STATEMENT
OF
COMMISSIONER ROBERT M. MCDOWELL
FEDERAL COMMUNICATIONS COMMISSION

BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON
COMMUNICATIONS AND TECHNOLOGY

OVERSIGHT
OF THE
FEDERAL COMMUNICATIONS COMMISSION

JULY 10, 2012

Thank you Chairman Walden, Ranking Member Eshoo, and Members of the Subcommittee for inviting us to appear before you today.

The FCC's "to do" list is lengthy. Among the many tasks that face the agency are, in no particular order: implementing the new spectrum auction law; completing universal service contribution or "tax" reform; modernizing our media ownership rules; determining a path forward in the wake of the Supreme Court's recent ruling regarding our indecency policies; and turning back international efforts to regulate the Internet.

First, as the Commission works to implement the new spectrum auctions law, we should do so with simplicity, humility and restraint. History teaches us time and again that over-engineered or micromanaged auctions and spectrum policies inevitably lead to harmful unintended consequences such as interoperability complications, reduced investment and less revenue generated at auction for the Treasury. Band plans and auction rules should be minimal and "future proof" so no innovation is preempted by government action and no market player is excluded from the opportunity to bid.

Second, to help put more spectrum into the hands of American consumers, we need to find new ways to encourage the Executive Branch to relinquish federal spectrum for auction, as well as help create a policy framework to encourage technological advancements and investments in spectral efficiency – that is, how can we squeeze more capacity out of currently available airwaves.

Third, although the Commission has completed most of its work on the spending side of the universal service ledger, we are overdue for an overhaul of the "taxing" side. As this automatic tax increase skyrockets into unprecedented stratospheric heights, we have an obligation to finalize fiscally prudent reform as soon as possible.

Fourth, in 1996, Congress directed the FCC to clear away unnecessary regulations in the media marketplace as competition takes root. Although complicated by several appellate rulings, the Commission owes it to Congress, the courts and, most importantly, the American people to modernize our rules to reflect the competitive realities of the new media age. In my view, the newspaper broadcast cross ownership rule is outdated, is contributing to a loss of voices in the media marketplace and should be largely eliminated.

Fifth, as the father of three young children, protecting them from inappropriate content is a high priority for our family. The Commission should act with all deliberate speed to clarify its indecency policy in the wake of the recent Supreme Court decision on this matter and work to process the roughly 1.5 million indecency complaints, some of which have been pending for 9 years.

Lastly, I would like to thank this Subcommittee once again for raising the profile of the international effort to regulate the Internet. The May 31 hearing was watched literally around the world and delivered a loud and clear message that not only is it the strong bipartisan policy of the United States to ensure that the expansion of intergovernmental powers over the Net never takes place, but that failure to prevent this effort would harm developing nations the most.

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

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FCC Commissioner Robert M. McDowell
Supplemental Statement and Analysis
July 10, 2012

America's future is bright when it comes to putting the power of new communications technologies into the hands of consumers. Our nation has *always* led the world when it comes to wireless innovation, and as I have said for some time, we are in the early days of the Golden Age of mobile broadband. If we adopt the correct policies, we will further strengthen America's global leadership.

The United States has approximately 21 percent of the world's 3G/4G subscribers and approximately 69 percent of the world's LTE subscribers even though the United States is home to less than five percent of the global population.[1] Investment by American wireless providers is higher than that from their international counterparts. For example, in 2011, over $25 billion was invested in United States' wireless infrastructure[2] versus $18.6 billion invested in the 15 largest European economies combined.[3]

The American mobile market also enjoys more competition than most international markets. According to the most recent FCC statistics, nine out of ten American consumers have a choice of at least *five* wireless service providers.[4] In Europe, that number is around three.[5] As a result, American consumers benefit from lower prices and higher mobile usage rates as compared to consumers in the European Union (EU) – 4 cents per minute versus 17 cents generally in the EU.[6] Wireless subscriber usage on average in the United States is often three to seven times as much compared to some countries.[7] At the same time, American consumers pay at least one-third less than consumers in many other parts of the world.[8]

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[1] *See* INFORMA TELECOMS AND MEDIA (WCIS Database) (Dec. 2011).

[2] *See* CTIA-THE WIRELESS ASSOC., CTIA SEMI-ANNUAL WIRELESS INDUSTRY SURVEY (2012), http://www.ctia.org/advocacy/research/index.cfm/AID/10316; *see also* CTIA-THE WIRELESS ASSOC., SEMI-ANNUAL 2011 TOP-LINE SURVEY RESULTS 10 (2012), http://files.ctia.org/pdf/CTIA_Survey_Year_End_2011_Graphics.pdf (providing cumulative capital investment numbers).

