we thought," or "It's up to Congress now to pass legislation to give us clear authority." The thing that worries us about the Title II proceeding just hanging out there is it does create an overhang. That's why we'd like to see it closed. We think if the FCC goes down the path to Title II, it would be pretty destructive for us. Again, that's why Title II is such an issue for us.

Gigi won't agree, but if people are worried about having a cop on the beat look at this, whether it's anti-consumer or anticompetitive, there is the FTC. It has authority to look at these things. I'd also point out that BITAG gets together and talks about industry best practices.

There are a lot of other options out there. If the new FCC chair were to say, "Look, Congress has to do this," I think there would be an attempt. But given the divided Congress, I really don't see realistically that legislation making its way through Congress is actually a viable outcome.

MR. MAY: Okay. Craig?

MR. SILLIMAN: To sharpen this debate we should be clear on what we're talking about here. We talk about the appeal of the *Open Internet Order*. The appeal and this larger debate have almost nothing to do with the open Internet. Verizon and many other companies committed to the open Internet principles going back to 2005, well before the *Open Internet Order* was in place. This whole issue is about the FCC's jurisdiction over the Internet ecosystem.

Win or lose the appeal of the *Open Internet Order*, the question for the FCC, to some degree, is this larger

future decision concerning its future policy direction, which asks, "Where are we going to try to assert our jurisdiction?" At its core, this question is about where the FCC's jurisdiction ends and the FTC's jurisdiction begins. If the order and the FCC's jurisdiction is upheld on appeal, the question for the FCC then is: how aggressive are you going to be in asserting that jurisdiction in the broader Internet ecosystem and the broadband Internet ecosystem?

As you look at the evolving technology, you look at Microsoft and Skype. You look at Google. You look at some of the services that are going on out there. You say, "This now gives me a clear path to assert jurisdiction over that broader Internet ecosystem." If, on the other hand, the Court does not uphold the FCC's jurisdiction over this, then the question becomes: do you keep trying to fit this square peg into a round hole? Do you say, "Listen, this is where the technology's going, and so I'm going to find my way by hook and by crook to find the jurisdictional hook there"? Or, do you say, "Listen, the courts have spoken. Congress, if this is where you want the jurisdiction to be, then change the law to put jurisdiction over the Internet ecosystem with the FCC." If jurisdiction should stay with the FTC, I would recommend people look at a very thoughtful

speech that FTC Commissioner Wright gave a month or two ago in which he laid out the consumer protection angle on net neutrality, and asserted the competition law in consumer protection. Those are the FTC's fortes and the FTC has the easy ability to handle these issues.

From a larger government policymaking perspective, the federal government would be saying we have the ability to protect consumers in this space. This question is whether that happens in the FTC or the FCC. And the FCC has to decide how far they want to fight that jurisdictional fight.

MR. MAY: That really was helpful. And it did sharpen the issues. For someone who went to Carolina, you sound like a really smart guy.

That's just an inside joke among us Dukies up here.

Gigi, do you want to follow up that? Be really precise.

MS. SOHN: It's really important to note that Verizon's challenge is not just about the open Internet rules. It's about the FCC's ability to set rules of the road with regard to predatory billing practices and with regard to public safety. It's about whether companies like Verizon had to have back-up battery power if there is a

natural disaster.

MR. MAY: Why is it about those things rather than just the rules that are before the court? There's an order and a set of rules that's there. Why is it about all of these other things you're talking about?

MS. SOHN: The question, in front of the court, at least in my opinion, is whether the FCC has any ancillary authority at all to regulate broadband Internet access. It's not just about open Internet. It's about pricing. It's about competition. It's about public safety. The question is not that narrow. There's a second question, about whether the rules themselves are arbitrary and capricious. But it's really about FCC authority writ-large with regard to broadband Internet access.

FTC has some powers, but they don't reach a lot of things that organizations like mine are concerned with. They reach unfair, deceptive trade practices. That is actually quite narrow. And they reach some anti-competitive practices. Some of the things that we're talking about, really are anti-consumer, but not anti-competitive. And I can see the little shell game going on. Get the FCC out of it. Let the FTC do it. And then when we bring complaints to the FCC, we're told, "Well, Section 5 only really goes to unfair, deceptive trade practices."

There is an area, beyond what the FTC does, that is needed to protect consumers.

