STATEMENT
of
COMMISSIONER ROBERT M. McDOWELL
FEDERAL COMMUNICATIONS COMMISSION

Before the
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
UNITED STATES SENATE

December 13, 2007

Good morning Mr. Chairman, Senator Stevens and distinguished Members of the Committee. Thank you for inviting us to appear before you again this morning.

The Commission has been quite active since we were last before you on February 1. Time does not allow for me to discuss every issue before the Commission today, but I have included some highlights in this testimony. I will begin with a discussion of media issues. Secondly, I will talk about wireline issues. Lastly, I will touch upon wireless issues. As always, I look forward to answering any questions you may have.

Media Issues

Media Ownership. Of course, the highest profile issue before us is the future of our media ownership rules. By far, this one issue elicits more public passion than any other issue we work on. The media can shape the debate over every other issue because it serves as a filter or lens for the information the American people rely upon to make decisions about their lives and the future of our great country. "Information," as Thomas Jefferson said, "is the currency of democracy." The founders of our nation understood the important role played by the media in American society when they crafted the Bill of Rights. In fact, this Saturday marks the 216th anniversary of the ratification of the Bill of Rights. First among them, of course, is the First Amendment guaranteeing free expression and freedom of the press. In 1791, technology limited such expressions to word of mouth or the written word printed on the medium of paper.

Today, there is no disputing that the media marketplace has been transformed by technological innovation into the most robust and dynamic multimedia environment in human history – to the point where sometimes people complain about being bombarded by "too much information." Just in the past two decades, we have witnessed a brilliant technological explosion that has brought consumers five national broadcast networks, hundreds of cable channels

spewing diverse cable content produced by more than 550 independent programmers, nearly 14,000 full-power radio stations, two vibrant satellite television companies, telephone companies offering video, cable overbuilders, satellite radio, the Internet and its millions of websites and bloggers, a myriad of wireless devices operating in a wonderfully chaotic and competitive environment, iPods, podcasts, and much, much more. And that's not counting the myriad new technologies and services that are coming over the horizon such as those resulting from our Advanced Wireless Services auction of last year or the upcoming 700 MHz auction, which starts next month. In short, consumers have more choices and more control over what they read, watch and listen to than ever.

New media platforms do not live under the same regulations as traditional media. As a result, it should not be any wonder that most of the new investment, energy and ideas are flowing into these newer and less-regulated platforms. Contemplating this changing marketplace, in 1996 Congress mandated that the FCC periodically review the rules governing the ownership of traditional media platforms. Accordingly, Congress created a statutory presumption in favor of modifying, or even repealing, ownership rules as more competition enters the market. Section 202(h) states that we must "determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation that it determines to be no longer in the public interest."[1] This is our mandate from the directly elected representatives of the American people. The Commission's longstanding public policy goals of promoting competition, diversity and localism continue to guide our actions in media ownership.[2]

[1] 47 U.S.C. § 303, note.

[2] *See 2002 Biennial Review Order*, 18 FCC Rcd 13620, 13627 (2003).

Although the current media ownership proceeding began at my first open meeting as a Commissioner, almost 18 months ago, this issue has been before the Commission in one form or another for almost twelve years. Since a large bi-partisan vote in Congress engendered the Telecommunications Act of 1996 containing that unusual statutory presumption in favor of de-regulation, both Democrat and Republican commissions have initiated several proceedings. The 1996 Act sparked a proceeding on this matter the very same year. That action produced another proceeding in 1998 which ended with a report in June 2000 from a Democrat-controlled FCC finding that the newspaper/broadcast cross-ownership ban, enacted in 1975, may no longer be necessary to protect the public interest in certain circumstances. That conclusion gave rise to the 2001 cross-ownership rulemaking. The 2001 proceeding became the basis for the 2002 rulemaking, which produced an order. The order was appealed to the Third Circuit. In the meantime, Congress overturned the FCC's relaxation of the national television cap while the court remanded *almost* all of the remainder of the order. But I emphasize the word "almost." The court also concluded that, "reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest."[3]

Since then, the Commission's work on the latest iteration of this proceeding has been unprecedented in scope and thoroughness. We gathered and reviewed over 130,000 initial and reply comments and extended the comment deadline once. We released a Second Further Notice in response to concerns that our initial notice was not sufficiently specific about proposals to increase ownership of broadcast stations by people of color and women. We gathered and reviewed even more comments and replies in response to the Second Notice. We traveled across our great nation to hear directly from the American people during six field hearings on ownership in: Los Angeles and El Segundo, Nashville, Harrisburg, Tampa-St. Pete, Chicago, and

[3] *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372, 398 (3d. Cir. 2004)

Seattle. We held two additional hearings on localism, in Portland, Maine and here in our nation's capital. During those hearings, we heard from 115 expert panelists on the state of ownership in those markets and we stayed late into the night, and sometimes early into the next morning, to hear from concerned citizens who signed up to speak.

