TEXAS PUBLIC POLICY FOUNDATION
April 14, 2010

LUNCHEON:
"NET NEUTRALITY: WHAT'S NEXT?"

Speakers
Robert M. McDowell
Commissioner, Federal Communications Commission

Deborah Tate
Former Commissioner, Federal Communications Commission

Barry Smitherman
Chairman, Public Utility Commission of Texas

MODERATOR: We have had a great program so far today. We're looking forward to hearing Commissioners Tate and McDowell give us more information on what's going on when it comes to net neutrality and the Internet today.

To get our program started, I would like to introduce to you Commissioner Barry Smitherman. He will further introduce our two commissioners today.

Chairman Smitherman is a fourth-generation Texan, appointed by Governor Rick Perry to the Texas Public Utility Commission back in 2004. He was reappointed in 2007 and then, again in 2007, was

promoted to the position of chairman. Between 1986 and 2002, Chairman Smitherman was a public finance investment banker working with state and local governments through the South, the Southwest, and the Midwest to build infrastructure projects, such as roads, bridges, airports, water and sewer systems, schools, hospitals, and sports facilities. During this time he held leadership positions with First Boston, Lazard Freres, J.P. Morgan Securities, and Banc One Capital Markets.

Beginning in 2003, Chairman Smitherman began a second career as a prosecutor with the Harris County District Attorney's Office. During this time, he successfully prosecuted many jury trials against defendants charged with various crimes. At the time of his appointment to the PUC, he was part of the Family Criminal Law Division, which prosecutes domestic violence cases, especially cases where the victim has recanted the occurrence of the crime.

Chairman Smitherman grew up in Highlands, Texas, received his DBA from Texas A&M University, his J.D. from the University of Texas Law School, and his

MPA from Harvard University. He and his wife of twenty-three years live in Austin with three of their four wonderful children. Their oldest son attends Texas A&M.

He has been a leader in bringing the PUC towards a free-market position on so many different things. We at the Foundation are pleased to have him as chairman of the PUC and pleased to have him with us today. Please join me in welcoming him.

MR. SMITHERMAN: Thank you, Bill. I'm delighted to be here. Once again, the Texas Public Policy Foundation has put together a terrific program. This is exactly the kind of audience and the kinds of participants that we have come to expect from your organization. What a great crowd you have today. I'm really looking forward to the comments of our two present and former commissioners.

It is my privilege to introduce Commissioner Robert McDowell. I'm going to introduce him. He's going to come up and give a short presentation. Then I'm going to introduce former commissioner Tate. She's going to do the same. I think we'll then have a robust

dialogue among the commissioners, Bill, and any of you who have questions.

Robert McDowell was first appointed to the seat on the Federal Communications Commission by President George W. Bush. We know him, one of our former great governors, who went on to become a terrific president. This was in 2006. He was reappointed to the Commission on June 2, 2009.

Commissioner McDowell, it's an accomplishment to be appointed; I consider it an even better accomplishment to be reappointed. It means you're doing a good job and you have the support of the President.

He has now the distinction of being the first Republican to be appointed to an independent agency by President Barack Obama. He was unanimously approved by the Senate on June 25, 2009.

During his time at the FCC, he has worked to help consumers in the communication marketplace enjoy the benefits of choice. We like choice in this state. We like it in both telecommunications and electricity. We like to think that we're a leader in both of those.

Commissioner McDowell brings to the FCC approximately sixteen years of private-sector experience in the communications industry. Prior to joining the FCC, he was a senior vice president with the Competitive Telecommunications Association, otherwise known as CompTel. Before that, he was executive vice president and general counsel of the America's Carriers Telecommunications Association.

He graduated *cum laude* from Duke University. I know you were pleased with the outcome of March Madness. He served as a legislative aide to a member of the Virginia House of Delegates and has a law degree from the Marshall-Wythe School of Law at the College of William and Mary. Perhaps equally important, he is married to his wife Jennifer, and they have three lovely children.

It's my distinct pleasure to welcome back to Texas and to the capital city Commissioner McDowell.

MR. MCDOWELL: Thank you, Mr. Chairman.

I was hoping that introduction would be just a little bit longer because I was really enjoying that steak. Here I am in Texas and I'm having steak for

lunch. Just the way it ought to be. But as the chairman pointed out, I might be sleeping on the way home. Hopefully, you won't be sleeping here in the next half hour or so.

