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2007 NATIONAL LAWYERS CONVENTION

THE FEDERALIST SOCIETY

presents

TELECOMMUNICATIONS: THE REGULATORY STATE AND AMERICAN TECHNOLOGY*

PANELISTS:

Amb. David A. Gross, U.S. Department of State

Mr. Roy E. Hoffinger, Qualcomm, Inc.

Hon. James C. Miller, III, formerly of the U.S. Office of Management & Budget

Hon. Robert M. McDowell, U.S. Federal Communications Commission

Moderator: Hon. Stephen F. Williams, U.S. Court of Appeals, D.C. Circuit

THE FEDERALIST SOCIETY

TELECOMMUNICATIONS:

THE REGULATORY STATE AND

AMERICAN TECHNOLOGY

JUDGE WILLIAMS: We're going to move the speakers along smartly so that everyone can get off to Rudy at the end. Introductions will be short and sweet.

We're going to move, as many of us associated with the Federalist Society have, from left to right from your perspective, starting with Jim Miller, who is Director of OMB and formerly Chairman of the FTC, and is now a senior adviser at the law firm of Blackwell Sanders. He is also Chairman of the Board of the Governors to the U.S. Postal Service — a daunting task.

HON. MR. MILLER: Thank you, Judge. Eight years ago I wrote a book that was published by the Hoover Institution, in which I extol the virtues of competition and competitive markets and condemn the vices of mo-

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nopoly. And I applied the basic economist analytical tools to the market for political representation or elected representatives. I found that the market was extraordinarily monopolistic and that a lot of measures, such as campaign finance reform, made matters worse, not better.

In describing how competition not only lowers prices, but enhances the development of new products and technological change, I looked down at the notebook computer that I was using to write the book. I want to read to you quickly what I wrote — “I’d like a notebook computer that weighs” — by the way, this is page 21; you can obtain it on Amazon —

(Laughter.)

HON. MR. MILLER: “I’d like a notebook computer that weighs no more than three pounds, is no more than one inch thick, runs at 300 MHz, has a full-size keyboard, an active matrix screen, a built-in floppy and CD-ROM, a five GB hard drive,” — that was a long time ago — “at least 96 MB of RAM, and a built-in battery that lasts for at least five hours between charges; all for a price of less than \$1,000.” Well, ladies and gentlemen, here it is.

I lied about the thousand dollars. It’s a little bit more expensive than a thousand dollars. But there are others out there that come very, very close to, if not within, the bounds of what I said. It also has a CD, not a floppy, but the floppy is obsolete now anyway. It also has a lot of other features that I didn’t even think about at the time.

Now how did this all come about? Well, the way it all came about is that the market for computer hardware is extraordinarily vigorously competitive. Pick up any magazine on computers, look for the index of advertisers, and you will see company after company after company after company advertising. And they all have some measure, whether it’s an advanced thing like, “this thing reads a fingerprint; you don’t have to put a password in,” or things of this nature. But you have this development of new products, and prices fall, and it’s there because you have competitive markets. A competitive marketplace enables this to happen, and all the resources necessary to put this together are freely available. A marketed property right on them is freely exchanged in the marketplace.

The marketplace for telecommunications is different because an essential input into the production of any product or any service is a scarce resource we know as “frequency,” and it’s not freely available. There are no private property rights on frequency, and it’s not tradable. There are some exceptions. I know you’ve done some trading, Commissioner. But by and large, the use of the spectrum is determined and is allocated by fiat by a government agency known as the Federal Communications Commission.

In that regard, it’s very important for regulators, the FCC in particular, to understand that by its choice of means of regulating and the allocation of its authorities and its property to those in the private sector, it really has an enormous effect on competition. The FCC does best, in my judgment, when it enables — it facilitates — competitive markets and guards against having monopolistic markets.

Look at what happened in the pair wire telephone service when you had the AT&T agreement that Bill Baxter orchestrated. You had an explosion not only in devices, but in services offered. Look at the cell phone service. The FCC did a terrific job in establishing opportunities for companies to compete, and you have an incredible variety of services offered by competing cell phone companies. Look at PDAs. I mean, we've probably all got a Blackberry squirreled away around here, or a Treo, or something similar. That, I think, is where the FCC does the best job — when it maintains competitive markets.

The bottom line that I want to get across is that competition matters a lot. I remember when I was the chairman of the Federal Trade Commission, the Miller team got excoriated by a lot of people because we found some business practices, such as vertical arrangements — we said they were not restrictive of competition; in fact, they were pro-competitive. And we found some mergers that were not only benign, but even found some that were pro-competitive. But I think it's important that we understand that the place that you're most likely to find anticompetitive behavior — monopolistic behavior — is where companies and industries are highly regulated. Where the market is free to operate, you don't have nearly as many problems as when you have a regulator.

And so the real challenge, if I were commissioner of the FCC, would be focusing on how to keep from impeding competition and how to keep from memorializing monopoly.

Thanks. I think I was just about to receive the boot.

(Laughter.)

JUDGE WILLIAMS: Perfect.

The next speaker is Robert McDowell, Commissioner of the FCC since June 1, 2006. He comes from a distinguished career in private FCC practice.