[3] *See* BOA/MERRILL LYNCH EUROPEAN TELECOMS MATRIX Q112 (Mar. 30, 2012) (GLOBAL TELECOMS MATRIX Q112) (estimating €14,368 YE 2011. Conversion at $1.2948/1€). The European countries included in the Matrix: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and UK; there are 27 members of the European Union (EU).

[4] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, including Commercial Mobile Services, WT Docket No. 10-133, *Fifteenth Report*, 26 FCC Rcd 9664, 9669 (2011).

[5] *See* GLOBAL TELECOMS MATRIX Q112.

[6] Roger Entner, *The Wireless Industry: The Essential Engine of U.S. Economic Growth*, RECON ANALYTICS, at 1 (May 2012), http://reconanalytics.com/wp-content/uploads/2012/04/Wireless-The-Ubiquitous-Engine-by-Recon-Analytics-1.pdf).

[7] *See* GLOBAL TELECOMS MATRIX Q112 at 71.

[8] *See id*.

Consumers in all demographic and socioeconomic categories are choosing to access the Internet through mobile devices. Having the freedom to be online while on-the-go is fueling a dramatic spike in global Internet traffic. For instance, Cisco recently released the following projections regarding global Internet trends:[9]

- IP traffic per capita will reach 15 gigabites in 2016, up from four gigabites per capita in 2011;[10]
- Last year, only six percent of consumer Internet traffic originated with non-PC devices; by 2016, this number will grow to 19 percent;[11]
- Between 2011 and 2016, mobile traffic will grow by 62 percent;[12] and
- By 2016, 1.2 million minutes of video content will cross the Internet every second.[13] Or, put another way, by 2016, it would take one person over six million years to watch the amount of video that will cross global IP networks each month.

Combining the power of the Internet with the freedom that comes from wireless mobility has created new opportunities that were unimaginable just six years ago when I was first appointed to the FCC. Throughout my tenure, I have worked hard to maintain America's light touch regulatory policy for mobile communications, which has enabled our wireless sector to flourish. Competition, private sector leadership and regulatory liberalization throughout the globe have wrought a wonderful explosion of entrepreneurial brilliance, investment and economic growth.

Against this backdrop, I will discuss the following initiatives that are before the Commission: (1) implementing the new spectrum law; (2) working on ways to free up spectrum held by the federal government; (3) fostering greater spectral efficiency; (4) continuing reforms of the universal service fund; (5) working on FCC process reform; (6) seeking comprehensive and detailed data of the special access marketplace; (7) modernizing media ownership rules; (8) determining how to implement the Supreme Court's recent indecency decision; and (9) discouraging international efforts to regulate the Internet.

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[9] Cisco Visual Networking Index: Forecast and Methodology, 2011-2016 (rel. May 30, 2012) http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-481360.pdf.

[10] *Id*. at 1.

[11] *Id*. at 2.

[12] *Id*. at 10.

[13] *Id*. at 2.

THE FCC SHOULD IMPLEMENT THE NEW SPECTRUM LAW WITH SIMPLICITY, HUMILITY AND RESTRAINT.

As discussed above, Americans are increasingly relying on sophisticated mobile devices. While the popularity and power of mobility have wrought vast consumer benefits, new and advanced wireless services have increasingly strained our spectrum capacity. As you know, Congress passed historic and bipartisan legislation in February that originated in your Committee, which includes a voluntary incentive auction to yield more spectrum from our nation's television broadcasters.[14]

The Commission has started its work on implementing the new law. The spectrum auctions that will ensue will be the most complicated in world history. Given this complex task, I am hopeful that the Commission will undertake its work with an eye toward simplicity, humility and restraint. In the past, regulatory efforts to over-engineer spectrum auctions have caused harmful, unintended consequences. I hope that we will avoid such missteps by implementing the law with regulatory humility. I will work to ensure that the new auction rules be appropriately minimal and "future proof" to allow for uses that we cannot imagine today as technology and consumer preferences evolve. For instance, the auctions should include band plans that offer opportunities for small, medium and large companies to bid for and secure licenses without excluding *any* interested participant.

THE FEDERAL GOVERNMENT SHOULD RELINQUISH MORE SPECTRUM FOR AUCTION.

In addition to making television broadcast spectrum available for new and innovative service offerings, I look forward to continuing to work with you to identify opportunities to move federal government users into new spectrum bands. As our colleagues at the National Telecommunications and Information Administration (NTIA) reported in March, various federal government operations are employing spectrum located within the 1755 – 1850 MHz range that could be made available for commercial uses.[15] As you know, the NTIA report concluded that while it is possible to repurpose all 95 megahertz of the band, various agencies allege it would cost about $18 billion and take over ten years to move current government users off of that spectrum. I thank my friend, Larry Strickling, and his team at NTIA for their thoughtful and comprehensive report.