As far as the BITAG is concerned, I'm very proud of my participation. It's the Broadband Internet Technology Advisory Group. The purpose of that group is to determine what a reasonable network management practice is when it comes to provides managing their networks. I'm very proud of that. But it's a very, very narrow scope, and it's a technology group. It's a bunch of engineers. We're not allowed to meddle in their engineering decisions; it is not a policy organization. Frankly, I hope it stays that way.

MR. MAY: Okay. I want to talk about data caps a little more. We started that discussion, and Gigi has said that for quite a while she's been asking the FCC to initiate an inquiry to examine data caps. I've read some of the letters and papers that she's filed and they want the Commission to look at things like how much usage is there, what the costs are for the ISPs, and the demand.

For someone that used to try a lot of rate cases back in the early '80s before public service commissions, when I look at that request, it looks a lot like what would be a rate case if it were followed through. But, to sharpen that issue, about three weeks ago there was a story

in the *Wall Street Journal* that one unnamed ISP and ESPN were having discussions along the lines that, in order for the visitors to ESPN's site to avoid incurring overage charges for exceeding a certain data cap, ESPN would provide some form of subsidy to that ISP to mitigate that harm to the ESPN visitor.

When you think about that, it seems like it might be a pro-consumer type of thing in the sense that the ultimate user is avoiding potentially higher charges per data caps. But Gigi or Public Knowledge issued a statement or letter to the effect that, in fact, if wireless providers were not exempt, this would be a net neutrality violation.

So what I want to ask Gigi to do is articulate what the harm would be to the ultimate consumer, if we're looking at it from a consumer's viewpoint, if that type of arrangement were allowed to take effect.

One of the things, it seems to me, that happens when you have these net neutrality rules in effect is anytime there's any type of potential new arrangement - some type of new innovative billing arrangement or something - someone often says this might be a net neutrality violation. That even has a chilling effect on thinking about new arrangements that might be pro-consumer,

if we're looking at it from a consumer's point of view. So, just respond to that.

MS. SOHN: Yeah. Actually, can I take the second part of what you said, first? I actually think it's the opposite way around. When AT&T was blocking FaceTime, the fact that the rules were there gave us a hook to go to AT&T and say, "We're going to file a complaint unless we work this out." And guess what? We worked it out. The same thing with Google Hangout, which they're also blocking.

It gave us opportunity for Jim Ciccone to pick up the phone and say, "Gigi, we're going to make sure everybody has Google Hangout. We're just a little freaked out right now, because our network can't handle it. So could you just hold off?" But the fact of the matter is without those rules he probably wouldn't pick up the phone, even though he and I are good friends too.

The Open Internet rules allow for the kind of conversation that we've been having with ISPs and they continue to allow for innovation. This allows the parties to talk and incentivizes the parties to talk as opposed to ISPs just doing whatever they want to do. And I think that's a very good thing.

So why does the ESPN issue trouble me from a consumer standpoint? It troubles me because if ESPN goes

down this road, it will lead to an arms race where all the big content providers pay to get under the cap. The one friend I have at Disney kind of agrees with me.

And at that point what is the incentive for the ISP to raise the cap? The incentive is otherwise: why not keep the caps low so you can have people pay to get under it? And what does that mean for the consumer? That means, number one, the consumer is probably never going to try to discover what else is out there. Why would you go to some other new sports network or other movie network, or what have you, when that is subject to your cap?

The problem with caps, generally, is it makes consumer have to watch the meter. And if you're watching the meter, you're always going to underuse. Now, I will give my friend Gail and Time Warner Cable some props because they actually reward you if you use less. They have a data cap plan where you actually get rewarded if you use less.

But most of the data cap plans out there are for two gigs, or four gigs, and that's it. Okay. So you don't get rewarded if you use three, or you still pay that same price.

The fact of the matter is it's a disincentive for consumers to try new things, and a disincentive for them to

use a lot of bandwidth. As a result, you're always going to underuse, because you really don't know what it takes, what you have to forego or what you can actually do to hit that cap just right. That's profoundly anti-consumer. And there are other ways, if the companies want to price discriminate. There are other ways consumers could read signals better.

MR. MAY: Okay.

MS. SOHN: Just let me finish? Speed, I could talk about. I think speed is the much better way if the companies want to price discriminate, because you know as a consumer if you're not buying a fast enough connection.