HON. MR. MCDOWELL: Thank you, Your Honor. Well, we have a lot going on at the FCC, and I'll try to keep my comments short because some of you might have a number of questions regarding what's going on at the FCC. I certainly do.

(Laughter.)

HON. MR. MCDOWELL: Over the years, the FCC has done a terrific job of keeping you very busy, Your Honor, and I'm sure sometimes you end up with your forehead on your keyboard wondering what the heck the FCC was trying to accomplish.

But in any case, what the FCC does really touches the lives of every American, as well as people across the globe. Directly, we affect about one-sixth of the U.S. economy, and indirectly about forty percent. So what we do is very, very important, and I'm at the FCC quite simply to promote freedom and the sovereignty of the individual. We do that for the promotion of free markets and the dissemination of free ideas.

I believe that the government simply cannot, and should not, try to replicate the billions of decisions that are made in the private sector each day because free and competitive and open markets work. Regulations should be

reserved only for market failure. I know we have rebuttal time reserved. I'm not sure we're going to be rebutting each other very much here. I think we might be all coming from the same perspective.

But one of my top priorities as a commissioner, in order to promote competition, has been to promote the construction of new delivery platforms. Robust competition among, and sometimes within, platforms is good for consumers and the economy by, of course, producing more technical innovation, lower prices, and more choices for consumers. Among some of the initiatives we've worked on recently to help us spur even more competition is the video franchise relief to clear out unnecessary regulatory underbrush, so localities cannot unreasonably delay the franchising of the video providers. We have made sure — I have made sure — that not only did that apply to new entrants into the video market, but to incumbents as well, so we have a level playing field.

We had our advanced wireless services auction last year. It was phenomenally successful. It raised \$14 billion for the U.S. Treasury, and the policy there was a market-based approach. It promoted the use of unencumbered spectrum, and that gave entrepreneurs the flexibility to apply their ingenuity in ways that we aren't able to imagine now, and won't be able to imagine even as they're building out, because it will continue to grow and flex.

I think it's important to follow up on a point that Jim made a minute ago. Yes, spectrum is a finite resource, but overall in this country and worldwide (but primarily driven by the United States), spectral efficiency doubles every two-and-a-half years. So that's the overall throughput of the use of the spectrum, and that's terrific. Since Marconi's first radio transmission in the 1890s, we are one trillion times more efficient in our use of the spectrum. That, I think, is very promising.

Of course, we have the 700 MHz auction coming up in January. I supported some of that order, and I dissented on other parts (the parts regarding the encumbrances, the open access mandates, and the reserved bid sections). Nonetheless, it is terrific spectrum — the most powerful we have, really — and I am very, very excited by the prospects there.

On the horizon, we have possible entrepreneurial uses of white spaces, and I think we need to maximize the use of those spaces. I want to make sure that we do that without interference for current users, but I'm confident that technology will solve that problem. Inventors will continue to invent, and they will find a way around the interference problem. Technology always solves problems like that.

Other opportunities could involve the reduced orbital spacing of satellites. Right now we are considering something in that regard. Each satellite currently is roughly the size of an automobile, and there's breathing room of about 4,000 miles between each of those automobile-like satellites. While I'm no rocket scientist, I'm confident that we can probably squeeze a few more up there without any adverse consequences.

But overall, our deregulatory policies of the past few months have really served America well. Our broadband penetration rates have been surging from a thirty-two percent adoption rate or growth per year, to fifty-two percent, to our most recent report showing a sixty-one percent penetration rate. We are the largest broadband market in the world with over 82.5 million broadband users. Nearly sixty million of those are in the fast lane of the 1.5 or 3.0 or higher megabits per second, and that fast lane is getting faster. Our fiber to the home market is growing at ninety-nine percent per year as a result of deregulation. Cable is available to ninety-four percent of all U.S. households, and America is home to about one-third of the world's WiFi hotspots.

The closing point on that, and I sense from the shifting in the chair my time is –

JUDGE WILLIAMS: You're doing it very well.

HON. MR. MCDOWELL: – thank you, Your Honor. Hopefully, I can bottle that up and do that in an opinion sometime.

But anyway, wireless broadband growth showed the largest percentage increase from a mere roughly 82,000 units at the end of 2005 to over 4.1 million wireless broadband users by the year-end of last year. That's an astonishing 5,000 percent increase; actually, slightly over 5,000 percent in about one year.

So anyway, while we can always do better, and we should always strive and never be satisfied, I think our deregulatory policies in those areas have served America well. In the Q&A session, I'll be happy to talk about more regulatory stuff that might be facing the FCC.

JUDGE WILLIAMS: Thank you. The next speaker is Roy Hoffinger, Vice President and Legal Counsel for QUALCOMM, and its chief in-house antitrust counsel. He comes from a career in law firms and also with AT&T and Qwest.

MR. HOFFINGER: Thank you, Your Honor. Before I begin my remarks, I think I should preface them by stating that they reflect my own personal views and not necessarily those of my employer.

