

**STATEMENT
OF
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HUDSON INSTITUTE
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“IMPROVING FCC PROCESS”

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

JULY 11, 2013

Thank you, Chairman Walden and Ranking Member Eshoo, for inviting me to join you today. It is an honor to be before your Committee again. This is my first time back since leaving the Federal Communications Commission as a commissioner almost two months ago.

Currently, I serve as a Visiting Fellow at the Hudson Institute's Center for Economics of the Internet. The Hudson Institute is a nonprofit, nonpartisan policy research organization dedicated to innovative research and analysis that promotes global security, prosperity, and freedom. Having said that, the opinions I will put forth today are purely my own.

As a brief aside, however, I'd like to thank this committee for its outstanding bipartisan leadership on federal spectrum matters. By all accounts, your June 27 hearing was a terrific success. By some estimates, the federal government occupies about 80 percent of some of the most useful spectrum. Understanding more about how efficiently that spectrum is used by the government, and undertaking a thorough analysis of alternative bands and transfer costs, will help shape better policymaking and, I hope, lead to the freeing up of substantial amounts of federal spectrum to auction for exclusive use licenses.

As a commissioner, serving for nearly seven years both in the majority and the minority, I wrote, spoke and testified frequently on some of the advantages and disadvantages of the FCC's procedures. FCC process reform is not necessarily the most glamorous of topics, but it is an important one and I commend this subcommittee for its ongoing work in this area. The FCC, after all, regulates about one-sixth of the American economy and indirectly affects the rest. Just as important, the Commission also serves as a regulatory template for countries across the globe. The ways in which the FCC considers proposed regulation, and goes about shaping their substance, has a direct effect on the U.S. economy and, ultimately, consumers.

In short, to paraphrase Chairman Emeritus Dingell, those who control the process also control the outcome. It is prudent for Congress to cast a bipartisan oversight eye on the processes of all administrative agencies. Chairman Walden and other Members should be commended for sparking this conversation with the legislation from the last Congress as well as this year's discussion drafts. It has been said that the crafting of constructive legislation is a lot like making sausage, so it is important for us to start grinding away now and debate credible ideas from all perspectives.

Before going further, however, I would be remiss if I did not mention the need for a fundamental rewrite of our nation's laws regulating the information, communications and technology sector. Such a comprehensive rewrite has not occurred since 1996, and even that left in place legacy "stovepipes" that regulate technologies rather than market conditions. Today, consumers don't know - or really care - if their data is transmitted over coaxial cable, fiber optics, copper or wireless platforms. In fact, most data travels through a multitude of hybrid networks before reaching the intended end-user. Instead of directly focusing on whether the marketplace is experiencing a concentration of market power, abuse of that power and resulting consumer harm, today's regulations draw their authority instead from the nearly eighty-year-old Communications Act of 1934. And that Act is based on 19th Century-style monopoly regulation, which rests on an even older foundation. Therefore, having different regulations based on the type of technology used and their history rather than on current market conditions is likely distorting investment decisions. For the sake of improving America's global competitiveness, I respectfully urge Congress to move ahead as soon as possible with a comprehensive rewrite of our communications laws with the aim of promoting investment and innovation while protecting consumers.

Putting some of this into tangible terms, in 1961, when consumers had a choice of one phone company and three broadcast television networks, the FCC's portion of the Code of Federal Regulations filled 463 pages. In 2010, the FCC's rules filled 3,695 pages despite the bipartisan deregulatory mandates of Congress as codified in the Telecommunications Act of 1996. Today, the Commission's rules fill 3,868 pages despite President Obama's call in 2011 to pare back unnecessary rules.¹ In short, in a marketplace that is undeniably more competitive than it was in 1961, the FCC's regulations grew by approximately 800 percent as measured in the number of pages – with nearly a five percent increase just since 2010. In contrast, the American economy has grown by a much smaller number since 1961, approximately 370 percent.²