It's terrific to be here. Thank you very much to the Foundation for inviting me. It's wonderful to be reunited with my former colleague, Debbie Tate. We'll be hearing more from her in a few minutes.

I miss you, Debbie. We could use one more. We're outnumbered three to two sometimes.

In any case, this is a very, very important time. It's great to be back in Texas. I am genetically a Texan. My father was born in San Antonio. There are four generations of McDowells that have been here. My great-grandfather, C.K. McDowell, was the Republican nominee for governor of Texas in 1942 — not that there is anyone in the room who would remember that. But it's great to be here. My father, when he passed away last year, wanted his ashes scattered in the Rio Grande. So we had a family reunion in Del Rio to do just that. My grandfather was a rancher and he had ranches in that area. So I have a

soft spot in my heart for the Lone Star State.

In any case, there's a lot going on in Washington and at the FCC. We had a terrific panel right before lunch. Thank you for letting me sit in on that.

I thought I would just take three or four minutes to talk about a few things and then we'll go right to Q&A. We'll kind of mix this up and make it a little bit disorganized and chaotic, because I think it's much more interesting that way, and you are more likely to stay awake after eating steak if I do it that way.

First of all, I'm going to jump right in the middle, instead of starting at the beginning. There's a little bit of a semantic argument going on in Washington right now over the term "reclassification." We had an oversight hearing right before the Easter recess, before the House Subcommittee on the Internet and Telecom. I tried to bring this up in my testimony and then had a little bit of a give-and-take with Chairman Waxman, Henry Waxman. We'll be filing a subsequent letter outlining this when it's appropriate

to do so.

I just want to clear up a myth. Broadband Internet access services have never been regulated under Title II, period, as a matter of law, as a matter of fact. So when we talk about reclassification, that can be confusing. I just want folks to understand why that's a little bit confusing sometimes.

The Internet springs from information services. If you go to the FCC's proceedings, the Computer Inquiry I, II, and III, starting in the 1970s, those were appealed to the appellate courts and withstood scrutiny at the end of the day. It was talked about earlier today on the panel. Information service providers, ISPs, were known first as enhanced service providers, then became known as information service providers, ultimately Internet service providers, and now we're talking about broadband Internet access service providers — all the same thing. The basic idea, for those in the audience who have no idea what I'm talking about, is computers talking to computers. That was the idea — interactive services.

This has always been treated differently from

the monopoly-era voice communications for common carrier regulations that come about. It's really important to understand that never have these services been regulated as common carriage.

Let's go back to when the Internet was privatized in 1994. It was Clinton-Gore Administration policy to keep the government's hands off the Internet. Here I am as a Republican in the FCC defending Clinton-Gore Administration policy. High entertainment value there. But they were absolutely right. They were absolutely right. And things have blossomed as a result.

There is the landmark 1996 Telecom Act. It did not say that information services shall be treated as common carriage under Title II. It didn't do that. That came up in the hearing. It's just wrong. It's a myth.

In 1998, Chairman Bill Kennard, President Clinton's second chairman of the FCC, sent a report to Congress, as mandated by Congress, outlining that these services had never been classified as common carriage and shouldn't be, because it actually would harm

innovation and the nascent nature of that market. We wanted to keep government out of that space.

Then, in 2002, under Chairman Michael Powell, the FCC formalized that whole policy of the Clinton-Gore Administration by saying that cable modem services should be really looked at under Title I. Cable services traditionally had always been under Title VI. Cable modem was something fairly new and really hadn't been classified by the FCC, back to that classified versus reclassified. That's the case that went to the Supreme Court ultimately. It was known as the *Brand X* decision that was ruled on in June of 2005. The Supreme Court said, "FCC, you got it right." Now, the Supreme Court at that point did also say, "FCC, you could have said, if you wanted to, that it could have been common carriage, but you didn't."

Subsequently, we have looked at DSL, we have looked at broadband over power lines, we have looked at wireless broadband. All those have been formally classified as Title I services.

An administrative agency can change its mind under the APA and under due process. When? Any

lawyers in the class? I feel like law school; I'll start calling on somebody.

