Remarks By Commissioner Kevin J. Martin
To the Texas Association of Broadcasters
Austin, Texas
August 22, 2002
As prepared for delivery

Thank you for inviting me to speak with you today. I am delighted to be here. I always enjoy participating in broadcasters' events, but I am especially excited to be with you here in Texas. As many of you know, I lived here in Austin for 18 months during President Bush's campaign. My wife and I loved living here, and we return as often as we can.

I am honored that you invited me to speak this morning at your Community Service Awards breakfast. I congratulate this morning's honorees for their efforts to make their communities a better place. Broadcasters have a strong sense of history and tradition of providing Americans with critical news and information at both the local and national level, and they have played a vital role in our communities. Our democracy depends on the free flow and ready availability of information. We all rely heavily on the variety of information that broadcasters provide. And unlike fee-based media, you provide this service to everyone for free. The importance of the role broadcasters play was exemplified by your response on September 11. By foregoing advertisements and scheduled programming to provide Americans with the critical information we all so needed, broadcasters demonstrated what an immeasurable contribution they make to our local communities.

I also commend you for the other, sometimes less obvious, public services you provide. For example, here in Texas some of you started what became the "Amber Plan," the voluntary partnership between law enforcement agencies and the media used to alert the public of serious child abduction cases. This system is an innovative and creative way to use our broadcast networks in the quest to make our communities safer and better places to live. I understand that your use of the Amber Alert Network has saved at least 11 children here in Texas. I can think of no more important public service broadcasters could perform for their communities than to save a child's life.

I saw in the paper that Governor Perry, General Cornyn, and several other state agencies have joined the Texas Broadcasters in announcing a plan to extend the Amber Alert Network to all of Texas. I congratulate the efforts of both you and your state leaders to implement this important program statewide. I hope you will continue to look for additional innovative ways to better serve your communities.

I thought I would take this opportunity today to talk for a few minutes about some of the issues the Commission has been tackling lately that I think might be of interest to you.

I. DIGITAL TELEVISION

As you know, this Commission is committed to the digital television transition. We look forward to a time when consumers across the country will have access to the many benefits digital television will bring: a markedly sharper picture and better sound; an astounding choice of video programming, including niche programs and movies on demand; CD-quality music channels of all genres; interactivity; sophisticated program guides with parental control capabilities; and innovative services, such as using the broadcast spectrum for high speed Internet access.

I firmly believe that among the most important actions the Commission can take to advance the digital transition is to provide regulatory certainty, so that the rules of the road are clear for all affected industries and consumers. To that end, I believe it imperative that the Commission resolve outstanding issues within its jurisdiction in a more timely fashion.

As you probably also know, just a few weeks ago the Commission took two steps in that direction.

A. Digital Tuners

First, the Commission issued an order requiring television manufacturers to include digital tuners in all but the smallest television sets. While I applaud the Chairman's work to conclude this proceeding, I dissented from this order. I would have preferred that the Commission do even more.

The Commission's broadcast digital tuner order requires that every consumer who buys a new television set bear the cost of the tuner, even if that consumer receives broadcast programming through cable or satellite. But, the Commission did nothing to address cable compatibility, which would enable many more consumers to receive all digital signals.

If we had resolved the digital cable and broadcast tuner issues together, we would have created a significantly greater benefit for consumers with relatively little additional cost. As I understand it, manufacturers can integrate digital broadcast and cable reception capabilities. So cable and broadcast tuners could have been added to new televisions for approximately the same price as the broadcast tuner alone. Tackling both the broadcast and cable tuner issues together therefore would have enabled consumers to receive more digital programming at no additional cost to their sets.

B. Broadcast Copy Protection

At the same time we issued the digital tuner requirement, we also released a Notice of Proposed Rulemaking on digital broadcast copy protection.

This is an extremely important issue. Many people believe that digital content will remain limited until copy protection issues are resolved. And if content providers hold back their best content out of fear of mass reproduction on the Internet, consumers will have little incentive to invest in digital televisions.

And so a critical question needs to be resolved: what is the appropriate balance between broadcasters' interest in protecting their content against unauthorized distribution, and consumers' interest in making home recordings?

Several parties recently reached a general agreement with respect to a technology called a "broadcast flag," and they, as well as members of Congress, asked us to initiate a proceeding inquiring whether the FCC has the authority to implement such a solution.

The questions we asked in our Notice are difficult, but I am heartened that we are confronting them now, and I look forward to the help of you and your colleagues as we debate the issues in the coming months.

C. Next Steps

I hope that we will continue to make the difficult decisions regarding the digital transition in order to bring more certainty to the industry. We still have much to do. Two of the issues I believe are critical to the transition, and which I have been calling on the Commission to resolve for some time, are: (1) digital carriage rights, and (2) cable compatibility and interoperability.

1. Digital Carriage Rights

The single most important step to further the digital transition may be resolving the digital carriage issues. How we define broadcasters' must-carry rights in the digital world will have a significant impact on the availability of compelling, innovative digital content.