I'd like to talk a little bit about something I think is very timely, and that is the efforts of certain elements of industry to use competition law, agencies, and courts worldwide to foster regulation of the licensing of intellectual property. I think that's a particularly appropriate topic for this panel, which, as I understand it, is titled "The Regulatory State and American Technology."

The outcomes of these efforts could have an enormous impact on incentives to innovate, and the potential for harm to the United States cannot be understated, given the role that research and development, for example, as opposed to manufacturing, plays in our economy. I'm going to focus today on two particular issues, or rather sets of issues. One is the effort to get competition law agencies to play the role of price regulator or regulator of licensing tariffs.

One area where we see this is with regard to intellectual property that's incorporated in standards. It's been the case for the past ten to twenty years that, prior to incorporating a particular technology that's subject to patents into a standard under consideration, standard organizations will ask the patent owners of essential patents — which basically means you have to practice a patent in order to comply with the standard — to agree to license their patented technology in terms that are fair, reasonable, and nondiscriminatory. In industry rubric, this is often referred to as FRAND or RAND.

Now, the original underlying intent of these FRAND or RAND requirements was to ensure the availability of the patented technology. In other words, the concern was that if this was going to be standard, and everybody was going to be building to the standard, you didn't want to create a monopoly over downstream products compliant with the standard, by virtue of the fact that under patent law the patent holder has the exclusive right to practice that patent. So again, they wanted this technology to be available to downstream producers so that there would be competition. And FRAND and RAND worked pretty well.

But what has happened of late is that we're seeing these FRAND policies and commitments distorted beyond their original intent. In particular, the proponents of this perspective are attempting to use FRAND and RAND commitments, and alleged breach of those commitments, to institute nothing less than a rather pervasive public utility-type scheme of rate and other forms of regulation.

I was at a panel in the spring with one of the proponents of this view — a very well-respected law professor and practitioner — who began his discussion of FRAND by saying that it embodies at least twenty-four separate principles of rate regulation. Now, I do have this background in telecom regulation, and for those of you who are familiar with it as well, you might think that I would have tended to bristle a bit, and I did.

"Fair and reasonable" — that raises the question again that many of us who practice in the field confronted, which is, "how do courts and agencies regulate price?" It is an incredibly difficult topic with the outcome almost always arbitrary, and in my experience, more often than not suboptimal from the point of efficiency. That's even true when you have supposedly "expert" agencies doing a regulation. Here, the idea is to have competition agencies do the regulation.

It is not too difficult for me to conceive of someone ultimately trying to suggest, for example, that FRAND requires TELRIC pricing. With all due respect to Hon. Mr. McDowell, who I don't think was around, or was not responsible, for TELRIC, I don't think any serious person would recommend TELRIC pricing as the law for the licensing of extremely valuable, important technology that is central to economic growth.

In fact, I would submit to you that the idea of subjecting important innovation to public utility-type regulation stands on its head the original intent not only underlying FRAND, but patent protection to begin with. The idea is to give this patent owner control over its property, not subject to being sec-

ond-guessed, so that the patent owner would have maximum possible incentive to innovate.

To give you an example – the most extreme example of how this would work: there's a proposal that's floating around called aggregate royalty terms and proportionality. The idea that someone somewhere determines what the maximum aggregate royalty payable should be for intellectual property. Consider all intellectual property and all intellectual property owners, and then you determine some arbitrary cap. You divide that cap in proportion to the number of patents that are declared as essential to the standard organization. There is no support whatsoever in economics, precedent, or industry practice for this concept, yet it's been taken seriously in certain quarters.

And the nondiscrimination principle is another thing that's got to be deeply concerning. What does that mean in this contest? One-size-fits-all? A number of licensors have licensing policies which are extraordinarily flexible for the purpose of accommodating the very different needs of their licensees. Are these licensees able to afford big up-front payments? If not, you'll recover your rates in royalties; if so, perhaps the opposite. Taking away that flexibility would be deeply harmful both to patent owners and the users of their patents.

The other topic I wanted to mention is little bit different. I think we're seeing what I perceive to be an argument that, in essence, standard-setting organizations should be turned into buyer cartels. The purported problem that this would address is something called hold up. But preliminarily, the idea is FRAND regulations or FRAND requirements are inadequate. They haven't produced sufficient control over purported market power by patent owners. And there's something called hold up, which is where, after the standard is adopted, the patent holder will try to extract some sort of super-competitive price for its patents. There is no empirical evidence of this, and the purported solution, by one of the leading proponents of this view, is joint negotiations *ex ante*, before the standard was adopted, which he calls coordinated buyer power, quite candidly.

That is simply not necessary. Terms can be made available through bilateral *ex ante* negotiations or certain policies requiring advanced disclosure of royalty terms. There is no need for using SDOs to create and exert monopolistic power.

Thank you.

JUDGE WILLIAMS: Thank you. Our next speaker is Ambassador Gross, whose title is United States Coordinator for International Communications and Information Policy, and he comes to that from a distinguished career in communications starting with Sullivan Asbill & Brennan.

