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Good morning. It's a pleasure to be here today talking about the FCC and competition policy.

Let's start with a simple proposition: Networks, particularly that collection of networks we call the Internet, are important to American prosperity.

Silicon Valley is in the network business. Not necessarily because you operate or own a communications network. But because it's hard to imagine a Silicon Valley business that doesn't depend on robust, reliable, and affordable broadband networks.

The FCC is in the network business as well and always has been. We don't build networks. We don't dictate network architectures. But within the direction given by Congress, we do establish the legal culture that governs networks. Our statutory mandate: To maximize entrepreneurship, competition, innovation and consumer benefits. These are the outcomes markets can produce. Our goal is to permit new markets to be created under law, and to allow existing markets to be challenged by the process of creative destruction.

We want to enable all kinds of communications networks. Networks with wires, networks without wires. Networks that carry telecommunications or cable television. Wireless networks of broadcast stations or mobile broadband.

So how do we think about networks? The starting point, as Chairman Wheeler's mantra goes, is competition, competition, competition.

The importance of competition is recognized across the agency. For example, Commissioner Pai gave a very important speech in December on the 100th anniversary of the Kingsbury Commitment. That was the settlement of the original antitrust enforcement action against AT&T – and it abandoned competition in favor of regulatory monopoly. That might have been good for AT&T, but, as Commissioner Pai reminds us, “in a competitive marketplace, we must understand that there will be winners and losers. It is not the government's job to tilt the playing field by punishing the winners or helping the losers.”¹

Today I'd like to talk about how the FCC can best formulate and apply a competition policy.

It is said often that past is prologue. So before we continue to look to the future, let's start with the past.

When I was a young man, I worked for a lawyer named Jack Miller. Jack headed the criminal division in the Justice Department for Bobby Kennedy and he negotiated Richard Nixon's pardon. But his face really lit up when he talked about a case he argued in the D.C. Circuit in the 1950s involving the FCC and a piece of plastic.

A man in New York had invented a plastic cup that would connect to the end of a telephone receiver to shield outside noise. He called it the “Hush-a-phone”, but the FCC called it a “foreign attachment” to the

¹ Remarks of FCC Commissioner Pai at TechFreedom's Forum on the 100th Anniversary of the Kingsbury Commitment (Dec. 19, 2013), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db1219/DOC-324810A1.pdf.

network and said it could not be sold to consumers because that would infringe on AT&T's monopoly.² The D.C. Circuit said, no, the fact that it was a rival device did not render it illegal.³ This was a mistake by the FCC – an attempt to protect the monopoly provider.

But in the decades that followed, the FCC got it right – time and time again.

Starting in the 1960s, when the FCC issued its Carterfone decision and then developed standards.⁴ The eventual payoff was this: people in their homes unplugged telephone lines from telephones and connected them to computers. Fast forward to narrowband Internet. America, with the world's leading penetration of phone lines and computers, instantly became the world's leading Internet networked country.

That could not have occurred but for the fact that the computer companies could count on, and could design for, the telephone lines to fit into the sockets on computers and work like a charm.

The Internet spread across America like wildfire. And narrowband competition set the stage for broadband.

FCC policies also enabled competition in the wireless industry. For example, embracing congressional authority to auction digital cellular licenses, the FCC conducted the PCS auctions in the 1990s, which have since been replicated around the world. FCC rules creating multi-firm markets and mandating interconnection requirements between wired and wireless networks also enabled rapid growth in the wireless industry.

Actions like these continue to be relevant to our competition policies today.

So how should the future of competition policy at the FCC be defined?

I believe that the FCC's actions should be informed by competition principles. These principles look to the impact of practices on consumers, not just on competitors. They are designed to be fact-based and data-driven. They reflect a common-law belief that the experiences of the present are, to paraphrase Justice Holmes, as important as the logic of the past.

Of course, the Commission's authority is not the same as the antitrust agencies. The public interest standard of our governing statute is broader – for example incorporating concerns about universal access, public safety, competition, consumer protection, as well as localism, diversity and speech.

In addition, the FCC can anticipate a problem, try to head it off, and then, if necessary, take enforcement action. Traditional antitrust agencies generally must wait for harm to occur⁵ and, as *US v. Microsoft* demonstrated, it can take years for legal principles to catch up with marketplace conduct.