An administrative agency can change its mind — A, it has to explain itself, but, B, there has to be a factual basis for changing its mind. So what would be the factual basis in saying, since 2002, in the past eight years, broadband services have become less competitive? We'll talk more about this in a few minutes. They have become, actually, more competitive. And I disagree a little bit with George, I think. Wireless is really where the competition is coming from. There is a lot coming over the horizon. We'll save some for Q&A.

If we can pull up my first slide or second slide, let's look at what has happened since we classified broadband under Title I. This just shows the growth according to the Pew folks, the Pew Internet & American Life Project. In 2003, seven years ago, we had about 15 percent or so of Americans subscribing to broadband services. This is now stale. It says two-thirds, roughly, as of maybe a year ago or more, of American households are now subscribing to broadband.

It's probably closer to over 70 percent at this point. We have broadband availability to 95, 96 percent of the country. I'm not saying everything is rosy. We want fatter and faster pipes. We're Americans, for crying out loud. We want to do better. We want to lead the world. But we have gotten this far through the hands-off policy and by opening up new avenues of competition.

Commissioner Tate and I, back in December of 2006 — kind of copying Texas, I would like to add, Mr. Chairman — voted for the video franchising order which made it easier to lay fiber. We didn't steamroll over the municipalities. We survived that in court. The court said it was okay. We made it easier, so unreasonable roadblocks couldn't be put up.

We have auctioned off new spectra. We have tried to deregulate as best as possible. I think this graph tells a lot of the story.

Real quick — I'm well past my four minutes that I said I would be — the number of homes passed by fiber has gone from basically zero to over 17 percent of households since we have done that. Billions and

billions of dollars have been pouring in. It's similar, how many have actually been connected by fiber. So adoption has to be a big part of any broadband strategy. Is a new regulatory regime the best way to spur that? I think that is one of the questions we have to ask.

We'll skip over that one.

So wireless broadband really offers a tremendous amount of hope. Seven years ago, during the UDP fights — and, George, I know you know a lot about that, being from Z-Tel — there wasn't any discussion of wireless being a substitute for residential wireline voice. It wasn't discussed. But now, just in the past couple of years, you haven't seen much of a discussion regarding wireless broadband. Is it a perfect substitute? Maybe not yet. But on the voice side, one out of four American households are wireless only, and more and more folks — about 100 million, at least — are saying they want wireless broadband. We have done a lot at the FCC, through our white space order and various spectrum options, to do that.

I will end it on that note, before I blab on

forever and preempt all the questions that you all want to ask. I will end it there. We can turn it over for more discussion on a lot of these other topics.

[Applause]

MODERATOR: Once a Texan, always a Texan, no matter how far back it goes. Welcome home again.

It's my pleasure to introduce now former commissioner Deborah Tate. Deborah was nominated to the FCC by President George W. Bush on November 9, 2005, and unanimously confirmed by the Senate. She was sworn in in January of 2006. In 2007, she was reappointed by President Bush to a full five-year term. Among her many responsibilities, Commissioner Tate served as chair of both the Federal-State Joint Board on Universal Service and the Federal-State Joint Board on Jurisdictional Separations.

She has worked extensively to facilitate market-based solutions to public policy issues, drawing upon her extensive experience at the state and local level. Commissioner Tate promoted cooperative federalism and public-private partnerships when it was time for the government to act. At the time of her

appointment to the Federal Communications Commission, Commissioner Tate was serving as chairman and director of the Tennessee Regulatory Authority.

Of course, we have a special place in our hearts for Tennessee volunteers, because they came to the Alamo to help us defend, back in the day. And that's just as good as being a Texan.

Commissioner Tate has been an adjunct professor at both the business level and nursing and law school level and served as director at Vanderbilt's Institute on Public Policy. She has served as legal counsel and policy adviser to two Tennessee governors, then-Governor Lamar Alexander, now U.S. Senator, and former governor and congressman Don Sundquist.

Like Commissioner McDowell, she has three children. I was listening the other day to a story about how Western civilization is not having enough children, not repopulating our society. You have three, you have three, I have four. We are doing our part, ladies and gentlemen.

Welcome, Commissioner Deborah Tate.

MS. TATE: Thank you.

I think you'll find that Commissioner McDowell and I are great bookends, because he is an incredible historian and legal scholar and I kind of come along and sweep up with all the PR and words and bring some common sense to Washington. As I told him earlier, we're kind of like the revival of the Grateful Dead. I'm so excited to be back with Commissioner McDowell again. I miss you, too, Rob, and I wish it were three-two as well. I wish that my second nomination had gone as well as Rob's did. But he is doing a terrific job. You all are very well represented, as you just heard.

