Dear Ms. Cornell:

I am pleased that Chairman Wheeler has assigned you the task of heading up the effort to reform the FCC's processes. As you may know, for over a decade I have been advocated FCC reform, and I hope that the effort you are leading will bear some fruit.

I am attaching my testimony from both 2011 and 2013 before the House Communications and Technology Committee at two hearings examining FCC process reform. My testimony addresses issues directly relevant to how the FCC conducts business. In some instances, congressional action might be required to go as far as I advocate, but I'm the majority of instances the FCC possesses the discretion to implement reforms.

I am also attaching another document which, for ease of reference, consolidates together a number of other Free State Foundation pieces having to do with different aspects of FCC process reform. The subject matter ranges from imposing "shot clocks," to requiring cost/benefit analysis, to forbearance relief reform, to issuing orders promptly after FCC meetings, to transaction process reform, and so on. These pieces are authored by different FSF scholars, including me, Deborah Taylor Tate, Seth Cooper, and Sarah Leggin.

I hope you find these materials helpful as you undertake the important FCC process reform effort. Of course, please feel free to contact me if we can further assist you in any way.

Best regards,

Randy

Randolph May

President

The Free State Foundation

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Testimony of Randolph J. May

President, The Free State Foundation

Hearing on "Improving FCC Process"

before the

Subcommittee on Communications and Technology

Committee on Energy and Commerce

U.S. House of Representatives

July 11, 2013

Summary of the Testimony of Randolph J. May
President, The Free State Foundation

I commend the Committee for undertaking this effort to reform the FCC's processes and its decision-making approaches, and I support the proposed reforms in the Discussion Drafts. Given the increasing competiveness in the communications marketplace, FCC reforms, such as those embodied in the draft bills, are needed now more than ever.

The FCC still operates today with a pro-regulatory bent pretty much as it did in 1999 when FCC Chairman William Kennard called for the reorientation of the agency's mission to account for the increasingly competitive environment evident even then. The reforms in the draft bills, along with a few additional proposals I will suggest, would make the FCC less likely to default so often to regulatory measures, even absent clear and convincing evidence of market failure or consumer harm. In today's marketplace environment, the default position should not be regulation.

I wish to highlight here the proposed reform of the rulemaking requirements and the transaction review process because they are especially consequential. New Section 13(a)(2)(C)(iii)'s requirement that the Commission, before adopting a new or revised rule, provide a reasoned explanation why market forces and technology changes will not, within a reasonable time period, resolve the agency's concerns is particularly welcome. I urge the Committee to go a step further to make it more difficult for the Commission to avoid the import of this provision while carrying on "business as usual." I suggest revising the provision to read: "(iii) a reasoned determination, based on clear and convincing evidence, that market forces or changes in technology…." This change will not prevent the Commission from adopting any new regulations, and it is not intended to do so. But, without altering the substantive criteria the bill specifies, the suggested change simply requires the agency to meet a higher evidentiary burden before adopting or revising regulations.

The provisions contained in new Section 13(k), especially the addition that would allow the Commission to condition approval of a proposed transaction only if the condition addresses a likely harm uniquely presented by the specific transaction, would go a long way toward combatting abuse of the transaction review process. Over time, the agency increasingly has abused the merger review process by delaying approval of transactions until the applicants "voluntarily" agree – usually at the "midnight hour" – to conditions not narrowly tailored to remedy a harm arising from the transaction or unique to it.

I also suggest the Committee reform the forbearance and periodic regulatory review process by, in effect, requiring a higher evidentiary burden to maintain existing regulations on the books. Absent clear and convincing evidence that the regulations at issue should be retained under the existing substantive statutory criteria, regulatory relief should be granted. Similarly, I propose adoption of a "sunset" requirement so that all rules will automatically expire after five [or X] years absent a showing, based on clear and convincing evidence, that it is necessary for such rule to remain in effect to accomplish its original objective.

Testimony of Randolph J. May

President, The Free State Foundation

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 and administrative law and regulatory practice areas. I have been involved for thirty-five years in communications law and policy in various capacities, including having served as Associate General Counsel at the Federal Communications Commission. While I am not speaking on behalf of these organizations, by way of background I wish to note that I am a past Section Chair of the American Bar Association's Section of Administrative Law and Regulatory Practice and its representative in the ABA House of Delegates. 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 longstanding experience and expertise in communications law and policy and administrative law and regulatory practice.

I appreciated the opportunity to testify before this Committee a bit more than two years ago on June 22, 2011, at the hearing on "Reforming the FCC Process," and I appreciate the opportunity to testify today.

Though H. R. 3309 and H. R. 3310 both passed the House, unfortunately they died in the Senate. I want to begin by saying that reform measures like those embodied in those bills and the present Discussion Drafts, or very similar ones, are needed now more

than ever. In my June 2011 testimony, I generally supported the proposed reforms, and I do so again today. I do so because the Federal Communications Commission needs to change in a way so that, in today's generally dynamic, competitive communications marketplace environment, it will be less prone to continue on its course of too often defaulting to regulatory solutions, even when there is no clear and convincing evidence of market failure or consumer harm.

In addition to supporting the Discussion Drafts, including the few changes that are included in the draft bills that were not part of H. R. 3309 and 3310, I want to suggest a few additional reform proposals for consideration as well. These proposals, though requiring only relatively small revisions to the language of the Communications Act, would be useful as complements to the measures proposed in the Discussion Drafts as a means of requiring the FCC to eliminate or reduce unnecessary regulation. And this point is key: They do so not by altering the substantive regulatory criteria presently in the Communications Act relating to protecting consumers and the public interest, but rather by establishing higher evidentiary burdens the Commission would be required to meet in deciding whether to maintain existing regulations or adopt new ones.

At the outset of my testimony two years ago, to set the stage for explaining why Congress should adopt FCC reform measures, I presented 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, in his "Great Digital Broadband Migration" speech, 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."

These statements by two FCC Chairman, one a Democrat and the other a Republican, still provide a most useful frame for thinking about today's topic. Without belaboring the point now with all the latest marketplace facts and figures, we should be able to agree, regardless of party identification, that, as Bill Kennard predicted they would be, U.S. communications markets are now "characterized predominately by vigorous competition."

Despite the fact that the communications marketplace incontrovertibly is characterized by much more dynamism and competition now than at the turn of the century – and that economists and regulatory experts agree that increased marketplace competition generally should supplant the need for regulation – the FCC's staffing levels have maintained essentially level since 2000, and the amount the agency spends on regulation has increased substantially during that period. In both 2000 and today, the FCC's FTE employee count stands roughly in the 1900 range. And from 2000 to 2012, based on data extracted from the *Budget of the United States Government* and compiled by the Weidenbaum Center on the Economy, Government and Public Policy at

Washington University and the George Washington University Regulatory Studies Center, the amount the FCC spends on regulatory activity (in constant 2005 dollars) has increased from $303 million to $392 million.

While these figures are not intended to – and don't – show the benefits and costs of any particular regulations or suggest that regulation is not still appropriate in particular market segments or areas, they do suggest that the FCC still operates today with a pro-regulatory bent pretty much as it did in 1999 when Bill Kennard called for the reorientation of the agency's mission to account for the increasingly competitive environment and in 2000 when Michael Powell urged that the agency remake itself so that it can respond to the challenges of "Internet time."

Hence the need now for Congress to adopt meaningful FCC regulatory reform measures.

The Federal Communications Commission Process Reform Act

I support the proposals in the Process Reform Act Discussion Draft and commend the Committee for undertaking this effort. In my testimony, I just want to highlight here the provisions that I think are most important, suggest three relatively minor revisions to the language of the draft, and then propose three additional measures that I believe are consistent with the FCC reform the Committee is trying to accomplish.

Section 13(a) – Rulemaking Reforms. In light of what I have already said concerning the dynamic, generally competitive state of the communications marketplace, I want highlight new Section 13(a) relating to the adoption of new or revised FCC rules and especially Section 13(a)(2)(C). Section 13(a)(2)(C)'s requirement, regarding adoption or revision of a rule that may have an economically significant impact, that the

Commission must (i) identify and analyze the market failure and actual consumer harm the rule addresses; (ii) make a reasoned determination that the rule's benefits justify the costs; and (iii) make a reasoned determination that market forces and changes in technology are unlikely to resolve within a reasonable period of time the problem the Commission intends the rule to address is particularly important. As I have explained, despite the dramatic marketplace changes that have occurred over the past couple of decades, the Commission still too often defaults to regulatory solutions when they are not justified. Requiring the Commission to perform the identification and analysis and to make the determinations specified in Section 13(a)(2)(C) should be helpful in combatting the FCC's tendency to default to regulatory solutions without undertaking rigorous economic analysis, considering the cost and benefits of regulations, and evaluating marketplace conditions.

Section 13(a)(2)(C)(iii)'s requirement is a very welcome addition to the Process Reform Act that was not present in H. R. 3309. Requiring the Commission to explain in a reasoned way why market forces and technology changes will not, within a reasonable period of time, resolve the agency's concerns is consistent with recommendations I have made in the past. While the addition is positive, I would urge the Committee to go a step further in order to make it more difficult for the Commission to avoid the import of this provision while carrying on "business as usual." I suggest revising the provision to read: "(iii) a reasoned determination, based on clear and convincing evidence, that market forces or changes in technology…." This change will not prevent the Commission from adopting any new regulations, and, indeed, it is not intended to do so. Without altering the substantive criteria that the bill specifies the FCC must consider, the suggested

change simply requires the agency to meet a higher evidentiary burden before adopting or revising regulations.

Section 13(c) – Sunshine Act Reforms. I 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 somewhat similar to the draft bill's proposals.

Section 13(k) – Transaction Review Process Reforms. As I testified in 2011, the new Section 13(k) provision that would reform 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, go a long way to reforming the review process. But the Discussion Draft now contains an additional provision, Section 13(k)(1)(c), that allows the Commission to condition approval of the transaction only if the condition

addresses a likely harm uniquely presented by the specific transaction. This is a very good addition that will reduce the wiggle room for the Commission to continue abusing the transaction review process by imposing conditions that, if imposed at all, should be imposed only on an industry-wide basis in generic rulemaking proceedings.

I first suggested reforms exactly along these lines, including the new addition, in an essay entitled "Any Volunteers?" in the March 6, 2000 edition of *Legal Times*, so I am very pleased with the transaction review proposal. And as said in the *Legal Times* essay, and in my testimony in 2011, 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 this area. The FCC's primary responsibility then would be to ensure the applicants are in compliance with all rules and statutory requirements.

Other Provisions. 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. 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 but 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, report to Congress, or *ex parte* communication unless the public has been afforded adequate notice and opportunity to comment. 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.

New Section 13(e) requiring brief advance notice to the commissioners of an action proposed to be taken on delegated authority and allowing two or more commissioners to require that the action be brought before the full Commission makes sense. The Committee might wish to consider formalizing somewhat the objection procedure to avoid confusion. For example, Section 13(e) might be revised to provide that "2 or more Commissioners may <u>file an objection in writing to</u> prevent an order…."

New Section 13(l) requires the Commission to publish certain information on its website, including the total number of its full-time equivalent employees. I think this is useful information, but, as a complement, it would be useful if the Commission were

required to provide information concerning the number of contractors it retains to perform work for the Commission, for what purpose, the length of the contracts, and the material terms of the contract.

Additional Reform Recommendations for the Process Reform Act

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 that would lead to less regulation. In the statute's preamble, Congress stated 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 understood that the development of more competition and more consumer choice should lead to reduced regulation.

But the fact is that the FCC has not done nearly enough in the 17 years since the 1996 Act's adoption to "reduce regulation" and provide a "de-regulatory" framework. Whatever the reason, the key point is that a fix is needed. As I have said, the Discussion Drafts are very commendable. But, in my view, there are a few additional reform measures that should be included in the bills to more effectively ensure that the FCC does not maintain in force existing regulations, or adopt new regulations, that are not necessary to protect consumers from harm. Enactment of these measures would require only modest changes in the Communications Act's language, and I hope the Committee

will consider including them in the bills so as to better effectuate what Congress intended to be the 1996 Act's deregulatory intent.

The **Forbearance Relief and Periodic Regulatory Review Provisions**

The 1996 Act introduced two related deregulatory tools rarely – if ever -- found in other significant 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 too 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.

The Section 10 forbearance and Section 11 periodic review provisions can be made more effective deregulatory tools 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. And the two regulatory relief provisions should be made applicable to all entities subject to FCC regulation, not just telecommunications providers.

This sentence could be added at the end of Section 10(a): "In making the foregoing determinations, absent clear and convincing evidence to the contrary, the Commission shall presume that enforcement of such regulation or provision is not necessary to ensure that an entity's charges or practices are not unreasonable or unreasonably discriminatory or necessary for the protection of consumers and is consistent with the public interest." Similarly, a sentence could be added to the Section 11 regulatory review provision which states: "In making the foregoing determination, absent clear and convincing evidence to the contrary, the Commission shall presume that such regulation is no longer necessary in the public interest as a result of meaningful competition between providers of such service."