Here is Chairman Wheeler's approach. Earlier in January, here in Silicon Valley, he said: "Where competition does exist, we will protect it. Where competition can exist, we will incent it. And where

² *Hush-a-Phone Corp.*, 20 F.C.C. 391, 420 (1955).

³ *Hush-A-Phone v. United States*, 238 F.2d 266, 269 (DC Cir. 1956).

⁴ *Use of the Carterfone Device in Message Toll Tel. Serv.*, Decision, 13 F.C.C.2d 420 (1968).

⁵ The review of proposed mergers and other prospective transactions is, of course, an exception to this generalization.

private markets cannot be expected to deliver what the public needs, then we will proceed in a transparent manner to fill that void.”⁶

I’ll take on the second part first: where competition can exist, we will do what we can to make it more robust.

Of course, the FCC is constantly working to improve access to and the efficient use of spectrum, for example by enabling unlicensed devices to access TV white spaces for new and innovative use.

The FCC also strives to set out rules that spur our networks by removing barriers to deployment. Over the last few years, the agency has acted to eliminate barriers to entry in the cable market,⁷ improve access for pole attachments,⁸ and implement so-called “shot clocks” for tower siting.⁹ Other rulemakings, like the Data Roaming Order, also remove deployment barriers and help consumers through individualized commercial negotiations and a dispute resolution process that promotes competition, investment, and new entry while improving consumer options for ubiquitous data service.¹⁰

This is not unrelated to the Chairman’s statement that interconnection is a core attribute of what he has called the Network Compact. After all, the Internet is not a thing, it is a collection. A collection of networks that connect together.

The next principle is this: Where competition does exist, we will protect it.

Think of this as preventing competitive markets from being transformed artificially into non-competitive markets through, for example, anti-competitive actions or transactions.

In the wireless marketplace, our competition role goes hand-in-hand with our role in managing radio spectrum. A key goal of the Commission’s mobile spectrum holdings policies is ensuring that multiple carriers have access to needed airwaves, and that is particularly important in our consideration of policies for the upcoming incentive auction. Furthermore, in working to promote competition through our spectrum policy, the Commission has concluded that spectrum resources in different frequency bands have different technical characteristics that affect how the bands can be used to deliver mobile services.

⁶ Prepared Remarks of Chairman Tom Wheeler, Computer History Museum (Jan. 9, 2014), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0109/DOC-325054A1.pdf.

⁷ See *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5103 (2007) (*Local Franchising Order*) (interpreting section 621(a)(1), which prohibits local franchising authorities from “unreasonably refusing to award” competitive cable franchises, and establishing time frames for local action on franchise applications with an interim franchise deemed granted if the time frames were not met), *aff’d sub nom.*, *Alliance for Community Media v. FCC*, 529 F.3d 763(6th Cir. 2008), *cert. denied*, 129 S. Ct. 2821 (2009).

⁸ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864 (2010) (initial steps to improve pole attachment practices); *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order on Reconsideration, FCC 11-50 (April 7, 2011) (ensuring timely and rationally priced access to poles).

⁹ See *Petition for Declaratory Ruling To Clarify Provisions of Section 332(C)(7)(B) To Ensure Timely Siting Review and To Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165, Declaratory Ruling, 24 FCC Rcd 13994 (2009), *affirmed by City of Arlington v. FCC*, 133 S.Ct. 1863 (2013) (finding presumptive timeframes for a “reasonable period of time” for tower siting and collocation decisions);

¹⁰ *Data Roaming Order*, 26 FCC Rcd. 5411, 5442, para. 63, *affirmed by Cellco v. FCC*, 700 F.3d 534 (DC Cir. 2012).

Turning to the media industry, there have been traditional concerns about the creation of bottlenecks where content creators and cable distribution operate under common ownership. The program access rules that Congress enacted, which provide cable operators and satellite systems with the right to access content owned by rival cable systems, are a good example of actions designed to address such concerns. We also take a careful look at media transactions generally.¹¹

In judging transactions, such as our review of AT&T/T-Mobile, we must be careful to move along both efficiently and in close cooperation with antitrust agencies. And we should emphasize the particular expertise that we bring to the table and that can have – I believe *has* had – concrete impact on transaction reviews.

