



Net Neutrality and Net Neutering in a Post-Brand X World: Self Regulation, Policy, Principles and Legal Mandates in the Broadband Marketplace *

**Thomas Tauke
Dan Brenner
David McClure
Peter Pitsch
Adam Thierer ****

Randolph May, *Progress & Freedom Foundation*: Welcome to our event this morning. I'm Randy May, Senior Fellow and Director of Communications Studies at the Progress & Freedom Foundation. This is "Net Neutrality and Net Neutering in a Post-*Brand X* World: Self Regulation, Policy, Principles and Legal Mandates in the Broadband Marketplace."

Before introducing our distinguished keynote speaker this morning, I'm going to set the stage, without preempting anything that our speaker or panelists will talk about. This way, we will all be on the same page. The *Brand X* in the title of the program today refers to the Supreme Court's decision in late June affirming that the FCC had the authority to classify cable broadband services as information services and not telecommunication services, thereby not subjecting them to the common carrier requirements of Title II of the Communications Act that apply to telecommunications services.

In the common carrier regime, one of the principal requirements of telecommunications carriers is to make your service available on nondiscriminatory terms and conditions to all comers. Shortly after the *Brand X* decision, the FCC decided that telephone company-provided Internet broadband services were information services, just like cable broadband Internet access. At the same time, the FCC adopted a policy statement containing four principles to, in its words, "preserve and promote an open and interconnected Internet."

When people speak of net neutrality, they are most often referring to these principles. I'm just going to recite them quickly so we'll have in mind the net neutrality part of the program.

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** Speaker biographies are available at the end of this transcript.

Consumers are entitled to:

- Access lawful Internet content of their choice;
- Run applications and services of their choice subject to the needs of law enforcement;
- Connect to their choice of legal devices that do not harm the network; and
- Competition among network, application, service, and content providers

Please have in mind that these principles are contained in a policy statement. That policy statement has not yet been released formally.

Also keep in mind that simultaneously the FCC is conducting rulemaking proceedings to examine its authority under its ancillary jurisdiction of Title I of the Communications Act. If authority is

present, it is examining whether to subject cable broadband services, telephone company-provided broadband services, and other providers to some of the same types of common carrier requirements, which don't automatically apply under Title II because they are not telecommunications services.

And, of course, as almost everyone in the room knows, Congress is now gearing up to undertake an examination of our communications laws to decide whether reform is necessary. For example, in recent weeks, the Ensign bill was introduced on the Senate side as well as the Blackburn bill on the House side concerning video franchising, which is an important issue in competitive terms. In addition, just last week there was the release of the Discussion Draft by the House Commerce Committee staff. So with that backdrop, I want to turn it over to our introductory speaker. We have an opening keynote from Tom Tauke to be followed by a roundtable discussion.

Tom is executive vice president of public affairs, policy and communications at Verizon, a position he has held since May 2004. He also serves as a member of the corporate leadership council, and leads Verizon's external affairs organization. He is responsible for the development of Verizon's legislative and regulatory strategy and the company's policy and advocacy at the local, state, federal, and international levels.

Before joining Nynex in 1991, Tom was a member of Congress, representing Iowa's Second Congressional District in the House of Representatives from 1979 until 1991. More importantly, during his congressional service, Tom was a member of the telecommunications subcommittee of the House Commerce Committee. There is much more. We have everyone's full biographies on the front table.

With that, I'd like to say that we've been fortunate at PFF to have had Tom speak to us several times. Every time he's spoken at a PFF forum in the past, his remarks have always been insightful and provocative. As you can tell from just what I've recited from Tom's resume, he has a unique blend of business, policy, and political experience that gives him the ability to contribute meaningful insight that impacts the public policy debate. He has always done that. So we're grateful that you're here with us today, Tom.

(Applause).

Thomas Tauke, Executive Vice President of Public Affairs, Policy and Communications, Verizon: Well, thank you, Randy. Looks like you have a full house. It must be a quiet day in Washington today. Welcome to all of you, and it's very good to be here.

In 1900, the Ladies Home Journal went out on a limb and predicted that in the year 2000 direct dial long distance would be a common occurrence, and that strawberries would be as large as apples. Fifty years later, Popular Mechanics predicted that by now we would be living in homes with plastic floors and furniture that could be cleaned with a garden hose. They also predicted that most of us would be wearing rayon underwear that chemical factories could convert into candy. Now, my more culturally attuned colleagues tell me that this would make Bart Simpson, and his "eat my shorts" line, a real visionary.

Forecasting the future is risky and rarely turns out as anticipated. And this has never been truer than in the broadband days. In fact, ever since Randy and I talked about this a few weeks ago, things have changed. As we often say, "The world has changed." Indeed that is one of the few things that we can predict. Changes in technology and the market will continue.

Ten years ago policymakers noted that change and asked how they could maximize and encourage competition, investment, and innovation in telecommunications. They asked the right question. But the answer that they gave wasn't what many lawmakers anticipated.

The 1996 Telecom Act recognized that the world was changing and it based policy on the premise that competition would be incremental. For example, a new wireline telephone company would compete with the existing wireline telephone company. Instead, of course, innovation and investment in broadband and wireless technology enabled inter-platform competition among telecoms, wireless, and cable companies for voice, data, and soon video customers.

At another PFF forum five years ago, on behalf of Verizon, I discussed and outlined this changed world using a policy direction which became known as "Old wires, old rules, new wires, new rules." While any shorthand description will miss some key nuances, this general policy is now a reality in the world of telecom. Broadband networks are no longer subject to unbundling and broadband services are not regulated as telecommunications services.

Today, technology and customers are again transforming the marketplace. Although this time it's not just about communication services. Instead it's about a whole universe of digital content including voice, data, and video. Today, technology permits us to seamlessly deliver an array of voice, video, and data services, both fixed and mobile, over various networks using different technologies. Consumers are demanding faster

broadband speeds with a greater ability to manage their communications services. As in 1996, policymakers are again asking how to maximize competition, investment, and innovation.

I still believe that those questions about innovation, investment, and competition are the right questions. However, this time it's not just about new rules. It's about how the rules of the game are set and who sets the rules. This is what I would like to discuss with you this morning.

So what do we need from a policy perspective to get consumers what they need in this evolving broadband world? The short answer is that we need a lot of investment and a lot of innovation. We need the combination of investment and innovation that worked in the past to create competition and choice in the Internet. It worked to create competition and choice in wireless. It is creating competition and choice in broadband. That competition and choice have shaped the market and has delivered benefits to consumers.

In spite of what we have experienced, however, some policymakers do take a lot of comfort in using the power of government to shape the market. They want to imagine all of the things that could possibly go wrong and then write rules to prevent them from happening. We call this "anticipatory regulation" which simply does not work in today's broadband marketplace.

You simply are unable to anticipate what consumers will make, how technology will develop, and what services will come about to meet consumers' needs. To try to do so only hampers innovation and the deployment of new services.

What we need instead of anticipatory regulation is a market-driven approach. This does not mean there is no role for government. It simply means that there is an updated role for government. Instead of anticipating how the market will develop and then writing rules governing that market, government could empower consumers to shape the market and thereby permit those consumers as they shape the market, to set the rules of the game.

Government should not be on the field calling the plays, nor should it be writing the rules. Instead it should fill a referee-like role, observing the field of play, responding to complaints from any of the players, and addressing cases of market failure.

Vital to empowering consumers in the marketplace is a good set of operating principles, and in particular the connectivity principle. These principles were first laid out a few years ago by the High Tech Broadband Coalition. We have with us Peter Pitsch, who is the Godfather of those principles. They were designed to ensure consumer freedom while also supporting a marketplace that encourages investment and innovation in broadband.

Verizon, as well as many other companies providing broadband network software and equipment, have endorsed and support these principles. We are observing them as we provide broadband service over DSL, and more recently, Verizon's new fiber services called FiOS.

Essentially, the principles state that consumers using the public Internet should be able to, one, use their broadband connections to run applications of their choice; two, access their choice of legal content on the Internet going anywhere they want; three, run any devices they wish on their broadband connection; and four, receive meaningful information about the functionality and capabilities of their data and broadband connections.

These principles are based on the philosophy that innovation will flourish in this vibrant Internet space. We agree with that philosophy. Indeed, competition is driving the development of new and innovative services across this new marketplace. For example, Verizon now has expanded its broadband offering to meet an array of consumer interests and needs. We have made DSL widely available and continue to expand that availability and have priced it aggressively. To attract customers who are still on dial-up, we recently introduced the basic DSL service for only \$14.95 a month. To meet the needs of those who want higher speeds, we have offered a 3 megabit DSL service. To fill gaps in the wireline service, we have launched a successful experiment with Wi-Fi in small rural towns such as Grande, Virginia.