I am going to very quickly run through some slides. Some of them don't even need a comment. Some of them are just for you all to read and draw your own conclusions. But one of the things that I really want to do today — I woke up in the middle of the night thinking, how can I say something that will really resonate with consumers and with citizens and with Americans about why this discussion about net neutrality is important? I literally got up and went to my computer and wrote what you all have found.

Commissioner McDowell wrote a wonderful op-ed that was in *The Washington Post*. Mine, I hope, is going to run. You all have a copy of it as a preview.

What I really am suggesting is that we need to change the entire dialogue and get rid of all this "open" and "free." There is nothing free in America, and we all know it. This has cost billions and billions of dollars to invest in infrastructure. What we really need to talk about — and I'm so thrilled with the earlier panelists — is, we really need to move to a discussion about safe and secure.

What do most Americans think? Most Americans really don't want to see the FCC regulating in this space. Incredibly, 85 percent of parents are concerned about their children online.

I also threw in some headlines: Is Net Neutrality Dead?

Here is another quote: This was a mammoth hit.

But I also want to share you with some realities. Here's a quote from our President: No, net neutrality is not dead. It might have taken a mammoth

hit, but we now have a very ardent advocate supporting it.

I'll just let you draw your own conclusions.

Here are a couple of things that were said about the new FCC chairman when he was chosen.

This was actually the first Internet Czar. I don't know if you all followed this. She was very vocal and very ardent in her support of net neutrality. She has now resigned. I don't know whether that means that she had gone too far and now they might be coming back a little from the left or not.

These were just some more quotes. In fact, I can leave these with the Foundation in case you all want to read them at more length later.

But I think the point here is, as Commissioner McDowell was talking about with all the titles, Title II, Title VI, all the different titles of regulation — and now he is talking about extending to wireless carriers, when there is more competition in the wireless sector than almost any sector in America.

This is the new commissioner, Mignon Clyburn. She is an old, old friend of both Chairman Smitherman

and me. She used to be a state regulator. She actually has taken this to a different level. A lot of our media regulations — she is also interested in applying those, somehow, to some Internet regulation.

This is from the chairman, Ed Markey, whom you all know, a congressman who has been very involved in telecom for many years.

This is Chairman Rockefeller, now the chairman of the Commerce Committee.

I think, as you all can see, there are many, many very important and powerful people in Washington who are very supportive of net neutrality.

I think this is a point, too, that Commissioner McDowell was making and that Dr. Ford has made in the past, I don't think as strongly today. These are just the facts. There is no market failure. Twenty of the foremost economists in this country actually signed a letter listing why they are not supportive of net neutrality. That's something that you all might find interesting.

This is what *The Wall Street Journal* said. Actually, this is probably true. The words here, you

might note, are “spark efforts” and “prompt Congress” to get involved. We all know what that usually ends up meaning.

There are four FCC principles that have been adopted by the FCC. They have worked very well. One point that was made in the earlier panel is that all of these policies only deal with lawful content. This was a quote, very recently, in *The New York Times*. BitTorrent was actually the specific case that Commissioner McDowell talked about. The decision just came out, I believe, last Tuesday in the Comcast matter. That’s why I was so thrilled that the Foundation was interested in doing this, because it’s such a timely topic.

Really, what agencies should be doing is looking at, case by case, what is in front of them and using the exact facts, as Commissioner McDowell was suggesting.

I would like to say, when I was in Washington, as you all know, many Republicans — the party is often called the “Party of No.” I like to say that I was the “Commissioner of Yes.” So these were

just outlining some of the ways that I think government — not necessarily the FCC, but that, as citizens, we can be protected and we can indeed have access to the types of networks and Internet availability that we would all like to have. These were just some of my ideas.

This goes back to safety and security. I saw this the other day. Verizon is witnessing 5 billion breaches a day. These are issues that are really happening and that we, as citizens and consumers, should be concerned about.

This is a matrix. You all can't even read it. This is just how complicated the risks and threats are that we all see most every day — or that we don't see, but that the infrastructure providers do.

This is to show about the marketplace, that actually some pricing is even coming down for consumers.