MR. MAY: Good. I know some responses I might have to that. But I'm going to ask Craig to respond, if he would like, and then Gail, if she would like.

MR. SILLIMAN: Sure. A couple of things here. To quickly respond to Gigi's point about the incentive talk of rules really as the sort of Damocles that hangs over your head that gives the incentive to talk: I disagree with that. We disagree on some things, but we agree on a lot of things. But even the things that we disagree on, we try to engage and have constructive dialogues on. And how this plays out in the community actually does matter. Certainly, companies like Verizon pay a lot of attention to

that.

We have millions and millions of customers. We have an entire company that wakes up every morning and says, "How do we provide services that consumers want so they will stay with us or they'll switch from us to someone else?" The entire driving force of the company is: How do you provide things that customers want? So that is what's driving us as an incentive. We're not waking up every morning saying, how do we get away with something?

On this larger question, I read the *Wall Street Journal* article about ESPN. I don't know who ESPN is talking to or what the terms of that are. But as it's described, just to be clear, this is a business model that is as old as the hills. This is 1-800-Calling. This is when I used to get DVDs from Netflix and they prepaid the postage on the DVDs.

When I buy things from Amazon, they sometimes pay the postage, the mailing fees, for what I buy from them. Now, smaller, online retailers, presumably, don't have the same financial means to pay my postage the way Amazon does. Some companies can pay 1-800 numbers, so that you as the consumer don't pay for it. Some don't. Some will prepay my postage. Some have money to do lots and lots of advertising, and some don't.

That's part of the nature of the market. This, in fact, also has been rolled out. If any of you have an Amazon Kindle, that's what we're talking about. When you download a book from Amazon onto your Kindle, you don't pay airtime for that. That's already bundled into the price. Amazon's worked that out with their carrier. Just so we're all clear on what I'm talking about, this is not an unfamiliar concept. All of you and all of us have dealt with this for years and years.

Differentiation is at the heart of competition. I agree with Gigi. There are lots of other ways you can differentiate. You differentiate speed. You differentiate on customer service. You differentiate on product features and functionalities. But you also differentiate on pricing innovations. That's the way competition works.

That's what's great about it. Different competitors can try different things and see what works. You see it happening right now in the marketplace. Some companies are using usage-based pricing, which is a business model as old as human commerce itself. You buy more; you pay more. You buy less; you pay less. And some are going with flat rate pricing schemes.

That sort of differentiation is a good thing. It's good for consumers. And it would be a wrong thing for

policymakers to constrain that sort of choice, because there's a certain amount of arrogance to say we actually know better than consumers do on what they should choose and what's best for them.

MR. MAY: Gail, you got some kudos or props from Gigi, but do you want to add anything?

MS. MacKINNON: One of the things that really concerns us is the view that consumption-based billing data caps are inherently bad. Both the FTC and the FCC have said favorable things about usage-based pricing. We were one of the first companies that engaged several years ago to do it, and we really stumbled. And the public outcry was so big that we immediately stepped back and said, "You know, we have to reevaluate this." So we came up with a much smarter approach that has worked well and we are rolling it out across our footprint.

But to Craig's point, it is important to allow us to differentiate and to experiment with different packages.

At the end of the day, if consumers don't like it, if it's anti-consumer, they'll drop our business, and that's not in our interest. And if you ask my boss, Glen Britt, what keeps him up at night, he says it's the federal government coming in and screwing up our business. So that's a huge, sobering thing that we live with daily as a

company.

MR. MAY: In just a moment I'm going to throw the ball back to you for a final ramp-up of this. When you were patting Gail on the back in terms of their program, the first thing that occurred to me is the marketplace working. This was explicit during Craig's remarks, too.

They're doing one thing that may be attractive to some customers. Others will do something else. And therefore, it's working.

So I thought that was a point that showed maybe it's not a reason for the government to jump in. I'm going to let you have the last word on this particular issue, at least for this program. People here know you'll probably be back another day. But here's what I want to ask you two to comment on, and almost in a yes-or-no fashion.

When this net neutrality debate started, sometimes I would debate Tim Wu, who you know. He had a lot to do with starting the debate. And he would state his position pretty clearly. For his purposes, it didn't make any difference to him how competitive the market was. Open Internet rules adopted by the government were in and of themselves good, because openness is good, *per se*. It didn't matter whether the market was competitive or not.