We are also deploying EV-DO, our high speed mobile wireless access, across the country. Of course we are leading the world in fiber deployment with our FiOS product, which brings consumers unprecedented broadband speed and capacity. At the same time we believe that we can offer consumers additional value by participating in all levels of the broadband value chain. Frankly, in order to earn a return on the huge investments in innovation we are making advanced networks from which many other customers have gained. We must be able to offer our consumers the innovative services and the integrated solutions that provide greater convenience, control, and security.

This means, for example, stand-alone offerings of VoIP services, like our Voice Wing services. It means video. Tomorrow, in Keller, Texas, Verizon will formally flip the switch on our FiOS TV service delivering over our fiber to the premises network a rich video experience to consumers. Our set-top box and its advanced network will feature a market navigation device that is colorful, flexible, and consumer friendly, which will enable a full range of all digital programming options. Soon our FiOS TV product will permit the integration of video and data services into one viewing experience.

Because FiOS TV is a customized platform, it will ensure that our customers' privacy is protected and that our video partners' content is securely delivered. It will also be secure from many viruses and worms that plague many computer systems. Doing all these things reliably is critical to giving both our consumers and video partners what they expect. At the same time, we are offering video over the network. Over the same network, we are offering the fastest Internet access available to our FiOS data services. Consumers can go any place, using any service and any end user device they please, which are all consistent with the connectivity principle. In the end it is the consumer who decides.

This is why commercial or proprietary offerings are as important as access to the public Internet. Commercial offerings allow companies to innovate and differentiate their

products in a variety of ways, from the services they offer over their networks, to the devices that link to those networks, to the networks themselves.

Ultimately, of course, consumers will decide what combinations of products and services to buy and from whom. Everyone in the marketplace, from Verizon to Google, Microsoft, and eBay, is working to pull together the packages they think consumers will want.

Government can't hope to predict how all of this will work out. From past experience, we know government shouldn't try to do so and that government regulations impose significant costs on businesses and consumers. For example, from past experiences like the 1996 Telecom Act, we also know from that government rules have unintended consequences. Some of these consequences may not emerge for years after the regulations take effect, and may very well hamper deployment of the very technologies we should be encouraging.

The past, as well as the promise, of broadband future should impose a high threshold for imposing new regulations on the marketplace. Why risk harming consumers and slowing innovation when the market is working? And working well?

About a mile away up on Capitol Hill, Congress is beginning to work on updating our communications laws. We are encouraged by the stated commitment of many members of both the House and the Senate to promote investment in broadband networks and innovation in service development. It's good to hear lawmakers say that we should rely on market forces rather than government fiat to shape this new world of communication.

However, as evidenced in the current staff draft circulating among the members of the House Energy and Commerce Committee, the temptation to anticipate and regulate is strong. While there are many good concepts in this legislation, and while we understand that this is a document intended to trigger discussion, the draft clearly shows that the "government knows best" mentality is still among us.

However, what the forces of "government know best" are proposing really threatens to deny consumers many of the benefits that today's technology and marketplace can deliver.

Let me talk about a few of the notions in the draft that cause concern. Okay, I'll limit myself to two.

(Laughter).

First, the draft contains provisions that attempt to remove the huge barrier to video choice by lifting the requirements that a company, like Verizon, must secure a second franchise in order to offer video services to customers. As you know, we already have the authority to deploy our network. Now that notion is a good one. However, in order to qualify for this national franchise, Verizon would essentially have to design a service to attract the desires of policymakers rather than customers. In particular fashion, design a set-top box to

double as a personal computer, so customers would use their television to surf the Internet. This notion raises red flags.

We wonder, "Why is Congress trying to design the service we offer? Or dictate the capabilities of the customers' premises equipment, and specifically our set-top box?"

To take the latter example, if customers want to use their television as a computer monitor, they can go to Circuit City, buy the appropriate device, and surf away on their television screen. By requiring Verizon to offer the PC equivalent in the set-top box, Congress is, one, raising the cost of the set-top box; two, potentially opening up the set-top box to various viruses that affect the viewing experience; and three, making it much more difficult to give content owners the guarantees that their copyrights will be protected. We are the third video provider in the market after cable and satellite. Why would government try to tell us how to approach the customer and how to offer services?

Second, the draft includes a section entitled, "Build-outs," with a note that this section is, "to be determined." The good news is that nothing is there. The bad news is that somebody apparently believes that there should be something there, and more specifically, a build-out requirement.

Let me point out the obvious. We are the new player in the video market. We start tomorrow. In 24 hours, I trust we will have paying customer number one signed up. We are clearly entering this market with confidence. However, there is no guarantee in an open competitive market. Yet before we enter the horse race, some on Capitol Hill are already adding weight to the horse and lengthening the track. Instead of encouraging competition in this market, they are making it harder for new entrants to get out of the starting gate.

I'm confident that these concerns in the draft do not reflect the thinking of most lawmakers. But it never hurts to periodically ground the key players again in the realities of the market. In other words, we have to keep making the case that this is a key world. So let me offer a suggestion that the drafters of the legislation might consider as they develop a policy for this new world.

First, start with the premise that the market is working and that it disciplines all the players. Then update the role of government by adapting it to this new world of rapidly evolving technology and vibrant competitive markets. More specifically, make it clear in the statute that this wired and wireless broadband space is an interstate market; that it is a national market subject to the jurisdiction of the FCC.

Second, to support this market, transform the role of the FCC by adopting a new model for the work of the Commission. Under this new model for the broadband space, the FCC would not write rules. Instead, it would act in response to complaints and in cases of market failure.

Third, encourage all participants in the value chain that make up the public Internet to

adopt a common guide to govern the market and have them let us know if problems develop. That guide, I suggest, might be the connectivity principles that encourage investment and innovation, protect consumers, and promote competition.

We challenge all providers, including application providers, equipment manufacturers, and other wireline network providers, to embrace those principles as Verizon has. In one sense, this kind of change in the FCC is not a very big deal. It's simply adapting government's role to a new world. From another perspective, this is a huge change in the way the government deals with the telecommunications industry.

Just as big change is usually hard for us as individuals, it is also difficult for the body politic. As we periodically say, the world has changed and we know that the old game, where the government rules and consumers are passive beneficiaries, won't work in the real world. Now we have a new game where consumers, not regulators, rule. The proper role of government is to simply referee. The consumers rule, Congress adopts, and the government referees policy. The public interest will be achieved and the marketplace will be served. The policy will promote competition among providers of services, while driving investment and innovation. It will also create value and choices for customers. This policy will help fulfill the promise of the broadband age, achieving the larger goal of constructing a truly connected broadband society that creates both financial and social value for us and future generations. Thank you.

(Applause).

R. May: Tom, thank you very much. I never get to write the headlines. I always wish I could. But I think I see one here, "Consumers Rule, Government Referees." It makes a lot of sense to me, for sure.

Tom has graciously agreed to stay on the panel. Right now, I want to allow a couple of audience questions for Tom. Then we're going to go to our panel and have a very interactive discussion. Do we have any questions for Tom before we start the panel?

Ted Hearn, *Multichannel News*: (Off-mic).

T. Tauke: Well, that's what we think it says. Summaries of bills are always useful but also can be dangerous. Many times what is intended is not what is written in the legislation. Unfortunately, we've all experienced that in the past. I tried to say in my remarks that we appreciate a lot of the good intentions of lawmakers, but we have to look at the words that are being proposed.

In this case, it appears as if some of the words don't fulfill the broader philosophy or expectations that lawmakers are cutting out. So let's give the benefit of the doubt to the lawmakers and those who are trying to do this. They are trying hard to do the right thing.

But I think in an attempt to address every issue that arises, answer every question, do what frankly policymakers like to do, anticipate all the problems, answer all the questions,

et cetera, they create substantial difficulties for an evolving marketplace. The issue with the set-top box is one of them.

T. Hearn: (off-mic).

T. Tauke: I would say that there are a variety of rationales. I don't want to speak for any member of Congress or any of the staff who are drafting this. They are looking for comments and we are offering them. I think clearly there are still many players who believe that they can anticipate how this market will evolve and they want to shape it. I guess my major point today is that it is a fool's errand. It is not something that works. In fact, it can have dangerous consequences.

We've gone through this with video before. We had the open video systems thing which Congress put forward. Do you remember when we were going to have video dial tone? There were lots of rules. It was a wonderful idea, but was never viable in the real world. Obviously, there are other issues that could be addressed. One of the specific reasons is that I don't want to see us going down the same path again where we set up a nice structure, one that is totally unrealistic in relation to what's going on in the marketplace.

