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"The Evolution of Communications Policy:
Fresh Thinking for 2014 and Beyond"
Georgetown Center for Business and Public Policy
McDonough School of Business
National Press Club, Washington, D.C.
March 12, 2014

Thank you for that introduction, and thank you to John Mayo for inviting me to be here back in February, when it snowed, and again today, when we're all hoping that it won't.

My younger colleagues are wont to tell me that I don't look old enough to remember the 1960s (which is exceedingly kind).

I do remember that in the 60s, however, among other interesting pastimes, it was popular among students to ask the question, what is the relevance of what older people are telling us? In other words, what is the relevance of a course of instruction, of received wisdom, of tradition?

That turned out to be the wrong question and it led to some bad answers. Luckily the mists of memory obscure some of them.

But the right questions, what we should have been asking at that time, were these: of the wisdom, tradition and instructions that were communicated to us, what was and should be transient? What was and must be enduring?

We saw both in the social debates of the 60s. The campaign for civil rights was a campaign to change what needed to be changed. Think of the Supreme Court decision – in perhaps the most aptly-captioned case in history – *Loving v. Virginia*.¹ That case had to do with marriage, and it was a part of the societal decision that discrimination needed to be not just transient, but terminated.

At the same time, the institution of marriage was called into question in the late 60s, early 70s, by some to whom it seemed like a dusty tradition. But it was, and it remains, fundamental and enduring.

Those same two questions can inform our thought process as we consider the evolution of communications law and policy. To be sure, the FCC is not asked to assess or implement social judgment like the nature of marriage. But the taxonomy of these two questions strikes me as apt in considering our mission. I speak today as a lawyer, not a policy maker, and these are my personal views, not the views of the FCC, but I would like to take a few minutes to apply this framework.

As we look forward in 2014 and beyond, what is transient, and should change, and what is fundamental and must endure?

What is transient is technology. Chairman Wheeler has emphasized this in his ebook entitled "Net Effects." There he identifies four great Network Revolutions. First, the printing press; then the railroad; then the telegraph and the forms of electronic communication that it spawned, like telephony and even broadcasting (does anyone recall that Alexander Graham Bell predicted that the telephone would be used as a mean to transmit live music from a concert hall to listeners at home?).

¹ 388 U.S. 1 (1967).

We are in the middle of the Fourth Network Revolution, and it is the dramatic, dynamic shift to IP-based communication – to an era in which the Internet is the most fundamental platform of social, commercial, political, sometimes it seems, even personal communication. Change is the only constant – especially when you’re talking about an industry that has progressed from the telegraph, to the telephone, to the dial-up modem, and then to broadband faster than Spinal Tap changed drummers.

We must be - and of course we are - in favor of technological improvement and innovation; it is the lifeblood of American economic growth.

The Commission is tackling the challenges of change. In January, the Commission adopted its IP Transitions Order.² Think plural -- transitions. Because the technical change from circuit-switching to IP-based communication involves fiber and copper and coax and wireless.

The IP transition operates on three dimensions. There is the change of protocol - TDM to IP. There is the change of network construction - fiber, bonded copper, fixed wireless, to give just some examples. These changes are in the marketplace and many consumers are adopting them daily - and that is a good thing.

But there is a third dimension. The large network carriers have made plain their desire to retire the copper networks that millions of Americans still use. That will not be the addition of choice to the marketplace, it will be the removal of one.

Section 214 and other provisions of the Act provide the legal framework. But how do we learn *before* legal and policy decisions are made? One way, not the only way but one way, will be through voluntary experiments of the kind proposed by AT&T and authorized by the Commission in January. We have already received two service experiments and we have received nearly 1000 expressions of interest in the more targeted experiments that will accompany them. Such experiments will enhance the ability of the Commission, network providers, consumers, competitors and the public to monitor and measure the impact of change.