The specified consumer protection and public interest criteria would not be changed. But by establishing a rebuttable evidentiary presumption, in carrying out its duties under these two provisions, only those regulations supported by clear evidence that the substantive criteria have not been met would be retained. It is possible the FCC might seek to ignore or skew evidence in order to avoid reducing regulation, 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.

Limitation on General Rulemaking Authority

Section 201(b) of the Communications Act provides that the Commission "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." This is the grant of rulemaking authority that was relied on so heavily by Justice Antonin Scalia in the recent *City of Arlington* v. *FCC* case as a reason for granting the agency such broad sway for so-called *Chevron* deference. When an agency receives *Chevron* deference upon judicial review, the agency's interpretation of its statutory authority is entitled to "controlling weight" and must be upheld unless it is unreasonable. A simple proviso could be added at the end of Section 201(b) to the effect that, before adopting a rule, "the Commission must determine, based on a showing of clear and convincing evidence presented in the rulemaking proceeding, that marketplace competition is not sufficient adequately to protect consumers from harm." This change would not prevent the Commission from adopting new regulations. Rather it would simply require the Commission to meet a higher evidentiary burden before doing so.

Sunset Requirement for Agency Regulations

Congress could add a general sunset provision to the Communications Act that provides that all rules will expire automatically after five [or X] years absent a showing by the Commission, based on clear and convincing evidence compiled after public notice and comment, that it is necessary for such rule to remain in effect to accomplish its original objective or objectives. Again, this sunset provision would not dictate that

regulations expire. Instead, it would require that the agency bear the evidentiary burden of showing that such regulations be retained.

None of these proposals I have suggested would change the substantive regulatory criteria, such as protecting consumers and the public interest, that presently are in the Communications Act. Rather in each instance they simply require the Commission to show by clear and convincing evidence that existing regulations should remain on the books or that new regulations should be adopted. I urge the Committee to consider these proposals in conjunction with the other worthwhile reform measures it is considering.

The FCC Consolidated Reporting Act

I wholeheartedly support new Section 14, the proposed Federal Communications Commission Consolidated Reporting Act of 2013. The required consolidated report would replace the myriad of existing sector and technology-specific marketplace reports that the Commission is now required to compile on a periodic basis. Consolidation of the various competition/marketplace status reports should help reduce the agency's workload somewhat because there necessarily is some inherent duplication in producing the half dozen or more separate reports. But, more importantly, the requirement to produce a consolidated report should steer the Commission away from its pronounced tendency to view the separate technology-based services as confined to their own "smokestacks" and non-competitive with each other. In today's competitive digital services environment characterized by convergence, adhering to the "smokestack" view inherently neglects marketplace realities. For example, the Commission still refuses to acknowledge the extent to which wireless services compete with wireline services, even though nearly 40% of U.S. households have abandoned landline telephone service.

The draft bill requires the Commission to assess competition in the communications marketplace, taking into account all the various services and technologies, and it specifically directs the agency "to consider the effect of intermodal competition, facilities-based competition, and competition from new and emergent communications services, including the provision of content and communications using the Internet." This requirement is especially important as part of the necessary effort to get the FCC to take a more realistic, economically rigorous, view of the extent to which competition now prevails in the communications marketplace.

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

FCC Process Reform Blogs

House Unanimously Passes FCC Consolidated Reporting Act
Sarah Leggin (September 12, 2013)

This week, the House unanimously passed the FCC Consolidated Reporting Act (H.R. 2844) in a 415-0 vote, with 227 Republicans and 188 Democrats voting yea. The legislation requires one Communications Marketplace Report instead of the eight separate reports previously required, and it also strikes redundancies and outdated references in the Commission's reporting requirements.

Representative Steve Scalise kicked off the House debate on Monday by stating: "This bill is another step in the process of streamlining government so that businesses can focus their time and resources on growing our economy and creating jobs, instead of complying with outdated and burdensome mandates from the federal government."

Free State Foundation President Randolph May called for the passage of the Consolidated Reporting Act in his testimony at the July hearing before the House Subcommittee on Communications and Technology entitled, Improving FCC Process. May stated:
"I wholeheartedly support new Section 14, the proposed Federal Communications Commission Consolidated Reporting Act of 2013. The required consolidated report would replace the myriad of existing sector and technology-specific marketplace reports that the Commission is now required to compile on a periodic basis. Consolidation of the various competition/marketplace status reports should help reduce the agency's workload somewhat because there necessarily is some inherent duplication in producing the half dozen or more separate reports. But, more importantly, the requirement to produce a consolidated report should steer the Commission away from its pronounced tendency to view the separate technology-based services as confined to their own "smokestacks" and non-competitive with each other. In today's competitive digital services environment characterized by convergence, adhering to the "smokestack" view inherently neglects marketplace realities. For example, the Commission still refuses to acknowledge the extent to which wireless services compete with wireline services, even though nearly 40% of U.S. households have abandoned landline telephone service.

The draft bill requires the Commission to assess competition in the communications marketplace, taking into account all the various services and technologies, and it specifically directs the agency 'to consider the effect of intermodal competition, facilities-based competition, and

competition from new and emergent communications services, including the provision of content and communications using the Internet.' This requirement is especially important as part of the necessary effort to get the FCC to take a more realistic, economically rigorous, view of the extent to which competition now prevails in the communications marketplace."

FCC Commissioner Ajit Pai said in a statement Tuesday, "this is straightforward, good-government legislation, and I hope that the U.S. Senate will act quickly to send this bill to the President for his signature."

I agree.

Getting Out of the Business? Reform of the FCC's Merger Review Process
Sarah Leggin (September 11, 2013)

While the FCC considers pending mergers such as the application of AT&T and Atlantic Tele-Network, Inc. ("ATN") filed in March of this year, as well as others, it is timely to reexamine the FCC's review process for such transactions. On August 27, the FCC stopped the 180-day "shot clock" on Day 175 in order to allow AT&T to submit further information, claiming that the requested information is necessary for the Commission's determination of whether the transaction meets the public interest test. This delay and its somewhat ambiguous justification are just another indication of the need to reform the Commission's transaction review process in order to curb inefficiency and promote clearer standards of review.

In thinking about the FCC's transaction review process, perhaps a larger, more fundamental question should be considered: Should the FCC have the authority to review mergers at all? In July of this year, the House Subcommittee on Communications and Technology held a hearing entitled "Improving FCC Process," in which panelists and Representatives commented on discussion drafts of the FCC Process Reform Act of 2013 and the FCC Consolidated Reporting Act of 2013 presented by Chairman Walden. During testimony on the proposed legislation, particularly on the Process Reform Act, panelists and Representatives alike recognized that the merger review process is an important issue to consider in the context of FCC reform efforts overall.

The FCC Process Reform Act recommends changes to the Commission's transaction review process. The provisions in the proposed act would allow the Commission to condition the approval of a transaction only if the condition addresses "a likely harm . . . uniquely presented by the specific transfer or other transaction." This change is intended to combat the Commission's systematic abuse of the merger review process, in which the Commission frequently withholds approval of transactions unless and until applicants "voluntarily" agree to conditions that often do not relate directly to the transaction at issue.

In the context of the discussion concerning the merger review portions of the draft legislation, Congresswoman Eshoo stated that what underlies much of this reform effort, "driving [it] more than anything else," are not only the problems in the review process, but also the FCC's very authority to review acquisitions and mergers. She stated this issue is where there is "concern, disagreement, agitation, and aggravation." Stuart M. Benjamin, Professor at Duke University

Law School, then pointedly raised the question of whether it is appropriate for the FCC to be "in the business" of reviewing mergers at all.

In response, Richard J. Pierce, Professor at George Washington Law School and member of the Free State Foundation's Board of Academic Advisors, stated that "it would make a lot of sense to take the FCC completely out" of the merger review process. Professor Pierce, an expert in the administrative law field as well as in antitrust law, elaborated that "the FCC does not know much about antitrust law; the FTC and the Department of Justice know a lot about antitrust law. They have the power to impose conditions, they regularly impose conditions on mergers, and those conditions are specifically tailored to address the competitive issues that are raised by a proposed merger." Professor Pierce proposed that "the far more sensible thing" than reforming the FCC's merger review process would be introducing a statutory change that states "the FCC has no power over mergers. That is exclusively the realm of the DOJ and the FTC."

The need for reform of the FCC's transaction review process has been discussed by Free State Foundation scholars for years. In his piece, "Any Volunteers?" released in 2000, FSF President Randolph May noted how the FCC has used the license transfer review process to essentially regulate by condition, consistently conditioning transaction approval on concessions from communications companies. He advocated that the review process should be reformed to prevent this type of abuse.

Moreover, in "Any Volunteers" as well as in "Reform the Process" released in 2005, Mr. May noted that the FCC largely duplicates the efforts taken by the DOJ and FTC in reviewing mergers by requiring that the transaction "enhance competition" under the public interest standard. He proposed that the Commission exercise regulatory self-restraint by principally deferring to the DOJ's or the FTC's expertise regarding competitive concerns, since both agencies are already tasked with determining whether transactions would "substantially lessen competition." In an age of justified concern regarding government efficiency and the effective use of resources, it is important that agencies neither duplicate efforts, nor undertake processes that other agencies are better equipped to handle.

Professor Pierce's suggestion that the FCC merger review process should not be changed, but that the FCC should be out of the business of reviewing mergers and transaction applications, deserves closer consideration. Agencies like the Antitrust Division of the DOJ or the FTC already have statutory standards based on antitrust principles that are more easily applied to merger reviews, in addition to greater expertise and experience in antitrust law.
In contrast, the FCC's ambiguous public interest standard creates opportunities for abuse and over-regulation. Indeed, the FCC has justified the imposition of burdensome, so-called "voluntary" conditions on many major transactions under the nebulous public interest standard, even when those conditions were unrelated to the specific issues presented by the pending transaction.

The reforms proposed by Chairman Walden in the FCC Process Reform Act would require that the FCC only impose conditions that are narrowly tailored to remedy the unique effects of the pending transaction, and those reforms would prevent the FCC from justifying merger conditions under the over-broad public interest standard. These meritorious changes would go a long way to

reforming the review process.

But in the context of discussing reform of the merger review process, it is worth considering Professor Pierce's point: Should the FCC be in the business of merger review at all?

Time to Reconsider FCC's Competition Reporting
Seth Cooper (July 18, 2013)

On Friday, July 19, the FCC is expected to release its Fifteenth Video Competition Report in the course of its public meeting. I wrote about the Fourteenth Report in my *Perspectives from FSF Scholars* paper, "FCC's Video Report Reveals Disconnect Between Market's Effective Competition and Outdated Regulation." This new report should at least summarize more recent data on competitive developments in the video market.

The timeliness, scope, and frequency of FCC competition reports to Congress were all touched on during the U.S. House Subcommittee on Communications and Technology's hearing on "Improving FCC Process."

FSF President Randolph May provided testimony at that hearing. And his blog post, "FCC Regulatory Reform and Administrative Law," offers a further response to the hearing's discussions.

At the hearing, one of the discussion draft bills that Chairman Greg Walden called attention to a discussion draft bill that would consolidate the FCC's competition reports into a single, biennial "State of the Industry" report. In the 112th Congress, the House passed such a measure – the Consolidated Reporting Act of 2012 (H.R. 3310) – on a voice vote. Unfortunately, the Senate gave the legislation no consideration.

In my *Perspectives* paper, "Convergent Market Calls for Serious Intermodal Competition Assessments," I explained why I thought consolidated reporting legislation was ripe for reintroduction:

Combining disparate competition reports would structurally conduce to intermodal competition assessments. It should come as no surprise if the current system of separate FCC reporting on specific services results in largely silo-like analyses. That is what current law all but invites. A more comprehensive approach to digital age communications services – combined with a specific directive regarding intermodal competition assessment – could offer a better perspective on the competitive state of voice, video, audio, and data services as well as the substitutability of wireline, wireless, satellite, and other platforms. It could even shed light on the unnecessary and outdated regulatory burdens that now saddle communications services on a variety of platforms. Combined FCC reporting could also reduce the administrative burdens.

Combining future FCC reports is something that a June 25 GAO report also called attention to. And the forthcoming release of the FCC's *Fifteenth Video Competition Report* should likewise provide occasion to consider the benefits of reform.

FCC Regulatory Reform and Administrative Law
Randolph May (July 16, 2013)

I appreciated the invitation to appear as a witness at the July 11 hearing on "Improving FCC Process" held before the House Commerce Committee's Subcommittee on Communications and Technology. And I commend Committee Chairman Greg Walden for convening the hearing.