R. May: Drew?

Drew Clark, *Technology Daily*: You just referenced the open video systems and how the provisions in the definition of a video broadband service seem to echo back that prior definition. Could you comment on all the other rules that are imported into the new broadband video system? The decency provisions, candidate time, all the rules that apply to cable systems would now apply to this broadband video system? Also, why would someone like Verizon, even want to get that kind of relief if you could?

T. Tauke: That was so good, I don't know if I need to answer that question. When the rules were drafted that govern the cable industry, they were the sole provider of services. They were entering the market with a guarantee of exclusivity. As a result, there were a lot of rules written. As you know from history, there were some problems in the cable industry that developed from time to time, and, therefore, more rules were written. We're at a different place now. We don't need those rules for new entrants. Frankly, I would argue we don't need them for the incumbents, the cable companies, in this case. A lot of the rules just don't make sense anymore, and certainly shouldn't apply to new players in the marketplace.

R. May: We'll take maybe one more question, and then we'll go to the panel.

Art Brodsky, *Public Knowledge*: When you talk about the FCC moving from its rule-writing capability into more of a referee enforcement capability, what rules would they referee and enforce?

T. Tauke: My sense is that PFF has studied this in the past, and there are some models out there that work. No model is perfect. I think what happens at the Federal Trade

Commission is one model that we could look to for guidance. The FTC doesn't set out a lot of rules. The Federal Trade Commission receives complaints. They look at what's happening in the marketplace. They make judgments about competition, and they act on the complaints.

They don't attempt to set rules that are going to shape the way in which the market develops. That kind of model, or something similar, is what I think we should look for in a new Federal Communications Commission. In other words, the FCC can look at what's happening in the marketplace, can observe principles like the connectivity principles, and say, "We see that somebody has jumped out of bounds. We're throwing a flag and we're making a judgment that this kind of behavior isn't good."

Frankly, we saw that recently with VoIP. As you know, there are a lot of players asking Congress or the FCC to adopt lots of rules relating to voice over Internet protocol. One problem that receives attention is the problem of *Madison River*. I suspect none of you have heard of this before, but Madison River Communications blocked a VoIP call. The FCC didn't need to adopt a lot of rules. They didn't even reference Title II. Instead they said, "This shouldn't happen." And the issue was addressed.

That would be an example of a complaint coming to the FCC where they can act expeditiously. They can throw the flag and say, "No, that's not proper conduct." In that way they can help guide the marketplace and protect consumers.

If instead Congress, or the FCC, had adopted lots of rules governing how we interconnect with one another, how traffic is exchanged, and how much is paid or not paid, then we would have been at this for years. We would have really distorted the development of the VoIP marketplace. So I think that what's happening in the VoIP world is a pretty good example of the kind of role that it seems to me the FCC might play in this new world.

R. May: Okay, since Tom gave me an opening, I'm just going to take advantage of it and insert this brief advertisement. At PFF we have a project called the Digital Age Communications Act Project, the DACA project. Many of you are familiar with it. If you are not, I'd urge you to look at our home page and to go to the DACA link. We've released a report of our working group which sets forth a new regulatory framework which is based on the FTC model. The first key ingredient of the model is that it would import much more of a market-oriented competition-based type analysis to the FCC's decisions as to what to regulate and what not to regulate. Secondly, it would rely much more heavily on *ex-post* rather than anticipatory regulation. In other words, adjudication will follow a complaint.

In this working group we spent a lot of time examining and discussing these models. When we looked at all the available models, we decided on one that moves away from "techno-functional" constructs of the current act and proposed models which were the most appropriate for the long term. This is important when moving to a market-oriented regime, rather than one that's based on trying to define and anticipate future technologies. So I'd ask you to take a look at that.

Now we're going to turn to our panel and hear their take on the net neutrality issue. With their permission, I'm just going to say a couple of sentences about each panelist and refer you to the speaker bios for their full personal history.

First, we're pleased that Dan Brenner is here. As you know, Dan is senior vice president for law and regulatory policy at the National Cable and Telecommunications Association in Washington, where he has served since 1992. Dan was, importantly, senior legal adviser to Chairman Mark Fowler when Chairman Fowler was at the FCC.

Next, we're delighted to have David McClure with us. David is president and chief executive officer of the United States Internet Industry Association, a trade association for Internet commerce, content, and connectivity. In 2002, Broadband Properties magazine presented David with its Distinguished Cornerstone Award for leadership in the broadband industry.

Next, we have Peter "The Godfather" Pitsch. The Godfather is director of communications policy for Intel Corporation. Peter was chief of staff to the chairman of the FCC from 1987 to 1989, and prior to that, he served as chief of the office of plans and policy.

Next, we have Gigi Sohn. As you know, Gigi is president and cofounder of Public Knowledge, a nonprofit organization that addresses the public's stake in the convergence of communications policy and intellectual property law. In a previous life, Gigi served as executive director of the Media Access Project, a Washington, D.C.-based public interest law firm. And with you, Gigi, I'm going to take the liberty of adding just one more sentence. Just within recent weeks Gigi's become the proud mother of a new daughter. So congratulations to you, Gigi.

(Applause).

R. May: Okay, and then last, but not least, of course, is my colleague at the Progress & Freedom Foundation, Adam Thierer. Adam is senior fellow and director of PFF's Center for Digital Media Freedom. Prior to joining PFF earlier this year, Adam spent four years at the Cato Institute as director of telecommunications studies. Prior to that, Adam spent nine years at the Heritage Foundation.

So with that, I present to you our speakers. Dan, why don't you please start us off.

Daniel Brenner, *National Cable and Telecommunications Association:* Thank you, Randy. Good morning, everyone. I'm honored to be on the panel. I don't think anybody represents an industry better than Tom does. I've always been grateful for learning when I have a chance to talk to him about these issues. So we're lucky to have such a thoughtful representative. Having said that, I have a few thoughts, but seriously...

R. May: That's why I put them at opposite ends of the table.

D. Brenner: Randy doing follow-up, this is really going to be funny. I have a couple of

observations. First, in talking about the switch on in Keller, Texas, it is suggesting that the video market is working. It suggests that Verizon, despite all of the *sturm and drang* about franchising and the barrier to entry that it provides, some argue it hasn't been a barrier to entry. Verizon was able to enter that market. As Tom said, it's a competitive market. His company is the third entrant.

So I think that to some degree while the current franchising system is far from perfect, and having worked in the cable industry for more than a decade, it does not appear to be the barrier to entry that I think some of the rhetoric would lead you to believe. There is definitely room for reform. I'm thinking of the Bill Maher television show when he ends the program by yelling, "New Rules," and comes out with a series of new rules that make a lot of common sense.

Here we have no rules coming from Tom's speech. I wonder if that is maybe a bridge too far. I think the headline is not the one you suggested Randy. One I can draw from that is, "Verizon Declares No Need for Program Access." I'm sure that's not entirely what's intended. If you simply had an *ad hoc* jurisprudence regulation where every issue is subject to a customer or competitor complaint, that would eliminate program access and the compromise that was adopted in 1984 for the franchise fee of five percent. I was at the FCC when Tom was in Congress and the cap on franchise fees was a highly contentious issue. This is a compromise on a set amount. Having worked with cities, I can assure you that their view of a rent model is not the right way to analyze rights of way. I think Verizon and the cable industry would agree. They would view it as more of a cost-based model. Without some regulation of that, I think you would find the Commission in a midst of a lot of complaints, which brings me to my final point about the network neutrality rules. I have been on panels like this for several years saying that this is a solution in search of a problem. In fact, it's not only a solution but it's a problem in search of a problem.

Imagine bringing every single kind of commercial dispute to the FCC. Thank goodness, Chairman Martin's very helpful, separate, policy statement said that this is not enforceable with the FCC. This is because he has not opened the window for the kind of business dispute resolution at the FCC that some would like network neutrality to become.

That's why we oppose it. It's not the principles themselves. The principles themselves are being observed by cable, DSL, and by almost every provider of broadband services. When you get into issues like the application of those principles to an Xbox on a cable platform, is that a violation of net neutrality? Where the cable operator and Microsoft agree to favor Xbox in some manner to promote it? Where we might attack viruses? And somebody says, "That's not network neutrality. You are not allowing my program code application to go through. We bring a dispute at the Commission."

Imagine importing all of that through an existing body of law at the FCC in every conceivable way, and you can see why the Commission, rather than being a place where policies and rules are enforced, has to develop a policy on every commercial dispute.

