

**REMARKS OF FCC COMMISSIONER NATHAN SIMINGTON
TO THE FREE STATE FOUNDATION**

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Good morning. It's a pleasure to be here, virtually, at the Free State Foundation for my maiden speech. As part of its work promoting free-market, limited government principles, the Free State Foundation has a long and thoughtful record on telecommunications issues. It's an honor to take this stage where so many of my distinguished colleagues have spoken before.

This month marks the 25th anniversary of the Telecom Act of 1996. This landmark, bipartisan legislation would be a great model for consensus on telecom legislation going forward. It led to a stable, sustainable, broad-based consensus that has supported growth and the common good for a quarter century of rapid change. It's worth taking a moment, then, to reflect on how much of our modern regime of telecommunications governance owes to the principles, and to specific advocacy efforts, of the Free State Foundation. Today, the Hush-A-Phone and Carterfone lawsuits seem impossibly quaint and exotic, like the penny-farthing or patent medicines. This tells us how far we've come from the restrictive regulatory environment of the postwar era. Things were moving in a better direction by 1995, but even so, spectrum auctions were in their infancy, the Baby Bells couldn't offer long-distance service, and innovation was frequently stifled by lawfare.

While the present day may not be perfect, I don't think anyone disputes that we have fulfilled the promise of the deregulatory era. Prior to the Telecom Act, it was far from a foregone conclusion that we would graduate to a more efficient, competitive system. A change in national direction could have sent us back to the incumbent-driven system of midcentury. Instead, we came together, chose the free market and a light regulatory touch, and a quarter century of transformative innovation speaks to the wisdom of this choice.

The past decade has seen an incredible convergence of communications technologies that would have been impossible to predict in 1996. By then, the distinctions between telephones, television, and newspapers that seemed so obvious and fundamental in 1934 were already growing creaky. Today, they are in the rear-view mirror and receding fast. Your phone might well be a wireless device connected to home WiFi through which you access fiber internet and on which you watch television and read the news. When Steve Jobs introduced the iPhone, he told the audience that that day, they would see three new products: a phone, an internet device, and a new iPod. Then he revealed that it was a single product combining all three. That's as good a summary of the smartphone era as any.

And yet, this mundane daily activity is a smooth surface over a convoluted legal infrastructure. Reading the news at the breakfast table is an act that combines licensed and unlicensed regimes; Titles I, II, and III of the Communications Act; content that may be international or multinational; and that's all before you've had your morning coffee. Under these circumstances,

the FCC has to discern what the public convenience, interest, or necessity requires, based on a regulatory history that in many cases was only loosely directed by Congress.

The Telecom Act took careful account of technological convergence and legal Balkanization, but in 1996, it would have been impossible to predict how much the former would accelerate, even as the latter survived in nooks and crannies. Further, it's quite reasonable to argue that excessive efforts to anticipate the future would have been disruptive and resulted in overreach. So I don't intend to criticize the Telecom Act in any respect for the curiously converged situation we find ourselves in today. At the time, it was a major, forethoughtful, and sorely needed reform, and it set the stage for vast advances. Instead, in the spirit of the Telecom Act itself, I would encourage Congress to revisit the question of refreshing telecommunications law.

I believe Congress has kept to a clear and sensible course in the past 25 years of telecom law. It has sought to lower technological barriers to convergence; it has sought to protect regulated firms from unregulated ones so that convergence doesn't put incumbents in regulated industries at structural disadvantages; and it has reserved the right to push for pro-social outcomes overall, even as it has declined to pick winners. But it's probably coming time to have a fresh look at the situation. Video, for example, faces very different treatment depending on the sourcing entity and the physical means of delivery. Telephony takes place seamlessly between copper wires and apps. Like today's computerized cars, the very simplicity and ease of customer-facing interfaces has made it easy for us to ignore how complicated things have gotten under the hood.

And this has manifested into public discourse in unanticipated ways. A public raised on certain standards of public speech and platform access feels betrayed and bewildered by the new role of online companies in the dissemination of speech, even as such companies try hard to be responsible to both the free speech and speech accountability constituencies – and even as they are burdened by unclear or contradictory legal and regulatory guidance. Today, there's a debate about fact-checking on voice-chat applications. But we'd hardly be happy if people proposed to fact-check our phone calls! Convergence has left everyone in a state of uncertainty – what is permissible, what will be recorded, who decides, and where to turn. And it's tough to tell the public that the transmission medium is the basis for what they can say, even if that's the legally correct answer.

Most of the issues that I am raising here are the kinds of issues that we would want decided by Congress, not the FCC, as a matter of democratic accountability and legitimacy. They are also issues whose technical details are bracing for professional telecom attorneys and, as such, utterly opaque to the general public. Congress may well decide that for some these issues, regulatory competency resides more properly with other agencies, such as the FTC. I recognize that what I'm calling for today won't be easy, but as we've seen this past year, this is a major social fault line and flashpoint. We can't let the history of telecommunications law be what holds us back from a resolution.

We can't talk meaningfully about freedom, free markets, or deregulation in telecommunications without mentioning net neutrality. In my confirmation hearing, I said that I believed in a light-touch regulatory regime. Title II net neutrality can have a light or a heavy touch. As it is likely to

be back on the agenda this year, I think we need to get serious about what different approaches may mean.

Two of the leading theoretical motivations are the “monopoly” argument and the “gatekeeper” argument, so let’s review those for a moment. The monopoly argument is that many Americans don’t have meaningful choices among broadband providers. Thus, in the absence of a regulatory regime preventing it, monopolist providers will take advantage of their market power to favor themselves. This needn’t mean price-gouging as such; it might mean cutting deals with content providers for preferential treatment or exclusion of their competitors.