The implication for me was that the market

somewhat was competitive. I don't want you to discuss how competitive you think the market is, but I want to know whether you're aligned with Mr. Wu. If the market were competitive and if we agreed on that and reached a certain level, would you then agree that we don't need these types of rules, because the marketplace will work.

MS. SOHN: I think it's a moot point, because the marketplace is not competitive.

MR. MAY: No.

MS. SOHN: I know I wasn't supposed to say that, but it needed to be said. Look. If we had the rules we had in the early 2000s where the average American had a choice of 13 dial-up ISPs, no, I don't think we'd need net neutrality. Net neutrality is a poor substitute for what we had in the late '90s and the early oughts. But you guys don't like that either. So where can I go?

About the 1-800 thing, that analogy doesn't work. 1-800 came up in a Title II regulatory regime, so you can't hate Title II at the same time and then rely on 1-800 numbers as a justification for your data caps. 800 numbers were a regulatory response to high long distance rates, which in turn was caused by the fact that those long distance rates were going to pay for rural connectivity.

So it was a different regulatory regime. It was a

regulatory response to a regulatory problem. And data caps are not a regulatory response to a regulatory problem. So I just don't think the analysis works. And my colleague, Mike Weinberg, wrote a very nice blog post about it if anybody wants to read it.

MR. MAY: Okay. In just a moment now I am going to turn to the audience for questions. But while you're thinking of your question, I'm going to spring this one on the panelists here.

We've talked all about the policy issues, their priorities, what should be done in 60-90 days, and so forth. I want the panelists briefly to describe what character traits they think a new chairman should have, what's important for success for the new chairman in terms of the way he operates the Commission and the character traits he brings to that.

So whoever wants to speak first can speak. Or, if you want to approach that in another way, because I asked you this before, we know that Tom Wheeler's a historian. That's something that's been an important part of his life. Is there anything in terms of the way that you would think about the job or that you think he should, as a historian, think about the job and that you would share with us?

MS. MacKINNON: Being a historian is a real asset,

because as one senior entertainment executive once said to me, "It's the history you don't know that will kill you." Tom Wheeler's been around for a long time. He is somebody who knows how business works and he's a very thoughtful, deliberative human being. I don't know him personally but what I've been told is he's open-minded and collaborative. Those are very essential characteristics for somebody who is coming over and presiding over the industry, looking at industry on a daily basis.

MR. MAY: Craig?

MR. SILLIMAN: First, since you got the last word I've got to sneak in that 1-800 is not the only example. There are countless examples of companies that offset costs that have nothing to do with regulated interest. Sorry. She'll find a way to sneak in yet again the last word.

MR. MAY: This reminds me of Gotcha Last.

MR. SILLIMAN: Yeah. Tag! You're it. I don't want to comment on Tom Wheeler. It would be inappropriate for me to speculate. It would be presumptuous for me to speculate on how people think about the job and how Tom Wheeler will do. But the scope of history is an interesting question. You can look at this from a variety of angles. There is a fascinating angle on the role of technology in history; you mentioned the telegraph, and it

goes back.

Even before that, I could bore you for hours about what I think are interesting discussions. You can talk about the role of the printing press and the Treaty of Westphalia in bringing the end of the Thirty Years' War in Europe. You look at the role of the telegraph in the 1848 revolutions in Europe where, for the first time, information could flow freely between capitals. And that triggered the spread of the revolution across the world. There's been a lot of talk recently about things like the Arab Spring.

There is a fundamental question that is quite an exciting one for our industry that has a couple of angles. One is that communications technologies throughout the scope of history have served an empowering, enabling role, for people to spread and disseminate ideas, to open up their horizons to people beyond their direct physical proximity. That spread of ideas has unleashed a whole round of human innovation, freedom, and other empowerment. It's tremendously exciting.

The second lesson would be people sitting around ten years before Gutenberg came up with the printing press, or ten years before the development of the telegraph. People could no more foresee the technological changes that

would be wrought and the societal changes that would be wrought ten years hence than we can here today.

We often feel, and rightfully so, that we are at the cutting edge of technology. And we are. But we also have to remember that the cutting edge is constantly moving out ahead of us. We are six years into the smartphone revolution. 15 to 18 years ago, if you were an early adopter and you had dial-up Internet and maybe an analog cell phone, the idea that we could foresee 10 years, 15 years out what may be coming would be the ultimate hubris. I don't think we can foresee years out now.