As Jonathan Baker has explained, our conditions and divestitures on mergers like Comcast/NBCU allow us to remedy potential anticompetitive harms that DOJ would have difficulty addressing.¹²

Similarly, Phil Weiser has described “successful cases of FCC merger review [where] the agency’s oversight of mergers can be a productive part of the policymaking process” even as he, rightly, urged the Commission to improve its processes.¹³ That’s something the Chairman has committed to accomplish.

The Chairman’s third principle is that where private markets cannot be expected to deliver what the public needs, then we will proceed in a transparent manner to fill that void.

A good example is the concept of universal service – that, as a nation, we have a common interest in extending networks of opportunity, including broadband networks, to all Americans.

In most of the country where broadband deployment has been and will continue to be fueled by private capital, as it should be. But simple economics tell us that markets do not own the responsibility to serve every possible customer. Profit maximization goes only as far as the ability to earn profits.

So there is a special responsibility to consider the reach of broadband across the nation. Rural America is a prime example. Rural America has a lower density population, of course, and that traditionally has increased the cost of network deployment. But a rural American is also to be more likely to be older, and more likely to be living in poverty.

Metcalfe’s law tells us that the addition of each single additional user to a network creates more than one unit of additional value to the network as a whole. Not just for new users, but for every user and edge provider, including the businesses in Silicon Valley that create networking apps, software, and hardware.

Consider this speech as an invitation to you – as business people, as economists or lawyers, as students, as Internet users outside the Beltway – to take part in this conversation with the FCC about its competition policy.

¹¹ *In re Applications for Consent to Transfer of Control from Shareholders of Belo Corp. to Gannett Co., Inc. and for Applications for Consent to Assignment of Licenses from Subsidiaries of Belo Corp. to Subsidiaries of Sander Media, LLC and Tucker Operating Co., LLC*, MB Docket No. 13-189, Memorandum Opinion and Order, DA 13-2423, paras. 29-30 (MB rel. Dec. 20, 2013) (explaining that it considers the economic consequences “taken as a whole” and for “its consistency with the Commission’s policies under the Act, including our policies in favor of competition, diversity, and localism.”).

¹² Jonathan Baker, *Antitrust Enforcement Sectoral Regulation*, 9 COMP. POL. INT’L. 1, at 3 (2013).

¹³ Philip J. Weiser, *Institutional Design, FCC Reform, and the Hidden Side of the Administrative State*, 61 ADMIN. L. REV. 675, 610-11 (2009) (describing competition policy remedies in the News Corp./DirecTV transaction that addressed the Department of Justice’s most significant concerns).

That conversation is already underway.

For example, Greg Rosston and Reed Hundt have suggested a “modern” FCC competition policy, which focuses on using tools “to create largely deregulated, multi-firm, competitive markets,” but to step in with new pro-competitive rules when bottlenecks or market power emerges.¹⁴

And Jeff Eisenach has suggesting eliminating the siloed approach to communications policy and moving to an integrated, antitrust-based approach to assessing dynamic market forces.¹⁵

With that kind of dialogue in the air, let me leave you with some questions.

From your perspective what are the critical competitive questions around communications networks? Do you see bottlenecks? Are old categories obsolete? Are networks being effectively interconnected? Are certain kinds of services, like special access, competitive or non-competitive?

I started this speech by describing the importance of our networks to all Americans. That the FCC has played a major role in promoting competition, and in doing so, investment and innovation in the Internet ecosystem and wireless markets is, I believe, clear. I hope we hear your views – or at least the views of your lawyers and economists – as we learn and apply lessons of the Internet economy.

Thank you.

¹⁴ Reed E. Hundt & Gregory L. Rosston, *Articulating a Modern Approach to FCC Competition Policy*, 66 FED. COMM. L.J. 71 (2013).

¹⁵ Jeffrey A. Eisenach, *Broadband Competition in the Internet* (American Enterprise Institute, 2012), available at http://www.aei.org/files/2012/10/17/-broadband-competition-in-the-internet-ecosystem_164734199280.pdf.