My written testimony submitted to the Committee is here, and a video of the entire hearing, which includes the witnesses' oral statements, may be found here.

As regular readers of this space know, for over a decade I have been arguing for meaningful FCC regulatory reform, including when I testified at the House Communications Subcommittee's June 2011 hearing on the subject. In the last congressional session, the House of Representatives did pass the two regulatory reform bills that came out of that hearing, the "Federal Communications Commission Process Reform Act," [H.R. 3309], and the Federal Communications Commission Consolidated Reporting Act," [H.R. 3310]. Unfortunately, both bills died in the Senate without serious consideration.

Now Chairman Walden has produced new Discussion Drafts that, with only a few revisions added, essentially replicate last session's H.R. 3309 and H.R. 3310. The Discussion Draft for the new FCC Process Reform Act is here and for the new Consolidated Reporting Act here.

The reforms embodied in the two new draft bills are needed now more than ever. As I explained in my testimony, this is because the FCC "needs to change in a way, so that, in today's generally dynamic, competitive communications environment, it will be less prone to continue on its course of too often defaulting to regulatory solutions, even when there is no clear and convincing evidence of market failure or consumer harm."

Aside from the proposed reforms to the FCC's transaction [merger] review process, which are much needed and which I will address again at a later date, the most important part of the new Process Reform Act is the section proposing changes to the Commission's rulemaking process. These changes would require the FCC to: (i) identify and analyze the market failure and actual consumer harm the rule addresses; (ii) make a reasoned determination that the rule's benefits justify the costs; and (iii) make a reasoned determination that market forces and changes in technology are unlikely to resolve within a reasonable period of time the problem the Commission intends the rule to address.

As I testified, requiring the Commission to perform these tasks "should be helpful in combatting the FCC's tendency to default to regulatory solutions without undertaking rigorous economic analysis, considering the cost and benefits of regulations, and evaluating marketplace conditions." In today's dynamic, increasingly competitive communications environment, the agency should be rigorously undertaking such analysis in any event – but the reality is that it often doesn't.

Opponents of the proposed reforms generally don't argue that the communications marketplace is not increasingly competitive and dynamic and that FCC regulations need not take account of

these factors. Instead, they argue it is ill-advised for Congress to impose on the FCC rulemaking requirements beyond the minimal procedures prescribed by the Administrative Procedure Act. And they suggest that imposing any such requirements, with new statutory terms such as "market failure" and "changes in technology," will lead to uncertainty and litigation. Professors Richard Pierce and Stuart Benjamin generally advanced these arguments at the hearing, and you can read their witness statements here and here.

I believe the professors' professed concerns are quite exaggerated. Frankly, I find Professor Benjamin's suggestion that the addition of any new statutory terms should be avoided because of the uncertainty introduced and potential for litigation somewhat puzzling, if not a bit (unintentionally, I'm sure) demeaning to the Commission and its staff.

I have confidence that, if Congress directs the Commission to do so in connection with the consideration of new regulations, the agency will be capable of articulating, in appropriate circumstances, the proper meaning of terms such as "market failure" and "changes in technology." Assessing the likelihood of market failure and the impact of changes in technology ought to be central to the FCC's supposed expertise. Indeed, terms similar to these appear elsewhere in the Communications Act. And, as Professor Benjamin knows, under Supreme Court precedent in the *Auer-Seminole Rock* line of cases, if the FCC wishes to issue its own regulations interpreting these statutory terms because it believes doing so will reduce uncertainty and litigation, the agency's interpretations will receive deference upon judicial review.

Professor Benjamin's professed concerns regarding the increased potential for litigation, which in my view are exaggerated, really are not much different than arguments that can be made – and often are, depending on whose ox is being gored – regarding any proposed new statutory change or proposed regulation. Such arguments should not be a basis for rejecting reforms if the changes, on their merits, will improve the FCC's decision-making process. As (newly) former FCC Commissioner Robert McDowell testified at the hearing in response to Professor Benjamin's claims, the FCC gets taken to court in any event whenever it acts on any major item – so conjured up fears of litigation ought not hold much sway.

Professor Pierce acknowledges in his testimony that he is not an expert on communications law and lacks an adequate basis to discuss proposed changes in the substance of communications law. But he certainly is a leading authority on administrative law whose views and expertise I respect. Indeed, I am pleased that he is a member of the Free State Foundation's Board of Academic Advisors. Professor Pierce also is concerned about the potential for increased delay and uncertainty in the rulemaking process if the additional rulemaking requirements are adopted. But in his testimony, Professor Pierce concedes there is nothing "inherently wrong" with any of the proposed new rulemaking procedures. In fact, he states that:

> "In my decades of studying the rulemaking process, I have come across rulemakings in which agencies have used each of these procedures, though I have never seen any rulemaking in which an agency used all of the procedures that the FCC Process Reform Act would make mandatory. Each of the twelve additional procedures has advantages that cause it to be a potentially beneficial addition to a notice and comment rulemaking in some cases."

Professor Pierce goes on to observe that, in his view, they have serious disadvantages as well. Accordingly, sometimes the benefits of the proposed new requirements are justified, sometimes not. On balance, he would leave the decision as to whether to impose any new analytical requirements to the agency itself.

I respect Professor Pierce's views and his general administrative law expertise, and I agree with him that, in general, Congress should deliberate carefully before deciding to impose agency-specific rulemaking requirements. But there is nothing inherent in sound principles of administrative law that suggests Congress ought not impose particular sector-specific analytical decision-making requirements when it determines that circumstances warrant. And, in this case, in my view, circumstances warrant. Changes to the FCC's rulemaking process are warranted in light of the agency's ongoing proclivity to default to regulatory measures, even when there is no convincing evidence of marketplace failure or consumer harm or reasoned explanation offered as to why market forces or changes in technology are not expected to resolve its concerns within a reasonable period of time.

Without doing a deep dive here, it is worth noting that, due to special circumstances, there are agency-specific and sector-specific variations in rulemaking requirements, even while the APA maintains a certain level of minimal process. For example, the EPA has various rulemaking analytical requirements imposed by statute that go beyond the APA requirements. The FTC and OSHA do as well. And so does the SEC. The Exchange Act requires the SEC to consider efficiency, competition, and capital formation factors whenever it is "engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest." Additionally, the Exchange Act requires the SEC to consider the impact that any rule promulgated would have on competition and to include in the rule's statement of basis and purpose "the reasons for the Commission's . . . determination that any burden on competition imposed by such rule or regulation is necessary or appropriate in furtherance of the purposes of [the Exchange Act]." There are other examples, of course, where agencies, in conducting rulemakings, are required to undertake analyses beyond the minimum requirements specified in the APA.

Finally, I want to commend the Communications Committee's Vice Chairman, Rep. Bob Latta, for introducing, in conjunction with the hearing, H.R. 2649, the "FCC 'ABCs' Act of 2013." Rep. Latta's bill would amend Sections 10 and 11 of the Communications Act, the forbearance and periodic regulatory review provisions, to require the Commission to presume, absent clear and convincing evidence to the contrary, that regulatory relief should be granted. Here is the press release issued by Rep. Latta to accompany H.R. 2649's introduction. As Rep. Latta explains, his bill would "force the FCC to come to more deregulatory decisions by reforming the FCC's forbearance authority and biennial review of regulations by adding an evidentiary presumption."

I'm pleased that Rep. Latta's bill mirrors almost exactly the proposal offered in my April 2011 paper, "A Modest Proposal for FCC Regulatory Reform: Making Forbearance and Regulatory Review Decisions More Deregulatory." There I suggested just such an evidentiary presumption as Rep. Latta has now proposed. It is important to point out, however, that I also urged, shortly thereafter in a blog post and many times thereafter, including in my July 11 testimony, that the

regulatory relief accorded by the revised forbearance and regulatory review provisions be extended to all entities regulated by the FCC, not just telecommunications carriers.

When all is said and done, there should be meaningful regulatory reform at the FCC. Perhaps not surprisingly, the agency has been very slow to reform itself in a way that makes it less likely to resort to regulation as a default. So action by Congress, such as that embodied in the revised FCC Process Reform and Consolidated Reporting Act draft bills, and Rep. Latta's new bill, should be welcomed.

FCC Reform: Return to the Rule of Law
Deborah Taylor Tate (July 19, 2013)

Congressman Greg Walden should be applauded for doggedly holding a Congressional hearing on the much needed review, reform, and reinventing of FCC procedure and process. He is expected to introduce legislation similar to the FCC Process Reform Act and FCC Consolidated Reporting Act that passed the House of Representatives last year, only to die in the Senate.
In the meantime, the FCC should not wait for legislation to pass to adopt some simple, common sense reforms of their own. In fact, first they just need to return to the "rule of law," not the "rule of man" (With two female Commissioners, I suppose this will have to be the "Rule of Women" now!).

Too often the personality of the agency leadership has resulted in expansion – broad expansion in some cases – of the specific legal authority granted by Congress to the FCC. The office of FCC Chairman has been expanded far beyond the letter of the law. It needs to be curtailed by self-control, aside from whether a new law is passed. Some people remember a time when two or more commissioners could bring forward a proposed order or place an item on circulation. During my tenure as an FCC commissioner, even four commissioners – a bipartisan group of four – were unable to do so.

In other examples, the Chairman has expanded the agency's oversight into areas of the law which are clearly beyond any legal authority. In most of those cases, after thousands of hours of work by public employees, and taxpayer and industry dollars spent, courts generally have overturned this abuse of power. Just think if that energy and money had been used on reports to Congress, review of consumer complaints, and enforcing the law of the land.

Another specific example of this expansion of the agency's legal authority involves mergers. While we have all become accustomed to the imposition of merger conditions, those conditions should only relate specifically to a "harm" which is likely to occur as a direct result of the specific merger under consideration. Mergers conditions somehow have become "the kitchen sink" for every policy notion or alleged "wrong that needs to be corrected," whether or not they legitimately relate to the merger at hand. In addition, the merger conditions take on quasi-statutory significance and are then applied to other companies in the sector or those in the "same circumstance."

I regret that I, too, voted to approve mergers with such conditions during my tenure and hope the present FCC will use a little more restraint in what may be a very busy merger time in the days

and months ahead. Certainly, competitive harms or other potential wrongs should be addressed, but only through proper legal vehicles and certainly not in the dark of night just to get a deal done.

The Free State Foundation's President Randy May has repeatedly called upon the FCC to reform itself and his testimony at last week's House Commerce Committee hearing again addressed these important issues. FSF recently held a standing-room only luncheon on the topic of "FCC Process" where scholars, industry representatives (regulated through these processes), and former commissioners presented a number of thoughtful ideas on Commission reform.
Many of the issues mentioned address the topic of speed of process – or lack thereof – a constant criticism of the agency. I have previously suggested utilizing any and all willing commissioners to oversee an item and draft a proposed order, working in conjunction with the relevant expert staff, to speed up the time required to get an order on circulation. Oftentimes, a particular commissioner has had specific industry or issue expertise which could provide great insight along with alacrity.

Other ideas regarding expediency include setting a specific timeline for completing consideration of each order – a "shot clock" that could be keyed to the subject matter. Or the establishment of a true mediation process in appropriate cases as a way to achieve quicker turn around, allowing regulated parties to opt for mediation. Not only have trial courts learned this is often a more efficient process, but also one in which the parties often have more control over outcomes. Other creative procedures could include a "weekly docket call" to dismiss hundreds, if not thousands, of filings that have languished for years.

Often the FCC has failed to utilize its own expert advisory bodies effectively – or at all. In fact, the Commission could pose a question with a specific timeline and/or even request a list of solutions and alternatives from which to choose. Why have expert advisors if you don't utilize their real world experience and expertise? And, once delegated authority over issues or complaints has been thoroughly vetted and specifically granted by a vote of the Commission, Bureau Chiefs should utilize that authority – and nothing more – to resolve identical issues with identical decisions. This enhances both agency efficiency and provides consistent outcomes for industry. Further, in very specific cases in which a decision may actually have broad, industry-wide impact, the Commission should *proactively* grant broad waivers for similarly situated entities rather than clogging up the system with unnecessary and redundant case-by-case-by-case reviews.

While it may take congressional approval to change the "Sunshine Law" (which should be known as the "Unable to Communicate Law"), perhaps it will only take a dose of personal humility, a clear understanding of legal authority, and a little trust in one's fellow commissioners to make the agency operate more efficiently – so that it hums like the industries and sectors it oversees.

FCC Slow-Moving Forbearance Process Isn't Getting Any Faster
Randolph May (June 21, 2013)

My March 14 blog "FCC Opts for Delay over Deregulation in Forbearance Process," I cited a dozen sorry examples of agency delay in deciding forbearance petitions. At the time of posting, two significant petitions were pending—a USTelecom petition seeking relief from 17 categories of legacy voice service regulations and a CenturyLink relief from enforcement of legacy regulations with respect to its enterprise broadband services. And I observed the FCC granted itself 90-day extensions in reviewing both of those pending petitions.