I think that's tremendously exciting, because we are going to see huge breakthroughs in the areas of energy management, education, healthcare. A lot more things are going to be enabled by these communications technologies. But in the policy realm what I would take from the sweep of history is: don't ever assume that standing in the static point, where we are today, that we can see out over the horizon 5, 10 years in an environment that has been characterized by this pace of technological change, either from the straight technology perspective, or the larger societal benefits perspective.

When you're looking at these issues, don't make the mistake of locking yourself into today's vision of

today's technology. Make sure you have a framework that will evolve at the same rate as technology.

MR. MAY: I don't want to hear 800 mentioned here.

MS. SOHN: No, I'll speak to that. The FCC chair has got to be a leader, and he has to have an agenda. Within the first 30 days, he needs to get up there and say, "This is what I want to do and this is why." I've even said this to Tom Wheeler. I think the last chair did not do that, and that was a mistake.

He also needs to pick good people; people that really know the agency, not his best friends from college or the Supreme Court, or wherever else; people that care about this stuff and people that know how to run the agency. As far as a historian is concerned, he needs to look at the history of broadcasting. He needs to look at the history of cable and see the consolidation that's taken place.

Broadcasting was first proposed to be a common carrier service, believe it or not. And Congress decided to do this public interest obligation thing, which hasn't worked out all that well. Cable also started out not that vertically integrated in the 1984 Cable Act. They were allowed to own the programming on their systems. Both of those were huge policy mistakes. And the chair needs to

learn that the Internet cannot become the same thing.

The Internet is the most empowering technology we've ever seen. But if it falls under the control of just a few hands or some really bad countries, it's not going to be that. I started out 20-some-odd years ago trying to make broadcasters and cablecasters obey their public interest obligations. Having completely totally failed at that, I look to the Internet as being the solution to the problem of top-down command-and-control media. And it's got to stay that way.

MR. MAY: Okay.

MR. SILLIMAN: On the consolidation point in historical perspective, we should be careful not to define these things within a narrow module. If you look at the history of the transportation sector, 80 years ago, consolidation amongst the railroads was a huge concern and a huge policy agenda. How many people in the room today even know how many railroads are in this country or care?

You don't, because they're competing with airlines, with trucking, with intra-coastal waterway shipping. So as these communications technologies increasingly compete in a more blurred way, the old realm of looking at what's consolidating becomes less relevant. You have to look at the overall competitive ecosystems.

MR. MAY: I have to say I think all of those were really thoughtful responses and educational responses. So thanks for that.

Now here's what we're going to do. My colleague here at Free State Foundation, former Commissioner Debi Tate, is here. She's a Distinguished Senior Adjunct Fellow, and she's going to end up our program or very near the end in just a little while. She's got some advice for these aspiring chairpersons.

(Laughter.)

MR. MAY: So I'm going to call on you to do that here in just a few minutes. But we're going to take some questions. I'm going to ask members of the press, what I call the deans of the press, over there. Gary, I'm not sure you're one of the deans, but does anyone over there have any questions?

If not, then I'm going to call on Scott first. And so we give several people an opportunity to ask questions, keep the questions pretty short, not a lot of subparts, A, B, C, D.

MR. CLELAND: Scott Cleland, Net Competition. I have a question on Title II reclassification being the ultimate fallback. I wanted to know what you thought about how the D.C. Circuit or ultimately the Supreme Court could

potentially foreclose the Title II reclassification. If there is a sense it's arbitrary, or if in a sense they say, "In your use of 706, you flip-flopped," won't that tell us that you can't go back to reclassification, that that would be a flip-flop that wouldn't fit under *Chevron*?

MS. SOHN: That's not the question before the court. So I don't think that that would be the case, particularly in the Supreme Court, where Scalia in his *Brand X* dissent basically said, "You should have stuck with Title II." I seriously doubt the Supreme Court would do that. It's not for the Court, and I don't know how saying that 706 is not a source of jurisdiction somehow forecloses Title II.

I have to think about that more and talk to Harold, because he's the better lawyer than I am. But I don't see it, Scott, honestly. I mean somebody could say it in *dicta*, but that issue *per se* is not before the court. The FCC used its ancillary authority to Title I. So I don't know why Title II would even come up.

