Testimony of Randolph J. May

President, The Free State Foundation

Hearing on "Improving FCC Process"

before the

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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 file an objection in writing to 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.