

Testimony of Randolph J. May

President, The Free State Foundation

Hearing on “Reforming FCC Process”

before the

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Mr. Chairman and Members of the Committee, thank you for inviting me to testify. I am President of The Free State Foundation, a non-profit, nonpartisan research and educational foundation located in Rockville, Maryland. The Free State Foundation is a free market-oriented think tank that, among other things, focuses its research in the communications law and policy area. While I am not speaking on behalf of these organizations, by way of background I should note that I am a past Section Chair of the ABA's Section of Administrative Law and Regulatory Practice, and I am currently a public member of the Administrative Conference of the United States and a Fellow at the National Academy of Public Administration. So, today's hearing on FCC process reform is at the core of my expertise in communications law and policy and administrative law and regulatory practice.

As a frame of reference for my testimony, and for your consideration of FCC reform, I want to invoke statements made over a decade ago by two different FCC commissioners. In August 1999, FCC Chairman William Kennard released a strategic plan entitled, "A New FCC for the 21st Century." The plan's first four sentences read:

"In five years, we expect U.S communications markets to be characterized predominately by vigorous competition that will greatly reduce the need for direct regulation. The advent of Internet-based and other new technology-driven communications 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."

In December 2000, then-FCC Commissioner (soon-to-be FCC Chairman) Michael Powell delivered his visionary "Great Digital Broadband Migration" speech in

which he said: "Our bureaucratic process is too slow to respond to the challenges of Internet time. One way to do so is to clear away the regulatory underbrush to bring greater certainty and regulatory simplicity to the market."

For my purposes, these statements, one by a Democrat and the other by a Republican FCC Chairman, provide a useful frame for thinking about today's topic. Without belaboring the point now, we should be able to agree that, as Bill Kennard predicted, U.S. communications markets are now "characterized predominately by vigorous competition," and as Michael Powell said, we need to "clear away the regulatory underbrush to bring greater certainty and regulatory simplicity to the market." Hence the need for FCC regulatory reform.

While I don't necessarily endorse all of the proposed reforms in the Discussion Draft, I certainly support most of them and commend you for undertaking this effort. In my testimony, I want to just highlight the ones that I think are most important, and then propose another reform that I believe would be most effective in bringing the FCC's body of regulations, many of which are now unnecessary, more closely in line with today's competitive marketplace environment.

Taking them generally in the order they appear in the draft bill, I want to especially endorse the provisions that would require the agency, with respect to the adoption of a new rule that may impose additional burdens on industry or consumers, to identify and analyze the market failure and actual consumer harm the rule addresses, to perform a cost-benefit analysis of the rule, and to include measures for evaluating the effectiveness of the rule. The FCC has had a pronounced tendency over the years, and certainly this tendency was evident with respect to the adoption late last year of new net

neutrality regulations, to adopt rules without engaging in the type of meaningful analysis required by the proposal. Certainly, the requirement that the Commission analyze any claimed market failure and consumer harm before adopting new rules should force the FCC to engage in a more rigorous economic analysis than it often does when it simply relies on the indeterminate public interest standard as authority.

I wholeheartedly endorse the proposed changes to the Sunshine Act. Currently, the Act's strictures, without any meaningful public benefit, prevent the agency's five commissioners from engaging in the type of collaborative discussions that may lead to more reasoned decision-making. And they inhibit the development of greater collegiality among the commissioners, which itself may contribute to more effective functioning of a multi-member commission. I led a study in 1995 on this subject for the Administrative Conference of the United States, the results of which are published in 49 *Administrative Law Review* 415, which made recommendations similar to the draft bill's proposals.

Relatedly, I support the provision that would require publication of the text of agenda items in advance of an open meeting so that the public has the opportunity to review the text before a vote is taken. As you know, before each and every item is considered by the commissioners at a public meeting, the staff requests and is granted so-called "editorial privileges." Because the public does not have the text upon which the commissioners are voting, the public has no way of knowing the extent to which a draft order is actually changed – that is, the extent to which editorial privileges are exercised and for what purpose – after a vote and before the item *eventually* is released as a final order. I emphasize "eventually" in the previous sentence because, as this Committee knows, there have been some lengthy delays in releasing orders to the public after they

supposedly have been approved at open meetings. Thus, I support the provision that requires the Commission to publish each order or other action no later than 7 days after the date of adoption, or at least within some reasonably short period.

Along the same lines, I support the provision that requires the Commission to establish deadlines for Commission orders and other actions and to release promptly certain identified reports. And I support the provision in the draft bill that provides that the Commission may not rely in any order or decision on any statistical report or report to Congress, or *ex parte* communication, unless the public had been afforded adequate notice and opportunity to comment. The Committee is aware that a large amount of material, including studies, articles, and reports, was "dumped" into the docket of the net neutrality proceeding only a few days before the Commission adopted a draft order citing many of these documents. This last-minute "data dump" made it difficult, if not impossible, for the public to review and comment on the new material in the docket.