That said, the underlying message is disappointing primarily because other Executive Branch agencies did not provide NTIA with the granular data and analyses necessary to support many of the report's assumptions and conclusions. The thrust of the report seems to indicate that the Executive Branch will resist relinquishing more

[14] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6402-6404, 126 Stat. 156, 224-230 (2012).

[15] U.S. DEPT. OF COMMERCE, AN ASSESSMENT OF THE VIABILITY OF ACCOMMODATING WIRELESS BROADBAND IN THE 1755-1850 MHZ BAND (Mar. 2012) ("NTIA Report").

spectrum, even though the federal government occupies about 60 percent of the best spectrum. Clarity in the underlying cost assumptions would go a long way to create greater market certainty as we attempt to attempt to satisfy longer-term commercial spectrum needs.

THE GOVERNMENT SHOULD ADOPT POLICIES THAT WILL ALLOW FOR ACCELERATED IMPROVEMENTS IN SPECTRAL EFFICIENCY.

While we think through the complex issues that will arise as we implement the new spectrum legislation, I will continue to call for an increased focus on technologies and strategies to improve spectral efficiency. In practical terms, even if we could easily identify 500 megahertz of quality spectrum to reallocate today, we should expect the better part of a decade to transpire before consumers could enjoy the benefits. As history illustrates, it takes time to write proposed auction rules, formulate band plans, analyze public comment, adopt rules, hold auctions, collect the proceeds, clear the bands, and watch carriers build out and turn on their networks.

A heightened emphasis on and better education in this area will improve the ability of mobile service providers, engineers, application and content developers as well as consumers to take better advantage of the immediate fixes already available in the marketplace. Service providers have a greater urgency to deploy more robust enhanced antenna systems and improve development, testing and roll-out of creative technologies where appropriate, such as cognitive radios and smaller cells. These types of options would augment capacity and coverage, which are especially important for data and multimedia transmissions. I am pleased that the Commission has undertaken educational efforts in this area.

We are also beginning to discuss the concept of "spectrum sharing." Although the term "sharing" has yet to be defined in the context of current deliberations, I have consistently supported FCC efforts to promote some forms of sharing where technically feasible. For instance, I have strongly encouraged the Commission's work to: promote unlicensed use of the "TV white spaces" within the 700 MHz Band,[16] clear the way for use of medical devices in the 400 MHz Band,[17] and promote growth for our nation's information infrastructure in the 5 GHz Band.[18] Consumers will seamlessly enjoy higher

[16] *See, e.g.*, Unlicensed Operation in the TV Broadcast Bands, ET Docket No. 04-186, Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band, ET Docket No. 02-380, *Second Memorandum Opinion and Order*, 25 FCC Rcd 18661 (2010) (using unused and under-used spectrum held by licensed and unlicensed commercial incumbents for the purpose of developing new low power wireless services).

[17] Amendment of Parts 2 and 95 of the Commission's Rules to Provide Additional Spectrum for the Medical Device Radiocommunication Service in the 413-417 MHz Band, ET Docket No. 09-36, *Report and Order*, 26 FCC Rcd 16605 (2011) (sharing spectrum with federal government users for the purpose of developing and employing implantable medical devices that have a wide range of operations, including restoring movement to paralyzed limbs).

[18] *See, e.g.*, Revision of Parts 2 and 15 of the Commission's Rules to Permit Unlicensed National Information Infrastructure (U-NII) devices in the 5 GHz Band, *Memorandum Opinion and Order*, ET Docket No. 03-122, 21 FCC Rcd 7672 (2006) (sharing spectrum with federal government users for the

speeds and expanded coverage once these sharing protocols are introduced into the marketplace. Moreover, the new services stemming from these instances of sharing have the potential to add many billions of dollars to the U.S. economy and to become essential components of the mobile broadband arena. For instance, unlicensed use of white spaces could serve as an "off ramp" for traffic congestion on licensed wireless channels in the same way as Wi-Fi functions today.

Nonetheless, because "spectrum sharing" can have different meanings depending on one's perspective, policymakers should be careful when using the term. Furthermore, spectrum sharing should not be seen as a substitute for auctioning more spectrum, especially federal spectrum. Spectrum sharing is not a panacea. For instance, when referring to the private sector sharing spectrum with federal users, many questions abound, such as: Are federal users given priority of use over private sector users? How would shared use of federal spectrum be determined? Through a unique technological protocol? By time of day? Geographically? On an *ad hoc* basis? Should consumers expect their use of shared federal spectrum to be interrupted with or without notice? What would the value proposition be for various spectrum sharing scenarios?