Ultimately, the FCC's stuck to its delay-prone pattern. The final bylines for both petitions could just as well be added to the dozen examples I cited earlier. To wit:

- USTelecom Forbearance Order (2013), granting, in part forbearance from legacy voice services regulations *(petition filed, Feb. 16, 2012; order granting relief, in part, and granting extension, Feb. 19, 2013; final order adopted, May 10, 2013; final order released, May 17, 2013)*
- *CenturyLink Broadband Enterprise Petition* (2012-3) seeking relief from legacy regulations with respect to enterprise broadband services *(petition filed, Feb. 23, 2012; extension granted, Feb. 22, 2013; order requiring additional information and public notice requesting data, March 5; petition to withdraw granted, March 20)*

This is a sorry addendum to make, particularly in the case of CenturyLink, which sought relief identical to that which was granted to other providers through the FCC's *Enterprise Broadband Orders*.

Chevron Deference and Regulatory Reform
Randolph May (May 28, 2013)

There may be disagreement among scholars concerning the soundness of the Supreme Court's reasoning in its May 20 *City of Arlington v. FCC* opinion. Nevertheless, many agree that the Court's decision likely will give federal agencies somewhat more leeway in exercising administrative authority because courts are likely to accord the agencies' actions a broader scope of deference upon judicial review.

For my purposes here, the specifics of the *City of Arlington* case concerning the FCC's authority to set time limits for localities to act on tower siting applications are not important. What is important is that Justice Scalia, writing for the majority, held that so-called *Chevron* deference applies to agency interpretations of ambiguous statutory provisions concerning the scope of the agency's authority (or, as some put it, the agency's jurisdiction). According to Justice Scalia, the question "is always whether the agency has gone beyond what Congress has permitted it to do, [and] there is no principled basis for carving out some arbitrary subset of such claims as 'jurisdictional.'"

My own sympathies lie with the view espoused by Chief Justice Roberts in his dissent. According to the Chief Justice, "[a]n agency cannot exercise interpretative authority until it has

it; the question whether an agency enjoys that authority must be decided by a court without deference to the agency." In other words, "[a] court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference."

As tempted as I am to provide an explanation of why my sympathies, as a matter of law, lie with the Chief Justice, I resist the urge here. What I want to emphasize is that, putting aside the impact on the outcome of any one particular case, the Chief Justice is almost surely correct that the practical impact of *City of Arlington* will be to expand the power of the federal agencies. This is because when *Chevron* deference applies, the agency's interpretation of its statutory authority is entitled by the reviewing to "controlling weight." Unless the court finds the agency's interpretation "unreasonable," it must affirm.

Thus, Chief Justice Roberts has a good point when he declares that *City of Arlington* must be viewed against the backdrop "whether the authority of the administrative agencies should be augmented even further…."

With regard to the FCC, the agency whose authority was actually at issue in the *Arlington* case, the worry about "even further" augmentation of agency power is real. To support his expansive articulation of *Chevron's* domain, Justice Scalia relied heavily on the Communications Act's broad grant of general rulemaking authority to the FCC to "prescribe such rules and regulations as may be necessary in the public interest" to carry out the statute's provisions. You may rest assured that the Commission, and its lawyers, now will rely even more heavily than in the past on this general grant of rulemaking authority as they routinely invoke *Chevron* deference.
So, what, if anything, reasonably can be done, to serve as a check on such augmentation of agency power resulting from *City of Arlington*?

The answer lies, I think, in sensible regulatory reform measures. Indeed, such reform measures make sense even absent the potential impact of *City of Arlington*. This is especially so for the FCC which, despite the dramatic changes that have occurred in the past quarter century with the development of competition in most market segments, too often still is governed by an ingrained pro-regulatory disposition that distrusts the marketplace.

With regard to the FCC, here are some regulatory reform measures that could be adopted. None of these would alter the Communications Act's substantive statutory criteria, such as protecting consumers or the public interest, which govern the Commission's decisions. Rather, they are in the nature of process reforms that would have the effect of altering the Commission's decisionmaking framework in a way that makes it less likely that the agency will regulate absent evidence of market failure or consumer harm.

- Congress could enact legislation along the lines of the "Federal Communications Commission Process Reform Act of 2012," which passed the House in March 2012, but which subsequently died in the Senate. The House bill had many good process reform features, and in testimony at a House hearing in June 2011, I urged adoption of many of the reforms included in the bill that ultimately passed the House. In my view, the most important provisions were the requirements that the Commission analyze any claimed market failure and consumer harm and employ cost-benefit analysis before adopting any

new rules. While other measures in the House bill, such as "shot clock" and transparency requirements, were meritorious too, these analytical requirements would force the FCC to engage in a more rigorous economic analysis than it routinely presently does.

- Congress could revise the forbearance and periodic regulatory review requirements added to the Communications Act by the Telecommunications Act of 1996 so that, in effect, the evidentiary burden is shifted to the Commission to deny regulatory relief. As I proposed in an April 2011 Perspectives paper entitled "A Modest Proposal for Regulatory Reform," this shifting of burden through a deregulatory evidentiary presumption could be accomplished with a modest revision to Sections 10 ["Competition in the Provision of Telecommunications Service"] and 11 ["Regulatory Reform"] of the Communications Act.

For example, the following sentence, or a similar one, could be added to the Section 10 forbearance relief provision: "In making the foregoing determinations, absent clear and convincing evidence to the contrary, the Commission shall presume that enforcement of such regulation or provision is not necessary to ensure that a telecommunications carrier's charges or practices are not unreasonable or unreasonably discriminatory or necessary for the protection of consumers and is consistent with the public interest."

Similarly, a sentence could be added to the Section 11 periodic regulatory review provision which says: "In making the foregoing determination, absent clear and convincing evidence to the contrary, the Commission shall presume that such regulation is no longer necessary in the public interest as a result of meaningful competition between providers of such service."

In neither instance would the substantive criteria set forth for considering regulatory relief be changed. Instead, as explained in my "A Modest Proposal for Regulatory Reform Paper," the revisions would simply establish a rebuttable presumption favoring regulatory relief absent clear and convincing evidence to the contrary. And, as I have made clear, regulatory relief under the forbearance and periodic regulatory review provisions should be available to all entities regulated by the Commission.

- Congress could also amend the Communications Act's provision granting the Commission general rulemaking authority that was relied on so heavily by Justice Scalia in *City of Arlington*. Section 201(b) provides that the Commission "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." [Query whether this sentence was ever intended to grant the FCC general rulemaking authority beyond Title II ["Common Carriers"] because it is located in a particular section of Title II rather than Title I's general provisions.] In any event, a proviso could be added at the provision's end to the effect that, before adopting a rule, the "the Commission must determine, based on a showing of clear and convincing evidence presented in the rulemaking proceeding, that marketplace competition is not sufficient adequately to protect consumer welfare." This would simply require the Commission to meet a higher evidentiary burden before adopting a new regulation.

- Congress could add a general sunset provision to the Communications Act that provides that

all rules will expire automatically after five [or X] years absent a showing by the Commission, based on clear and convincing evidence compiled after public notice, that it is necessary for such rule to remain in effect to accomplish its original objective or objectives.

- Congress could adopt legislation specifying that the independent regulatory agencies, such as the FCC, are not entitled to *Chevron* deference upon judicial review of their action because they are not politically accountable in the same way as the executive branch agencies, such as the EPA. *Chevron* itself involved review of an EPA interpretation of the Clean Air Act, and in its decision announcing the *Chevron* deference doctrine, the Court relied heavily on the fact that EPA, an executive branch agency, was politically accountable to the President. In two separate law review articles published in the *Administrative Law Review*, I have suggested that the actions of the independent agencies not receive the same degree of deference on review as those of the executive agencies. The articles are here and here.

Again, these are process-oriented regulatory reform measures that should be considered in any event with respect to FCC reform. But the Supreme Court's *City of Arlington* decision ought to provide an impetus for Congress to take up the reform mantle in a serious way, at least with process-oriented reforms such as those suggested here.

You might say it's too bad Congress needs such an impetus to act. But given one, it should move forward with some urgency.

House-Approved SEC Regulatory Reforms are Worth Repeating
Seth Cooper (May 20, 2013)

On May 17, the U.S. House of Representatives passed H.R. 1062. This legislation was the subject of my blog post, "For Independent Agencies, SEC Regulatory Accountability Bill is an Act to Follow." Congratulations are in order for those who supported it.

But don't expect H.R. 1062 to be readily greeted in the U.S. Senate. Last week the White House issued a "Statement of Administration Policy" in opposition to the bill's final passage.

The SEC Regulatory Accountability Act may not make it into law this time around. Still, the legislators who sponsored the bill should be thanked for taking regulatory reform ideas seriously. Legislators should likewise be encouraged to continue pursuing regulatory reforms of this kind. H.R. 1062's cost-benefit analysis and look-back review provisions make the bill a model of reform for all independent agencies.

For Independent Agencies, SEC Regulatory Accountability Bill is an Act to Follow
Seth Cooper (May 14, 2013)

Everyone needs a reality checks sometimes, even "the experts." When so-called expert independent agencies consider regulating areas of our economy, shouldn't they check to make sure new regulations won't cause more economic harm than good? Isn't it worth double-checking

the results once new regulations are in place?

For independent agencies, cost-benefit analysis should provide that reality check. And post-adoption "look back" assessments should serve as a double check. This is the basic approach of the SEC Regulatory Accountability Act (H.R. 1062). It's an economic-minded reform bill scheduled for consideration soon on the floor of the U.S. House of Representatives.

H.R. 1062 offers a constructive model for regulatory reform for other independent agencies – like the FCC. Provisions of the SEC Regulatory Accountability Act could form the foundation of a future "FCC Regulatory Accountability Act."

Absent market failure, regulation typically reduces economic efficiency and technological innovation. Regulation reduces the freedom of market participants to rely on their informational insights and skills to pursue new technological and service strategies to meet consumer demand. Freedom and knowledge is replaced by prescriptive government rules. Those come with compliance costs and are more likely to preserve the status quo. And regulatory costs to providers routinely reach consumers in the form of higher prices.

Where regulation is suggested to remedy a perceived problem, cost-benefit analysis can help identify those situations where regulation is justifiable. This means an economically grounded assessment by the assigned government agency. Such an assessment can improve the likelihood that proposed regulations might outweigh the negative consequences often attached to government controls on markets.

Requiring a government agency to conduct a cost-benefit analysis prior to imposing regulation offers a check on bureaucracy. It is an informative procedure that can help stave off harmful overregulation.

The SEC Regulatory Accountability Act (H.R. 1062) would reform Securities and Exchange Commission processes for assessing, adopting, and reviewing rules. Among the legislation's provisions, two features stand out.

H.R. 1062's first standout feature is its requirements for agency cost-benefit analysis. Before issuing a regulation under the securities law, the SEC would be required to:

> [U]tilize the Chief Economist to assess the costs and benefits, both qualitative and quantitative, of the intended regulation and propose or adopt a regulation only on a reasoned determination that the benefits of the intended regulation justify the costs of the regulation.
> Also, "[i]n deciding whether and how to regulate," the SEC must assess costs and benefits of alternative approaches, "including the alternative of not regulating." The SEC must pick the approach that "maximizes net benefits."

H.R. 1062 lists components of such cost-benefit analyses. Those include whether the rulemaking: (i) "will promote efficiency, competition, and capital formation"; (ii) " is tailored to

impose the least burden on society, including market participants, individuals, businesses of differing sizes, and other entities"; and (iii) "is inconsistent, incompatible, or duplicative of other Federal regulations."

H.R. 1062's second standout feature is its post-adoption impact requirements regarding "major rules." The SEC would have to track the consequences of new regulations likely to have an annual economic impact over $100 million or which result in "a major increase in costs or prices" for consumers or industries. When adopting major rules, H.R. 1062 would require the SEC to set out post-implementation metrics to measure their economic impact.

Those metrics would form the technical basis of a required SEC "assessment plan" regarding major rules. The assessment plan would have to consider "the costs, benefits, and intended and unintended consequences of the regulation." That plan sets the groundwork for an assessment report, submitted by the SEC's Chief Economist within two years of the major rule's adoption. Within 180 days of an assessment report's publication, the SEC would be required to propose amending or rescinding the major rule, or to publish a notice stating no action will be taken.
In short, H.R. 1062 reform proposals are commendable and worthy of the U.S. House's full consideration.

And Congress should consider applying the SEC Accountability Act's cost-benefit analysis and post-adoption assessment requirements to other independent agencies. Both of H.R. 1062's standout features are suitable for application to the FCC and for inclusion in FCC reform legislation.