That was our fear with the network neutrality principles. That's why Peter and I agreed to disagree over many months about whether the Commission should say anything about them. The Commission has spoken. The chairman has put an excellent stamp on that speech by saying that these are principles, not enforceable doctrine at this point.

I think that is as far as government should go in terms of establishing generalized principles. On other reforms of Title VI, I think there is plenty of work to do. I look forward to working on that. The fundamental argument that has been proven is that local franchising as a barrier to entry is somewhat belied by tomorrow's launch in Keller. Thanks.

R. May: Thank you, Dan. David?

David McClure, *United States Internet Industry Association*: It's really amazing to me that the ink was not dry on the August 4th order out of the FCC before we sent up advocates who were headed for the Hill demanding re-regulation of the industry. Now that was coded in many different colors and couched in many different terms. I think the most recent example we've seen is the staff draft out of the House of Representatives.

I've read all 70+ pages, several times. There are dreadful ideas in there. From wholesale licensing requirements for the ISP industry that have never existed before, up to new requirements for disabled access to the Internet, which, by the way, we support and always have. Internationally, we have been a leader pushing for the idea of disabled access to the Internet. However, not in the terms which are expressed in this legislation. Now, before we bash it too hard, this is the staff draft.

(Voices talking over).

The reality is that what is going to emerge for consideration is going to look nothing like the draft. There are just too many problems. It's just unworkable.

However, it does reach the fundamental question, "Within the Congress and federal agencies, why is there so much distrust of our ability to handle a marketplace driven by consumers?" There is some distrust. We produced a white paper last month on principles of connectivity that built on the work of several people including the High Tech Broadband Coalition and the draft of the FCC. We added a total of ten principles we thought were important for networks as well.

More importantly, we looked beyond that as a process. I think actually Art Brodsky put it pretty succinctly, "What rules are you supposed to referee? Who is going to make the rules? How should those rules be administered?"

Well, that's a process. It's not like we're stumbling blind here. This is a town filled with trade associations that represent industry. There is a process whereby you establish the concept of principles, as we have done. Then you pull the industry together into a form so that they can agree on the principles. Ultimately, you endorse them.

We're getting to the point of doing those things now, but the next step is going to be the hardest. Next, we have to put in place an enforcement mechanism for the articles we all agree on. We will first reinforce this concept within some government agencies and then within others that are not capable of it. If we can't do that as an industry, the government must step in, regulate, and dictate.

That is not the case in other industries. There are legions of industries out there that regulate themselves very efficiently; where rules, regulations, and new laws are required only in clear cases of market failure. However, it's going to require a couple of things. It's going to require for the industry to stop working in this direction and begin working together based around this set of connectivity principles. It's going to require the industry to stop "gaming" the system for a cheap short-term competitive advantage in order to look at a longer term that is better for all competitors. That's the process that needs to be in place. We've written extensively about this over the past several years.

The point is, consumers are going to drive the market. This is no surprise. If you studied marketing you know that the rules of mass production, followed by mass communication for mass consumption, died when Burger King said, "Have it your way."

It might have died a little before that, it might have died when cable was introduced. The fact is, starting in the '70s, it died. There is no such market. There is no market where Henry Ford can say, "You can have it any color you want it as long as it's black." It doesn't exist any more. In the real world that we live in, consumers drive the market everyday. If you don't believe that, look at the outcome of the 1996 Telecom Act. Consumers made that a failure, not the federal government and not the players within the industry. All I'm saying is that it's time for industry to step up to the plate. We've got a set of principles we can work around, and it's time for us to do that job.

R. May: Okay, thank you. I've asked all the panelists to react to their fellow panelists with their questions and comments. I encourage the audience to do the same. Peter?

Peter Pitsch, Intel Corporation: Thanks, Randy. I came to talk about the connectivity principles. I want to say a few words about the problem and then a few words about the solution. I think there is a real concern on the part of many of us as we look at the broadband market. There is a lot of uncertainty. We don't know what the structure is going to look like. Even more importantly, there are possible rate structures in place that might lead companies to try to protect their embedded services from new services such as voice over IP. One of the great advantages of the Internet will be disintermediation when consumers try to go directly to video producers and so on.

So there is a concern, a real concern. At this point in time, on the other hand, there is not a lot of evidence of a problem. Over the last few years we've had a lot of discussions about this, and that debate has not produced very much evidence of a real problem. Secondly, another reason for being careful in how we proceed is that this is very complex. This is not a new area. The video dial tone order that was produced in the early '90s is

over 50 pages long. The Commission worked long and hard on it. Very smart and capable people, some of the most dedicated and market-savvy people I know at the Commission. At the end of the day it was an incredibly complex order and nothing came of it. They tried to anticipate all kinds of problems.

So I think as we think about the problem, it's important to recognize that there may be a real concern. On the other hand, we are very much in the mode of trying to anticipate problems that may or may not be easily solved. So what about the solution? The High Tech Broadband Coalition, when it looked at this more than two years ago said that we really need is to make sure that the Commission has jurisdiction, without getting into the weeds of Title I. As the Commission looks to reclassify services, we wanted to be sure that they maintain their jurisdiction in this area. Secondly, we wanted them to commit to some broad principles such as the connectivity principle. These basically are the ideas behind dial-up service. When you dial up and connect, you get access to your content, attach devices, and use applications as you see fit.

Recognizing that there was not substantial evidence of a problem and that it is complex, we advocated a case-by-case approach to the problem. We monitored complaints by dealing with them expeditiously and realistically. But we did not try to come up with a statutory solution that tries to anticipate all problems.

Just let me illustrate this briefly. For example, if a broadband provider were to sit down with a group of customers and say, "We are going to provide caching facilities. We would like you jointly to invest in this." This will mean that your customers will have more rapid access to your website. If they were to do this, that would be a good thing. That is not degrading the overall quality of the network.

If Barnes & Noble were to sign up with such a joint venture with Verizon, then that would be a good thing. If six months or a year later, Amazon.com said, "We want to have exactly the same terms and conditions," it would not be pro-consumer to require that at that point, because to do so would defeat the incentive to invest in the first place. So the High Tech Broadband Coalition's and Intel's position is to have clear articulation, recognize the complexity, and allow the FCC to deal with this on a case-by-case basis. Thanks.

R. May: Thank you, Peter. Gigi, you're next.

Gigi Sohn, *Public Knowledge*: Thanks, Randy. Before I comment on the net neutrality generally, I want to ask everybody in the room a question. "Do we want to replicate the cable business and regulatory model of broadband?" This is with all due respect to my friend Dan Brenner and the industry that he has worked in for many years.

We're talking about consumer empowerment. How am I empowered when I have to pay \$60 plus for 100 channels I never watch, to get the two cable channels I want, HBO and Showtime, which I also have to pay for on top of that?

That's not consumer empowerment. That is profoundly consumer unfriendly. The

broadband revolution has led to a First Amendment revolution of diverse speech which renders things that I used to fight for, like media ownership concentration, moot. Why do we want to screw that up?

Let me talk about the biggest straw man--that is, that any net neutrality requirement entails massive regulation. I don't think that is right, and that's why I was very comforted by Tom's speech.

I think if you have a simple enforceable principle, it must be enforceable. I agree with Peter, we have to keep jurisdiction to enforce; you act as a referee. It's extremely unclear here. Particularly, we talked about the *Madison River* case because the FCC has deregulated DSL.

Nobody that I've talked to or worked with is talking about a massive regulatory scheme a la 1996, the Telecommunications Act. The notion that consumers should be able to go where they want on the net, attaching the equipment they want to attach without restriction or designation, would prohibit what I call "disinclination." That principle is so core. It has to be enforceable in some way.

Now, I like Dave's paper very much. I think the idea of an industry body shouldn't just be for the broadband industry. It could be application and hardware providers acting as a place of first resort for complaints. I think that is a really good idea. Jonathan Salet put out a paper with the Economic Policy Institute regarding an administrative adjudicative process that might take place along the lines of what Tom was saying. There can be a light regulatory cut that deals with the core issue. But again, I think the question you have to ask yourself is, "Do we want to really empower the consumer? Or do we want to build a cable model that has a lot of good things about it, one that is consumer friendly but doesn't empower people?"

R. May: Thank you, Gigi. Adam, why don't you wrap it up?

Adam Thierer, *The Progress & Freedom Foundation*: Thanks, Randy. I've got a lot to say and very little time to say it, so I'm going to speak fast, and I apologize in advance.

I have a new law review article on these issues that basically debunks everything that Gigi just said, and it's out there on the table. You can pick it up on your way out. I'd like to start by very briefly summarizing a few points that have already been made quite nicely by Tom.