Before implementing any spectrum sharing initiatives, these questions, and many more, will need to be answered thoroughly.

THE FCC SHOULD PRESS AHEAD WITH UNIVERSAL SERVICE CONTRIBUTION REFORM.

Prior to last fall, the prospects of the Commission reforming the universal service fund (USF) and the intercarrier compensation structure seemed dim. But, after years of fact gathering and analysis, last October, the FCC voted unanimously on a comprehensive reform order which modernized the intercarrier compensation system and the high cost portion of the USF. As a result, we were successful in flattening the spending curve on a federal entitlement by imposing a strict budget on the former high cost fund.

The USF high cost fund has historically supported traditional voice telecommunications services and has not directly subsidized broadband deployment. And, over the years, the program has steadily grown without ensuring efficiency in the system. To put this growth in perspective, the high cost fund grew from $1.69 billion in 1998 to over $4 billion by the end of last year.[19] During that time, multiple providers have received high cost fund support for the same locations. Even worse, the old structure permitted providers to receive subsidies to serve areas that were already served by unsubsidized competitors. In sum, the Commission tackled these issues, among many

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purpose of developing and employing Unlicensed National Information Infrastructure (U-NII), which provides short-range, high-speed wireless connections).

[19] Similarly, the aggregate amount spent on all USF programs grew from $3.66 billion in 1998 to over $8 billion through 2011. Sources: Federal Communications Commission and Universal Service Administrative Company.

others, and transformed the high cost fund into one that will support next-generation communications technologies, while also keeping a lid on spending.[20]

Additionally, this past January, the FCC took initial steps to reform the USF low income program (Lifeline/Linkup) by approving some necessary measures to eliminate waste, fraud and abuse in that program.[21] Pursuant to that Lifeline/Linkup order, the Wireline Competition Bureau has been directed to prepare several progress reports analyzing whether these new reforms are working and whether they are effectively meeting the projected savings. The first bureau report is due soon.

Reforms to the high cost fund and the low income programs are just part of the effort, because only the distribution, or spending, side of the USF equation has been addressed thus far. Just as imperative is the need to fix the contribution methodology, or the "taxing" side of the ledger.

By way of background, the USF contribution factor, a "tax" paid by telephone consumers, has risen each year from approximately 5.5 percent in 1998 to a historic high

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[20] Congress has given the Commission broad authority not only to repurpose subsidies to support advanced services, but it has imposed upon the FCC a *duty* to do so as well by the plain language of section 254. In section 254(b), Congress specified that "[t]he Joint Board and the Commission *shall* base policies for the preservation and advancement of universal service on [certain] principles." 47 U.S.C. § 254(b)(emphasis added). Two of those principles are particularly instructive: First, under section 254(b)(2), Congress sets forth the principle that "[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation." 47 U.S.C. § 254(b)(2). Second, with section 254(b)(3), Congress established the principle that "[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and *information services* . . ." 47 U.S.C. § 254(b)(3) (emphasis added).

Also, section 254(b)(7) instructs the Commission and Joint Board to adopt "other principles" that we "determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with" the Communications Act. In that regard, in 2010 the Federal-State Board on Universal Service recommended to the Commission that we use our authority under section 254(b)(7) to adopt a principle to "specifically find that universal service support should be directed where possible to networks that provide advanced services."

Some contend that the definition of universal service under section 254(c)(1) muddies the water because it does not include "information service." Instead, that provision states that "[u]niversal service is an evolving level of *telecommunications services* . . . taking into account advances in telecommunications and information technologies and services." But, it is also relevant that the term "telecommunications service" is qualified by the adjective "evolving." Even if section 254 were viewed as ambiguous, pursuant to the well established principle of *Chevron* deference, the courts would likely uphold the FCC's interpretation as a reasonable and permissible one. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

As part of this USF order approved last fall, the Commission agreed with the Joint Board recommendation and adopted "support for advanced services" as an additional principle. Moreover, even if any of the statutory language in section 254 appears to be ambiguous, the Commission's reasonable interpretation would receive deference from the courts under *Chevron*.

[21] Funding for the Lifeline/Linkup program has steadily increased over the years. In, 1998, the total support for the program was $464 million, and in 2010, the total support was over $1.3 billion. *See* UNIVERSAL SERVICE MONITORING REPORT, CC Docket No. 98-202, Table 2.2 (2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-311775A1.pdf.

of almost 18 percent in the first quarter of this year.[22] This trend is unsustainable and is therefore unacceptable. Simply put, the vague language on consumers' phone bills coupled with the skyrocketing "tax" rate, has produced a new form of "bill shock." We must tame this wild automatic tax increase as soon as possible.