AMBASSADOR GROSS: Thank you very much, Your Honor, and it's a great pleasure to be here with everyone. I'm going to pick up a couple of threads I think that Jim and Robert really laid out, and I think my role here is perhaps to state the obvious, which is that the role of competition, free market enterprise, etc., and the benefits that come from them, are of course universal when allowed to flourish.

In the area of telecommunications, ICT worldwide is an over three trillion dollar-a-year business, now growing at double-digit rates. That was not always the case. In fact, the United States has been the leader in terms of deregulation in this field. The area of telecommunications, of course, has been primarily characterized not only by monopolies, but usually state-owned monopolies, and has rarely been the area of innovation and growth until recently. The world looks very closely at what the FCC has done and what our Congress has done in the area of deregulation and has followed suit in ways that are really quite extraordinary.

Just to give you a few ideas about what is happening out there, in December 2000 there were about 700 million mobile phones in the whole world, which was an extraordinarily large number compared to what people thought would be the case. Following the lead of the United States in deregulating the wireless industry — which is now primarily deregulated around the world — there are now over three billion cell phones in the world, growing extraordinarily rapidly — four times since the end of the year 2000 — largely because the world has looked at the success of the United States and other countries that have deregulated that industry and have found extraordinary benefits.

India is one place where you see those benefits. In the past in India, and I know from my times in private industry and private practice how regulatory the Indian government had been in the area of wireless, there had been virtually very little wireless in that country. Now, as a result of deregulation opening up that market, including to foreign investment, that market grows at approximately eight million phones a month. Since the population of Finland is only about a little over five million, they're growing at about one-and-a-half phones? Million phones? per month, which is good news, I think, for Nokia, but fortunately also good news for American companies as well.

China, of course, is growing very rapidly. I don't mention that other than for the fact that they've got over 500 million cell phone subscribers in the country already.

One country which few may focus on, but it goes very much to the point, I think, of the panel of deregulation and competition, is Pakistan. In 2000, there were well less than one million cell phones in that country — a very large country but less than a million [cell phones] because they had not deregulated. We, the United States government, worked very closely with the Pakistani government to provide capacity building support and the like. They deregulated very dramatically. There are now over seventy-three million cell phones [in Pakistan]. It's gone up approximately 100 times since 2000.

This is going on all around the world. In Iraq, Saddam Hussein — of course no surprise — didn't allow cell phones in that country. Today, there are 10 1/2 million cell phones in Iraq. They just auctioned off (Rob would be happy about the auctioning) three licenses there. Each one went for \$1.25 billion plus eighteen percent of the revenues for a fifteen-year license. All of those licenses were purchased by investors from the region. So these are

Arab investors investing in Iraq today on the bet of a good and prosperous future for the country.

Afghanistan? It is the same thing. Under the Taliban, it was even worse. Not only were there no cell phones, but you had to leave the country to make an international call. Today, there are well over three million cell phones in that country, of which there are four licensees – extraordinary competition. When you are in Kabul, you see women in burqas with cell phones, talking as they're on the street. The economic impact has been extraordinary.

But it's not just about the economics. It's about social development – the ability of people to be able to provide services – government services, personal services, and the like – to their people, particularly through the Internet. The Internet has seen the same sort of growth. In 2000, there were about 400 million Internet subscribers in the world. Today, there are about 1.3 billion subscribers. So, just in the past few years we've seen more than a trebling of the number of Internet subscribers in the world.

Through that, we not only see economic growth and social development (as I said before), but extraordinary political change, as the ability to have the free flow of information has continued to advance. In the early 1970s, according to Freedom House, there were about forty countries in the world that could call themselves a democracy. Without trying to quibble about how free each democracy is, today Freedom House says that there are about 120 countries in the world that are democratic. There are lots of reasons for that, of course, but clearly one of them is the ability to access information. More people have lower-cost access to information, whether it's through cell phones so people can talk to each other, communities to stay connected, families to stay connected, or through the Internet, where people have access to information and know about lives outside of their communities and can better themselves.

The changes have been dramatic, and the changes have come really for two reasons: changes in technology – most of which are American-based – and competition and free markets. Where we see competition and free markets, we see growth, we see lower prices, and we see greater availability. The changes, as I said, have affected the world dramatically, not only socially, but politically as well.

Thank you.

JUDGE WILLIAMS: Thank you. The panelists have been extraordinarily good at keeping within the time limits, and I thank you all.

The arrangement was that if panelists wanted to respond at all to each other, we have a minute for that now.

PANELIST: (Inaudible) a rebuttal, and I'm not sure I want to rebut anything.

(Laughter.)

[HON. MR. MILLER]: Could I just follow up on something the ambassador was saying? Many of these devices and services that start out rather elitist quickly become ubiquitous because of competition. A cell phone is an

example. And I understand that this past year notebook computer sales exceeded home desktop installations for the first time. And you know, when the cell phones first came out, I got one of those bricks. You remember? And I remember standing on a corner in New York City, and somebody walked by and said, "He's talking to Henry Kissinger."

(Laughter.)

[HON. MR. MILLER]: It was so exceptional. But now cell phones are ubiquitous. So, competition plays an extraordinarily important role in society — in converting something that's really an elitist product or service into something that people consider almost an essential service or product.