We also commissioned and released for public comment ten economic studies by respected economists from academia and elsewhere. These studies examine ownership structure and its effect on the quantity and quality of news and other programming on radio, TV and in newspapers; on minority and female ownership in media enterprises; on the effects of cross-ownership on local content and political slant; and on vertical integration and the market for broadcast programming. We received and reviewed scores more comments and replies in response. The comments of those who did not like the studies are also part of the record. I have also greatly valued hearing directly from the thousands of people who have traveled to our hearings, often on short notice.

Almost no one has disputed the data that shows we live in a media world that is far different from the one that existed even at the time of the 1996 Act. Consumers' eyeballs and corresponding ad dollars are migrating to new media platforms. The Hollywood writers' strike is a good example of this phenomenon. The strike is all about following the audience and ad revenue. Creators are taking their content directly to the Internet. Under this new scenario, viewers that would usually be tuned in to broadcast entertainment are, despite the strike, able to find, download and watch new and different programming choices directly.

Moreover, as a result of this paradigm shift, at least 300 daily newspapers have shut their doors forever in the last 32 years because people are looking elsewhere for their news, information and entertainment. During the third quarter of this year, ad revenue for newspapers

dropped by nine percent and circulation for a similar period dropped by almost three percent. In view of these developments we must ask: has this new era of competition been helpful or harmful to localism and diversity? On the one hand, some argue that combinations that may have been dangerous to diversity in 1975 are no longer any threat due to the existence of an unlimited number of delivery platforms and content producers. The record demonstrates that not only are there more hoses to deliver the information, there are more spigots to produce the information. On the other hand, most people still rely primarily on television broadcasts and newspapers for their local news and information. With local broadcasters and newspapers still producing a large share of local online content as well, are there really more diverse sources of local journalism than before? All of us must handle this question with great care.

Another vexing question is: what can the FCC do to promote ownership among people of color and women? Many positive and constructive ideas before the Commission may be constrained by Supreme Court prohibitions against race-specific help on one side, and a lack of statutory authority for doing much more on the other side. Whatever the FCC or Congress does must withstand constitutional muster. So let's focus on the possible -- and the legally sustainable. I am hopeful that many of the ideas before us for a vote on December 18 can be adopted so America can start back on the path of increased ownership of traditional media properties by women and people of color.

As we debate and deliberate these important matters, traditional media is shrinking and new media is growing. But the good news is that all Americans will benefit from this new paradigm because new technology empowers the sovereignty of the individual, regardless of who you are. All of us should weigh all of the arguments presented before us in the context of these facts.

Digital Transition. One of the biggest challenges the Commission faces over the next fifteen months is moving our nation from analog to digital television with minimal consumer disruption. The Commission, particularly our Media Bureau and Office of Engineering, is working diligently on digital transition issues to make the February 17, 2009, transition date a reality. Much more work remains to be done, but we are all striving to make the transition as smooth as possible for the industry and for consumers so that the benefits of digital television technology can be enjoyed by the public.

Since Congress established the transition deadline, the Commission has moved beyond simply ensuring that stations were capable of operating in digital to focus on facilitating broadcasters' construction of their final, post-transition channel facilities. In early August, the Commission issued the final table of allotments, which provides over 1,800 television stations across the country with their final channel assignments for broadcasting following the DTV transition on February 17, 2009. Last week, Chairman Martin circulated to the Commissioners an order that proposes procedures and rule changes to ensure that broadcasters can begin digital operations on time. I look forward to working with my colleagues to provide broadcasters the certainty they need to move ahead with the transitions for their individual stations.

The natural next step for the Commission is to review how cable multichannel video programming distributors (MVPDs) will carry the broadcasters' digital signals after the conclusion of the digital transition. At our October meeting, we adopted an order regarding the obligations of cable operators to ensure that the digital signals of "must carry" stations are not materially degraded and are viewable by all cable subscribers, as required by law. The order requires cable systems that are not "all-digital" to provide must-carry signals in analog format to their analog subscribers. This requirement will sunset three years after the broadcast digital

transition hard date, with review by the Commission of the rule within the final year. Our decision strikes the appropriate balance between ensuring that broadcast signals are not materially degraded and permitting cable operators to use their technology efficiently to produce both high quality video and high-speed broadband offerings for consumers. We must now consider the appropriate requirements for DBS and other MVPD competitors. I thank key players in the private sector for their efforts to find workable solutions for the benefit of all the parties, especially consumers. I look forward to working with my colleagues on these issues in the near future.