Ideally, the FCC would have reformed both the spending and taxing sides at the same time. Instead, our effort was staged separately. Nevertheless, I was encouraged by Chairman Genachowski's subsequent launch of a further notice of proposed rulemaking on contribution reform which was approved by the Commission several months ago. I am eager to work with my colleagues and all interested parties to develop a practical and equitable solution to lower the tax rate while broadening the base in a manner that is within the authority granted to us by Congress. Hopefully, the Commission can complete this reform effort this fall.

Similarly, I have had a long-standing interest in the FCC completing its reform of the rural health care program. Of the four USF programs, this is the only program that has yet to be reformed even though the Notice of Proposed Rulemaking has been pending since 2010.

Finally, I must underscore that USF reform is an iterative process. I am committed to constantly monitoring its implementation, listening to concerns, and quickly making adjustments, if necessary, especially if there are legitimate points raised regarding the use of flawed or incomplete data in the implementation stages.

WORKING ON FCC REFORM EFFORTS.

Congratulations regarding the recent House passage of the two FCC reform bills which originated in your Committee. Those bills include many positive and constructive reforms.

Modernizing the Sunshine in Government Act to increase the FCC's efficiency and spirit of collaboration while preserving openness and transparency makes good sense. Also, requiring the Commission to include in its rulemaking process cost benefit analyses to justify new rules will produce a more targeted rulemaking process. I look forward to working with all of you on your continued efforts to streamline and improve FCC procedures.

On a related note, I share with you an interest in ensuring that unnecessary, outdated or harmful rules are repealed. While I have supported the Commission's efforts to eliminate outdated or harmful rules, I think more can be done to ensure that future changes are substantive and meaningful.

[22] *See* Proposed First Quarter 2012 Universal Service Contribution Factor, CC Docket No. 96-45, *Public Notice*, 26 FCC Rcd 16814 (OMD 2011).

SEEKING COMPREHENSIVE DATA IN THE SPECIAL ACCESS MARKETPLACE.

The Commission's special access rules are once again back in the headlines. In particular, the FCC had before it three special access price flexibility petitions which the Commission allowed to be "deemed" granted pursuant to the current FCC rules. In my view, that was the proper outcome. The petitions were filed under existing rules which were adopted during the Clinton Administration. The petitions met the Commission's long-standing criteria for providing regulatory relief and they were granted in accordance with the law and facts.

Also, a special access rulemaking proceeding has been pending before the Commission since 2005. Regarding that proceeding, for several years now, I have repeatedly called upon the FCC to seek detailed and up-to-date special access market data, in part, so any change of the special access rules would withstand appeal. I have maintained that this data must be collected from all players in the special access market, and it needs to be sought on a granular basis to include building-by-building and cell-site-by-cell-site information. The Department of Justice was able to collect and analyze data in such a detailed manner during its reviews of the Verizon-MCI and SBC-AT&T mergers in the last decade.

It is my hope that the Commission will move forward with a mandatory data collection soon so that it will have the adequate information to make responsible and fully-informed decisions as to whether the current special access rules should be changed and, if so, how they should be changed.

OUR MEDIA OWNERSHIP PROCEEDING GIVES US AN OPPORTUNITY TO MODERNIZE OUTDATED RULES.

As is required by Section 202(h) of the Communications Act, I am hopeful that, in the coming months, the FCC will modernize its media ownership rules to reflect the current economic realities of the marketplace and eliminate any and all unnecessary mandates.[23] In particular, there is a growing body of compelling evidence that the 1975

[23] Section 202(h) of the Telecommunications Act of 1996 states that:

> The Commission shall review its rules adopted pursuant to this section and all of its ownership rules quadrennially . . . and shall 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 it determines to be no longer in the public interest.

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 111-12 § 202(h) (1996); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) (amending Section 202(h) of the 1996 Act). In December, I concurred to the majority of the December 2011 notice of proposed rulemaking, because the Commission appears to be prepared to accept a regulatory *status quo*.

newspaper-broadcast cross-ownership ban should be largely repealed.[24]

Over the past decade, broadcast stations and daily newspapers have grappled with falling audience and circulation numbers, diminishing advertising revenues and resulting staff reductions,[25] as online sources gain in popularity.[26] This trend has led many prominent daily newspapers to declare bankruptcy, while others have faced more dire circumstances. In fact, over the past five years, an average of 15 daily papers, or about one percent of the industry, have shuttered their doors *each year*.[27]

Although newspaper circulation numbers continue to decline, the number of unique visitors to newspaper websites has been increasing.[28] In fact, the 25 most popular U.S. news sites – two-thirds of which are operated by traditional news organizations – experienced a 17 percent increase in visitors in 2011.[29] This development has led many dailies to experiment with new business models, such as moving to online-only formats[30]

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[24] Although the Commission has offered up a relaxation of the ban on newspaper-television ownership for the largest markets and considers eliminating restrictions on newspaper-radio combinations, my preliminary view is that these proposals are anemic and do not reflect marketplace realities.