In my view, the provision reforming the Commission's transaction review process is as important as any other in the bill in light of the abuse of the process for many years now. The agency often imposes extraneous conditions -- that is, conditions not related to any alleged harms caused by the proposed transaction -- after they are "volunteered" at the last-minute by transaction applicants anxious to get their deal done. The bill's requirement that any condition imposed be narrowly tailored to remedy a transaction-specific harm, coupled with the provision that the Commission may not consider a voluntary commitment offered by a transaction applicant unless the agency could adopt a rule to the same effect, would go a long way to reforming the review process. Indeed, I first suggested these reforms in an essay entitled "Any Volunteers?" in the March 6, 2000

edition of *Legal Times*. And as said in that essay, my own preference would be to go even further to reduce the substantial overlap in work and expenditure of resources that now occurs when the antitrust agencies and the FCC engage in a substantial duplication of effort. I would place primary responsibility for assessing the competitive impact of proposed transactions in the hands of the Department of Justice and the Federal Trade Commission, the agencies with the most expertise in the area. The FCC's primary responsibility then would be to ensure the applicants are in compliance with all rules and statutory requirements.

Towards the end, the bill requires that the Commission produce a biennial report for Congress that identifies "the challenges and opportunities in the communications marketplace for jobs, the economy, the expansion of existing businesses, and competitive entry as well as the Commission's agenda to address the identified issues over the course of the next 2-year period." I am not opposed to requiring the Commission to produce such a report, and in fact it could be a useful exercise if taken seriously. But this requirement should only be adopted if Congress eliminates the existing requirements for the agency to produce the regular video competition reports, wireless competition reports, and Section 706 broadband reports. If the new report is done properly, continuation of these pre-existing reports would be duplicative and a waste of resources.

As I said early in my testimony, the reality is, as FCC Chairman William Kennard predicted in 1999, most segments of the communications marketplace are now effectively competitive and have been so for a number of years. Indeed, when Congress passed the landmark Telecommunication Act of 1996, it anticipated the development of a competitive marketplace, stating in the statute's preamble that it intended for the FCC to

“promote competition and reduce regulation.” And, in the principal legislative report accompanying the 1996 act, Congress stated its intent to provide for a “de-regulatory national policy framework.” In other words, Congress concluded, correctly, that the development of more competition and more consumer choice should lead to reduced regulation.

But the FCC has not done nearly enough in the 15 years since the 1996 Act's adoption to “reduce regulation” and provide a “de-regulatory” policy framework. There may be various explanations, including just plain bureaucratic inertia, as to why this is so. Whatever the reason, the point is that a fix is needed, and the draft bill, while commendable in many respects, does not directly address the problem of reducing or eliminating *existing* regulations. It should do so. I hope you will consider adopting a simple measure I have proposed to better effectuate what Congress surely intended to be the 1996 Act's deregulatory intent.

The 1996 Act introduced two related deregulatory tools rarely – if ever -- found in other statutes governing regulatory agencies. The first provision, Section 10 of the Communications Act, titled "Competition in Provision of Telecommunications Service," states the Commission “shall forbear” from enforcing any regulation or statutory provision if the agency determines, taking into account competitive market conditions, that such regulation or statutory provision is not necessary to ensure that telecommunications providers' charges and practices are reasonable, or necessary to protect consumers or the public interest. The second provision, Section 11 in the Act, titled "Regulatory Reform," requires periodic reviews of regulations so that the Commission may determine “whether any such regulation is no longer in the public

interest as a result of meaningful economic competition between providers of such service.” The agency is required to repeal or modify any regulation it determines to be no longer in the public interest.

While these two provisions obviously were added as tools to be used to reduce regulation in the face of developing competition, the FCC has utilized them only very sparingly. In its forbearance and regulatory review rulings, the agency generally takes a very cramped view of evidence submitted concerning marketplace competition — for example, refusing to acknowledge that wireless operators compete with wireline companies by offering substitutable services, or that potential entrants exert market discipline on existing competitors, or that present market shares are not as meaningful in a technologically dynamic, rapidly changing marketplace as they may be in a static one.

So, Congress should amend the Communications Act to make the Section 10 forbearance and Section 11 periodic review provisions more effective deregulatory tools. It can accomplish this simply by adding language that requires the FCC to presume, absent clear and convincing evidence to the contrary, that the consumer protection and public interest criteria for granting regulatory relief have been satisfied. (I have proposed language in "A Modest Proposal for FCC Reform: Making Forbearance and Regulatory Review Decisions More Deregulatory," April 7, 2011, which may be found at: http://www.freestatefoundation.org/images/A_Modest_Proposal_for_FCC_Regulatory_Reform.pdf.)

I am not proposing that the specified consumer protection and public interest criteria be changed. But by establishing such a rebuttable evidentiary presumption, only those regulations supported by clear evidence that the substantive criteria have not been

met would be retained. And it is important to note that the two regulatory relief provisions should be made applicable to all entities subject to FCC regulation, not just telecommunications providers. I understand that it is possible the FCC might seek to ignore or skew evidence in order to rebut the deregulatory presumption, but I assume the agency's good faith in following congressional directives – and, in any event, the agency's decisions are subject to review by the courts.

In my view, based on years of watching the FCC treat the forbearance and regulatory review provisions in a way that has weakened the impact of their clear deregulatory intent, I believe my proposal to amend Sections 10 and 11 of the Communications Act may be one of the most effective measures Congress can take to reduce or eliminate unnecessary and outdated FCC regulations. I hope the Committee will consider the proposal in conjunction with other reform measures it is considering.

Thank you for giving me the opportunity to testify today. I will be pleased to answer any questions.