Some of these rules are necessary, but are *all* of them? Shouldn't the Commission have the authority to weed out all outdated rules the way it can - and must - for rules affecting telecommunications services under Title II as mandated by Sections 10 and 11?³ Forbearance authority should apply to *all* platforms and industries, not just traditional telecom services. (For easier reference, I have attached my July 7, 2011, testimony before this Subcommittee's sister Subcommittee, Oversight and Investigations. *See* Exhibit A.) In the absence of a comprehensive rewrite, granting to the Commission expanded statutory authority to clear out unnecessary

¹ Exec. Order No. 13,563, 76 Fed. Reg. 3821 (2011).

² The growth rate was calculated based on historical figures reported by the Commerce Department's Bureau of Economic Analysis. *See generally* Bureau of Economic Analysis, U.S. Dep't of Commerce, "National Economic Accounts," <http://www.bea.gov/national/index.htm#gdp>; *see also id.*, "Current and Real Gross Domestic Product," <http://www.bea.gov/national/xls/gdplev.xls>.

³ Section 202(h), adopted by a large bipartisan majority of Congress in the context of the Telecommunications Act of 1996, also compels the FCC to deregulate the traditional media sector in the face of increased competition. *See* 47 U.S.C. § 336. Under this Section, the Commission is obligated to review its media ownership rules every four years and trim back unnecessary or counterproductive rules as warranted by market conditions. Thus far, the FCC is almost four years behind schedule in the course of the most recent media ownership review.

regulatory underbrush, after appropriate public notice and comment, could help make our country's tech economy more robust and competitive.

Along those lines, as my fellow witness Randy May has advocated for quite some time, requiring the Commission to justify new rules with *bona fide* cost-benefit and peer-reviewed market analyses would help better inform policy makers and restrain them from issuing unnecessary rules. Exercising discretion and regulatory humility while being patient with markets can create a better experience for consumers. Regulators should be wary of issuing *ex ante* regulations in the absence of evidence of market failure. The law of unintended consequences sometimes works more quickly and forcefully than communications laws, no matter how noble their intentions.

Similarly, new rules should sunset after a definitive period and their renewal should be justified from scratch in new proceedings with public notice and comment. The continuation of old rules may be absolutely necessary, but let's test that premise every few years.

Furthermore, should transaction approvals be weighed down with costly and unnecessary conditions that have nothing to do with the attendant transaction? You may wish to consider a statutory requirement that the public interest requires the Commission to justify every transaction condition first and then tailor any condition narrowly. Put another way, the Commission may set a condition to cure a harm only after a meaningful economic analysis demonstrates that the merger will cause harm to consumers. Conditions impose costs on transactions that are ultimately borne by consumers. Keeping conditions streamlined to address merger specific problems would reduce costs to consumers and help spur market activity.

If I haven't said anything you can agree with yet, here is a guaranteed bipartisan applause line: please modernize the Sunshine Act so more than two commissioners can meet at a time to

discuss substance. Safeguarding the administrative law cornerstones of transparency and openness can live alongside the need to act efficiently.

While I may not be able to address every possible constructive idea, I take this opportunity to mention a few more:

Eliminate and consolidate FCC reports. I suggested some time ago that Congress consider eliminating and consolidating the myriad annual reports it has required over the years. I appreciate Congressman Scalise's efforts in this regard and I acknowledge his pending bill. I can tell you first hand that the agency spends a great deal of time and utilizes a large amount of resources gathering and analyzing information for these reports. This is especially true for the Wireless Competition Report, the Video Competition Report, and the International Broadband Data Report, to name a few. Moreover, some reports are no longer relevant and contain mere boilerplate. The Orbit Act Report, mandated in 2000 when INMARSAT and Intelsat were privatized, immediately comes to mind. Consolidating those reports that remain relevant with an eye toward removing platform-specificity would reduce reporting burdens and improve congressional oversight capabilities. Likewise, eliminating outdated reports would free up the Commission's staff to focus on those obligations that are relevant and time sensitive.