As observed earlier, the FCC is *not* required to attempt cost-benefit analyses before it imposes expansive regulations. For example, the FCC's decision to impose network neutrality regulation on broadband Internet access services was criticized on this count. The FCC lacked any cost-benefit basis for its sweeping regulatory intrusions. Its *Open Internet Order* was further criticized for dismissing any need to demonstrate existing or likely anticompetitive conduct or consumer harm before imposing regulations.

More recent FCC notices, such as its proposed rulemaking regarding spectrum aggregation, invited interested parties to explain likely costs and benefits of different agency actions.
But asking marketplace competitors to offer the assessments the agency should consider is not a serious accountability measure. And the FCC is vigorously defending its legal authority to impose net neutrality regulations without any cost-benefit analysis in the D.C. Circuit.

For that matter, the FCC has no empirically-based process for measuring and examining the results of its new regulatory undertakings. The FCC's two primary tools for removing outdated regulations – Section 10 forbearance authority and Section 11 biennial review authority – have been largely neglected by the agency.

In many instances, H.R. 1062's language could be lifted directly from the bill and made applicable to the FCC context. Other bill provisions would need only minor recalibration.

An "FCC Accountability Act" would help ensure proposed regulations are justifiable. And it

would serve as a check against agency overregulation. Requiring the FCC to undertake cost-benefit analyses prior to adopting rules and to measure results post-adoption is sound policy. It makes economic sense too.

FCC Opts for Delay Over Deregulation in Forbearance Process
Randolph May (March 14, 2013)

The FCC's forbearance process has sadly proven more prone to delaying action than deregulatory action. Too often the FCC takes too long to rule on forbearance petitions. This reluctance to forbear from enforcing legacy voice regulations becomes less and less justifiable as the broadband era progresses and as the free market offers consumers more and more product and service choices.

Orders issued by the FCC in February on forbearance petitions by USTelecom and CenturyLink are the latest reminders of the regrettable near breakdown of the regulatory forbearance process. Both proceedings have been beset by delays. In both instances the FCC has consumed its year-long statutory shot clock for ruling and then granted itself 90-day extensions.

The 1996 Telecom Act obligates the FCC to deregulate whenever circumstances satisfy Section 10's forbearance criterion. That is, the FCC must forbear from applying any telecommunications law or regulation if it determines that enforcement is not necessary to ensure that charges are just and reasonable nor necessary to protect consumers, and if it determines that forbearance is consistent with the public interest.

Congress attempted to add teeth to Section 10 by including a shot clock. If the FCC fails to respond to a forbearance petition within one year's time, or fifteen months if the agency grants itself a three month extension, the petition "shall be deemed granted" by operation of law.

But as I explained in my *Perspectives from FSF Scholars* paper, "Delaying Deregulation: Forbearance at the FCC," rulings on petitions are too frequently rendered after the end of the one-year shot clock, and at or near the end of the 90-day extension. Such delays are strongly suggestive of the agency's general aversion to the exercise of its forbearance obligation. Now consider two new cases in point.

On February 28, the FCC finally released an order on USTelecom's forbearance petition involving 17 categories of legacy voice service regulations. USTelecom filed its petition on February 12, 2012. The FCC sat on the petition for a year's time and granted itself an extension on February 2, 2013. The February 28 order, however, was limited to granting relief from only two-and-a-half regulatory provisions, including its § 64.1 traffic damage claim rules. According to the order: "Adopted in 1936 by an order of the Commission’s Telegraph Division, section 64.1 was originally intended to address issues with claims against telegraph carriers arising from errors in, or delayed delivery or non-delivery of, messages and money orders. Today, telegraph service is obsolete." That is, it took over a year's time to grant forbearance relief regarding some very old regulations where no party raised any specific objections. In any event, USTelecom's petition remains pending regarding several remaining regulations.

And on February 22, the FCC issued an order granting itself a 90-day extension to consider a CenturyLink's petition. CenturyLink seeks forbearance relief from enforcement of legacy regulations with respect to its enterprise broadband services. Its petition was filed with the FCC back on February 23, 2012. In prior blog posts, FSF President Randolph May and I have written about the strong case to be made for granting CenturyLink's forbearance petition regarding broadband enterprise services.

Unfortunately, lack of timely action on both USTelecom's petition and CenturyLink's petition are part of a repeating pattern of FCC delay and resistance to forbearance relief. For evidence of this pattern, consider the following dozen-plus instances from recent years. *In every instance below the FCC used up its entire one-year shot clock in considering forbearance petitions and used nearly all 90 days of its self-granted extensions*:

- *SBC Title II IP-Platform Order* (2005) – denying forbearance from Title II regulations as applied to IP Platform Services *(petition filed: Feb. 5, 2004; order released: May 5, 2005)*

- *Qwest Omaha Order* (2005) – granting in part and denying in part forbearance from certain section 251 and other obligations in the Omaha, Nebraska Metropolitan Statistical Area (MSA) *(petition filed: Jun. 21, 2004; order adopted: Sept 16, 2005; order released: Dec. 2, 2005)*

- *Verizon Computer Inquiry Petition* (2005-6) – taking no agency action, the Commission issued a news release announcing that the petition had been granted by operation of law regarding requested relief from Title II requirements or *Computer Inquiry* rules *(petition filed: Dec. 20, 2005 ; deemed granted: Mar. 20, 2007)*

- *Verizon 6 MSA Order* (2007) - denying forbearance from dominant carrier, *Computer III*, and UNE regulations in 6 MSAs *(petitions filed: Sept. 6, 2006; order released: Dec. 5, 2007)*

- *ACS UNE Order* (2007) - granting certain conditional forbearance from unbundling obligations in wire centers in the Anchorage, Alaska study area *(petition filed: Sept. 30, 2005; order adopted: Dec. 28, 2006; order released: January 30, 2007)*

- *ACS Dominance Order* (2007) - granting in part, subject to conditions, certain forbearance from dominant carrier regulation in Anchorage, Alaska *(petition filed: May 22, 2006; order released: Aug. 20, 2007)*

- *AT&T/BellSouth Computer Inquiry Order* (2007) – granting forbearance from Title II requirements or Computer Inquiry rules *(petition filed: Jul. 13, 2006; order released: Oct. 12, 2007)*

- *Embarq Computer Inquiry Order* (2007) - granting forbearance from Title II requirements or *Computer Inquiry* rules *(petition filed: Jul 26. 26, 2006; order released: Oct. 24, 2007)*

- *Qwest Terry Order* (2008) - granting certain forbearance from dominant carrier and UNE

obligations in the Terry, Montana exchange *(petition filed: Jan. 22, 2007; order released: Apr. 21, 2008)*

- *Qwest 4 Order* (2008) - denying forbearance from dominant carrier, *Computer III*, and UNE regulations in 4 MSAs *(petitions filed: Apr. 27, 2007; order released: Jul. 25, 2008)*

- *Verizon New England and Rhode Island Petitions* (2008-9) – closing proceeding involving requested relief from dominant carrier, *Computer III*, and UNE regulations in two MSAs following Verizon's withdrawal of petitions a few days before the end of the Commission's extension period *(petitions filed: Feb. 14, 2008; petitions withdrawn: May 12, 2009)*

- *Qwest Phoenix MSA Order* (2010) – denying forbearance from dominant carrier, *Computer III*, and UNE regulations *(petition filed: Mar. 24, 2009; order released: Jun. 22, 2010)*

- *NCTA Section 652 Order* (2012) – granting, in part, forbearance from Section 652 requirements *(petition filed: Jun. 21, 2011; order released: Sept. 17, 2012)*

These examples demonstrate how the Congressionally-imposed shot clock for ensuring prompt deregulatory action has been turned on its head and is now a license to delay action. Many of the orders above were subject to serious legal challenges, and in some cases FCC rulings denying relief were overturned and remanded. Substantial delays have even preceded instances where the FCC finally acceded to forbearance relief.

It shouldn't be this way.

In today's digital environment, innovation and competition in the free market for broadband services are more attuned to consumer welfare than regulations addressed to an older and increasingly obsolete generation of voice services. These dynamic market changes call for more promptness in considering forbearance petitions, at the very least. Also, the FCC purports to be serious about facilitating the transition to next-generation broadband networks and to retiring the legacy public switched telephone network. If it is, then it should be more open to eliminating last-generation rules that are becoming a costly drag on investment and innovation and prone to undermining competition.

Report Evaluates FCC's Increasingly Expensive Regulations
Seth Cooper (February 28, 2013)

CEI's February 21 *Regulatory Report Card* on the Federal Communications Commission offers a concise overview of the costliness of complying with FCC regulations. Anyone who follows FCC policy and takes an interest in regulatory reform should keep a copy of this publication handy for reference.

Authored by Ryan Young, CEI Fellow in Regulatory Affairs, the *Regulatory Report Card* puts the cost of FCC regulations "at $142 billion per year, making it the third most expensive branch of regulation." Also, the number of new regulations the FCC imposes annually is staggering. To

wit, "Federal agencies published a total of 3,706 final rules in 2012. Of those, 108 came from the FCC, for an average of one new final FCC rule every 2.3 working days." Moreover:
The fall 2012 Unified Agenda lists 86 rules from the FCC in various stages of the regulatory pipeline. Seven of them are "economically significant," meaning they impose at least $100 million in economic impact in a given year.

For more facts and figures revealing the FCC's trend of increasing regulation despite the growth of competitive market conditions, see the *Regulatory Report Card*.

FSF's Randolph May Applauds Introduction of Sunshine Act Reform Bill
Sarah Leggin (February 8, 2013)

On February 7th, FSF's Randolph May issued a media advisory concerning the bills introduced to implement Sunshine Act reforms. Here is his statement:

> As a very longstanding advocate of reforming the Sunshine Act, and one who has written often about the need to change it, I applaud the introduction of the proposed "FCC Collaboration Act" by Reps. Eshoo, Shimkus, and Doyle, and Senators Heller and Klobuchar. And I am pleased the bill has bipartisan sponsorship.

By allowing more than two of the five FCC members to meet together to discuss agency business, the bill, if adopted, would facilitate more collaboration and a franker exchange of views among the FCC commissioners. And it would also enable the Commission to accomplish its work more efficiently because the exchange of views can take place directly, rather than through a series of one-on-one "round robin" discussions or through various staff intermediaries shuttling between the commissioners' offices. The current Sunshine Act restrictions are fundamentally at odds with the very rationale for the establishment of multi-member commissions and with notions concerning how they can most effectively function.

While I applaud the reintroduction of the bill, I do wish to state my preference would be for the Sunshine Act reform to be incorporated into a bill encompassing a broader range of necessary reforms. Indeed, the "FCC Reform Act of 2011," which contained a number of other desirable FCC process reforms, such as cost-benefit analysis requirements and shot clocks, included the same Sunshine Act proposal now introduced separately. I testified last year at a hearing on the "FCC Reform Act" and supported adoption of many of its provisions. And the House of Representatives ultimately adopted the bill.

So, while I support adoption of the FCC Collaboration Act, I'd like to see it adopted in conjunction with some other process reforms that warrant bipartisan support as well."

The FCC: "The More Things Change …"
Randolph May (June 24, 2012)

You're familiar with the old saying, "The more things change, the more they stay the same." For me, the quip calls to mind the Federal Communications Commission. Despite the competitive developments that have occurred in the communications marketplace since passage

of the Telecommunications Act of 1996, the FCC is essentially the same size and regulates much in the same way as it did in 1996.

This shouldn't be the case.

Congress declared in the 1996 Telecom Act's preamble its intent "to promote competition and reduce regulation." The primary legislative report stated the law was intended to create a "deregulatory national framework." Normally, the development of competition replaces the need for regulation, which, concomitantly, reduces the need for as many regulatory personnel. This is a general proposition to which almost all subscribe.

Except it hasn't ever worked that way at the FCC. And even now, despite the fact that market segments regulated by the agency are becoming ever more competitive, there are no signs – absent congressional intervention – that it will work that way.

In fact, over the course of the 15-year period since the 1996 Act's adoption, the FCC's staffing level (as measured by full-time equivalent staffers) has grown from 1755 (reported in the FCC's 1997 Annual Report) to 1917 now. Assuming that some of the increase in FTEs is attributable to additional staffing hired in connection with post-1996 Act implementation activities, in the last decade, despite the increase in competition in the markets subject to FCC regulation, the number of FCC FTEs has remained essentially steady.

The chart below shows the number of FCC FTEs over the past decade.