First of all, I want to reiterate the issue or question of "Where is the harm here?" Why in the world are we talking about imposing preemptive prophylactic forms of regulation, or what Tom calls anticipatory regulation, for a complex field such as broadband Internet services and so on and so forth.

I'm a little bit tired of hearing that neutrality supporters haul out this *Madison River* case as somehow indicative of everything that is going on. It's just the opposite. It is not indicative

of what is going on at all; it's a very narrow case by a very small provider who made a very stupid decision. So that really should not serve as the rule to go by.

But, I'd say, even if there were examples of carriers playing certain games with the broadband networks out there, I say, let those carriers play games. Let them make stupid decisions and mistakes. You know the debate about net neutrality really is a major test of our belief in how contestable and competitive communications and broadband networks and industry services are.

A lot of people are failing this test and applying old regulated monopoly era tests or notions such as the Carterfone or Hush-a-Phone precedents to a newly competitive or contestable marketplace, which is completely inappropriate.

As Tom has suggested, if we really believe or assume that markets are indeed becoming more contestable and competitive here, then the assumption should be that rivalry and the threat of new entry is always the better way to police these markets. I frankly believe that even in those areas where rivalry is not as intense, carriers and incumbents playing games on the networks will actually invent new forms of entry, or at least the threat could be helpful.

Third, I'd like to point out that we need to think about what Tom raised earlier--the idea of unintended consequences. I think Gigi is completely missing this. I think we need to think about the future, and, specifically, how this new net neutrality regime could be used in ways we cannot possibly today imagine. None of us would have believed that the vague language in the Telecommunications Act having to do with interconnection and open access, would have led to UNE-P, but we got it. That's the kind of thing we have to anticipate.

Also, if these net neutrality supporters really believe in these digital nondiscrimination principles so much, what's to say that they shouldn't be applied or won't be applied in the future to other forms of digital infrastructures or networks?

E-Bay has a very powerful network out there. I happen to be an E-Bay fanatic, selling my fifth car in five years right now on E-Bay. I love E-bay. But you know what? Some could say there is not a lot of choice there. They just integrated PayPal as their only provider of digital cash services, and they've integrated Skype as a voice service that they're going to use now. You probably will not be able to use another one. "Digital discrimination, I say. Let's regulate". Now, that's just silly.

What about Google? People are already calling Google potentially a public utility of the Internet. Hmm, sounds like we need some discrimination principles there to make sure they don't impose any harm. Of course Microsoft is a supporter of net neutrality rules. They spent ten years in an antitrust case fighting off these same sorts of principles or ideas with regard to their browser and to their operating system. Now they're supporting this. I'm sorry. I just don't quite get that.

This debate, like every other one about open access or forced access regulation, that's ever taken place will ultimately come down to a question of pricing. We can pretend that pricing is not on the table, that it's not an issue, or that this is all about behavioral access regulation. But that's nonsense. We have to understand that at the end of the day, even if you had this vague access provision for nondiscrimination principles, if a carrier wanted to play games and price the Microsoft Xbox Live network at \$100 per second, what are you going to do about it? You're going to regulate prices. So, you're going to get at it somehow.

I can think of other ways you can probably imagine that regulators will try to potentially regulate the price of the pipe. That's because right now, we are at a very important moment in the future of broadband networks where carriers are thinking, but not talking, about the idea of integrating or introducing more price discrimination into the marketplace.

Now price discrimination, as any good accountant will tell you, is not a dirty word. It drives the market-based capitalist economy. Right now, presumably it's not illegal for them to price differentiate. We know it's not at least for the various tiers of broadband access. I got my FiOS card yesterday in Fairfax County. It says you can get two or three different levels of service for broadband.

What happens in the future? Maybe they start to tinker by metering the price of the pipe and offer services at different prices saying, "If you're on the Microsoft Xbox network and you are consuming thousands of times more bandwidth than my mother who just downloads email once a month, maybe you should pay a little more."

Is that discrimination? You better believe it is discrimination. But it's good discrimination. It is discrimination we should encourage and we should allow experimentation. If it gets excessive or really does harm to Microsoft Xbox consumers, or anyone else, presumably, someone will enter that market.

I have a lot more to say on that in my law review article. My closing point is that we really have to remember the impact that access regulation and price control can have on innovation and investment. Whether or not you believe the way I've envisioned the world to come, the fact is that net neutrality regimes, even at a minimum, at the margins, could potentially influence innovation and investment in this industry.

There is one key principle, which took me a lot of years to define, and which I try to get across in all my writing on this topic. It's that net neutrality proponents seem to ignore that competition in the creation of networks is every bit as important, if not more important, than the competition in goods and services that get sold for traffic over existing networks. We need to stop spending so much time thinking about how to squeeze as much juice out of the existing lemons as possible. No offense to the existing carriers; they're not lemons. But let's think about getting a whole new fruit salad of services and broadband providers. Let's not just start imposing these regulations in what is an increasingly competitive and contestable industry. Let's have faith in markets. Thank you.

R. May: Thank you, Adam. I have a couple of questions that I would start off with, and then we're going to open it up to the panelists.

A couple of things struck me. Peter, if I understood you correctly, you said that it would not violate the principles articulated by the FCC if one of the providers, for example Comcast, had an agreement with Borders, which would accelerate access to its particular content, and not for example, with Amazon?

P. Pitsch: That's more or less what I said. In fact, the High Tech Broadband Coalition sent a letter to the FCC on December 25th, 2003, with the principles and delineated examples including something close to that.

R. May: Okay. When I look at these principles, they are stated very generally. When you look at the new House commerce Committee draft, and I think the same thing is true in the Ensign bill draft, the legislation usually speaks about not "unreasonably impairing or interfering" with any content.

Using that same example that you have given, I have asked some people on the Hill whether if speeding up one entity's content is by definition impairing or interfering anyone else? As often as not, I get a "Yes that could be". Obviously those terms are not interpreted. Would you not support principles written into legislation that would go beyond the ones the FCC articulated which would contain language like, "unreasonably interfering" or "impairing other services"?

P. Pitsch: I'm not an expert on the draft. But the short answer is that we at Intel are reluctant to speak to this point because I don't think we've reached the issue of legislation. We would not support codification or promulgation of detailed rules. As I indicated, what's important to us is that they have jurisdiction and are vigilant in exploring complaints.

As I indicated, we are concerned about the unintended consequences. While I agree with much of what Adam says, and ultimately hope that competition works, at the end of the day I don't know what we're going to end up with in the marketplace. We may end up with fiber to the home provided by our local cable or telephone company, but not by both.

In that world, the connectivity principles would not solve all monopoly pricing problems. However, it would assure that customers were able to get access to content and that the monopoly problem would be contained to the broadband transport that's being provided. The short answer is that we wouldn't support codification or promulgation of rules.

G. Sohn: Can I go back to this Barnes & Noble/Amazon paradigm?

R. May: Okay, go ahead.

G. Sohn: What would your reaction be if AMD paid a lot of money to Google, Comcast, and Verizon to basically obliterate Intel from the list?

P. Pitsch: Well, you might have picked a better example. Let me abstract it. Intel as a rule is very committed to open markets and subject to larger societal constraints, such as antitrust. We have no problem with any other competitor using their own insight, foresight, skill, or industry to compete effectively against us.

If they enter into arrangements with customers that are otherwise legal, that's fine with us. We are quite prepared to compete. As Adam pointed out, in a competitive marketplace, those kinds of contractual arrangements are almost always pro-consumer.

To bring it back to a more realistic case, in my example, what that illustration is showing is that by allowing Verizon to invest in additional caching facilities with a select group of companies, they obviously have an incentive to include many. The reasoning is, with that, you're actually providing consumers better service. Do we want to preclude that possibility?

R. May: I thought I could get this started with that question. Dan?

D. Brenner: I was just going to make a simple point on the example that Peter gave. I think if you took a vote of the six people in front of the room, you'd probably get a 5-1 vote that it is not a violation of network neutrality.

Peter and I were at the Commission when all this was going down, and I see Bob Crandall, so he probably knows this better than any of us. But for those who are students of the regulatory process, if you remember Computer II, is it something basic or an enhanced service? They had to go through protocol conversion with the basic or enhanced distinction. They also had to go through whether voice messaging was basic or enhanced, because it had enormous regulatory consequences.

The fight was big, and the court cases continued on the Commission's authority to make those kinds of decisions. Peter and I think, and maybe the five of us would agree, that caching should be allowed. I'm guessing that Gigi wouldn't, although I don't want to speak for Gigi, she will speak next.