Those experiments will not be about technology *per se*, they will be about the impact of technology on consumers and values. Indeed, what is less remarked upon but perhaps more important in understanding the evolution of communications policy in light of technological advancement is the enduring values that have and continue to inform the business of communications networks. This is what Chairman Wheeler has referred to as the Network Compact. And these values answer the question: What is fundamental and must endure?

In other words, technology is transient. And should be. Values are enduring. And must be.

Among the values first articulated by Commissioner Rosenworcel, and then embraced by the Commission, are these: (1) public safety and security, (2) universal accessibility, (3) competition, and (4) consumer protection. These are the enduring values that have always informed communications law, and should also be the enduring values that guide us as we apply the Act to modern communications networks.

These principles are in the Communications Act -- in plain sight. As a law clerk a long time ago, I was taught that the starting point of statutory construction is the language of the statute itself.

² *Technology Transitions*, GN Docket No. 13-5, FCC 14-5 (rel. Jan. 31, 2014).

So let's start with the language, beginning with Title 1 of the Act and the admonition that the Commission should oversee all the wired and wireless communications in the United States.³ Let me quote just a portion: "For the purpose of regulating interstate and foreign commerce in communications by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination... , a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges...."

You can get a lot of the enduring values of our country's communications policy from that very first section of the Act.

Consider next the public interest standard, as it is found in sections that govern everything from how we assess regulatory fees,⁴ to how we exercise our forbearance authority,⁵ to how we assess limits on commercial time in children's television programming,⁶ to implementation of our universal service policies.⁷

Congress has mandated that we encourage universal access to the wonders of telecommunications capabilities to individuals with disabilities, or promote broadband access in even the most remote, most rural portions of our country.⁸

Then there's Section 706, which was at the center of the DC Circuit's recent decision in *Verizon v. FCC*.⁹

First, the court upheld the Commission's interpretation that Section 706 of the Telecommunications Act gives the FCC substantive authority to encourage broadband deployment by, among other things, removing barriers to infrastructure deployment, encouraging innovation, and promoting competition. The D.C. Circuit ruled that the FCC has the legal authority to issue enforceable rules of the road to preserve Internet freedom and openness.

Second, the court held that the Commission had rightly identified harms that are within the scope of its authority. The court specifically upheld the Commission's conclusions that "edge-provider innovation leads to the expansion and improvement of broadband infrastructure," and that "Internet openness fosters the edge-provider innovation that drives" a virtuous cycle of innovation and growth between the Internet ecosystem and the broadband infrastructure.¹⁰

Third, the court concluded that the Commission had selected the wrong mechanism in order to carry out its legitimate goals under its congressionally-authorized authority. The court vacated the Commission's "no blocking" and "anti-discrimination" rules (but not its requirement of transparency).

³ 47 U.S.C. § 151.

⁴ 47 U.S.C. § 159(b).

⁵ 47 U.S.C. § 160(a)(3).

⁶ 47 U.S.C. § 303a(c).

⁷ 47 U.S.C. § 254.

⁸ 47 U.S.C. § 254(c) ("[T]he Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services... are consistent with the public interest, convenience, and necessity."); § 254(d) ("Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.").

⁹ *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

¹⁰ *Id.* at 644.

At the same time, the court was careful to explain the kind of approach that the Commission might take, emphasizing that it had previously upheld the Commission's wireless data roaming rules. There the Commission had provided the marketplace with the certainty provided by an overarching legal principle – in that case “commercially reasonable” terms and conditions; provided extensive guidance on the factors to be considered in resolving disputes, and looking to individualized negotiation and, if necessary, case-by-case adjudication to resolve disputes.

So the third conclusion is that the Commission selected a mechanism that was not permitted, but this very promising alternative is available for it to consider.

In light of this opinion, there's little surprise that the Chairman has instructed the staff to bring to the full Commission a Notice of Proposed Rulemaking that would use the means articulated by the D.C. Circuit to fulfill the goals of the Open Internet Order, which the court found to be within the authority of the FCC.