Fiscal Year	**FCC FTEs**	**FTC FTEs**
FY 2012	1,917 Projected	1,176 Estimated
FY 2011	1,917	1,155
FY2010	1,905	1,133
FY2009	1,820	1,106
FY2008	1,775	1,093
FY2007	1,793	1,059
FY2006	1,816	1,005
FY2005	1,899	1,019
FY2004	2,015	1,057
FY2003	1,995	1,051
FY2002	1,975	1,054

FCC Source: Fiscal Year 2012 Budget Estimates Submitted to Congress
2011/2012: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-304636A1.pdf
Prior Years' Sources: FCC Performance Budgets, http://www.fcc.gov/omd/strategicplan/

FTC Source: Fiscal Year 2013Congressional Budget Justification, page 36
http://www.ftc.gov/ftc/oed/fmo/2013_CBJ.pdf

In addition to showing the number of FCC FTEs from 2002 - 2012, the chart also shows the number of Federal Trade Commission FTEs for the same period. It is interesting – and instructive as well – that the FTC, with its dual consumer protection and competition regulatory responsibilities cutting across all U.S. markets, operates with only 1176 FTEs. The FTC generally is regarded as a well-managed and effective agency.

Moreover, the FCC's budget has increased substantially over the past decade. According to the respected joint study of the Weidenbaum Center, Washington University, and the Regulatory Studies Center, George Washington University, since FY 2000, the amount spent by the FCC on regulatory activity has increased from $269 million to $446 million. These amounts are the budgetary "outlays" attributable to the agency's regulatory activities, gross of regulatory fees collected. This data is derived directly from the annual *Budget of the United States*. The Weidenbaum/RSC report may be found here and the above figures may be found in Table A-1. Again, the increased agency spending on regulatory activity throughout the past decade occurred as competition continued to increase in market segments subject to FCC regulation.

Small wonder then that, in recently reducing the FCC's appropriation mark for FY 2103 by $17 million less than the Commission has requested, the House Committee on Appropriations determined, "the current organizational and management structure of the Commission does not reflect the convergence in today's telecommunications market." Significantly, the committee concluded *"[t]he increase in market-based competition should result in a smaller Commission with fewer staff."* And it directed the Commission "to submit a review of the current FCC organizational structure as well as a proposal for improvement that reflects today's technology landscape and competitive marketplace."

As I stated at the outset, it is widely accepted that increased competition should lead to reduced regulation, which, in turn, should lead to a reduced number of staff and a reduced regulatory budget. I am not suggesting, and I do not suppose the House Appropriations Committee is suggesting, that there should have been a straight-line reduction, or a reduction in every year. But, over time, as competition increases and replaces the need for regulation, there should be a meaningful reduction in the agency's staffing level and the size of its regulatory budget.

I am confident this is what Congress anticipated when it declared the 1996 Telecom Act was intended to "promote competition and reduce regulation."

And I assume then-FCC Chairman William Kennard had in mind much the same when he released a strategic plan for the FCC in 1999 that began with this very statement: "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."

James Byrnes once said: "The nearest approach to immortality on earth is a government bureau." As someone who served in all three branches of government as a member of the U.S. House of Representatives and the Senate, governor of South Carolina, Secretary of State, and the Supreme Court, Mr. Byrnes knew something about the ways of government agencies and bureaucratic imperatives.

Mr. Byrnes need not worry. I am not suggesting the FCC should die, or that it should be crippled. There is still important work for it to do.

But, as the House committee report suggests, the Commission does need to reform itself institutionally in a meaningful way that reflects the marketplace changes that have occurred since 1996. This would require the agency to prioritize its activities to reflect today's realities, so, for example, it would devote resources to repurposing spectrum in a timely fashion, rather than to considering re-regulating services, such as special access, which were deregulated a decade ago.

There simply is no reason for the FCC to go merrily along in the cause of proving that, "The more things change, the more they stay the same."

Red Tape Still Rising, Despite Administration's Regulatory Review
Seth Cooper (April 2, 2012)

Continuing their series of periodic reports on the growing number of costly government regulations, Heritage Foundation's James Gattuso and Diane Katz recently released "Red Tape Rising: Obama-Era Regulation at the Three-Year Mark."

Like its predecessors (one of which I blogged about previously), this report continues to chronicle the accelerated rate of federal rulemaking:

During 2011, the Obama Administration completed a total of 3,611 rulemaking proceedings, according to the Federal Rules Database maintained by the Government Accountability Office (GAO), of which 79 were classified as "major," meaning that each had an expected economic impact of at least $100 million per year. Of those, 32 increased regulatory burdens (defined as imposing new limits or mandates on private-sector activity). Just five major actions decreased regulatory burdens…Regulations adopted in 2011 cost Americans some $10 billion in new annual costs, according to estimates by the regulatory agencies.

But Gattuso and Katz go on to explain why "[t]he actual cost of these new regulations is almost certainly higher than the totals reported here." And even more federal regulations are in the works for 2012:

The most recent Unified Agenda (also known as the Semiannual Regulatory Agenda)—a bi-annual compendium of planned regulatory actions as reported by agencies lists 2,576 rules (proposed and final) in the pipeline. The largest proportion—505 rulemakings—is from the Treasury Department, the SEC, and the Commodity Futures Trading Commission—all tasked with issuing hundreds of rules under the massive Dodd–Frank statute. The Environmental Protection Agency is responsible for 174 others, while 133 are from the Department of Health and Human Services, reflecting, in part, the regulatory requirements of Obamacare.

Of the 2,576 pending rulemakings in the fall 2011 agenda, 133 are classified as "economically significant." With each of these expected to cost at least $100 million annually, they represent a

total additional burden of at least $13.3 billion every year.

Gattuso and Katz also challenge effectiveness of the Administration's agency-by-agency regulatory review initiative to reduce outdated and costly mandates:

The Administration claimed that its reforms would, if implemented, reduce regulatory costs by $10 billion per year. But little or none of this reduction has materialized. Of the four major actions in 2011 that reduced regulatory burdens, none were the product of the regulatory review initiative.

The authors then offer some steps for Congress to take in stemming the tide of new federal regulations. Like its predecessors, this report offers a sobering assessment of the persistent growth of costly government mandates. Gattuso and Katz's critique of the Administration's regulatory review process is certainly worth further reflection.

Congressional Subcommittee Passes Cost-Benefit and Other FCC Proces Reforms
Seth Cooper (November 18, 2011)

As covered in recent news accounts, the House Communications Subcommittee passed a pair of FCC process reform bills on November 16. In a November 3 blog post titled "Reforming the FCC's Regulatory Process," FSF President Randolph May discussed both bills: H.R. 3309 and H.R. 3310.

The FCC is an independent agency and not subject to existing Presidential Executive Orders regarding regulatory processes. So among its many provisions, H.R. 3309 incorporates some key language contained in Executive Order 12866 (1993) and Executive Order 13563 (2011) regarding identification harm and cost-benefit analysis.

H.R. 3309 contains requirement that must be met by the FCC in conducting rulemakings that will have an "economically significant impact"—i.e., will cost $100 million or more annually or have "a material adverse effect on the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities." In particular, the FCC must identify and offer an analysis of "the specific market failure, actual consumer harm, burden of existing regulation, or failure of public institutions that warrants the adoption or amendment."

Cost-benefit analysis is receiving increasing attention as a method for bringing more discipline to administrative agencies and for halting or perhaps even turn the tide against escalating numbers of new federal regulations. Taking reasoned steps to curb unnecessary costs and restrictions imposed by federal regulations is particularly important in light of our existing economic travails.

Also on November 16, Dr. Jerry Ellig and Sherzod Abdukadirov of the Mercatus Center published a short primer on "Regulatory Analysis and Regulatory Reform." Ellig and Abdukadirov sketch out a useful framework for assessing the quality of regulatory impact analysis and offer some prescriptions for improving such analysis. It should come as no surprise that they recommend that "[r]egulatory analysis must be legislatively required for all agencies, including independent agencies."

a reasoned determination that the benefits of the adopted rule or the amendment of an existing rule justify its costs (recognizing that some benefits and costs are difficult to quantify), taking into account alternative forms of regulation and the need to tailor regulation to impose the least burden on society, consistent with obtaining regulatory objectives.

Reforming the FCC’s Regulatory Process
Randolph May (November 3, 2011)

Representative Greg Walden, Chairman of the House Commerce Committee's Subcommittee on Communications and Technology, and Senator Dean Heller, a member of the Senate Commerce Committee's Subcommittee on Communications, Technology, and the Internet, have just introduced two bills that, in important ways, would reform the Federal Communications Commission's regulatory processes.

The bottom line is that, together, the two pieces of legislation would require the FCC to operate in a more transparent, more efficient, less reflexively regulatory, and more market-oriented manner. In today's dynamic, competitive communications environment, this will serve American consumers well.

The "Federal Communications Commission Process Reform Act of 2011" (H.R. 3309) contains various provisions that would, on the whole, improve the way the agency operates. The "Federal Communications Commission Consolidated Reporting Act of 2011" (H.R. 3310), as its name implies, would require consolidation of various separate annual reports the FCC is now required to produce. This consolidated biennial report would focus, in a comprehensive fashion, on the state of intermodal (cross-technology platform) competition, the deployment of communications to unserved communities, and the elimination of unnecessary regulatory barriers.

Testifying at a hearing before the House Subcommittee on Communications and Technology on June 22, 2011, on the draft bill upon which the two new bills are closely modeled, I supported most of the proposed reforms, while not necessarily endorsing all of them. I won't repeat here what I said in my testimony about all of the various aspects of the proposed reforms because you can read the testimony.

What I want to do instead is simply highlight a few points that may be worthy of note as the process moves forward.

- In answering post-hearing follow-up questions, I suggested consolidating the various reports identified in H.R. 3310 into one "marketplace report." The bill accomplishes this very nicely. The requirement that the Commission examine cross-platform marketplace developments and competitive alternatives in a comprehensive, holistic way should lead not only to less duplication of effort at the agency and by the private sector, but, more importantly, to sounder decisions. For example, the holistic approach ought to be more difficult for the agency to ignore the fact that wireless service is substitutable for wireline service, or that the video distribution market is highly competitive.

· H.R. 3309's provision ("Transaction Review Standards") reforming the agency's merger review process is certainly one of the bill's most important features. In acting on a transaction application, the FCC could impose a condition on its approval only if the condition is narrowly tailored to remedy a harm that arises as a result of the specific transaction on review and only if the Commission possesses authority to impose a similar requirement outside of the merger review context. This provision would limit, at least to some extent, the Commission's tendency to use the merger review process to adopt regulatory requirements unrelated to alleged transaction-specific harms and that should be imposed, if at all, only in a generic rulemaking proceeding. I first urged these same reforms to the merger review process – the elimination of "regulation by condition" – back in 2000 in this Legal Times piece.

· The provision in H.R. 3309 ("Nonpublic Collaborative Discussion") that would allow, notwithstanding the existing Sunshine Act strictures, a bipartisan group of FCC commissioners to meet collaboratively is another key reform. Allowing more than two commissioners to meet together, rather than relying on a series of ongoing round-robin meetings or staff gatherings for communication with each other, would be more efficient. But more importantly, it would foster greater collegiality and collaboration among the commissioners, increasing at least somewhat the likelihood of sounder decisions. I have been advocating reform of the Sunshine Act along these lines since shortly before Genesis. Here is my law review piece from 1997 reporting on an effort to revise the Sunshine Act by a special committee of the Administrative Conference of the United States that I chaired.

· There is much to commend several of the various other process reforms that would, for example, prevent last-minute data dumps in rulemaking proceedings, require "shot clocks" for certain proceedings so decisions are reached on a timely basis, and require release of draft orders before public meetings and final orders promptly thereafter.

· One of the most important parts of H.R. 3309 would require, for rules that may have an "economically significant impact," that the FCC's order identify and analyze the specific market failure, actual consumer harm, burden of existing regulation, or failure of public institutions, that warrants adoption of the rule. And for these major rules with an economically significant impact, the agency also would be required to conduct a form of cost-benefit analysis. Compliance with these analytical requirements should make it more difficult for the Commission to adopt regulations that are unnecessary or which are unduly costly or burdensome. The draft bill did not restrict the requirement to perform the specified analyses to any subset of rules. At the June hearing, I agreed with some of the draft bill's critics that it may be appropriate to narrow the application of the analytical requirements so they do not apply to all proposed rules, no matter how limited the projected economic impact. In my view, however, H.R. 3309 now goes too far in the other direction. This is because economically significant impact rules are defined in the bill generally as those with an annual effect on the economy of $100 million or more. In my post-hearing responses, I agreed it might be impractical and unnecessary to apply the analytical requirements to all proposed FCC rules, but I suggested they be applied to those with a projected annual economic impact, say, of $10 - $20 million or more. I said:

> "A relatively low threshold such as this will ensure that most economically significant rules are subject to cost-benefit analysis, but exclude those with little or no impact, including rules, such as those barring racial or religious discrimination, that do not lend themselves to cost-benefit analyses." I understand the $100 million figure has been used in the various executive orders governing regulatory review. But I still believe a threshold considerably less than a $100 million annual impact is appropriate for the FCC, an agency with an historic tendency to over-regulate in the face of the development of competition. After all, in 2010, according to the government's "Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions," the FCC had 147 rules in various stages of development. Only 7 of these 147, or approximately 5%, were considered in the "economically significant" category triggered by the $100 million annual impact threshold. These figures are generally in line with those from previous years. Thus, as proposed, the analytical requirements designed to lead to sounder, more rigorous, market-oriented decisions – by requiring consideration of specific market failure, actual consumer harm, the burden of existing regulation, and the costs and benefits of the proposed rule – would not apply to most of the rules considered for adoption by the agency. (For information concerning the FCC's rulemaking activities, as well as much useful information concerning the regulatory activities of agencies throughout the federal government, see the most recent edition of Wayne Crews' *"Ten Thousand Commandments"* series of reports.)