MR. MAY: Anyone else want to add anything to that? Okay. Did you still have a question, Gary? Okay. Identify yourself. Everyone should state their name and affiliation for our transcript, please.

MR. ARLEN: I'm Gary Arlen, from Arlen

Communications. First question for you, Randy, a reference to Gigi's point, about the history of broadcasting and the cable.

MR. MAY: You may not understand the rules here. I'm not on the panel, but go ahead.

MR. ARLEN: The first question to you, Randy, is why are there no broadcasters or Silicon Valley people on the program other than there's just that rule up here? And the second question, is for Craig. Real quickly, you gave a speech a few weeks ago about the framework, and talked a lot about railroads. What the hell is the framework? Can you give us some details about that?

Mr. SILLIMAN: Do you want to defend your panel, first, Randy?

MR. MAY: I picked three people for this particular panel at this particular time that I thought would be most informative and educational, and would allow us to have a good dialogue. And I'm pretty certain, myself, we're accomplishing that today. So that's the answer to that question.

MR. SILLIMAN: I'll just give you a very brief answer, because this could be a much longer discussion if what you're really talking about is the whole policy framework. What Gary's referring to is a speech I gave a

couple of weeks ago where I talked about a 21st century policy framework for a 21st century industry. At its core, what you have to look at is building up.

You start with competition law and with consumer protection. You look at the overall competitive landscape. You look at how consumers need to be protected, and you look at it in a holistic environment. We talk about the device they use. There's a device manufacturer. There's a network. It may be WiFi. It may be a mobile network. There are Apps developers. There is an operating system involved.

You should not force the consumer to figure out what part of this ecosystem he or she is having trouble with, to figure out where in the government they need to go to get a remedy. You need to look at it from a technological neutral perspective, how you protect consumers, taking into account the overall competitive environment in which you're operating, all of which may change over time, as you need that flexibility.

Now, there's going to be debates. And I don't disagree with many of the things Gigi's articulated in terms of the types of things you need to talk about in policy framework. Obviously, how you put those together would be a subject where you need to bring together all

stakeholders to make sure those things are covered. My fundamental point is don't build siloes around given technologies of today or, even worse, 20 years ago. Build it on the technologically neutral consumer-centric basis that allows us to have a policy framework that will grow with the industry and move with the technology in times to come.

MR. MAY: Okay. Another question here? Steve, wait just a moment for the mic.

MR. EFFROS: Steve Effros, Effros Communications.

Gigi, when you started out today you started talking about interconnection rules for the Internet. We've also got situations now developing like private CDNs, with Netflix inserting its own content distribution network on some ISPs for a fee, so that they can be faster than anybody else to the consumer. Are you suggesting that an ancillary jurisdiction argument could be made that the Commission can regulate Netflix and all the others who are creating these private networks that interconnect with the Internet?

MS. SOHN: No. I mean I really have nothing more to say about that. I don't think the Commission should be regulating edge companies. I mean that is clearly not in their jurisdiction.

MR. EFFROS: They're interconnected.

MS. SOHN: They don't want to network, Steve.

MR. EFFROS: They are interconnected with the network and they wind up changing the nature of the network and selling their goods in a different way from others on the same network on the argument that they're faster within the network.

MS. SOHN: Okay. But maybe you can explain to me, what is the public interest value in having the FCC force Netflix to interconnect? I don't get it.

MR. EFFROS: I'm not suggesting there is. I'm suggesting that if you argue that ESPN, for instance, shouldn't be able to do it by simply paying the ISP for speed. But, you're saying, Netflix can insert its equipment within the ISP to get the same speed and get the benefit.

MS. SOHN: That's not what's going on. ESPN wants to pay to get under the cap. Okay? And that's discriminatory because ESPN Junior or News Sports Network is probably not going to be able to afford to do that.

MR. MAY: Okay.

MS. SOHN: I knew Steve was going to ask me a question, and I'm sorry. That's my answer.

MR. MAY: We can take whatever we want away from

that exchange and think about it on the way home.

(Laughter.)

MR. MAY: Yes, wait for the mic, please, and identify yourself.

MS. KURTZLEBEN: Hi. Danielle Kurtzleben, U.S. News. I'm just curious. This is going back a couple of months, I think it was in January or February. The NCTA president said something about data caps not having anything to do with congestion. And I'm curious about Time Warner and Verizon's ideas about this concept. Thanks.