That means the Commission will look for opportunities to enforce and enhance the transparency rule that was upheld and to fulfill the goals of the “no blocking” and non-discrimination rules. The Commission opened a new docket after the court decision entitled “Protecting and Promoting the Open Internet,” and we've received almost 10,000 comments so far. We're learning a lot and we hope to learn more. Indeed, we said that comments filed in the first thirty days would be particularly helpful – which runs out on March 21st. So we would very much appreciate more views, from diverse audiences, as the staff continues its work.

Looking at the Communications Act as a whole, the clear congressional intent is that communications networks are the crux of the FCC's business. We don't build networks or dictate network architectures, but we do, within the direction given by Congress, establish the legal culture that governs networks.

Let me spend the next few minutes focusing on one of the enduring values the element of competition. You have heard, I am sure, Chairman Wheeler's mantra of competition, competition, competition. But it doesn't stop with the Chairman, competition is recognized as an important and enduring value across the Commission. Commissioner Pai, for example, gave an important speech on this topic in December on the 100th anniversary of the Kingsbury Commitment.

Here is Chairman Wheeler's approach: “Where competition does exist, we will protect it. Where competition can exist, we will incent it. And where private markets cannot be expected to deliver what the public needs, then we will proceed in a transparent manner to fill that void.”¹¹

The first principle is that where competition does exist, we will protect it.

Not competitors, but competition. Think of this as preventing competitive markets from being transformed artificially into non-competitive markets.

Such allegations arise, for example, in the context of transactions that involve the transfer of FCC licenses. In judging transactions, we should be careful to move along both efficiently and in harmony with antitrust agencies.

But a comparison of the Communications Act with the Sherman and Clayton Acts clearly demonstrates that our authority and the authority of the antitrust agencies are not coterminous.

¹¹ 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.

The DOJ review is limited solely to an examination of the competitive effects of the acquisition, without reference to diversity, localism, or other public interest considerations. The FCC's competitive analysis under the public interest standard is somewhat broader, for example, considering whether a transaction will enhance, rather than merely preserve, existing competition, and takes a more extensive view of potential and future competition and its impact on the relevant markets. Simply put, we take a more expansive look.

Congress has also enacted a different process for the FCC than that used by the antitrust agencies. Under the Clayton Act, the Department of Justice must decide whether it will file a civil action in U.S. district court where it bears the burden of proof.

By contrast, if after a thorough review the FCC is unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, we are obligated to designate the application for an administrative hearing, at which the facts of the transaction can be examined in the traditional adversary process that is the hallmark of our Anglo-American jurisprudence.¹² Following that hearing, the Commission would render a decision on the merits after which, of course, judicial review is available.

I am aware of the reputation that some attribute to the FCC – that the answer is always “yes,” and the path to “yes” is by bargaining with the agency. It is hard to imagine that such a view can be squared with the manner in which the Commission assiduously applied the law to the facts of the proposed AT&T/T-Mobile transaction, among others. But in case there remains any doubt, Chairman Wheeler is very clear that transaction reviews under his tenure will be rigorous, will be fact-based, will be thorough, will follow Congress's statutory mandate, both as to the applicable standard and the appropriate process, and will serve the public interest.

That is important because the FCC has particular expertise that we bring to the table that adds value 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.¹³ Similarly, my friend 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.”¹⁴

Another example of the application of the principle that we will protect competition where it already exists is the Chairman's recent statements on joint negotiation of retransmission consent agreements and attribution of certain joint sales agreements between broadcasters. Consider, for example, the ban on joint negotiations among the top four broadcast stations in a television market. This arises when, for example, two of the big local stations begin negotiations with a cable or satellite system by declaring that one will not be available without the other. These two stations are competitors – in the supply of local news, for example, and in the market for local advertising. So joint negotiations can only be expected to artificially drive up prices to their customers, without supplying significant, if any, pro-competitive efficiencies. It is precisely to protect competition that the Chairman is asking the Commission to ban this practice.