This is another point that Commissioner McDowell made. I won't tarry here. The ancillary authority has to absolutely fit within the statutory jurisdiction that the FCC has.

This was to put up the op-ed that I didn't have a picture of, but I hope you all will read the op-ed that Ryan(?) wrote.

Then, of course, I think we're going to talk about this a little bit later, so I'm going to stop here so we can get to some questions. Just what is probably the next step in the Comcast case?

[Applause]

MODERATOR: Thank you both very much.

If the people with the microphones would go ahead and find some folks who might want to have questions — I have questions. I'm going to ask the commissioners some and let them talk back and forth. But if you would wave at somebody and have them next to your table, then we'll kind of intersperse some questions from the audience while we're going back and forth.

I would like to claim that the Foundation had something to do with the timeliness of the FCC Comcast decision next week, getting people to come out to our event. We'll just take it as fortune that it occurred. But I think it's a timely subject for you all to

discuss. You both mentioned it a little bit. Would you like to talk about it a little bit more, what you think about the decision and where that leads to where we're going next in the debate about net neutrality? I know the chairman has talked about some of the things that he might like to do. Could you all discuss that a little bit?

MR. MCDOWELL: Sure, I'd be happy to.

First of all, thank you for letting me finish my steak, Debbie. I appreciate that. It was delicious.

Commissioner Tate and I were the only two dissenters in the Comcast-BitTorrent case. I won't speak for her, but I think I can. I was pleased, and I think you were probably pleased. And we called it at the time, enough to say, "I told you so," but —

MS. TATE: I'll say it. Rob is so gallant.

MR. MCDOWELL: One of the things I like to say to people is I'm not necessarily that smart. You don't have to be that smart to be an FCC commissioner. You just have to know how to read — and also count to three. That helps, too. But in this case, you read

the statute and read the case law. We just didn't have the authority there.

There is a hole still — I don't think it's that big a hole — where the Commission could go, under Title I. "Ancillary" means, is it related? Is it related to, basically, a core, explicit statutory mandate, to some other title in the act? Title I just doesn't give you a blank check to do whatever you want. We're not Congress; we can't make new law. But if your ancillary authority relates directly to some other congressional mandate, then you can do it. As was pointed out in the panel right before, in this space, whether it's assessing VoIP providers for universal service or E911 or things of that nature, courts have upheld that, saying, "You've got a good reason there, and there's this application that is pretty much phone service."

But the court — I'm a little skeptical that it carved a very big hole for the Commission. I think it wanted to make sure that what it didn't say was that there is absolutely no way under Title I that you can do anything. I think there is one sentence in there

that is confusing folks, about midway in the order, that probably should have been deleted.

So there might be a small hole the Commission could try to go through, but I think it's going to be very, very difficult for it under Title I.

Actually, as we are speaking, I think Chairman Genachowski is in front of the Senate Commerce Committee, probably answering some of these same questions to senators. I sense that there is a lot of discussion in our Office of General Counsel and the bureaus and the chairman's office as to what to do next. One option would be to try to do it again under Title I, but tie it more closely to something. If you look at the case, though, all the precedent really is about the old AT&T voice monopoly and CPE decisions and things of that nature. It's really not relevant anymore to this market. It's a completely different market.

Or they could try this classification or reclassification, depending on which word you want to use — broadband Internet access services as Title II common carriage services.

My prediction: Both approaches would fail on appeal again. You can change your mind as an administrative agency, but you have to have a good factual basis for doing so. The market is not less competitive than it was in 2002. If anything, it's more competitive. And with a lot of wireless technologies coming over the horizon — not only the auctions that we had in 2006 and 2008, but the new technologies, cognitive radio, software-defined radio, smart antenna technologies — all that is going to allow for more competition in that space. WiMAX — you have Clearwire, for instance, up to 100 megs for a wireless device. That's real broadband.

So I think there is a lot of exploration at the Commission. But, as Commissioner Tate pointed out, net neutrality or regulation of Internet network management, or whatever you want to call it, is President Obama's number-one priority in FCC-land. It was an actual campaign promise. It's unusual for a presidential candidate to make a campaign promise of something for the FCC to do. I don't think they'll just throw up their hands and say it's Congress'

problem now. I think they are going to try to look for something else.