MR. SILLIMAN: I'm sorry. I can't comment specifically on what Michael Powell said. I'm just not familiar with what specifically he said. So I'm not sure how to respond to what he said.

MS. KURTZLEBEN: Yeah. I can get the exact quote.

MS. SOHN: I can tell you. Basically, he conceded, really, for the first time, to the extent congestion was being used as a rationale for capping people's data consumption, at least in the case of wireline, that was not the case; and that indeed the reason to do it was price discrimination.

MS. KURTZLEBEN: Right, and it's something that got a lot of ink on tech blogs, and so on. And I'm just curious to the companies' responses to that idea.

MR. MAY: Gail, do you want to respond?

MS. MacKINNON: I don't remember him saying that. But going back, our philosophy is to experiment with providing our customers different packages. For the individual who's not downloading a lot of movies a couple of times a day, but who is surfing the Internet, looking at websites and doing e-mail, that they should have the opportunity to have discounted service.

That's really the way we look at it, differentiating and offering packages to customers that meet their needs.

MR. MAY: Yeah. I do remember him making the point that you have users who are so-called "bandwidth hogs," who used an awful lot. Others don't use much. And I don't mind using that term "price discrimination," because in the sense that we understand it, all of us here, it's the way economists understand it: the use of price discrimination to achieve pro-consumer benefits.

And I think he was saying that, by at least experimenting with those models, it can be pro-consumer in the sense that low-volume users might pay less, and others might pay more. He said that, and I heard it. But I'm not sure that in the context in which he was talking about that.

MS. SOHN: I know what he said. The fact of the matter is that if I upload all my data to a cloud service at 3:00 in the morning, the network is not congested then. However, the data cap applies to me. Right? So it has nothing to do with congestion. Congestion takes place at a time and point in a day, and there are things the network operators can do. They can slow high bandwidth applications during that time of congestion. But really, it's a blunt instrument to deal with congestion. And, I think, basically, Michael Powell was just admitting it's not a congestion management tool. It's the way we price differentiate. And members of Congress seemed to be okay with that.

MR. SILLIMAN: I agree with that. As we discussed at some length before, price differentiation is one of many, many different competitive vectors that companies use to compete. We talked about things like the Amazon Kindle. That's a pricing innovation.

Verizon has rolled the share everything plan where you could have multiple devices within a family all along the same usage-based pricing plan. We see those as good for consumers, good innovations that differentiate the products in the marketplace.

MR. MAY: Good. Well, you've had your hand up.

I'm going to let you ask the last question, and it's going to be short, with short answers. Then we're going to ask Commissioner Tate to come up for just a few minutes to close. Go ahead.

MR. REINHART: Mine was actually going to be a short, two-part question, but I'm not going to deal with the IP transition stuff and actually talk about *Chevron*, the FCC/Arlington case.

The issue with that case is it reiterated pretty much what we already know about *Chevron*, the two-step test. Generally, it's punting back to Congress. At issue it seems with the *Chevron* case, recently, is ancillary jurisdiction, in the sense that it really only applies where Congress has directly spoken to the precise question at issue.

MS. SOHN: Here's your class on *Chevron*. I don't even have to give it to you. Thank you, Will.

MR. MAY: What I want to ask the panelists to do if they want is talk about the impact on the Verizon appeal in light of the City of Arlington case. If you have any thoughts about that that you want to offer, that's the immediate issue.

MS. SOHN: If the case had gone the other way and the Supreme Court said that an agency does not get

deference for its determinations as to whether it had jurisdiction or not, it would have meant game, set, match as far as I'm concerned. And I already think you have the stronger case even though we're actually on the FCC side in this matter. But I think it would be game over. This actually breathes some life into the FCC's defense of the open Internet rules.

MR. MAY: Okay. Gail. I know you've been a scholar of *Chevron* for many, many years.

MS. SOHN: Give him the two-step test now, 20 seconds. Do it.

MR. MAY: Do you want to comment on step zero? No. It's an important case and we'll have to see how it plays out. Now I'm going to wrap up after Debi. But it's pretty incredible, number one, the number of people that came here today.

So that's a tribute to you, and I'm very appreciative of that and also the fact that very few people have left, knowing how busy everyone is, and even what billable hours may mean for some of you. So it's really very impressive, and we appreciate it.