The next principle is that where competition can exist, we will do what we can to make it more robust. Think of this as opening the door to the creation of new markets.

¹² 47 U.S.C. §§ 309(d)(2), (e).

¹³ Jonathan Baker, *Antitrust Enforcement Sectoral Regulation*, 9 COMP. POL. INT'L. 1, at 3 (2013).

¹⁴ 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).

Of course, the federal government oversees the key input and lifeblood of wireless communications – spectrum. The FCC is constantly working to improve access to and efficient use of spectrum. This work includes both market and technological cutting-edge mechanisms. The incentive auction proceeding has drawn the most attention to the FCC’s work in this area because of its first-of-its kind approach of letting the market determine both supply and demand for spectrum. Television broadcasters will have the opportunity to bid in a reverse auction to relinquish some or all of their spectrum rights, and wireless providers will bid in a forward auction on nationwide, “repacked” spectrum suitable for two-way wireless broadband services.

But there is more. In late February, the Commission completed its first major spectrum auction since 2008, raising more than \$1.5 billion for licenses to use 10 megahertz of spectrum that, until fairly recently, was considered nearly valueless because of interference concerns that the Commission was able to resolve after much hard work and cooperation with industry.

On Monday, Chairman Wheeler circulated a proposal to the Commission that would set up an auction of an additional 65 megahertz of broadband-suitable spectrum this Fall. This auction was made possible following several years of hard work among numerous current federal agency spectrum users, industry, and the FCC.

The Commission is also looking for ways to increase the amount of unlicensed spectrum available – think WiFi.

For example, Commissioner Rosenworcel gave an important speech in early March in which she said, in part:

We can take the flexible Wi-Fi rules that have already been the script for an unlicensed success story in the 5.725-5.825 GHz band and expand them to the 5.15-5.25 GHz band. If we do, we could effectively double unlicensed bandwidth in the 5 GHz band overnight. That will mean more unlicensed service and less congestion on licensed wireless networks. That’s win-win.

But expanding unlicensed service in this band should not be the end of the story. Because we can seize unlicensed opportunities across other spectrum bands, too. For instance, we can explore the possibilities of using unlicensed bandwidth in the 3.5 GHz band.

Commissioner Rosenworcel is exactly right. Also on Monday, Chairman Wheeler circulated to his fellow Commissioners a proposal in the 5 GHz band that would do exactly what Commissioner Rosenworcel outlined. And FCC staff are working hard on developing next-generation technological and licensing spectrum management techniques to permit both licensed and unlicensed commercial use of 100 megahertz of spectrum in the 3.5 GHz band that today is available only to federal users. The incentive auction also will provide new opportunities for unlicensed use of low-band spectrum in the new 600 MHz band.

Also in the context of incenting competition, the Chairman has said that interconnection is a core value. After all, the Internet is not a thing, it is a collection. A collection of networks that connect together through various means of traffic exchange.

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. That’s a societal good.

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.

There are many areas, even most, of the country where broadband deployment has been and will continue to be fueled by private capital, as it should. 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.

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 to new users, but to everyone that uses the network.

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 poor.

I believe that we cannot be a nation of opportunity without networks of opportunity. And that, simply stated, is the case for rural broadband. The Commission has received nearly a 1000 expressions of interest by entities that wish to engage in targeted trials to demonstrate "best practices" in the construction and deployment of rural broadband networks. These proposals have come from diverse entities, including rural telephone companies, rural electric coops, cable and wireless service providers, schools and libraries, research and education networks, and communities.

What is transient and should be? Technological solutions.

What is enduring and must be? The values of public safety, universal access, competition, and consumer protection. Those are the values that have informed the FCC's interpretation of the Communications Act since 1934 and will continue to inform us going forward. As my younger colleagues tell me we said in the 60s, the beat goes on.

Thank you.