DTV Consumer Education. Both government and industry have begun consumer education campaigns about the transition to DTV. At the FCC, we have a consumer education website about the transition, www.dtv.gov, with helpful consumer and product information. This fall, we have held three consumer education workshops to address the transition generally and to ensure that senior citizens, minorities and non-English speakers are prepared for the transition.

We are also considering an order regarding what types of consumer education efforts the Commission should require of broadcasters, MVPDs, manufacturers, retailers and others, including winners of the 700 MHz spectrum auction and participants in the Low Income Universal Service Program. The order proposes to implement rules suggested by Congressmen Dingell and Markey in a letter to the Chairman dated May 24, 2007. I have some concerns regarding whether the Commission should regulate heavily in this area, given that the industries involved – particularly broadcasters, MVPDs and retailers – have an overwhelming economic incentive to ensure that the transition goes smoothly, and given the enormity of their voluntary consumer education campaign commitments. I also have questions regarding whether we can adopt some of the proposed regulations consistently with the First Amendment and the

Commission's limited jurisdiction over some of these entities. Nonetheless, the Commission should do all that it can to work with all stakeholders to ensure a seamless digital transition.

Video Franchising and MDU Access. I am pleased by recent actions the Commission has taken to promote additional competition among video competitors in an already competitive environment. To help create an environment where investment, innovation and competition can flourish, it is imperative that government treat like services alike, preferably with a light regulatory touch. This is especially true given the advent of the "triple play" of video, voice and high-speed Internet access services being offered by cable, telephone and other companies. The Commission has recently taken action to achieve regulatory parity between incumbent cable companies and new entrants into the video markets.

At our October agenda meeting, we adopted an order that helps give many consumers who live in apartment buildings and other multiple dwelling units (MDUs) the hope of having more choices among video service providers. The order could affect up to 30 percent of the U.S. population. The Commission found that contractual agreements granting cable operators exclusive access to MDUs are harmful to competition. Accordingly, we now prohibit the enforcement of existing exclusivity clauses, and the execution of new ones, as an unfair method of competition. Although I have some legal reservations about abrogating existing exclusive agreements only four years after permitting them, I agree that increased competition among video providers in MDUs will result in better service, innovative offerings to consumers, and lower prices.

Also, at our October meeting, we adopted a video franchising order that levels the playing field by extending to incumbent providers many of the de-regulatory benefits we provided to new entrants in our first order on that issue last December. No governmental

entities, including those of us at the FCC, should have any thumb on the scale to give a regulatory advantage to any competitor. Our latest order will provide regulatory certainty to market players, enhance video competition, accelerate broadband deployment and produce lower rates for consumers. Furthermore, as with our earlier action, I am confident that our recent action is fully supported by substantial legal authority.

Wireline Issues

Universal Service Reform. As I have consistently stated, the Universal Service system has been instrumental in keeping Americans connected and improving their quality of life. However, it is in dire need of comprehensive reform. To reform the system, we must:

(1) slow the growth of the Fund;

(2) permanently broaden the base of contributors;

(3) reduce the contribution burden for all, if possible;

(4) ensure competitive neutrality; and

(5) eliminate waste, fraud and abuse.

The Commission now has several options squarely before us. We have received two *Recommended Decisions* from the Federal-State Joint Board: one, on May 1, 2007, to adopt an interim, emergency cap on the amount of high-cost support that competitive eligible telecommunications carriers (CETCs) receive for each state based on average level of CETC support distributed in that state in 2006; and another on November 19, 2007, which proposes more comprehensive permanent reform. We sought comments on the interim cap recommendation on May 14, 2007, and the comment cycle closed on June 21, 2007. I advocate seeking comment on the permanent reform recommendation quickly so that we can consider all the options to reform the system.

Furthermore, we have a proposed order that would adopt an interim cap on CETCs at 2007 levels. Already this year, the Commision adopted a condition in both the Alltel order of October 26 and the AT&T-Dobson order of November 15, which subjects these wireless carriers to an interim cap. Potentially, 60 percent of the funds allocated to CETCs have been capped through these transaction reviews. Accordingly, it may make sense to work on permanent reform now in light of the fact that fund expenditures will continue to slow down. Other proposals before the Commission are elimination of the identical support rule and adoption of reverse auctions. If we complete the comment cycle on the Joint Board's recommendation for permanent reform soon, we will be in a terrific position to consider the panoply of options during the first half of 2008.