If it were allowed, you could see the enormous fight that would be at the Commission. As we've seen in the UNE-P, and these other things, the number of issues that come to the floor before five commissioners, addressing a whole range of congressional, public policy, and public interest concerns, really slows things down. I think Computer II would be just a foretaste of what network neutrality at the Commission would look like.

R. May: Well, Dan, it is amazing that you mentioned protocol processing. I just put up a blog in reaction to the House staff draft, and it was about these distinctions that I thought were very ambiguous. Does anyone remember the decade-long fight about protocol processing at the FCC? See, only a few. It's instructive. Gigi?

G. Sohn: I want to make two points. The first is on the Barnes & Noble/Amazon. Again, in my mind, this replicates a cable model where essentially the cable operator gets to say

what gets on the system, what's here, and who does it.

I was reading a Cato paper and one sentence blew my eyeballs out. Vertical integration of new features and services by broadband network operators, far from being something regulators should forbid, is a central part of the innovation strategy companies will need to use to compete and offer customers the services they demand. And I just thought, "Really?" Then I look at my cable system...

A. Thierer: Look at your 500-channel universe of services and your video on demand.

G. Sohn: My point is, of course, we care about competition among networks. We're encouraging that. Our principles talk about how spectrum could be allocated more efficiently so maybe we can have a nationwide wireless provider. But we don't have it yet.

In the Cato paper, I know this was in a different light, but I think it's very similar to what you have here. You talk about, "as competition develops, as it develops, as it develops." If we're in a world one day where, for example, we have one and two lines to that house, then perhaps an enforceable principle of net neutrality is not necessary. But we are not there now. I think the Cato paper from January 2004, talks about how the electricity company is just about to provide broadband service.

A. Thierer: They're talking about "maybe they're coming into the market", along with wireless.

G. Sohn: There are a lot of "maybes", okay. One other point. You talked about how this is a problem within a problem. Actually I agreed with that when you wrote this original paper only two years ago. I agreed with that.

But things have changed. It's not just *Madison River*. It's Clear Wire. It's Lockheed blocking Vonage. It's a telecommunications company blocking the telecommunications workers union website because it didn't do something it said. There were a variety of state laws that were passed, I think mostly in television but I think also with respect to cable, that would have prohibited consumers from attaching the devices they wanted to the broadband systems without their prior permission.

So it's not just one problem. It's now starting to multiply. Again, I'm not talking about anticipatory regulation. I like the idea of some sort of complaint process. I am no lover of giving the FCC power, as most of you know. But I think you need to give them the power to look at complaints and enforce them.

R. May: Gigi likes that part of our regulatory framework proposal, I can tell. That's good. I'm going to let Adam respond, then we're going to move to another subject.

A. Thierer: I'll be very brief, Randy. Gigi, I just think that the model that you have articulated is basically waxing nostalgic about the common carrier past. It's about saying the common carrier world was a wonderful thing, which we could argue about, whether it

was in a regulated monopoly environment.

In a competitive environment, there is a totally different question. In my personal opinion and a lot of economists' opinion, the proprietary model that cable has yielded has had wonderful benefits for the marketplace and consumers, whether you like them or not. You're not entitled to HBO or Showtime, but at least you have access to them, something that was not possible 30 years ago.

The point is how are we going to regulate these carriers in the future? Gigi asked the question, "Should broadband look more like cable?" Well, what's the alternative? She wants to look more like the common carrier model we had for AT&T with full blown Hush-a-Phone, Carterfone.

This is a really profound question. It was completely left off the table in the discussion draft and everywhere else. However, I see the creeping elements of common carriage entering into this debate about broadband.

Well, what's next? If broadband over power line or the next wireless network get online, are they common carriers? Is it that they must take all traffic at whatever rates and prices and terms and access services determinations that the FCC or the local PUC makes?

R. May: Okay, now the lawyer in me wants to ask this question to Peter and Gigi, because they addressed it, and then Dan Brenner. I think that Peter has asserted a couple of times that the FCC has jurisdiction to promulgate these principles. Then, I'm not sure, did you say the FCC doesn't intend to enforce them? I think Gigi said that the FCC does not have jurisdiction to do that.

So that obviously becomes relevant to whether Congress should or should not get involved at all. But why don't you just speak for a moment to your understanding of the jurisdiction, to whether the FCC has or doesn't have it. Let's get that on the table.

P. Pitsch: So what I said my solution was is to make sure that the FCC did have jurisdiction. I think Gigi is right that under current law, the Commission classifies a carrier or a service as an information service. Whether or not the ancillary jurisdiction allows the Commission to reach to these kinds of problems is an arguable point. I think they've strengthened that argument. But it's an open question. So as we turn to the legislative arena, while I wouldn't support detailed rules, I would support clarification because they do have jurisdiction to address that problem.

R. May: Do you have anything to add Gigi? Then Tom has a comment. Tom?

T. Tauke: We think the FCC does have the jurisdiction. However, I also want to point out the flip side of that by saying that many others do not have jurisdiction.

One of the challenges that we continue to deal with despite the rulings of the FCC, is that there are a number of states who believe that they should have jurisdiction, or potentially do have it, over a lot of these transactions that may occur in the broadband space. We

don't recognize that it's useful in this market to have one, two, or three, depending on how you count, jurisdictions.

G. Sohn: On the common carrier point, that's the other sort of straw man that Adam parades a lot when I'm talking about net neutrality. I'm not saying that the pipeline can't have a financial interest or vertical integration at all. It's just that they can't discriminate in favor of what they own against anybody else. So, no, we're not biased, even though I think Comcast is pretty darn good. I'm not saying that the pipeline can't have any financial interest in the content that goes over a pipe.

R. May: Okay, Drew.

D. Clark: So this question is for Gigi, but maybe Adam or Tom would want to comment on it. When you said, "Are we replicating the cable model?" I later realized you were criticizing the cable model and Adam has, of course, made comments to that effect.

However, another way of looking at the cable model is that it has kept some dangers to innovation out of the hands of legislators. By that, I'm referring to the broadcast flag and the encryption technology. The proprietary encryption technologies that the cable systems use meant that they didn't need legislation to mandate that the set-top boxes have the flag technology.

Given what Tom said about how the various elements of the broadband video service would effectively raise copyright questions. For instance, push copyright issues back into the hands of Congress, when they could otherwise be negotiated between carriers and Hollywood and not having to bring a broadcast flag mandate into the open. Isn't there some virtue in the cable model and the competition of platforms in the sense that we're spared another broadcast flag fight?

G. Sohn: I think there is some virtue. But I think what you are talking about is separate. Part of the cable model that I don't like is the fact that the cable operators were fully vertically integrated. They prefer at their internal whims certain programs over others.

D. Brenner: Gigi, why do you say we're fully vertically integrated? There is no operator that probably has fewer than thirty percent of the capacity, which is vertically integrated. The FCC has found that it's been declining over the last ten years. There are leased access requirements on the platforms so that an unaffiliated party has a statutory right to get on it. I realize it doesn't work very well, but it does work for some. So why do you say we're fully?

G. Sohn: All right, you get to pick and choose whatever goes on the cable. If you are an independent programmer and you want to get on the cable, you basically have to have the blessing of Comcast or Time Warner, otherwise you can't make a business of it. I don't want to see that replicated in broadband.

I'm not quite sure that I understand. I'm not saying that the cable model is a complete and

total failure. And, yes, that is one of the good things about it, the encryption. That's not the problem I have with cable. It's the ability to pick and choose and discriminate which is what I don't want to do on broadband.

R. May: The First Amendment hasn't been mentioned here this morning, but that could be the subject of a whole other discussion about access to these systems. But, David, why don't you make a comment.

D. McClure: Just quickly, again, I want to raise the point that we're again talking about, "what-if" scenarios. They are lots of fun to speculate about. But before we go writing massive new legislation and regulation, let's see more examples. *Madison River*, and even if you want to throw in one or two others, we're talking about one or two episodes over how many years? That has affected how many consumers?

When we have aberrations like that in the market, it can take care of itself. The market is capable of doing that. The consumer, they're certainly empowered and have the ability to do that. I would submit we're snapping at problems that don't exist yet.

R. May: Okay, Bob Crandall has the next question.

R. Crandall, *Brookings Institution*: I'm an economist. I'm always skeptical when I hear representatives or incumbents endorsing the continuation of franchise regulations or even Tom suggesting that he would endorse some sort of connectivity principle. I want to move away from the example of Barnes & Noble caching its content. What about when we finally come to our senses and auction off all the analog broadcast spectrum. Steve Jobs buys up 20 percent of it and builds himself a broadband network in which he proposes to distribute only his own videogames, motion picture, and audio content. He will not distribute anyone else's content. He won't distribute Skype, he won't distribute Vonage. He is there only for that purpose. Should we allow it or not?