JUDGE WILLIAMS: Sir? We had a question. There is a microphone back there.

PANELIST: That's John Lott.

JUDGE WILLIAMS: It's not on?

AUDIENCE PARTICIPANT: No. (Inaudible.) He's identifying me. I appreciate that.

Anyway, Mr. McDowell, I had a question about the auctions. Why don't you auction off the right to do the auctions, in the sense that, what happens is you hire experts to go and try to tell you exactly how you're going to set up the auctions that are there? It's really clear to me that they have enough incentive to go and figure out the exact right thing that should be done there. I mean, he may want to put certain types of restrictions generally, like what the market concentration would end up being or something like that.

My guess is that people would be a lot more imaginative [and] have a lot more at stake (themselves personally) in trying to figure out what might be the best way of doing the auctions, rather than the FCC trying to figure out whether it's English, Dutch, or whatever mechanism that you're going to have to auction it off there.

So, why don't you auction off the right to figure out the best way to do the auctions?

HON. MR. MCDOWELL: That's an excellent suggestion. We are limited by what Congress told us we could do, and our ability to auction is limited specifically by statute, so I would encourage you to talk to your representatives in Congress about that very idea. I don't know — I'd have to ask the Judge if there's a delegation issue there. Are we delegating what could be deemed a public policy function?

JUDGE WILLIAMS: Is there a delegation doctrine?

HON. MR. MCDOWELL: That's an excellent question. I will leave it to others to discern that. But that is a great idea.

JUDGE WILLIAMS: Yes.

AUDIENCE PARTICIPANT: Hi. Actually, I have two questions. The first is short. Mr. Miller, what's on page twenty-four of that book because I would like to invest in it before it gets too big?

HON. MR. MILLER: Twenty-one.

AUDIENCE PARTICIPANT: The next question is really for the panel as a whole. The last week — two weeks — we've seen cable companies take a massive hit from Wall Street, and analysts by and large have put part of that on a combination of factors, whether it is outright hostility at Chairman Martin's cable companies or treating AT&T and Verizon as new startups, essentially. Getting into a new market, it's kind of hard for some of us to fathom that when AT&T alone has \$130 billion a year in annual revenue, it gets new startup treatment.

I'm wondering if there's going to come a time, since we're sitting here talking about deregulation, that the SEC is actually looking at applying the same regulations to all providers of like services because right now it's being split up. Is this IPTV or is it cable services?

Well, at the end of the day what the consumer is doing is making a selection based on price and delivery of that product. These artificial markers seem to be based in the 1970s era of delivery, and it would seem — and we can use the laptop as an example — that whether it's Internet connectivity, video services in the home, or if it's telephone or mobile, that the FCC will deregulate and treat these just as the consumer does: as like services being delivered and regulated the same way, one of which, most importantly is, of course, that cable companies are restricted from having more than thirty percent of the cable TV market, which effectively prevents any cable companies, or at least Comcast (which is the biggest one) from acquiring anyone else or Time Warner acquiring any of the others. If you take the top-five cable companies and combine them, they're still not as big as AT&T.

In that ever-growing competitive environment, if you truly want to foster that competition, get rid of some of these '70s regulations, including a prohibition on accommodation. I'm wondering if there's any thought that we'll see that in the coming few years?

HON. MR. MCDOWELL: Absolutely. First of all, we could talk all day about that question, so I'll try to limit my response. We have already done that in some cases, but I agree there's a long, long way to go. If you look you what the Commission has done in the wake of the Supreme Court's *Brand X* decision — the Supreme Court in that case, for those of you who aren't familiar with it, basically said that the FCC was correct in ruling that cable modem services are information services, and that Cable broadband — cable modem — is an information service appropriately handled under Title I of the Act.

Since then, the Commission said, well, like services — DSL for instance — is also Title I. That was appealed to the Third Circuit, and the Third Circuit last month said, no, the FCC got it right. That should be Title I regulated appropriately; put it in that silo, so to speak. We've also looked at wireless broadband, broadband over power lines, and we're putting them all into the Title I bucket. So that's one instance.

With video franchising reform, just to give another example, I was concerned that our order of last December would put the thumb on the scale in the favor of the new entrants and not for the incumbents. Maybe we can also

have a discussion as to the conservatives' dilemma over the power and rights of localities to have their way versus something that's essentially an interstate type of service, having interstate deregulatory treatment. But anyway, that's more of a footnote.

In any case, after some bargaining and negotiating with the chairman, we were able to get video franchise relief applied to incumbents as well as new entrants. But we do have a long way to go. My hope is that those industries — and it's no surprise that those industries that are more lightly regulated are doing much better than those that are heavily regulated — are lightly regulated, and that we can keep it that way. That can sometimes be a challenge in this job.

AUDIENCE PARTICIPANT: In the spirit of other topics frequented at these gatherings, this would be directed towards, I guess, Mr. McDowell, and anyone else who would know something about this. Telecommunications — at least in my understanding, . . . at this time there are a lot of limits on . . . the other issues that [have] come into play with other panels . . . — issues [of] freedom of association and property rights and takings.