We at the Commission should quickly conclude the long outstanding rulemaking regarding what "program related" means in the digital world. A broad interpretation would provide broadcasters with an increased incentive to use their digital spectrum to deploy innovative and interactive programming. But regardless of the outcome, merely concluding the proceeding will help the transition by providing certainty to the industry.

In addition, the Commission has before it a petition to reconsider its narrow conclusion regarding what "primary video" means in the digital world. Many broadcasters here argued that the statutory language and legislative history support an interpretation of primary video that allows broadcasters "must carry" rights not just for one programming stream, but for any digital video stream that is provided over-the-air for free—consistent with broadcasters' primary purpose. Indeed, as Jeff and I discussed last night, addressing the cable carriage issues was one of the key recommendations of TAB's broadband task force several years ago.

And speaking of broadcasters' must carry rights, they are as important to satellite subscribers as they are to cable customers. I remain concerned about EchoStar's implementation of the "carry one, carry all" provision of the Satellite Home Viewer Improvement Act ("SHVIA").[1] I believe that EchoStar's practice of placing some, but not all, local broadcasters on a second dish violates the statute as well as our rules. I understand that EchoStar has continued with this practice, albeit with more disclosure to consumers. I do not view increased disclosure as remedying the underlying discrimination, and I continue to be concerned that EchoStar is disregarding SHVIA and our rules.

2. Cable Compatibility

To advance the transition, we must also focus on cable compatibility. To date, broadcasters have had to do the heavy lifting with respect to the transition. But your colleagues in the cable industry are just as critical in getting to the transition goal line.

The cable industry and the equipment manufacturers need to work together to resolve the obstacles currently hindering the manufacturers' ability to build DTV receivers capable of tuning digital cable signals. In short, we need digital cable compatibility and interoperability.

Ultimately, if consumers know that when they buy a digital set, they'll be able to take it home and have the set work with their local cable system, they'll certainly be more likely to pay the set's high price. And of course, the more people that buy these sets, the more quickly that high price will fall.

I understand that recently, the various industries have stepped up their negotiations. I hope a resolution is reached in the near future. If progress is not made soon, I believe Congress or the Commission may be forced to step in, perhaps creating and enforcing technical standards.

II. NEWSPAPER/BROADCAST CROSS OWNERSHIP

I know many of you are frustrated with the DTV requirements and deadlines that the Commission has imposed on you. I support these requirements, but also recognize that if we expect you to meet deadlines, we at the Commission should meet our own deadlines as well. Our history in this area is not so good. The digital carriage and cable compatibility issues I just talked about, for instance, have been outstanding for quite some time.

But a more explicit deadline that concerns me, and one which we repeatedly have failed to meet, is based on the biennial review provision of the Telecommunications Act.

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[1] *See* April 10, 2002 Press Statement of Commissioners Kevin J. Martin and Michael J. Copps *Re: National Association of Broadcasters and Association of Local Television Stations Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers, Declaratory Ruling and Order*, CSR-5865-Z (Media Bureau, April 4, 2002).

That provision instructs the Commission to review its media ownership rules every two years to determine whether they continue to be "necessary in the public interest as the result of competition," and to "repeal or modify any regulation it determines to be no longer in the public interest."[2] We have never completed such action with respect to the newspaper/broadcast cross ownership rule — in fact, we have not concluded a review of that rule since its adoption in 1975.

As early as February of 1996, a majority of the Commission expressed its belief that the newspaper/broadcast cross-ownership rule needed to be reviewed, and possibly revised. In the approval of the Capital Cities/Disney merger Order, the majority concluded that "a full review of these policies is warranted . . . [and] We intend to commence an appropriate proceeding to obtain a fully informed record in this area and to complete that proceeding expeditiously."[3] Then-Chairman Hundt went even further, arguing that, while the Commission could wait until the 1998 biennial review to consider this prohibition:

> there is no reason to wait – especially when there is reason to believe that . . . the newspaper/broadcast cross ownership rule is right now impairing the future prospects of an important source of education and information: the newspaper industry.[4]

Unfortunately, despite this rhetoric, the Commission followed that decision not with a rulemaking, but merely with a Notice of Inquiry into the waiver policy for newspaper/radio combinations. And the Commission has never completed that 1996 proceeding.

Then, in its 1998 biennial report, the Commission again concluded that the newspaper/broadcast cross ownership rule should be modified: "We recognize that there may be situations in which the rule may not be necessary to protect the public interest in diversity and competition."[5] Again the Commission promised to initiate a rulemaking proceeding to begin this process.

For a third time in the 2000 biennial report, the Commission again committed, this time:

> in the near future, [to] issue a notice of proposed rulemaking seeking comment on whether we need to

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[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (196), §202(h).
[3] Capital Cities/ABC, Inc., *Memorandum Opinion & Order*, 11 FCC Rcd 5841, ¶87 (1996).
[4] *Id.* at Separate Statement of Chairman Reed E. Hundt (noting that the Telecommunications Act, which included the biennial review requirement, had been signed into law that morning).
[5] 1998 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MM Docket No. 98-35, *Report*, 15 FCC Rcd 11058, ¶95 (2000).