MS. TATE: I'll just inject a little common sense. If we just went back in time and you said, "What was the real problem? What was the Comcast-BitTorrent issue really all about?" incredibly, Comcast and BitTorrent actually sat down and came to an agreement, after we had held several hearings around the country. Beginning however many years ago, the FCC started expending your dollars to go around the country talking about this issue and talking about what Comcast had done. In the earlier panel, you heard about something called deep packet inspection. Comcast actually said, "We will stop doing that." They actually settled with BitTorrent. They actually then became part of a P2P platform — talking group, basically — and then a P4P. This is how quickly technology is changing. Even the names of the groups are changing to keep up with the technology.

So, in essence, there was no issue. That was one of the places — and Commissioner McDowell does such a good job at laying out the legal ramifications. But

when you just get down to the mere facts of the case, there was no case. There was no complaint anymore. We used it as an opportunity to lay out all of our particular arguments. A lot of them — and we can go into this a little bit more — also revolve around both protecting children — and by that, I don't mean regulating, but I mean educating the public and parents and providing curriculum in schools — and also protecting our content, which is costing our economy billions of dollars. So I would hope that our government would be interested in those two issues, if not in any more.

But the bottom line was that, really, the case that came before us, Comcast-BitTorrent — there was no case, because it was resolved. As far as I know, there have only been three of these complaints. That was the only really formal one. One was Verizon, who had stopped text messaging that was from a pro-abortion group, where they instantaneously, as soon as it hit the press, stopped doing that and allowed those text messages to go through. The other one was the Madison River issue that someone mentioned earlier.

So there is no issue that needs to be resolved, that needs to be reclassified or classified, period.

MODERATOR: Dr. Ford, do you have a question?

DR. FORD: Since I've been called out by both of them, I will ask a question. I guess it's mainly to Rob.

The four principles, where we have argued, "We'll stick with this and do some case-by-case adjudication. And until something comes up, all is well" — I think all along that sort of hinged on, "If you don't do what we say, we will do something to you, under some sort of authority." That authority now seems to be questionable or even lost. What is the backbone of the four principles today?

MR. MCDOWELL: Excellent question. Dr. Ford is referring to the summer of 2005, about a year before I got to the Commission, about six months before Commissioner Tate did, where four commissioners adopted these principles. They sprang out of Michael Powell's four freedoms of the Internet. There was a vote taken that did not go through the public notice and comment

period or the normal rulemaking process. They were never codified in the Code of Federal Regulations, so they were not rules, by definition.

Subsequently, in the Comcast-BitTorrent case, the Commission tried to all of a sudden say, “Oh, but they are rules and they’re enforceable.” The court did not reach that issue in its decision.

That’s an excellent question. You had two of the four, at least, commissioners at the time, Chairman (at the time) Kevin Martin and Commissioner Michael Copps, both in their statements saying these were not enforceable, Commissioner Copps saying he wished they had been enforceable rules. So two of the four, the chairman and the ranking minority member, in that vote said they weren’t enforceable.

I wasn’t there. I’m not quite sure what they thought the legal basis was for it. Certainly we all want — you don’t like the terms “free” and “open,” but let’s just use them for a minute — a free and open Internet, not free in terms of cost, but free in terms of wanting consumers to be able to go to the website of their choice, provided it’s legal, and to use the

applications of their choice, provided those applications are legal and they don't harm the network. We want that.

That's what we have today. We have that today. So how did we get there? Would crossing that line and saying a new regulatory regime or an old regulatory regime in which we're then going to forbear from forty-eight out of the fifty requirements, or whatever it is, under Title II — is that really going to solve it?

Another point I want to make on that — and I make this in the op-ed, which you all have a copy of — societies that regulate the Internet more tend to be less free. Societies that regulate it less tend to be more free. Do we lose the moral high ground internationally when we cross that line and say it's okay now for governments to intervene in this space? What our definition of reasonable network management might be is far different from what it might mean to China or Venezuela or Iran or Syria. Do we start to lose the whole argument once we cross that line, that barrier?

But back to your question, I don’t know what the legal authority was there. They didn’t take the vote. I think at the time, if you look at the statements, the legal authority in 2005 was in real question as to what the heck they were doing, other than just putting out guidelines.

MS. TATE: I’ll just say one thing very quickly. There have been four principles for six years. There haven’t been any formal complaints. They seem to be working.