When it comes to FCC regulation, I believe there are some pretty strict limits on devices that limit the reach of cell phone signals, signal interrupters, and similar things that could create quiet zones for cell communications and what not. I'm interested, if anyone wants to comment about any moves afoot to sort of expand personal rights in that area, without having to go to Italy or Israel to get a signal blocker, and how that might intersect with another area like takings, which interferes with the right to exclude, to the extent that federal regulation doesn't permit interference with cell phones or cell signals or range.

JUDGE WILLIAMS: It looks like you're the target.

HON. MR. MCDOWELL: Okay. I'm the target again. So, I think your question focuses (and if this was a trial, I'd object on a compound question) but anyway, the right to exclude as an individual right versus — is that what you're saying? You want to have the ability in your neighborhood or your club to have cell phones function, or wireless devices and personal portable devices to function, is that what you're saying? Yes, more or less? Okay.

AUDIENCE PARTICIPANT: (Off mic.)

HON. MR. MCDOWELL: Right, right. Well, the laws that govern wireless are based on allocation of the scarce resources Jim laid out in his constructive presentation. Others are based on how to prevent interference. So, generally speaking — and there is tension between them — licensees have priority over unlicensed devices. So, in that your suggestion is going to play on all those sorts of tensions in the law that already exist, there are perhaps certainly some devices that are probably licensed. I don't think your scenario would be tolerated for unlicensed devices as a matter of public policy, but, in that there may be devices that could work on a license basis, or with special exceptions and special waivers, there might be that opportunity at the Commission.

But if you want to talk about a more philosophical discussion of the right to exclude, the difficulty is, especially with a licensee, if you're talking about a cell phone licensee who has the right to use that spectrum, that can pose a lot of technical interference problems. So, it's a swirling whirlpool of grays I think. I don't know if any one else wants to chime in.

AUDIENCE PARTICIPANT: Yes. The Commissioner mentioned satellites before. Multiple countries launch them. So what's the international regime for coordinating where satellites are, in rationing who can use geosynchronous orbit? I mean, what's the basic framework?

HON. MR. MCDOWELL: I assume I should take that one. The international coordination for orbital slots [is] done by the International Telecommunications Union, which is a U.N. affiliated agency based in Geneva, Switzerland. It's actually the oldest U.N. affiliated agency in existence.

So, the State Department, together with the FCC, coordinates. When a private company, or the government itself, wants to launch a satellite, there is paperwork — it's now mostly electronic — that is sent in. There is an analysis to see if there are interference issues with other existing or proposed satellites. As the Commissioner indicated, there are issues about the spacing between satellites and the like. Then, after a review process that is coordinated by the ITU, a right is given. That right can expire, however, if no launch takes place. In other words, you can't warehouse effectively.

Today, in fact, is the end of the World Radio Communications Conference, which is where the world comes together and looks at these various issues. It happens every three or four years. It's a treaty writing exercise, and our delegation of about 150 at large in Geneva has just finished their work just a couple of hours ago. One of the issues there had to do with satellite spacing issues, and in particular, a number of countries sought waivers to extend their time because they had concerns about getting satellites up there. There was one from the Andes, one from Vietnam, and a couple of others. So, you can get extensions as well, but it's all done through the ITU.

AUDIENCE PARTICIPANT: I just want to explore, a little bit, the relationship that we're talking about between deregulation leading to technological change leading to greater access to information. And, maybe playing devil's advocate for a second, I wonder whether that relationship will always hold? I'm thinking specifically in terms of the net neutrality debate — whether it's possible that the deregulation could lead to technological change but could also limit access to information, while increasing consumer welfare maybe in other ways — lowering prices or some other way — or greater technological change that improves the speed of access but not the breadth of access. I wonder: does anyone have any comments on that?

PANELIST: No. No. I have not followed that debate closely enough to have an informed judgment.

HON. MR. MCDOWELL: If you have competing platforms, if you have a dearth of bottlenecks in the systems that deliver information, the need for net neutrality is negated. So, it's a very simple concept. The term "net neutrality" is what I like to call a Rorschach term. It's really ill-defined. It's

whatever people look into it, that's what they see in it. So, I think there's also some confusion in that Rorschach term as to discriminatory conduct versus anti-competitive conduct. Anyone who has run a telecom network can tell you that engineers know discrimination operates, or manages, the network. You have to discriminate. Video bits over the Internet get priority over e-mail bits, for instance, to oversimplify somewhat.

So, is that anti-competitive? Well, we already have laws on the books that govern anti-competitive conduct, so those would apply. I think it's a bit of an academic discussion. There's a lot of fear surrounding it. The FCC put out a notice of inquiry last summer asking for evidence of market failure. In the context of that proceeding, nobody filed one drop of evidence regarding market failure. There is the complaint that I haven't had a chance to read yet, regarding Comcast and Bit Torrent, and we'll take a look at that. It's a pending adjudicatory matter, so I wouldn't comment even if I had read it.

But in any case, if there is evidence of market failure, we can act the way the Commission did in 2005 in the Madison River context, where there was a small phone company blocking the ability of a competitive Voice Over Internet Protocol provider. Anyway, in a nutshell, that is how I view the net neutrality issue.