> modify the daily newspaper/broadcast cross-ownership rule in order to address contemporary market conditions.[6]

Thanks to Chairman Powell's leadership, the current Commission finally complied last September, issuing another Notice. We now have a full record on the extent to which the newspaper/broadcast rule should be retained, modified or eliminated, and we have had almost a year to review the record. Regardless of what the Commission concludes is the appropriate action to take, the affected parties deserve to be spared further delay in knowing that answer. We should act on this proceeding now.

As I explained at NAB last April, I firmly believe that the Commission needs to develop a coherent framework for all of our ownership restrictions. By "coherent," I don't mean our analysis must be identical for every rule, but our approach to each rule must not be considered in a vacuum. If we think a "voice" when looking at local radio ownership should be defined differently than when looking at local radio/television cross ownership, we should have a very good justification. Once we develop that rational framework, we can address existing rules on an individual basis.

I therefore agree with the Chairman's announced intention to ask fundamental questions about all of our media ownership rules, and I commend him for his leadership in this area. I do have some concerns about his plan to fold the reviews of all our rules – including outstanding proceedings such of the newspaper/broadcast cross ownership rule – into a single large proceeding, to be concluded next Spring. I worry this approach might actually take more time to complete. We should not again delay action on this rule by incorporating it – once again – into another notice, seeking comment for a fourth time on the same issues. I therefore believe we should resolve the pending rulemaking on the newspaper-broadcast rule before the end of the year.

Contrary to claims that acting on this one rule would be unfair to other relevant industries, the Commission long ago gave an advantage to other licensees by relaxing their local ownership restrictions. In fact, since 1996, almost every other major broadcast ownership restriction has been relaxed, significantly increasing the number of radio and television licenses one entity could own in a local market … as long as the entity did not also own a newspaper. Indeed, it is the newspaper industry that has been prejudiced by the Commission's failure to act on the 1998 and 2000 Biennial Review Reports' conclusions that this rule should be reviewed and likely modified. Thus, acting on the newspaper/broadcast cross-ownership rule now would not distort the marketplace for these assets, but rather would finally be placing media entities on a level playing field.

Moreover, I do not believe that addressing the newspaper-broadcast rule now would prejudice the outcome of the 2002 Biennial. Broadcast and newspapers would still be considered as "voices" and contributors to the diverse and competitive local media marketplace. To the extent a new framework is pondered, the Commission could still regulate ownership of these entities as appropriate.

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[6] 2000 Biennial Regulatory Review, CC Docket No. 00-175, *Report*, 16 FCC Rcd 1207, ¶32 (2001).

Particularly in light of the Commission's long delay in reviewing this rule, I believe that the year that the newspaper/broadcast NPRM has been pending has given us enough time to determine what to do, and I would prefer to make that decision now.

III. Equal Employment Opportunity

Finally, I would like to take a moment to discuss the Commission's Equal Employment Opportunity rules with you. You are each in a unique position, capable of explaining to us both the challenges and opportunities inherent in crafting rules to promote equal employment opportunity in the broadcast industry. I believe we all share the same goal: designing a broad EEO outreach program that is comprehensive, effective, and constitutional, but does not impose excessive burdens on the broadcast industry.

The *en banc* hearing we held in June was very informative. I commend Ann Arnold for her clear assessment of how much good Texas broadcasters do in advancing equal employment opportunities, as well as a frank description of the extent of the burden the Commission's previous EEO rules and our review process imposed on broadcasters. I understand that the paperwork associated with compliance with our EEO rules has posed a particular challenge to the smaller broadcasters. I welcome your comments on how we can reduce that burden, and minimize the possibility that anyone might try to use the EEO process to take advantage of broadcasters.

I also am cognizant of the Commission's legal history in this area. Twice the courts have struck down this agency's EEO rules as unconstitutional. This time, as we draft new EEO rules, we must make sure that we give proper heed to the courts' instructions. Our rules should prohibit discrimination and may encourage broad outreach, but they must do so in a race and gender-neutral fashion. I therefore welcome your comments on any weaknesses that our proposed rules might have and how we might make our rules less susceptible to constitutional challenge.

I believe it is important to remember that a successful EEO program can be a valuable tool to promote not just diversity, but also true competition. Broad outreach will benefit our society tremendously by enabling the media to take advantage of the rich diversity of our nation. By expanding our recruitment efforts, broadcasters and multi-channel video programming distributors are more likely to find the best-qualified candidate. And when the media has a more talented workforce, we all reap the benefits.

IV. CONCLUSION

So as you can see, we are quite busy up in Washington. A year from now, I hope that I will be able to report to you that the Commission has taken significant steps towards resolving some of these issues we discussed.

Thank you again for inviting me to speak with you this morning. And congratulations again to this morning's service award recipients. Please keep up the good

work and continue looking for additional ways to better serve your communities. Good luck with the rest of your conference; I look forward to hearing from the other speakers. I am happy to take any questions you may have.