Review and reform the assessment of regulatory fees. I respectfully encourage you to consider reforming the manner in which the FCC assesses and collects the fees that fund the agency's activities. The regulatory fees process has not been overhauled since the late 1990s, yet this is an area that imposes a high burden on the agency staff, as well as causes much consternation among regulated parties. By way of brief background, I reviewed with interest last year's Government Accountability Office (GAO) report on the FCC's regulatory fee process.⁴

⁴ Federal Communications Commission: Regulatory Fee Process Needs to be Updated, GAO 12-686 (rel. Aug. 10, 2012).

According to the GAO, the FCC assesses regulatory fees among industry sectors and fee categories “based on obsolete data, with limited transparency.” While the Act required the Commission to base its regulatory fees on the number of Full Time Equivalents (FTEs), in other words the number of full-time staff that perform regulatory tasks in certain bureaus, the FCC has not updated the FTE analysis on which it bases its regulatory fees since 1998. As a result, the GAO concluded that, “after 13 years in a rapidly changing industry, the FCC has not validated the extent to which its fees correlate to its workload.” Moreover, on average over the past 10 years, the Commission “collected two percent more in regulatory fees than it was required to collect.”

The GAO makes some common-sense recommendations and I encourage you to consider them as you move forward. First, Congress ought to consider whether excess fees should be appropriated for the Commission’s use or another use. Second, Congress should ask the Commission to update immediately its FTE analysis and require at least biennial updates going forward. In addition, the number of FTEs should be easily found on the agency’s website both prior to and after this update is complete. Finally, in determining whether and how to revise its current fee schedule, the Commission should consider the approaches in place at other fee-funded regulatory agencies.

I respectfully offer two additional suggestions. First, consistent with their status as “information services,” that the Commission refrain from assessing regulatory fees on broadband services. Second, that, for the purposes of regulatory fees, the Commission’s FTE counts not include employees in areas other than the FCC’s core bureaus and offices.

Conclusion. I applaud your work in the important area of FCC process reform.

Experience has taught me that decreasing onerous or unnecessary regulations increases investment, spurs innovation, accelerates competition, lowers prices, creates jobs and benefits consumers. I look forward to working with all of you and thank you again for the opportunity to appear before you today.

Exhibit A

Testimony of FCC Commissioner Robert M. McDowell before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, United States House of Representatives (July 7, 2011).

**STATEMENT
OF
COMMISSIONER ROBERT M. McDOWELL
FEDERAL COMMUNICATIONS COMMISSION**

“THE VIEWS OF THE INDEPENDENT AGENCIES ON REGULATORY REFORM”

**BEFORE THE
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
COMMITTEE ON ENERGY & COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES**

JULY 7, 2011

Thank you, Chairman Stearns and Ranking Member DeGette, for inviting me to join you today. As a commissioner, serving both in the majority and now the minority, I have supported policies that promote consumer choice offered through abundance and competition in lieu of regulation whenever possible. I therefore welcome today's dialogue on regulatory reform.

Removing unnecessary or harmful rules is by no means a partisan concept. As many of you have noted, on January 18 of this year, President Obama issued an executive order directing agencies to review existing regulations to determine whether they are "outmoded, ineffective, insufficient, or excessively burdensome."¹ Additionally, Cass Sunstein, the Administrator of the Office of Information and Regulatory Affairs, sent a memorandum to agency heads regarding the executive order in which he noted that it "does not apply to independent agencies, but such agencies are encouraged to give consideration to all of its provisions, consistent with their legal authority."² Sunstein further wrote that, "[i]n particular, such agencies are encouraged to consider undertaking, on a voluntary basis, retrospective analysis of existing rules."³ Moreover, Chairman Genachowski recently indicated that he would follow the spirit of this executive order and review outmoded FCC regulations. I look forward to working with him on this important endeavor.