JUDGE WILLIAMS: There's a momentary lull. If it's okay, I'd like to ask a question of Roy Hoffinger, here. Well, maybe there really isn't a lull, but I'll seize it anyway. If I understood what you were saying correctly, it was that standard-setting bodies embarked on the process of imposing these FRAND, which essentially are price control standards, on the patent holders. So, I take it standard setting didn't make the patent monopoly more of a monopoly than it was by its own inherent nature. Then, if I understood it correctly, this seemed to morph into a public utility-type regulation or efforts to do that.

I guess my question is, that would be inevitable, would it not? And if it is inevitable, is it your thought that one should abandon any effort at FRAND in the standard-setting context or that there's some sort of middle way — FRAND that's not out of control but stays well short of public utility regulation?

MR. HOFFINGER: I think there is. Only time will tell whether it's inevitable or not. I'm not prepared to accept that it is. I don't think it was intended to morph into detailed price regulation when it was originally adopted. It really was about availability. And then you might ask yourself, well, what does "fair, reasonable, nondiscriminatory" mean in this context? I think it means in essence that it's almost like a constructive refusal to deal — that if your terms are so onerous that you preclude efficient competitors from succeeding down the street, then I think you have an issue. But short of that, I don't think it was intended to be the pervasive type of wealth transfer that I think is, in essence, the epitome of public utility regulation.

The middle ground, so to speak, is to encourage to the maximum extent possible something that the FCC has been trying to do over the last several years, which is to have rates, terms, and conditions established to the maxi-

mum possible extent through the competitive marketplace — through negotiations between patent owners and implementers. If you create the idea that either party can simply resort to a court or an agency any time they are dissatisfied with terms that one or the other is offering, that's going to be the death knell of negotiations.

And face it — in 20 years of these FRAND regimes, actual disputes over licensing terms for which agency or judicial intervention has been required have been very, very minimal. So the fact is: it works. The paramount thing to do, though, is to make sure that it's implemented in a matter that creates the maximum possible incentive for working out terms in bilateral negotiations.

AUDIENCE PARTICIPANT: I'd like to ask a very general question based on what I have been hearing, which is seen as very hopeful. Would you describe the industry as on a very strong trajectory towards free-market reforms, deregulation, limitation of rent seeking, and that sort of thing because that is what I'm hearing?

JUDGE WILLIAMS: Jim?

HON. MR. MILLER: Well, let me say that I'm an old deregulator, you know that. And I think it's very important that the barriers to competition that have been erected over a long period of time in any industry should come down. But there is rent-seeking behavior that can take place even in competitive markets, and you know, lots of people have written about that. It's one of the responsibilities of regulators, I think, to always be on the lookout for rent-seeking behavior, even in markets where they're deregulating, whether it is seeking some special set of rules and protocols or whether it's combining resources. I mean, you need to have your economist's thinking hat on all the time to try to achieve truly competitive marketplaces and efficient outcomes.

AUDIENCE PARTICIPANT: Hon. Mr. McDowell, my question is in the broadcast room. Actually, I've got two questions that are related. First, as you know, everyone here has been talking about and extolling the merits of competition — a very friendly audience for that kind of message. But the FCC tends to talk more about localism and diversity than competition, *per se*. Its ownership concentration rules have gone to a model in recent years that recognizes, presumably for their diversities contribution, the merits of counting noncommercial stations towards ownership caps when you're counting the size of a market and how many stations can be owned by a commercial operator in a market.

Now, I wonder if you might comment on the effect on the competition where, in many small markets, the presence of some noncommercial stations, which for instance are not competing for advertisers, can allow pretty close to monopoly behavior on commercial broadcasters in that market?

Secondly, let's just assume for the sake of argument that noncommercials are competing and contributing to competition. The FCC just had a filing window for new noncommercial stations. Some 3,700 applications were received, so there's a lot of interest in building these stations. I wonder

if you might comment on the fact that projections are that those applications, where they're mutually exclusive, will take two to five years to process because, largely, the Commission delegated authority to the staff? In most cases, with these applications, we pretty much know who's going already.

HON. MR. MCDOWELL: Excellent questions. First of all, regarding localism and diversity, Congress has told us we have to include the public policy goals of having localism and diversity in broadcasting. So when you hear us discuss that, it's because the directly elected representatives of the people have told us to discuss that and analyze that, and that's certainly very important. I agree with those policy goals.

I do think that new technologies over the past decade or two decades have strengthened localism and diversity – never before. You know, we hear complaints now about “too much information.” TMI [too much information] is a text-messaging acronym, and it can apply to many different things. But part of that is that we're all saturated with a lot of data every day from multiple sources and for multiple platforms. I think all of that has to be taken into account. Broadcasting is one of those platforms and one of the media from which we derive a lot of our information.

In terms of counting noncommercial stations or not, obviously, I'm not going to comment specifically on what we might do going forward because we obviously have a very important proceeding ahead of us. But in terms of monopoly behavior, under the rules as they are now, you really can't own more than roughly seventeen percent of a market, depending on the tier of the market. So, there is no monopoly in that regard.