[25] Although some sectors of the news industry have experienced a slight resurgence, newspapers continue to face decline with both advertising and circulation revenues continuing on a downward path. In 2011, network and local news viewership increased for the first time in years; however, local TV station advertising revenues still experienced a decline. *See* PEW RESEARCH CTR'S PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2012, KEY FINDINGS, http://stateofthemedia.org/2012/overview-4/key-findings/ (last visited Mat 14, 2012) ("THE STATE OF THE NEWS MEDIA 2012"); THE STATE OF THE NEWS MEDIA 2012, LOCAL TV, http://stateofthemedia.org/2012/overview-4/key-findings/ (explaining that some of this loss is due to a reduction of political and automotive advertising from 2010 and that these revenues will rebound during a busy election cycle.

[26] In fact, the White House's Council of Economic Advisors has found that newspapers are one of America's fastest-shrinking industries losing approximately 28.4 percent of its workforce between 2007 and 2011. Online publishing job growth, on the other hand, increased by more that 20 percent in the same time period. *See, e.g.*, ECONOMIC REPORT OF THE PRESIDENT TOGETHER WITH THE ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISORS 188 (February 2012) (citing a LinkedIn study), *available at* http://www.whitehouse.gov/sites/default/files/docs/erp_2012_complete.pdf; Matt Rosoff, *Newspapers Are The Fastest Shrinking Industry In The U.S.*, BUSINESS INSIDER (Mar. 8, 2012), http://articles.businessinsider.com/2012-03-08/tech/31135175_1_linkedin-job-growth-newspapers#ixzz1us0z9Urf.

[27] THE STATE OF THE NEWS MEDIA 2012, MAJOR TRENDS, http://stateofthemedia.org/2012/overview-4/major-trends/.

[28] *Newspaper Web Audience*, NEWSPAPER ASSOC. OF AM. (Apr. 25, 2012), http://www.naa.org/Trends-and-Numbers/Newspaper-Websites/Newspaper-Web-Audience.aspx.

[29] THE STATE OF THE NEWS MEDIA 2012, DIGITAL, http://stateofthemedia.org/2012/digital-news-gains-audience-but-loses-more-ground-in-chase-for-revenue/ (based on unique monthly visitors).

[30] Currently, 172 newspapers have launched online subscription plans or placed content behind a paywall. This represents a 15 percent increase since January alone and more papers are expected to follow suit in the coming months. Papers with Digital Subscriber Plans/Paywalls, NEWS & TECH (May 10, 2012), http://www.newsandtech.com/stats/article_22ac1efa-2466-11e1-9c29-0019bb2963f4.html (last visited May 14, 2012); THE STATE OF THE NEWS MEDIA 2012, NEWSPAPERS, http://stateofthemedia.org/2012/newspapers-building-digital-revenues-proves-painfully-slow/ (stating that roughly 150 newspapers have instituted a "metered model").

or partnering with online distributors.[31] The most recent example being the announcement that, in a cost-cutting effort, the 175-year-old daily New Orleans *Times-Picayune* – which won a Pulitzer Prize for its coverage of Hurricane Katrina's aftermath – would print only three times per week starting this fall in order to focus on online news.[32]

Regardless of any rule changes we may implement, it is clear that traditional media owners are choosing to invest in new, *unregulated* digital outlets rather than acquire more heavily-regulated traditional media assets. These business decisions, along with newspaper bankruptcies and closures, is probably a response, in part, to the challenging economic climate, but also may be a consequence of the FCC's failure to modernize our rules to adequately reflect the emergence of competition from new media, such as online and mobile platforms. We must ensure that the heavy hand of government regulation does not distort the marketplace or limit the options of broadcasters and the newspaper community to attract investment, increase efficiencies, and share the costs of news production.