Now I'm going to ask for Debi Tate. She has some advice that she would offer to the new chair. Of course, she's been right there on the eighth floor, as we like to

say. So she knows whereof she speaks. And we just have literally five minutes at most.

MS. TATE: How about 90 seconds? You all can read my blog. I'm just going to blog it. As you all know, I tried to give a former chairman some advice and it didn't go over so well. At different times and obviously in different moments the FCC needs a different kind of chairman. You all remember my colleague Michael Copps, who came in and really tried to help and repair a pretty demoralized and unappreciated staff.

Some of the things I've thrown out before. And you may well have heard them.

You have all these other commissioners, 2, 3, or 4. I'm not quite as proactive a chairman fan as my colleague Gigi is, but I think you ought to use your commissioners more. You ought to make them like a chief judge, put one of them over the spectrum auctions. Let them take some leadership.

Confident leaders can share both the responsibility and the glory, or, in some cases, the blame. So if you were really smart, you would give another commissioner a really tough thing, like the spectrum auctions. Don't be like a caterpillar. Don't bury yourself inside the FCC and just be about the issues, the

media world, or the USA for that matter. But for goodness sakes, get out and go see what is going on around the world.

I was on the panel with Verizon a month or two ago. There is more going on with mHealth in Rwanda and AIDS than there is in this country. So we ought to be watching what's going on around the world. Not only that, we've got to realize that our companies are having to exist in a global environment with incredible pressure to compete, not just here, and certainly not just here in the future. We need them and want them to succeed as Americans. I would encourage everyone, including the FCC, to do all they can about R&D, keeping girls and women in ICT and STEM.

Women are our greatest natural resource, and they are more important to us than gas or oil, I can assure you. And we are not educating or using them. That's a real shame.

Instead of hiring a cadre of McKenzie consultants, look inside at the FCC for people who have a lot of history and a lot of expertise, and they are there. Believe me.

Utilize the advisory groups rather than looking at them as rabble-rousers. Hey! Give them a specific question or a specific problem and say, "Give me three

solutions." That way, guess what? You don't have to choose one of them. You don't have to just take their one suggestion and bring in engineers and economists. Who in the world needs another lawyer at the FCC? And work with Congress, and their staff. Have a dialog rather than showing up just for contentious hearings.

Do not creatively find ways to expand the FCC's legal authority. You all should read Congressmen Upton and Walton's letter, if you'd like to hear how not to do that. And do find ways to creatively resolve issues promptly and efficiently. Set up rocket dockets, mediation to speed resolution, dismiss the thousand-plus dockets that probably every year are decades old, and utilize your staff, obviously, to do that much more.

For goodness sakes! I can't believe you brought this up. Could you just rename and renumber the floors of the building correctly? It is the 12th floor, not the 8th floor.

(Laughter.)

MS. TATE: Thanks.

(Applause.)

MS. TATE: If you all haven't had enough policy today, there is another event tonight from 6:00 to 8:00. And I want to thank Randy. I see that two-thirds of the

panel are women. Maybe it's because there's the first female chairman in history at the FCC.

MR. MAY: Thank you, Debi, very much. Yeah. That's part of the answer to my question about the panel today.

(Laughter.)

MR. MAY: I'm very pleased with that. And I want to thank Debi for what she does for the Free State Foundation. She mentioned what was happening around the world, and some of the things going on around the world. Let me tell you, she knows first-hand because she travels around the world. A lot of what she does in those travels has to do with issues that are important to children and women. And she spends a lot of time on it.

Once in a while, she'll write me a note and say I'm over here at this conference doing this, and it's often women and children. She'll say, I know it's not in your wheelhouse, or something like that. And a lot of it is not necessarily something we can do every day. But I'm always proud of the work she does and I'm happy to say a lot of it is in our wheelhouse for the work that you do. So thanks for that.

Now we are really going to wrap up. Again, it's been a terrific session. I'm confident that Tom Wheeler

and Chairman Clyburn will be looking forward to reading these reports from our friends over here in the press as soon as they hit the wire services. There's been a lot of terrific information that we've discussed today, a lot of good ideas.

So join me in thanking this panel for the program today, please.

(Applause.)

MR. MAY: And we look forward to seeing you at the next Free State Foundation event. Thank you.

(The meeting was adjourned at 2:00 p.m.)

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