Also, how do we judge the audio market if we're talking about radio? Is the audio market also satellite radio? We have an issue there as well with the merger. Is it your iPod? Where does the audio market begin, and where does it end? So, all of those things have to be taken into account when examining the competitiveness of a broadcast market, in my view.

In regard to the two to five years to process the applications from our newest filing window, I certainly hope it wouldn't take that long. The chairman should initiate delegating that authority promptly, and I would hope he would do so, but that's within his purview right now.

JUDGE WILLIAMS: Go ahead, Jim.

HON. MR. MILLER: I just wanted to jump in on something that I've actually thought about and written just a little bit about. Whether there's a broader entertainment — audio entertainment — market is really an empirical question. It sort of goes, I think, against the grain for us to think that iPods and CDs are perfect substitutes at the margin for satellite broadcasts. I am a Sirius subscriber, let me put that on the table, but I don't view them as interchangeable at the margins. But it's an empirical question, and what I've seen so far is that there is little evidence that the substitutability of alternatives would be sufficient to police what would be a merger of two down to one in this market, with no real opportunity for entry. Entry barriers are just extraordinarily high there.

[AMBASSADOR GROSS]: Let me just take a different direction. You talk about both localism and diversity, which, of course, are two values shared very directly both in the United States and in many other countries around the world. One of the things I see going on in the diversity side is the extraordinary growth of things like Internet radio, and now with things like YouTube and so forth. So those who have access to the Internet – over 1.3 billion people around the world – now have access to virtually all the radio stations because almost all of them now are broadcasting — using that term loosely — on the Internet as well. So, when I talk to my son, for example, who's in college, he listens to radio from a variety of places around the world. Even old people like me do too, now.

And the flipside is true, that as you travel around the world, you see people with access to radio from the United States and from other countries, and access to video, whether it's YouTube or the like. So, you're seeing a tremendous growth in diversity quite apart from the challenges of spectrum.

AUDIENCE PARTICIPANT: Hon. Mr. McDowell, I feel like we're piling on –

HON. MR. McDOWELL: No. There's a lot going on at the Commission, so I can understand you have a lot of questions.

AUDIENCE PARTICIPANT: – keep you away as long as we can.

We're talking about the regulation, but I, too, am hopeful. I share (inaudible). But it's almost a little bit embarrassing to say, well, we're kind of focusing on deregulation when I think it was just one or two weeks ago the FCC came down with a new rule on empty uses for apartment buildings and multiple dwelling units and basically applied this regulation that says, "okay, the cable company has an exclusive MDU," and they go ahead and wire it. Well, you have to open up to the telcos. That's fine, and that's good, if we want to lay a level field, but the inverse wasn't applied such that the telcos can now go in and sign these inclusive contracts to the exclusion of the cable operator.

So once again, we talk about deregulation and applying it fairly. And then Mr. Miller, I'm hopeful too. But just two weeks ago there was another one of these crazy decisions that if you are a cable investor, you're going, "my God, when is it going to stop?" So, again, you know, great lofty goals, but we'd love to see some action.

HON. MR. McDOWELL: Right. Well, with the cable industry, there's a lot of asymmetry – you're absolutely right – in terms of deregulating other platforms. And holding up competition is the reason for that but at the same time, for some reason, not doing so with the cable industry when they're facing the most competition they've ever faced before. So I share your concern with that asymmetry. Absolutely.

On the MDU item, as I understand it, there will be an item coming out that will give regulatory parity to all providers on that, and that was something we all talked to the chairman about. That would be forthcoming.

PANELIST: May I make a comment about that? My observation has been that to some extent, and I agree with the questioner that deregulation is

often a lot of talk and not a lot of action, but I think it's really a complicated issue, and I wouldn't want to paint with too broad strokes.

I think most fundamentally is that even proponents of deregulation still don't fully trust markets, and I see an awful lot of regulation that is designed to let marketplace activities not result in erosion of dominant market shares, but to basically force the erosion of market shares through regulation. I think the asymmetry that the questioner is pointing to is probably an example of that distrust of markets that I think still continues to exist, even among some proponents of deregulation.

JUDGE WILLIAMS: I'll just ask a question. You mentioned the mandate to pursue localism and diversity, but those often conflict in reality. Has the Commission grappled with how to work out trade-offs between them and also explored how far it could go when it sees a conflict?

HON. MR. McDOWELL: We have, and your colleagues on the Third Circuit handed us our heads back on a platter.

(Laughter.)

HON. MR. McDOWELL: That was an interesting journey before I got to the Commission. It had Congress overturning part of what the Commission did and the Third Circuit overturning almost the rest of it, except for the cross-ownership band, which it said the Commission did reasonably conclude that lifting the ban was in the public interest. So we're trying to struggle with having as much deregulation as possible to go forward, but still having it upheld in court.

JUDGE WILLIAMS: I'm getting signals that we should break up so all can rush to Rudy Giuliani. Won't you all join me in thanking the panel.

(Applause.)

HON. MR. McDOWELL: And our moderator.

(Panel concluded.)