The gatekeeper argument is less about physical media. It says that an “internet intermediary” shouldn’t be able to leverage its position to block, throttle or favor content, regardless of whether a local transmission monopoly exists for any given customer, because companies who reach consumer via ISPs must have access to all consumers all the time (and vice versa.)

I’d also like to mention one additional argument. I’d characterize the “minimum standards” argument as the argument that commercial ISPs need to face rigorous standards, with defined legal accountability, for resiliency and reliability. These standards are said to be justified because of consumers’ reliance on ISPs – we wouldn’t accept poor reliability or resiliency from utility companies, so we shouldn’t accept them here either. This is more an argument for Title II than for net neutrality per se, but with Title II on the agenda, we have to think about this argument as well.

Without denigrating the real concerns of those raising the monopoly argument, I think we can agree that it grows less applicable with every year. Not just new providers, but new technologies are rapidly entering the market. They are doing so because America’s appetite for connectivity currently creates an attractive investment environment for adding capacity. Many of us use multiple broadband technologies and providers every day. And not many of us are worried that our ISPs are going to censor our communications.

The gatekeeper argument, on the other hand, has implications far beyond the ISP level. “Internet intermediaries” could be taken to mean a lot of companies that aren’t ISPs. Carving it out to mean only ISPs seems more and more dubious as ISPs become a more commoditized part of the consumer online experience. For many of us, search engines, app stores, e-commerce sites, and social media accounts are more fundamental components of our online activity than whichever ISP we may happen to subscribe to. I’ve had one particular e-commerce account since 1999, and I’ve used it for at least ten different addresses. And yet, it seems facially absurd to require that they abstain from restricting others’ content. What’s the point of building a commercial service if you have to open it to exploitation by non-contributors?

The minimum standards argument is hard to argue with – presumably we’re all in favor of high standards for services. I’ll note only that sometimes these standards may come with unacceptably high costs and lock-in effects if imposed via Title II. But otherwise, I’d like to pass over this point for the moment.

None of this is to say that any of these arguments are bad, that they won't prevail in court or in public opinion, or that existing telecommunications law is free of some strange legal fictions. Even the Supreme Court has noted that sometimes, deferring to the evident will of Congress and the FCC trumps a strict extrapolation of a stated rationale to its logical conclusion. It is merely to say that none of them are above criticism, either, and we have to think carefully about the effects of imposing them. On the one hand, after *Verizon v. FCC*, "Title I net neutrality" seems like a dead letter; this leads proponents to Title II. But on the other, Title II net neutrality, whether under any of the theories I've discussed or some other, may have many seriously harmful unintended consequences.

I come from the world of corporate and project finance, and that's where I see some of the worst consequences if we aren't very thoughtful about what kind of Title II we get. Every corporate initiative has to compete for capital internally; if a project can't make an adequate risk-adjusted return, it won't get funded. Full telephone-style Title II net neutrality might not kill the share prices of ISPs, but it will make their infrastructure return profiles worse than they would be otherwise. This can't help but chill infrastructure construction, maintenance, and modernization.

Thus, my biggest worry about Title II is really that, after a few years of chilling effects on infrastructure construction, we will find ourselves in an entirely avoidable and artificial broadband infrastructure crisis. This isn't just about pressure on lines to homes, but on the wired infrastructure implied by most wireless technologies. America's hunger for wireless bandwidth has gone parabolic in the last ten years. Wireless WiFi depends on predominantly wired connections. Wired infrastructure is more needed than ever, and major players in the wired infrastructure industry are now setting minimum bandwidth and latency standards that would have seemed absurdly high just a few years ago.

And, if we experience a chill to construction incentives at the very moment that demand is dramatically escalating, I worry that free market solutions will seem impossible – not because the corporate sector is incapable or greedy, but because they've been put in a regulatory bind. This will generate calls for a government-led solution, because the problem of capacity will be a genuine problem, even if it is rooted in regulatory choices. Indeed, a government-led solution may even be the best solution once we find ourselves at the point. I'd prefer to avoid a government-led solution by not precipitating the problem in the first place.

This isn't from some sort of general-principles aversion to government activity, but from concern about the state becoming the infrastructure financier of first resort. If there is no economically viable way to build broadband infrastructure without state involvement, the state will definitely get involved. And at that point, we have permanently politicized broadband infrastructure as an economic sector. This should concern everyone who believes that debt finance should be the ordinary-course finance model for infrastructure construction. The state can and should have a role to play in regulating industries, supervising industries, providing subsidies when socially necessary infrastructure is not economically viable, and correcting market failures. Politicizing a major industrial sector is quite another matter. Without internalizing the expertise and oversight of all of the commercial banks funding infrastructure nationwide, it's hard to see how the state could do this job adequately; and at that point, we're talking about socializing far more of the economy than the innocent words "Title II" facially imply, and more than many Title II

supporters would condone. Frankly, if we're going to have an industrial policy, I could think of sectors that need it more.

But I don't think we need to go down this road. I hope Title II advocates, currently politically in the ascendant, will work with those of us who have concerns in the Mertonian spirit of disinterested, collegial common pursuit of sound public policy, un beholden to any slogan or faction. And I pledge to talk to anyone who wants to talk about this, to bring a respectful, open, mind to the conversation, and to do my best to understand everyone's concerns, because mutual trust and confidence is the basis of progress here as anywhere.

Thank you.