R. May: Why don't we just go down the row and get a "yes" or "no" to the question with a few words of explanation.

D. Brenner: Yes, we do. They're called VSATs and they exist today.

R. Crandall: I guess that would mean the consumer then would be forced to go to the other eighty percent of the spectrum to get the things they want?

P. Pitsch: We should allow it.

G. Sohn: You're going to do public spectrum? No way. That is the other thing that I think we need to mention here. When we get into the property regime and First Amendment rights, okay. The cable industry would have no property rights if you auction. The same thing with the telephone company. All right? I know I'm sounding like the old geezers, right?

Let's talk about First Amendment. Particularly broadband Internet has been a great savior of the First Amendment in this country. It gives everybody an opportunity for a variety of reasons to speak. The powerful media companies in this country, and in this world, really have to answer to the bloggers who call them on everything. When you use the public spectrum, there is no way you should be able to assume anything. Okay, you want to build and have your own private network and not use private rights of way? Go, God Bless, do what you want.

A. Thierer: But there is no such thing as essentially the private sector. I mean if Steve Jobs buys up that sector, isn't it technically Apple's or his?

G. Sohn: Legally it isn't, no.

(Voices speaking simultaneously).

A. Thierer: Ford Motor Company has spectrum today that it can use for very small aperture terminals (VSATs). Its private networks connect 10,000 Ford dealerships. The people who they broadcast to are Ford dealers and they communicate that way. Now that is allowed today, and there is no law stopping Ford from not letting me see the private communication between Ford and Dearborn and the dealer. That's a model that works in that kind of communication. I think to import all of Title III broadcast regulation to every bit of electromagnetic spectrum....

If you want to talk about broadcasters who take licenses under the public interest, you have a case. There you can say you've taken the license subject to. However, when Ford takes a VSAT license or other users, such as a movie or forestry company, and uses that spectrum for private purposes, our society thinks that is a good thing.

G. Sohn: I'd like to get rid of private [spectrum] regulations, period.

R. May: Adam?

A. Thierer: Just a comment, Randy. I'm going to insist on it. What I hear Gigi saying is that she no longer accepts the logic of *Red Lion* and yet *Red Lion* is implicitly in everything she just said. Because the heart and soul of *Red Lion* is the idea that somehow the public has First Amendment rights, but carriers, operators, spectrum users, and owners don't.

G. Sohn: Adam, you are not a lawyer.

R. May: Adam. There is a struggle between the old and the new that is going on here. I want to move on and let Tom answer Bob's question. Tom, do you remember what Bob's question is?

T. Tauke: Yes, I do, on the spectrum. I think that it should be permitted. I think that spectrum and spectrum policy is a whole different array of questions. However, I do think that there should be some equivalent of property rights associated with the purchase of

spectrum which should be permitted.

Now obviously there are other laws at work here. We can't look at these things just in a vacuum. We've got antitrust rules and a variety of other things out there that still provide some protection for consumers.

So while there is some spectrum that I would put more in the public category, I think there is a substantial amount of spectrum that can be in the private category, where some kinds of property rights apply.

P. Pitsch: I'll give you an example that's not hypothetical. Qualcomm owns 65 broadcast channels nationwide.

R. May: Okay. Rick Lane has the next question here.

Rick Lane, News Corporation: I'm glad to hear comments from Gigi on media ownership issues. She and Adam seem to be in alignment now with the First Amendment, as well as some of the other issues that are out there. We, as a company, are in the process of purchasing a lot on the Internet. So this is a very interesting debate for us internally as we see policies going forward. I had a question for Gigi on the net neutrality. Another piece of legislation that is being considered on Capitol Hill is H.R. 1201, the Boucher bill, which allows for the circumvention of copy control technologies for fair use purposes.

Under net neutrality, Verizon has a proprietary system that is encrypted. Are you saying that you think it should be legal for someone to connect a device to circumvent their encryption to allow for fair use purposes, or cable TV as well? They have protection technologies for pay-per-view that you should be allowed to connect devices to circumvent that pay-per-view business model for fair use purposes?

G. Sohn: No, that's not fair use.

D. Brenner: I think if you look at the principles that are actually mentioned, at least from the High Tech Broadband Coalition standpoint, we were one of the earliest articulators of the principles. We conditioned them on harm to the network and theft of service.

However, this is the theft of the intellectual property and license. Just take the content and circumvent it. So where would H.R. 1201 specifically apply to in the digital realm? Just DVDs that are encrypted? Or through the set top box where encryption takes place? Or at the DVR system?

G. Sohn: I don't know. I haven't given it one minute of thought. If you look at our paper, we don't have a problem with discrimination for security purposes or to maintain network integrity. Obviously, we wouldn't want circumvention of encrypted technology, theft of services, or any other unlawful purpose. Someone could claim it was fair use. But again, I haven't given that particular scenario that much thought.

R. May: Okay, Tom.

T. Tauke: I just want to say one thing. Sometimes we have philosophical debates, but there are also some real practical realities of life. I think that when you're attempting to develop policies, you also have to be grounded in the practical and real. When it comes to video, right now for example, we are in the process of negotiating with content providers. We have different arrangements with different content providers, because different content providers want different things.

For example, I think it was announced today, there will be one that will include some provisions relating to copyrights and how we protect the copyright of the content provider. If you don't have the ability to have, in a sense, the commercial agreements of some proprietary aspect of your network capability, you are unable to deliver some of the services that you would like to deliver to consumers. So that's just a practical reality of today's world.

A second observation that I'd make is that now that we are actually permitted to be in the wholesale business, in a more realistic way, we find that we're trying to deal with all these entities, these players who used to have problems with commercial arrangements. Now we find that they all want commercial arrangements but they all have different things. They want services delivered in a different way, with a different capability offered, or a different arrangement on terms of contract.

This is the marketplace at work. We're not the only ones in this game by the way. In the practical world, network providers have an interest in having more traffic on the network. There are a lot of people who want to use the network and are going to reach consumers. Market forces do work in getting these players together and coming up with reasonable arrangements.

I guess I just know that everyone here says that we do have some consensus on something. There shouldn't be any anticipatory regulation. There shouldn't be jurisdiction at the national level. Then we're arguing really about what posture should be taken as various complaints or issues arise. If we can debate about that, we have made a lot of progress.

R. May: Good, thank you, Tom. We're nearing the time when we need to close up. So I'm going to ask each of the speakers if they could sum up anything else for one minute.

A. Thierer: I just really honestly believe that this debate over net neutrality is really a debate about the future of property rights in the world of communications, broadband, and media. It is a fight that is going to be quite intense, with the net neutrality provisions that are being debated in the draft legislation on the Hill. However, I believe and predict these net neutrality provisions will pass into law in the next two to three years in some way, shape, or form. In addition, I predict that we will spend the next ten years having the same sort of fight we had over the last ten about the definition of the term and costs we will have

over the term, and whether to impair or interfere.

R. May: Thank you, Adam. The “new” Gigi Sohn.

G. Sohn: I do agree with Tom that there is actually a lot of agreement here. Nobody I've talked to is on favor of regulations. I think there are a number of different options that fall way short of what should be observed. However, without the future degradation, the core principles that consumers should be able to go wherever they want on the net, hooking up whatever devices they wish to hook up, needs to be enforceable and needs to be preserved.

Adam and I are never going to agree on the property rights part. I think there are property rights on both sides. I think there are First Amendment rights on both sides. The key thing is to define the balance.

The other thing I need to say about my friend, Adam, is that the “parade of horrors” that he puts forth in his paper is really remarkable. This is going to lead to the next Katrina practically, price discrimination on interconnection all over again. It doesn't have to be that way, particularly if good minds put their heads together to think about it. For example, some industries self-regulate. That would be helpful. Come up with a simple enforcement mechanism. It doesn't have to be a “parade of horrors” that Adam was looking at.

R. May: Okay, thank you, Gigi. Peter?

P. Pitsch: There has been agreement at a high level, and it has worked on jurisdiction. The ability for the FCC to monitor things might be useful. However, this is a complex area. When we started to delve into the examples, my own people called “namby-pamby” and others, quickly saw that there were disputes.

Because we don't know how this market is going to develop, I'm not all the way in Adam's camp. However, as we go forward, I think it is important to come up with a process to constrain this discussion. That way, as competition develops, the problem is not perceived as real. If the problem is severe, it can be addressed. If we approach this on a case-by-case or common law approach, I think we will more likely reach a good result.