Furthermore, evidence before the Commission demonstrates that in-market combinations do not negatively affect viewpoint diversity[33] and may actually increase the quantity and quality of local news and information provided by commonly-owned outlets to benefit the American consumer.[34] Additionally, an analysis of the success rate of newspaper-television cross-ownership operations demonstrates that many have not survived, disproving the hypothesis that these arrangements confer extraordinary

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[31] THE STATE OF THE NEWS MEDIA 2012, OVERVIEW, http://stateofthemedia.org/2012/overview-4/ (stating that Reuters is producing original news shows for YouTube; Facebook has entered into partnerships with *The Washington Post*, *The Wall Street Journal* and *The Guardian*; and Yahoo! paired with ABC News to be its sole provider of news video).

[32] *See, e.g.* David Carr, *Times-Picayune Confirms Staff Cuts and 3-Day-A-Week Print Schedule*, N.Y. TIMES (May 24, 2012), http://mediadecoder.blogs.nytimes.com/2012/05/24/new-orleans-times-picayune-to-cut-staff-and-cease-daily-newspape/; Keach Hagey, *Times-Picayune No Longer a Daily*, WALL ST. J. (May 24, 2012), http://online.wsj.com/article/SB10001424052702304840904577424352986964904.html.

[33] *See, e.g.*, Newspaper Association of America, Comments, MB Docket No. 09-182, at 18-20 (Mar. 5, 2012) ("NAA Comments"); Adam D. Renhoff and Kenneth C. Wilbur, Local Media Ownership and Viewpoint Diversity in Local Television News, at 3, 15 (June 12, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-308596A1.pdf ("[T]hese findings show that under the proposed definition of viewpoint diversity, variation in television station co-ownership and cross-ownership is generally found to [have] negligible effects on viewpoint diversity. However, it is important to note that the data are limited to the degree of media co-ownership and cross-ownership currently allowed under FCC rules.").

[34] *See, e.g.*, 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 09-182, *Notice of Proposed Rulemaking*, 26 FCC Rcd 17489, 17519 ¶ 85, n.185 (2011); NAA Comments at 15-18; Diversity and Competition Supporters, Initial Comments, MB Docket No. 09-182, at 40-43 (Mar. 5, 2012); Adam D. Renhoff and Kenneth C. Wilbur, Local Media Ownership and Media Quality, at 3, 15 (June 12, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-308504A1.pdf; Jack Erb, Local Information Programming and the Structure of Television Markets, at 4, 27-28, 40-41 (May 20, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-308508A1.pdf.

influence, market power and/or profits.[35] These relationships, however, may allow some television stations and newspapers the ability to stay in business. For these reasons, and many others, it appears that the newspaper-broadcast cross-ownership rule is out of date, counter-productive, and not in the public interest.

WE MUST DETERMINE HOW TO IMPLEMENT THE SUPREME COURT'S DECISION REGARDING THE COMMISSION'S INDECENCY RULES IN *FCC V. FOX TELEVISION STATIONS, INC.*

As the father of three young children, protecting them from indecent content is an important priority for our family. As a matter of public policy, Congress has made it clear that keeping the broadcast airwaves free from material that may be inappropriate for children during the hours when they are likely to be watching[36] is a high priority for the directly elected representatives of the American people as well.

The FCC's indecency policy has been the subject of appellate litigation over the decades. Two weeks ago, the Supreme Court held that the Commission failed to provide fair notice regarding the application of its indecency standards to fleeting expletives and momentary nudity.[37] Now that the Court has ruled, the FCC must expeditiously implement the decision. Although the Court's decision did not affect the Commission's authority to regulate indecency and assist parents in shielding their children from inappropriate programming, this decision raises many questions that the Commission will have to answer in the upcoming months.

Generally, how do we ensure that there is sufficient notice of the Commission's indecency policies? Justice Kennedy, in delivering the Opinion for the Court, stated that "regulated parties should know what is required of them so that they may act accordingly [and] precision and guidance are necessary so that those enforcing the law do not act in

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[35] John S. Sanders, *Kill Newspaper-TV Crossownership Rule, Now*, TVNEWSCHECK (June 26, 2012), http://www.tvnewscheck.com/article/60424/kill-newspapertv-crossownership-rule-now.

[36] 18 U.S.C. § 1464 ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."). *See, e.g.*, Public Telecommunications Act of 1992, § 16(a), 106 Stat. 949, 954 (prohibiting indecent programming between certain hours); 47 U.S.C. 503(b)(2)(C) (setting forth the forfeiture amounts for obscene, indecent, and profane broadcasts); Broadcast Decency Enforcement Act, Pub. L. No. 109-235, 120 Stat. 491 (2006) (increasing the maximum forfeiture penalties for obscene, indecent, and profane broadcasts). *See also* 47 C.F.R. § 73.3999 (implementing 18 U.S.C. § 1464 and the Public Telecommunications Act of 1992); Section 1.80(b)(1) of the Commission's rules, Increase of Forfeiture Maxima for Obscene, Indecent, and Profane Broadcasts to Implement the Broadcast Decency Enforcement Act of 2005, EB-06-IH-2271, 22 FCC Rcd 10418 (2007) (implementing the Broadcast Decency Enforcement Act).