All things considered, both H.R. 3309 and H.R. 3310, if enacted, would substantially improve the FCC's processes. The reforms almost certainly would lead to FCC decisionmaking that is more transparent and efficient than at present. And the reforms likely would lead to adoption of regulations that are less costly and less burdensome than they otherwise would be, or, in some instances, to the rejection of regulations not shown to be justified. The constraints placed on the FCC's pro-regulatory bent, particularly the constraints imposed by the market-oriented analytical requirements, will help spur job and investment growth in a very important, dynamic sector of the economy.

Finally, Chairman Walden seems to have gone out of his way to draft the two reform bills in a moderate way in order to attract support from House and Senate Democrats. It remains to be seen whether his effort in this respect will bear fruit. And it also remains to be seen whether President Obama will be supportive, now that, even if belatedly, he is talking regularly about eliminating unnecessary and unduly burdensome regulations.

In truth, regulatory reform once was a bipartisan undertaking. Reforming the FCC regulatory process ought now to be a bipartisan effort. I hold out hope it will be.

Engaging Regulatory Reform Efforts
Seth Cooper (July 18, 2011)

The flurry of federal regulatory activity taking place in the last couple years has led to renewed attention to regulatory reform efforts to scale back the growing scope of government agency rules and ease the burdens of bureaucratic restrictions. In a newly-published article in *Engage* titled "Prospects for Regulatory Reform in 2011," Susan Dudley provides an excellent

introductory and overview of current regulatory reform initiatives, with a special attention to legislative efforts in the 112th Congress. Dudley formerly served as Administrator for the Office of Information and Regulatory Affairs (OIRA) and currently serves as director of George Washington University's Regulatory Studies Center.

Dudley's *Engage* article begins with a useful background section, tracing regulatory reform implemented in the mid-1970s to mid-80s, as well as mid-90s reform proposals from the 104th Congress. Dudley focuses primarily on two categories of reforms for the 112th Congress to consider. The first category includes procedural reforms – that is, reforms to the processes by which regulations are adopted. The other category emphasized by Dudley includes decision criteria reforms – in other words, "improving upon the decisional criteria by which regulatory alternatives are evaluated." Both categories include a handful of different legislative approaches to regulatory reform that merit careful consideration by Congress.

And speaking of procedural regulatory reforms, FCC process reform, in particular, is a subject of continuing interest in policymaking circles this year. Free State Foundation recently posted the panel discussion transcript for its lunch seminar entitled "Regulatory Reform at the FCC: Why Not Now?" The panel followed a keynote address by Congressman Cliff Stearns, Chairman of the House Commerce Committee's Subcommittee on Oversight and Investigations. FSF President Randolph May moderated the event, and offered his own views in testimony at a June hearing on "Reforming FCC Process" before the House Commerce Committee's Subcommittee on Communications and Technology.

Me, Michael Copps, and the Sunshine that Hurts
Randolph May (March 14, 2011)

I don't often agree with FCC Commissioner Michael Copps -- so when I do, I like to take the opportunity to take note.

For many years now, to his credit, Commissioner Copps has been the most steadfast proponent of congressional action to revise the Sunshine Act. As most readers of this space know, the Sunshine Act prohibits more than two of the five commissioners from meeting together privately outside of a formal FCC open meeting preceded by a public notice.

Perhaps in theory, this post-Watergate "reform" sounds nice, but in practice – in the real-world of agency decisionmaking in a multi-member commission -- the Sunshine Act works against the type of collaboration and collegial discussion that might well improve agency decisions.

Way back in 1995, I chaired a special committee of the Administrative Conference of the United States that recommended revisions to the Sunshine Act. Our committee report proposed revisions that would, at least on a trial basis, allow agency members to meet in private, without advance notice, provided a summary of the meeting was put in the agency's public record after the meeting. The report explained in detail the problems with the Sunshine Act and the reasons why revising the law would improve agency decisions.

Now Representatives Anna Eshoo, John Shimkus, and Mike Doyle have introduced the "Federal Communications Commission Collaborative Act." Their press release says that the bipartisan

legislation "would modify current FCC rules to allow three or more Commissioners to hold nonpublic collaborative discussions, as long as no agency action is taken." A member of each political party would have to be included in any such discussions.

Commissioner Copps, in a news release commending the bill's introduction, stated that "[i]f there is only one action that the Commission could take this year to reform the FCC, this should be it."

I can think of several measures that ought to be taken to reform the FCC, but Commissioner Copps is right that revising the Sunshine Act is certainly an important one. Here is the way that Commissioner Copps explained why this is so:

“The inability of Commissioners to get together and talk as a group makes zero sense. The statutory bar on more than two Commissioners talking together outside a public meeting has had pernicious and unintended consequences—stifling collaborative discussions among colleagues, delaying timely decision-making, discouraging collegiality and short-changing consumers and the public interest. For almost a decade I have seen first-hand and up close the heavy costs of this prohibition."

Again, Commissioner Copps deserves credit for his leadership on this issue. Much of the press tends to take a pretty superficial, knee-jerk reaction against any proposed changes to the Sunshine Act, so it takes a certain amount of courage to argue for reforming the law.

Commissioner Copps and I are in agreement that, in the current state of affairs, too much Sunshine hurts.

PS – A final reminder. In a January blog, I put in a plug for Time Warner Cable's Research Program on Digital Communications, which awards stipends designed to foster research dedicated to increasing understanding of the benefits and challenges facing the future of digital technologies in the home, office, classroom and community. As I said in that piece, TWC executives, led by Fernando Laguarda, deserve much credit for developing and implementing the program. It presents a good opportunity for scholars to contribute to our understanding of digital communications.

The 2011 Program Announcement setting forth the program guidelines is here. The deadline for submitting applications is April 1. Take heed.

FCC Merger Review Reform: The Case for Regulatory Modesty Randolph May (March 3, 2011)

You probably have seen the trade press reports on FCC Commissioner Meredith Baker's Wednesday speech concerning reform of the FCC's merger review process. Even if you have, it is well worth taking the time to read the entire speech here.

Entitled "Toward a More Targeted and Predictable Merger Review Process," Commissioner Baker sets forth a number of specific ideas for addressing what she aptly calls the "long-term structural issues" bedeviling the agency's merger review process.

The speech is concise, and I am not going to repeat what Commissioner Baker says. The merger

review process, as carried out by the FCC, has been subject to criticism for well more than a decade. Suffice it to say that her reform suggestions fall into the following three categories: (1) eliminate or at least reduce the duplication of effort – and the attendant expenditure of resources – that result from dual review of the proposed transaction by the antitrust authorities and the FCC; (2) reduce substantially the time the FCC takes to complete its review; and (3) constrain the FCC's practice of imposing wide-ranging merger conditions that do not pose clearly merger-specific harms.

As noted in Commission Baker's speech, I first wrote about the problems attendant to the FCC's merger review process in *Legal Times* in March 2000 in a piece entitled "Any Volunteers?" ("Volunteers" was used purely in the ironic sense.) Another article entitled "Reform the Process" appeared in the *National Law Journal* in May 2005. I have written on the subject many times since.

Rather than rearguing here what should be done – and Commissioner Baker has certainly done a good job of laying out her own proposals – I want to emphasize a different point: The timing may be – ought to be -- right now for the FCC to adopt many of the reforms that Commissioner Baker and others have suggested.

Of course, as a practical matter, the Commission will only act to adopt merger reforms if FCC Chairman Julius Genachowski gets behind the effort – and provides the crucial third vote.

He should want to do so.

Commissioner Baker generously credits Chairman Genachowski with devoting agency resources to institutional agency reform. I am not aware of all he may have done in this regard. But I am sure that nothing Chairman Genachowski has done thus far would be as significant or meaningful with respect to institutional reform as changing the FCC's merger review policies along the lines suggested by Commissioner Baker.

There is widespread agreement that the way the Commission conducts the process now -- with the inevitable year-long reviews, the incontrovertible duplication of effort of the Department of Justice and the FTC on the one hand and the FCC on the other, and the unseemly extraction of so-called "voluntary" conditions – has contributed mightily to the FCC's reputation as an agency that does not function very well much of the time.

With the nation's economy and job creation prospects still fragile, and with intense focus on our massive budget deficit, the timing ought to be right for Chairman Genachowski to lead a serious effort to achieve merger review reform. After all, President Obama has made a point in the past few weeks of saying government agencies should ensure their rules and processes are not unnecessarily delaying or making more costly new investments and job creation by businesses. See, for example, the President's widely-publicized Wall Street Journal op-ed, "Toward a 21st Century Regulatory System." And earlier this week the Government Accountability Office released its widely-commended report, "Opportunities to Reduce Duplication in Government Programs, Save Tax Dollars, and Enhance Revenue," highlighting areas where the government can achieve cost savings by eliminating duplicative functions and increasing the efficiency of operations.

Nothing more is needed for the FCC to succeed in a merger review reform effort than a healthy dose of self-restraint and regulatory modesty. I understand that, consistent with the relevant Communications Act provisions, the agency must find that license or authorization transfers are in the "public interest." There is no doubt that within the context of that vague standard, the Commission has the discretion, for example, to adopt each of the process reform proposals Commissioner Baker proposes.

In 2008, I published an article in the *Administrative Law Review* entitled, "A Modest Plea for FCC Modesty Regarding the Public Interest Standard," in which I suggested that in carrying out its public interest responsibilities, "the FCC itself should act more modestly." With respect to the merger review process and other agency policies, I said that, short of congressional action, "regulatory constraint under the public interest standard must come from the agency itself."

While unusual, it is not unprecedented for an administrative agency, on its own, to implement institutional reforms. Over the past few decades, despite the remarkable marketplace and technological changes that have occurred, the FCC, unfortunately, has been especially resistant to institutional change.

Chairman Genachowski should seize the opportunity presented by Commissioner Baker's thoughtful merger review proposals to demonstrate that the FCC is still capable, in an exercise of regulatory modesty, of reforming itself – at least in this important respect.

Process Problems Plague FCC Review of Harbinger Merger
Randolph May (May 3, 2010)

Communications Daily recently highlighted a disconcerting facet of the FCC's conditional grant of approval in the Harbinger-SkyTerra merger. It appears that non-parties to the transaction directly affected by controversial conditions to the merger were kept in the dark about those proposed conditions because of a Commission grant of confidentiality issued a month prior to the merger approval. The episode highlights the continuing need for change that the Commission has promised in other areas. It's time to bring greater openness and transparency to the FCC's merger approval process.

The conditions adopted in the FCC's *Order* approving the merger include a prohibition on the merged entity's allowing access to its spectrum by the two largest wireless carriers absent prior Commission consent. In a blog post from last month ("FCC Regulating Outside Its Orbit"), I pointed to the problem inherent in the Commission's action. In sum, the FCC claimed for itself authority to bind not only the mobile satellite service providers that are parties to the transaction but also a power of sole discretionary approval of future business deals involving non-parties to the merger. Whereas several prior Commission merger approvals gave rise to extra-statutory regulation by condition relating to merging parties, its conditional approval of the Harbinger-SkyTerra merger marks a troublesome enlargement of the "regulation by condition" problem to unwitting non-parties.

Now added to those concerns with a seemingly open-ended condition by regulation process through FCC merger review is another peculiar dimension of agency non-transparency. The *Supplement to Petition for Partial Reconsideration* recently submitted to the FCC by Verizon

Wireless complains about the Commission's grant of confidentiality to the merging parties' proposal of conditions "materially the same" as those adopted one month later in the FCC's Order. "At no point during the month after they were first proposed," asserts Verizon Wireless, "did [it] ever receive notice that its access to spectrum and alternative network capacity was at risk of being restricted via an adjudicatory proceeding to which it was not a party." Rather, an unexplained post-approval withdrawal of confidentiality by Harbinger resulted in the disclosure of those "materially the same" conditions offered up a month before the FCC's *Order*.