R. May: Okay, David.

D. McClure: We've survived a decade of “what-if” regulation. We've been told time and again that this situation or that situation that usually attaches to one or another of the large carriers is going to spell doom or disaster.

It hasn't happened. The sky hasn't fallen. Technology moves more quickly than that, and consumers are much, much more powerful than we give them credit for.

I'll just point to TiVo boxes as a good example. Do you really think that if consumers were

locked out that DVRs would be dominant in the marketplace as they are today? Let's just give consumers a little more credit for being able to manage the markets they want pretty effectively, because they do.

We don't need more legislation to address things that don't exist, have never existed, or might never exist. I think if we endorse principles, if we self-regulate, if we're able to carry forward on that basis, then the role for regulators I think is going to become much clearer and much easier.

R. May: Good, thank you very much. Dan, you can wrap it up.

D. Brenner: Well, this panel has really been about who is a lawyer and who is not. Besides that important point, it reminds me of the old joke about the economist in a hole. The economist says, "Well, assume a ladder." Here to some extent advocates of strong network neutrality codification would say, "Assume a network." You can't assume that the new wires of Verizon or cable's investment in network just occur in the absence of market incentives. If you pose a heavy regulatory regime, which is what anticipatory regulation can be about at times, you discourage network investment. Many of the points that Adam raises address the fallout from discouraging network investment.

However, I think the other point everyone on the panel can agree on, because we are "Washingtonians," is what Tom made very early in his speech: Rayon underwear does not work in a human environment.

R. May: Okay, well on that note, we will adjourn, and have lunch. The good news, perhaps, is that we don't have a lunch speaker. So, please join us. But first, please thank all these panelists with me, and especially Tom.

(Applause).

Adjourn.

Speaker Biographies

Thomas Tauke is the Executive Vice President of Public Affairs, Policy and Communications of Verizon, a position he has held since May 2004. He also serves as a member of the Corporate Leadership Council and leads Verizon's External Affairs organization, responsible for the development of Verizon's legislative and regulatory strategy and the company's policy advocacy at the local, state, federal and international levels. He also manages community relations and relationships with national advocacy organizations and consumer groups. Before joining NYNEX in 1991, Tauke was a Member of Congress, representing Iowa's Second Congressional District in the United States House of Representatives from January 1979 to January 1991. During his congressional service he was a member of the Telecommunications Subcommittee. He also served on the Energy and Commerce, Education and Labor and Small Business Committees, as well as the Select Committee on Aging. Tauke served as a member of the Iowa General Assembly from January 1975 to January 1979. Tauke is a past Chairman of the United States Telecom Association (USTA) where he is currently on the Board of Directors and a member of the Executive Committee. He is Chairman of the Board of Home Technology Systems, Inc., in Dubuque, Iowa; serves on the Board of Directors of the Business Industry Political Action Committee; is Chairman of the Board of Regents of Loras College in Dubuque, Iowa; and is a member of the Board of Directors of Jobs for America's Graduates. Tauke received a B.A. from Loras College in 1972 and a juris doctorate from the University of Iowa College of Law in 1974.

Daniel Brenner is Senior Vice President for Law & Regulatory Policy at the National Cable & Telecommunications Association, Washington, D.C., where he has served since 1992. Previously, he served as Director of the Communications Law Program and a member of the faculty at UCLA Law School. He also served as Counsel to the Los Angeles office of LeBoeuf, Lamb, Greene & MacRae. Brenner was Senior Legal Advisor to Chairman Mark Fowler of the Federal Communications Commission. He was also Vice-Chairman of the U.S. Delegation to the ITU World Radio Conference in Geneva, Switzerland in 1984. He serves on the faculty of Georgetown School of Law. Brenner served as a member and Vice-Chairman of the Board of Directors of the Corporation for Public Broadcasting from 1986 to 1991. He is a graduate of Stanford University and Stanford Law School and the senior executive program of Stanford School of Business.

Randolph May is a senior fellow at The Progress & Freedom Foundation and director of Communications Policy Studies. The Communications Policy Studies program examines policies relating to deregulation of the competitive telecommunications industry and the implications of competition for reform of the Federal Communications Commission. Prior to joining PFF, May was a partner with Sutherland Asbill & Brennan in Washington, DC, specializing in communications and administrative law. He served as Associate General Counsel of the Federal Communications Commission and was a member of the Administrative Conference of the United States. In addition to writing a regular column on regulatory affairs for Legal Times and the National Law Journal, he has published over 50 articles and essays on a wide variety of topics ranging from

communications law to constitutional theory. May is chair of the section on Administrative Law and Regulatory Practice of the American Bar Association. He is an adjunct professor of law at George Mason University School of Law. May received his B.A. from Duke University and his J.D. from Duke Law School.

David McClure is President and Chief Executive Officer of the US Internet Industry Association, a US trade association for Internet commerce, content and connectivity. A technologist by education and experience, McClure has held positions in the Internet, broadband, computing, aerospace and environmental services industries. He has served at the helm of the USIIA since it was founded in 1994. Active in the online community since 1983, he has written and lectured extensively on management and technology issues, and he is considered an authority on technology applications for business. He is a regular contributor to business and broadband publications, has authored more than 200 white papers related to the Internet, and consults with government and Internet entities worldwide. In 2002, Broadband Properties magazine presented McClure with its distinguished "Cornerstone Award" for leadership in the broadband industry.

Peter Pitsch is the director of Communications Policy for Intel Corporation. Prior to joining Intel, Pitsch was the president of Pitsch Communications from 1989 to 1998. which represented communication's clients before the FCC and Congress, provided business and regulatory planning, and published and lectured on U.S. regulatory policy. Pitsch was the chief of staff to the Chairman of the FCC from 1987 to 1989. Before serving as chief of staff, Pitsch was chief of the Office of Plans and Policy. From 1980 to 1981, Pitsch was a member of the Reagan Administration Transition Team which developed recommendations for reforming the Federal Trade Commission. He was a senior attorney at Montgomery Ward, Inc. from 1979 to 1981. Prior to that, he worked for Commissioner Calvin Collier at the Federal Trade Commission. Pitsch received a B.A. in Economics from the University of Chicago in 1973 and his J.D. from Georgetown University Law Center in 1976.

Gigi Sohn is the President and Co-Founder of Public Knowledge, a nonprofit organization that addresses the public's stake in the convergence of communications policy and intellectual property law. Gigi serves as the chief strategist, fundraiser and public face of Public Knowledge. She is frequently quoted in the *New York Times*, *Washington Post* and *Wall Street Journal*, as well as in trade and local press. Gigi also has had articles published in the *Washington Post*, *Variety*, *CNET* and *Legal Times*. Gigi is a Senior Fellow at the University of Melbourne Faculty of Law, Graduate Studies Program in Melbourne, Australia. In 2002 she was an Adjunct Professor at Georgetown University, and in 2001 she was an Adjunct Professor at the Benjamin N. Cardozo School of Law, Yeshiva University, in New York City. Prior to joining the Ford Foundation, Gigi served as Executive Director of the Media Access Project (MAP), a Washington, DC based public interest law firm that represents citizens before the FCC and the courts. In recognition of her work at MAP, President Clinton appointed Gigi to serve as a member of his Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters ("Gore Commission") in October 1997. In that same

year, she was selected by the *American Lawyer* magazine as one of the leading public sector lawyers in the country under the age of 45. Gigi holds a B.S. in Broadcasting and Film, *Summa Cum Laude*, from the Boston University College of Communication and a J.D. from the University of Pennsylvania Law School.

Adam Thierer is a Senior Fellow and the Director of PFF's Center for Digital Media Freedom (CDMF). As Director of the CDMF, Thierer analyzes public policy developments that impact both the economic and social aspects of the media industry, with a strong focus on First Amendment issues. Prior to joining PFF in 2005, Adam spent four years at the Cato Institute as Director of Telecommunications Studies, and nine years at The Heritage Foundation as a Fellow in Economic Policy. His work on communications, high-technology, and media policy has been featured in *The Wall Street Journal*, *The Washington Post*, *The New York Times*, *Investors Business Daily*, *Forbes*, *The Economist*, *Newsweek*, and many other newspapers, newsletters, and trade journals. Adam is the author or editor of five books on diverse topics such as intellectual property, mass media regulation, Internet governance and jurisdiction, regulation of network industries, and the role of federalism within high-technology markets. Before coming to Washington, Adam spent time in London, England at the Adam Smith Institute where he worked on reform of the British legal system. Mr. Thierer earned his B.A. in journalism and political science at Indiana University, and received his M.A. in international business management and trade theory at the University of Maryland.