The other thing that I mentioned earlier — did you notice that I’m staffing you, Commissioner? I even have your quote up. We might want to move on to that, because I think you’re exactly right.

But the other thing is, just back to my point, the FCC shone a light on this, and the parties immediately came to an agreement, in the Comcast-BitTorrent example.

MR. MCDOWELL: And my name is a registered trademark, apparently.

MS. TATE: I can’t get it off. (Laughter)

MODERATOR: Since we’re all Texans of one

sort or another up here, I'd like to bring the discussion home a little bit and have you talk a little bit about Texas. What has the free and open, the safe and secure Internet that we have had up to this point, meant to states like Texas — broadband deployment, the new wireless access, those types of things? What might the future of Texas look like under some sort of net neutrality regimen?

MR. MCDOWELL: I'm not sure if your question touches on whether there is a state sovereignty issue here. The Internet, by definition, is sort of interstate, international in nature. So that will be curious there.

But I did look at some of the statistics regarding Texas. Texas, I think, is slightly above the national average in terms of deployment and adoption. That's fantastic. You all were cutting-edge. You all really preceded the federal Congress with your 1995 work and, subsequent to that, all the work that you have done there in terms of promoting competition, franchise reform, and all the rest, which also preceded what we did at the federal level.

So I think Texas has done a terrific job. In fact, you were just on the Commission when they had the hearing here. I'll let you talk about that, just to kind of spotlight how Texas was ahead of the curve.

Here we are in Austin, which is a tech center. You have many of them throughout the state. We have to ask ourselves, what is really good for investment and innovation? Is it going to be imposing a regulatory regime that was really invented in the late nineteenth century for monopoly railroads, and they replicated that common carrier regime in the 1934 act? The telecom or information services marketplace looks a lot different than the monopoly AT&T system of 1934.

If nothing else, it interjects uncertainty. Also it interjects, through that, litigation risk. At the FCC, a lot of times companies will come to us — in fact, maybe even more often than not — basically saying, if you boil down their arguments, "Please regulate my rival." "She's running too fast. Could you please slow her down, so I don't have to run as fast?"

As the distinction between a network operator and an application provider is blurring and as consumers want a mix of both — they want networks that offer them intelligence. Google today, for instance, has enough fiber connectivity and server capacity to be one of the largest telecom companies in the world. It's a great American success story. I think we're starting to see a little bit of a nuanced reengineering of their arguments on this. If you saw the recent editorial between the CEO of Verizon, Ivan Seidenberg, and the CEO of Google, Eric Schmidt, there is some concern: Do we really want monopoly regulations? Google has been, interestingly, quiet since the court decision came out last week.

So there is a lot of rethinking, as consumers are demanding this convergence. Another example of that is, in Cisco wrappers, there are over 28 million lines of code. That's embedded in part of the network. So networks need to have intelligence, and we need to be able to add value.

The question becomes, are they acting in an anticompetitive way? We saw in the earlier panel a

great illustration of how the antitrust laws over time have helped to protect and encourage competition and opportunities, rather than regulation, which is going to add a huge layer of uncertainty.

MS. TATE: Regulatory certainty unleashes innovation and investment. I think we have seen that over and over and over. Some of the statistics from the esteemed panel which talked about what's going on here in Texas — it's going on in many other states, but you all were some of the forerunners, under Chairman Smitherman and the PUC and your state government. I remember being at the Grapevine hearing. Even though there was a lot of opposition at that point, we realized, as the FCC, that this would unleash platform competition. Again, Commissioner McDowell was also talking about wireless broadband. When we were here, actually, the day before the hearing, we were able to go out — Barry, do you remember the company here that was doing broadband over power lines?

MR. SMITHERMAN: I don't remember. It may have been Current (phonetic).

MS. TATE: It was Current. We went out to

see a neighborhood and — I don't know what's going to happen with BPL, but it was really unbelievable. In one day we were down here and able to see a BPL application that was going on in an entire area — which, by the way, also is part of this whole movement towards smart grid that you all hear as the really core and center of our energy sector, should really want to move forward.

So we have seen just unbelievable gains, and we used you all as the example for video competition all across the country.

MODERATOR: I wish we could keep going on, because this has been so fascinating, but we have come to the close of our time. Would you please join me in thanking our panel once again today.

[Applause]