[37] FCC v. Fox Television Stations, Inc., No. 10-1293, slip op. (U.S. June 21, 2012). The Court also denied certiorari in *FCC v. CBS Corporation*, No. 11-1240, slip op. (U.S. June 29, 2012), bringing an end to the litigation over the momentary exposure of Janet Jackson's breast. In vacating the Commission's order, the Third Circuit held that the Commission's decision was arbitrary and capricious, because the agency departed from its policy of excusing the broadcast of fleeting moments of indecency. CBS Corp. v. FCC, 663 F.3d 122 (3rd Cir. 2011).

an arbitrary or discriminatory way."[38] He stressed that, "[w]hen speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."[39] Does the Commission need to take action to provide fair notice of our indecency standards? Or, do the decisions in the *Golden Globes* order and others provide sufficient notice going forward?[40] How do we ensure that Commission decisions in this area do not have the unintended consequence of chilling speech?

Further, the Court did not address the constitutionality of our indecency standard and left "the Commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements."[41] It noted that its opinion "leaves the courts free to review the current policy or any modified policy in light of its content and application."[42] We must ask ourselves: Should we generally revisit and update our indecency standard? What should our indecency policy be for fleeting expletives and brief nudity going forward? Would our current standard survive scrutiny under the First Amendment? Additionally, we should ask: What is the most efficient means to resolve pending complaints and renewals – both those that are currently pending and those to be filed in the future? If we fail to review our indecency standards and improve our complaint and renewal procedures, will the Commission face yet another backlog of matters in the future?

These will not be easy questions to answer. In the interest of good government, however, it is time to tackle these complicated issues. We owe it to American families and the broadcast licensees involved to carry out our statutory duties with all deliberate speed by acting on roughly 1.5 million indecency complaints involving about 9,700 broadcasts and approximately 700 station renewals that have been pending in light of this litigation.[43] I look forward to working with my colleagues to ensure that our indecency standards are clear, that broadcasters have the requisite notice and that Americans, especially parents such as myself, are secure in their knowledge of what content is allowed to be broadcast.

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[38] *Id.* at 12 (citing Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972)).

[39] *Id. See also id*. at 13 ("The Commission's lack of notice to Fox and ABC that its interpretation had changed so the fleeting moments of indecency contained in their broadcasts were a violation of §1464 as interpreted and enforced by the agency 'fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited.' This would be true with respect to a regulatory change this abrupt on any subject, but it is surely the case when applied to the regulations in question, regulations that touch upon 'sensitive areas of basic First Amendment freedoms.'" (citations omitted)).

[40] Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, File No. EB-03-IH-0110, *Memorandum Opinion and Order*, 19 FCC Rcd. 4975 (2004) (finding that certain fleeting expletives are actionable under the Commission's indecency policy). *See, e.g.*, Young Broadcasting of San Francisco, Inc., File No. EB-02-IH-0786, *Notice of Apparent Liability for Forfeiture*, 19 FCC Rcd. 1751 (2004) (finding that the licensee was apparently liable for a monetary forfeiture for broadcasting momentary nudity).

[41] *Fox Television Stations*, No. 10-1293, slip op., at 18.

[42] *Id.*

[43] These estimates include both television and radio matters. Some of the pending station renewals may also be the subject to other enforcement proceedings before the Commission.

WE MUST REMAIN UNIFIED IN OUR OPPOSITION TO UN/ITU REGULATION OF THE INTERNET.

Finally, all of us must stay engaged with respect to the well-organized international effort to secure intergovernmental control of Internet governance. During my appearance before your subcommittee on May 31, we discussed our mutual concern regarding the action by some countries to arm the International Telecommunication Union (ITU) with regulatory jurisdiction over all or part of the Internet ecosystem. Even if new Internet regulations are not enacted at the upcoming World Conference on International Telecommunications (WCIT) meeting in December, increased intergovernmental Internet regulations will no doubt be on the agenda for international conferences and discussions throughout 2013 and beyond. Given the high profile, energetic and persistent efforts by some countries, this issue will not go away. Similarly, I urge skepticism for the "minor tweak" or "light touch." As we all know, regulation only seems to grow. We must remain vigilant for years to come. Your hearing was timely and I am grateful for Congress's helpful efforts.

CONCLUSION

It is an honor to serve as a commissioner of the FCC, and it has been a privilege to work with the Members of this Committee on our nation's communications issues. I look forward to answering your questions.