On November 19, 2007, the Commission announced the award of $417 million for Rural Health Care Pilot Program projects. The purpose of these awards is to facilitate the construction of 69 statewide or regional broadband telehealth networks throughout the nation. This will not only bring advanced telehealth care to rural areas, but it will also facilitate broadband deployment throughout rural America. I am pleased to have supported this pilot project and look forward to learning from the experience of this program how we can utilize the Rural Health Care fund in the future.

Special Access. On July 9, 2007, the Commission issued a Public Notice seeking further comment in the Special Access proceeding. While the record contains some data, such as the GAO Study and carrier specific examples on a localized basis, we need a more complete record of exactly where special access facilities are located on a more granular basis before we can determine the appropriate level of long-term regulation—or deregulation—for special access services. I look forward to continuing to work with my colleagues on this important matter.

Forbearance. Closely related to special access is our recent action on several forbearance petitions that have required findings on the extent of competition in specific special access markets. The Commission has tried to strike a thoughtful balance. In the AT&T and Embarq/Frontier orders, we found that the number of competitors in the broadband services provided by the petitioners warranted limited relief from tariffing and discontinuance of facilities requirements. Specifically, we granted limited Title II and *Computer Inquiry* relief for existing packet-switched broadband telecommunications services and existing optical transmission services. In the ACS of Anchorage order, we partially granted relief from dominant carrier regulation of interstate switched access services in the Anchorage, Alaska study area and granted Title II and *Computer Inquiry* relief for specified enterprise broadband access services in the Anchorage study area. On the other hand, we have determined that certain requests for forbearance have exceeded the parameters of our authority to grant relief in Section 10. We have denied or excluded relief to ACS, AT&T, Embarq, Frontier and Verizon for their TDM-based service offerings, such as DS-0, DS-1 and DS-3 services.

On December 10, the Commission unanimously denied Verizon's forbearance petitions seeking wholesale unbundling relief in six East Coast cities. The petitions were denied due to a lack of evidence demonstrating sufficient competition under the Qwest Omaha standard to warrant relief from Section 251(c)(3).

While we're focused on forbearance, on November 27, 2007 the Commission took an important step to bring clarity to the uncertainty surrounding the forbearance petition process by initiating a rulemaking proceeding. Only Congress can amend Section 10, which is simple and clear in its mandate; but the Commission can take steps to improve its implementation. And that is what we are attempting to do by initiating this rulemaking. Among the important issues raised

for public comment in the Notice are: the specificity required for relief requested by the petitioner; the level of justification required for grant of relief; and the necessity for affirmative Commission action granting or denying a petition. It is also appropriate to examine the effect that forbearance petitions have on our broader rulemaking responsibilities. I am hopeful that we will evaluate our forbearance regulations in a timely manner and implement rules that we find are necessary to improve the forbearance process.

Dominant Carrier Relief for Long Distance Services. In August 2007, the Commission granted relief from dominant carrier regulation of the Bell Operating Companies' (BOCs') in-region, interstate, long distance services. Until this relief was granted, the BOCs were required to comply with structural, transactional and accounting requirements in Section 272 of the Act. This is a classic instance where regulation had been appropriate to protect emerging competitors and consumers, but where the relevant long distance market has become sufficiently competitive to warrant less onerous regulation, while continuing to protect consumers.

Broadband deployment. In April, we adopted two items that signaled the Commission is taking important steps to update and refine our efforts to determine the current state of broadband deployment in the U.S., including the market, investment and technological trends of advanced telecommunications capabilities. In the *Data Collection Notice of Proposed Rulemaking*, we sought comment on how we can further refine our information collection on broadband deployment to more accurately reflect service to rural areas and to include advanced wireless technologies. In the *Section 706 Notice of Inquiry*, our focus is on how to define advanced telecommunications capability, the status of deployment of broadband capability to all Americans, the reasonableness and timeliness of the current level of deployment, and what

actions can or should be taken to accelerate deployment. We are in the process of reviewing the comments in both of these proceedings as part of the Commission's ongoing effort to continue to increase the rate of broadband penetration and foster more choices for all types of consumers. We should continue to seize every opportunity to move America forward in this important area.