In light of the new FCC's professed commitments to change, to openness and to transparency, one is hard-pressed to understand the Commission's decision to consider those controversial merger conditions while keeping them away from the eyes of the non-parties to be affected and the eyes of public. None of this is to suggest that Harbinger-SkyTerra merger approval was the result of a conspiracy of regulators with sinister motives conducting deals in a dark and smoky room. But the episode positively points to the need for agency reform. The Commission is undertaking reforms of its procedural rules, its *ex parte* rules, and its forbearance process. FCC merger review should be the next prime candidate for process reform.

The non-transparency of the FCC's actions in approving the Harbinger-SkyTerra merger certainly bring into sharper focus the short-changing of due process principles resulting from the Commission's merger review actions. As Verizon Wireless' supplemental petition aptly put it:

> Stripped to its essence, the filing of the proposed commitments under these circumstances prevented Verizon Wireless from learning of their existence until after the Order was adopted. This new information underscores that the conduct in this proceeding denied Verizon Wireless – a target of two of the Order's key conditions – any opportunity to be heard, and underscores the unlawfulness of the conditions themselves. This deprivation of Verizon Wireless's due process and other rights represents that antithesis of open and transparent decisionmaking, and further establishes why the conditions should be eliminated immediately.

It is a basic rule of law that the rights of parties cannot be adjudicated unless those parties are actually or constructively before the decision-maker. FCC regulation by conditions imposed on non-parties to merger transactions epitomizes arbitrary agency action and is fundamentally unfair.

Overall, the FCC's case for adopting merger conditions constraining the non-party wireless carriers appears shaky. Agency non-transparency and non-party due process problems raise serious questions about the FCC's *Order*. Not to mention that the FCC's *Order* offered no analytical reasoning tying the controversial conditions it approved with any kind of market failure or power. Taking all these shortcomings into account, the most immediately sensible thing for the Commission to do is to drop the merger conditions constraining the non-parties to the transaction. The next most sensible thing for the Commission to do is to bring its professions of commitment to change, openness and transparency to its merger review rules with meaningful process reform.

Reforming the Sunshine Act
Randolph May (May 27, 2008)

There are many things, large and small, that should be done to reform the FCC in an institutional sense. They range, on the one hand, from major substantive changes to the Communications Act that would require the agency to rely more heavily on a competition-based standard rather than the indeterminate public interest standard, to various process-oriented reforms that the Commission could accomplish on its own.

At last week's Cable Show in New Orleans, amidst all the discussion of substantive issues like net neutrality, leased access, and whatnot, FCC Commissioner Copps again talked about the negative impact of the Sunshine Act on the Commission's decisionmaking process and the agency's sense of collegiality. He reminded the audience that he and then-FCC Chairman Michael Powell had sent then-Senate Commerce Committee Chairman Ted Stevens a letter in February 2005 urging that the Sunshine Act be amended to allow the commissioners to deliberate together outside of public meetings.

When Commissioner Copps renewed his plea at last week's Cable Show, he suggested that, rather than amending the Sunshine Act on a permanent basis and for all agencies, Congress might authorize changes in the Act on a trial basis. The notion of changing any jot or tittle of the Sunshine Act is not popular among the press, even though its failings have long been obvious to many others, including academics of all stripes who have studied the issue extensively. Commissioner Copps deserves credit for continuing to raise the issue.

In 1995, I chaired a special committee of the Administrative Conference of the United States ("ACUS") that recommended, after taking testimony from many agency witnesses and interested members of the public, that Congress authorize a pilot program which would allow agency members to meet in private provided the agency requires that such meetings be memorialized by a detailed summary of the meeting to be made public no later than five working days after the meeting. The ACUS report and a brief law review article I published introducing the report are here.

The ACUS report laid out all the familiar reasons why administrative law scholars and many close observers of agency behavior have urged that the open meeting law be modified, and I will not repeat the report here. This excerpt captures a good part of the argument:

> *[A]s a practical matter, it is at least arguable that the Sunshine Act produces an effect contrary to one of Congress's principal purposes for its enactment: creating multi-member agencies to obtain the benefit of collegial decisionmaking from persons who bring to the decisionmaking process different philosophical perspectives. experiences, and expertise. Unable to deliberate together in private, agency members resort to communicating with each other in writing, through staff, or in one-on-one meetings with other members (assuming the agency has more than three members so that even one-on-one meetings are allowable). Obviously, these indirect means of communication are not conducive to fostering collegiality in the same sense that it is fostered when all agency members are able to engage in a simultaneous collective discussion.*

A principal impetus for initiating the ACUS study back in 1995 was that all five FCC commissioners signed a letter asking that the study be performed because they were concerned

the Sunshine Act adversely impacted the quality of agency decisionmaking. I understand that it is difficult to get Congress to modify the Sunshine Act. But if all five FCC commissioners once again signed on to a joint letter asking Congress to authorize a trial for a limited period for only the FCC, Congress might well be receptive to such a pilot program. The trial could be limited to rulemakings and require that any closed-door meetings be memorialized in a summary of the meeting to be placed in the public record.

I hope Commissioner Copps will draft such a joint letter, take this idea to his colleagues, and secure agreement from all. No one disputes the notion that the FCC ought to function in a way that fosters collegial decisionmaking, consistent with holding agency members accountable for their actions. To that end, the agency's members ought to act collectively to urge Congress to authorize a limited trial to determine if modifying the Sunshine Act will indeed promote such collegiality and improve agency decisionmaking, while still maintaining public confidence in the integrity of the Commission's processes.

The Clock Keeps Ticking on FCC Reform
Randolph May (April 4, 2008)

The clock keeps ticking on FCC reform. It has now been over eight years since then-FCC Chairman William Kennard released a draft strategic plan titled, "A New FCC for the 21st Century." The plan stated that in five years, "[t]he FCC as we know it today will be very different in both structure and mission."

For the most part, the predicted change in structure and mission hasn't happened yet. But in light of the competitive marketplace and rapid technological developments that have occurred since 1999, reducing the need for traditional forms of regulation, certainly changes in structure and mission ought to be implemented. In my view, the FCC probably should not go the way, say, of the now defunct Interstate Commerce Commission and Civil Aeronautics Board. But the agency should undergo institutional reform if it is to be transformed into a regulatory entity in which its structure and practices match its 21st century mission.

Yesterday, I had the good fortune to moderate a panel sponsored by the ABA's Section of Administrative Law and Regulatory Practice. The panelists were John Duffy, Professor of Law at George Washington University; Sam Feder, now a partner in Jenner & Block's Washington office and the FCC's immediate past General Counsel; Andy Schwartzman, President and CEO, Media Access Project; and Joe Waz, Senior Vice President of External Affairs and Public Policy Counsel, Comcast. Perhaps not surprisingly, with the experience and expertise represented by this group, what ensued was an extremely thoughtful, informative, and wide-ranging discussion. I commend to you the excellent reports of the event in yesterday's TR Daily and Multichannel News, and today's Communications Daily and BNA Daily Report for Executives. [Subscriptions required].

A lot of ideas were put on the table, some of which would require congressional action, others of which are more modest, in the nature of process reforms, which could be accomplished by the agency itself. I want to offer some selected observations from the panelists that I think are worth noting, at least in the interest of provoking discussion (again, while urging you, if possible, to

look at the more complete press reports until the transcript becomes available.)

John Duffy suggested that the way the FCC operates today bears little resemblance to the theoretical and aspirational vision expressed by its congressional creators. Rather than an "independent" institution in which decisions are made by true experts insulated from politics, much of the agency's policymaking is and always has been political in nature. John proposed splitting the FCC's policymaking and adjudicatory functions, with the policymaking function moved to the Executive Branch under a single administrator, where the president ultimately would be politically accountable for the policy decisions. The adjudicatory function would remain with a multimember agency resembling the current agency.

Next was Joe Waz. Joe offered suggestions for what he called more immediate moderate reforms that would make the FCC operate in a more transparent fashion. The suggestions include making rulemakings more focused so that they are about adopting specific rules and not wide-ranging inquiries; restricting the ex parte process so that the actual comment period would once again be meaningful; subjecting some draft agency reports to peer review and public comment before being acted on by the Commission; releasing a semiannual agenda that lists what actions the agency anticipates taking during the next six months; notifying the public of agenda items three weeks in advance of agency meetings; and adhering to a "shot clock" to ensure that agency decisions are made on a timely basis, especially in merger proceedings.

Following Joe, Andy Schwartzman looked up from his always ubiquitous crossword puzzle to ask: "Does anybody know a three-letter word for an agency that does as well as anybody could do in a difficult job?" His answer: "The FCC." Despite this, Andy agreed with much of what Joe Waz suggested regarding process changes, especially changing the way the current ex parte process works. He suggested the FCC needs to require more detailed summaries of meetings in order to make the process more transparent. While agreeing with Joe's notion of a shot clock to bring Commission proceedings to close in a timely fashion, he would exempt merger proceedings from the requirement. He would also require that the Commission issue the texts of decisions reached at open meetings within 10 days. Finally, rather than moving towards a single administrator for policymaking, Andy would reverse the decision made in 1982 to reduce the Commission from seven to five commissioners.

Sam Feder completed the initial presentations. He said that before coming to the agency, he believed many of its orders were incoherent. Once he got there, he said, he began to understand why this is so, with the compromises necessitated by five commissioners with differing views. Sam volunteered that John Duffy's idea of putting the agency under the control of a single administrator made a lot of sense. While stating that the FCC was doing a good job operating under the current law, Sam stated there is a need for a new law to provide more congressional guidance in light of changed circumstances.

There was more, and a lot of intelligent back-and-forth discussion among the panelists and the audience. But the above will give you a good sense of the session's tenor and some of the specific suggestions advanced for modest and not-so-modest institutional reforms.

The issues raised in thinking about reforming the FCC go way beyond the actions of any

particular chairman or commissioner, past or present, or any political party. Indeed, they are independent of such. The focus should be on matching the institutional structure and practices to the agency's mission going forward in a competitive environment that already is much changed from the one envisioned even in 1999.

The panel deserves much credit for advancing the discussion.

FCC Reform: Changing the Institution
Randolph May (March 24, 2008)

Since it was created in 1927 as the Federal Radio Commission, and reincarnated in 1934 as the Federal Communications Commission, the FCC has undergone remarkably little fundamental institutional change. To be sure, there have been some changes that impact the way the FCC does business. For example, in 1982, the number of commissioners was reduced from seven to five. The enactment of the Sunshine Act in 1976 affected the way the Commission operates, and the way the commissioners interact – or don't – with each other. Compared with its preferred mode of regulating during its first few decades, for almost the last half-century the agency has regulated primarily through conducting *ex ante* rulemaking proceedings rather than *post hoc* adjudications.

For the most part, it is fair to say that, in fundamental respects, the agency functions much the same today as it has for decades. Certainly, this is true in the decade since the passage of the Telecommunications Act of 1996, which was billed by Congress as "pro-competitive" and "deregulatory" and by President Bill Clinton as "truly revolutionary legislation." And it is true despite the fact there have been unprecedented marketplace changes resulting in increased competition in all market segments subject to the FCC's jurisdiction and a definite blurring of traditional service categories due to the transition from analog narrowband to digital broadband communications.

In August 1999, then-FCC Chairman William Kennard released a strategic plan called "A New FCC for the 21st Century." The first two sentences presciently 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, the plan continued, "[t]he FCC as we know it today will be very different in structure and mission."

Since then, while there has been some rearranging and renaming of the boxes on the agency's office organizational chart, it would be a stretch to say today's FCC is "very different in structure and mission." Nevertheless, the agency's annual budget has continued to grow each year, from around $200 million in 2000 to $338 requested for FY 2009.

'Nuff said, for now. All of the foregoing is my way of calling your attention to a lunch program I am moderating on April 3. The program, sponsored by the American Bar Association's Section of Administrative Law and Regulatory Practice, is entitled, "FCC Reform: Changing the Institution." There is a stellar line-up of very knowledgeable speakers: John Duffy, Professor,

George Washington University School of Law; Sam Feder, Partner, Jenner & Block and immediate past FCC General Counsel; Andrew Schwartzman, President, Media Access Project; and Joe Waz, Senior Vice President of External Affairs and Public Policy Counsel, Comcast Corporation. The panel will address both potential major structural institutional reforms, which likely will be achieved, if at all, on a longer-term basis, as well as process-oriented reforms that possibly could be implemented over the near-term.

Achieving institutional change is never easy. Even with "change" this year's dominant campaign mantra, I can't promise this is the year there will be fundamental institutional changes at the FCC. But as the moderator of this program, I can promise the discussion will be lively and informative.

Testimony of Randolph J. May

President, The Free State Foundation

Hearing on “Reforming FCC Process”

before the

Subcommittee on Communications and Technology

Committee on Energy and Commerce

U.S. House of Representatives

June 22, 2011

Testimony of Randolph J. May
President, The Free State Foundation

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.