In the meantime, in October, the Commission released its latest report on High-Speed Services for Internet Access. This report, which reflects the status of broadband deployment in the U.S. as of December 31, 2006, demonstrates continued acceleration of broadband penetration. Specifically, the number of high-speed lines (those that deliver services at speeds exceeding 200 kbps in at least one direction) increased by 27 percent during the second half of 2006 and by 61 percent during all of 2006, for a total of 82.5 million lines. The number of advanced services lines (those that deliver services at speeds exceeding 200 kbps in both directions) increased by 17 percent during the second half of 2006 and by 36 percent during the entire year, for a total of 59.5 million lines. As for geographic coverage, the Report estimates that high-speed DSL connections were available to 79 percent of the households where incumbent LECs could provide local exchange service at the end of 2006, and that high-speed cable modem service was available to 96 percent of the households where cable operators could provide cable television service. While these figures are encouraging, we can and will do more to strengthen America's progress in broadband deployment by maximizing competition and encouraging investment.

Wireless Issues

White spaces. I am delighted that the Commission is taking the additional time necessary to analyze and field test numerous additional prototype devices to operate in the "white spaces" of the TV broadcast spectrum. I have long advocated use of the white spaces,

provided such use does not cause harmful interference to others. I am hopeful that a flexible, de-regulatory, unlicensed approach will provide opportunities for American entrepreneurs to construct new delivery platforms that will provide an open home for a broad array of consumer equipment.

At the same time, the Commission has a duty to ensure that new consumer equipment designed for use in this spectrum does not cause harmful interference to the current operators in the white spaces. I have enjoyed learning from various parties who are engaged in the healthy technical debate surrounding the best use of this spectrum. Assuredly, the discussions will become ever more intense as we move forward. But, at the end of the day, we will have a resolution. Inventors will continue to invent, and a workable technical solution will develop. We should let science, and science alone, drive our decisions. If we don't pollute science with politics, powerful new technologies will emerge, and American consumers will benefit as a result. And, who knows? This may spark a new wave of economic growth that we can't even imagine right now.

700 MHz auction. 2008 will soon be here, and the Commission is on track to meet Congress' mandate to commence the 700 MHz auction no later than January 28. In fact, the auction is scheduled to start on January 24, 2008. The Commission spent a great deal of time this spring and summer hammering out new service and auction rules for this valuable spectrum. After careful deliberation, I respectfully disagreed with my colleagues regarding the best path to achieve wireless device and application portability.

My original vision for the 700 MHz auction was for our rules to maximize investment, innovation, and consumer choice by promoting competition through the crafting of a wide variety of unencumbered market and spectrum block sizes. I am concerned that the open access

requirements set forth in the new rules trade the benefits of rural deployment by small and regional licensees, and their strong record of providing service to their customers, for – at best – speculative gains. Let me be clear: I am not opposed to a winning bidder employing an open network voluntarily. I am pleased to learn that several possible new entrants plan to participate in the upcoming auction. Like every other market, the wireless marketplace will be energized by the positive disruption only new blood can bring.

In the meantime, the wireless marketplace has continued to respond to consumer demand by delivering device and application portability. A broad array of wireless carriers offers numerous devices that are compatible with *any* Wi-Fi network. This capability allows consumers to wirelessly navigate the Internet just as they can on their home computer, and download software such as voice over Internet protocol applications, or popular search engines.

In early November, the Open Handset Alliance introduced Android, a Linux-based software stack that consists of an operating system, middleware, a user interface and applications. The Android kit, which has been in development since 2006 and is expected to be released early next year, will allow software entrepreneurs to freely access the source code and customize applications for their individual purposes. Most recently, and after almost a year in the making, Verizon Wireless and AT&T Mobility each announced initiatives to allow customers to use any wireless device and to employ elective applications on their respective networks. Sprint Nextel has long operated with an open network as evinced by the carrier's supporting "Java" applications and Amazon's "Kindle," for instance.

Currently, the Commission's staff is busy analyzing auction applications, which were filed on December 3. I applaud and appreciate the work of the incredibly hard working Wireless Bureau team, and eagerly anticipate watching the auction progress unfold.

Early Termination Fees. In addition to wireless carriers, DBS providers, traditional phone companies, and cable providers all allegedly assess early termination fees. Earlier this year, Chairman Martin indicated his intention to tackle this thorny issue. I am pleased that, since that time, the market has responded. For example, four wireless companies (Verizon Wireless, and more recently AT&T Wireless, T-Mobile and Sprint) have individually announced consumer-friendly policy changes. I would strongly encourage the stakeholders to continue their efforts. The private sector is better at solving such issues than the government.

Conclusion. Thank you for having us here today, and I look forward to answering your questions.