Two months ago our office compiled some compelling Code of Federal Regulations ("CFR") statistics which now turn out to be relevant to today's hearing. We discovered that over 50 years ago, there were only 463 pages in the FCC's portion of the Code of Federal Regulations ("CFR"). During this period, Americans only had a choice of three TV networks and one phone company. Today, over-the-air TV, cable TV, satellite TV and radio, and the millions of content

¹ Exec. Order No. 13,563, 76 Fed. Reg. 3821 (2011).

² Cass R. Sunstein, *Memorandum Regarding Executive Order 13563, "Improving Regulation and Regulatory Review,"* Feb. 2, 2011.

³ *Id.* at 6.

suppliers on the Internet are overwhelming consumers with choices. In other words, the American communications economy was far less competitive in 1961 than it is today, yet it operated under fewer rules.

In contrast, by late 1995, right before the Telecommunications Act of 1996 became law, the FCC's portion of the CFR had grown to 2,933 pages – up from 463 pages 34 years earlier. In fact, the 1996 Telecom Act states that the FCC should “promote competition and reduce regulation.”⁴ Just the opposite occurred, however. As of the most recent printing of the CFR last October, it contained a mind-numbing 3,695 pages of rules. So, even after a landmark *deregulatory* act of Congress, the FCC *added* hundreds more pages of government mandates.

To put it another way, the FCC's rules, measured in pages, have grown by almost 800 percent over the course of 50 years, all while the communications marketplace has enjoyed more competition. During this same period of regulatory growth, America's GDP grew by a substantially smaller number: 357 percent.⁵ In short, this is one metric illustrating government growth outpacing economic growth.

To be fair, some of those rules were written due to various congressional mandates. And sometimes the FCC does remove rules on its own accord or forbear from applying various rules in response to forbearance petitions. But all in all, the FCC's regulatory reach has grown despite congressional attempts to reverse that trend.

⁴ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (“1996 Telecom Act”).

⁵ The growth rate was calculated based on historical figures reported by the Commerce Department's Bureau of Economic Analysis. *See generally* Bureau of Economic Analysis, U.S. Dep't of Commerce, “National Economic Accounts,” <http://www.bea.gov/national/index.htm#gdp>; *see also id.*, “Current and Real Gross Domestic Product,” <http://www.bea.gov/national/xls/gdplev.xls>.

My testimony will focus on four points:

- (1) The FCC's authority;
- (2) Examples of ongoing proceedings that propose streamlining various regulations;
- (3) Examples of regulations that are ripe for repeal; and
- (4) Where we should go from here.

THE FCC HAS AMPLE AUTHORITY FROM CONGRESS TO DEREGULATE.

The 1996 Telecom Act passed both houses of a Republican Congress with a large bipartisan vote and was signed into law by a Democratic president. Congress envisioned allowing potential rivals, such as cable and phone companies and new entrants, to compete against each other. Added competition, lawmakers thought, would obviate the need for more rules. The plain language of the statute, plus its legislative history, tell us that as competition grows, deregulation in this economic sector should take place. The legislative intent of key parts of the legislation, such as Sections 10, 11, 202(h) and 706 – just to name a few – was to *reduce* the amount of regulation in telecommunications, broadcasting and information services. Unfortunately, over time, it does not appear that a net reduction of regulation has been the end result.

Congress has already provided the Commission with the legal tools it needs to reverse the pro-regulation trend of the past 50 years. Congress ordered the FCC through Section 10 of the 1996 Telecom Act to “forbear” from applying a regulation or statutory provision that is not needed to ensure that telecom carriers’ market behavior is reasonable and “not necessary for the protection of consumers.”⁶ Similarly, Section 11 requires the FCC to conduct reviews of

⁶ 47 U.S.C. §160(a)(2); see Harold Furchtgott-Roth, *FCC ignores law while blindly increasing its regulations*, THE WASHINGTON EXAMINER, (May 1, 2011), <http://washingtonexaminer.com/opinion/op-eds/2011/05/fcc-ignores-law-while-blindly-increasing-its-regulations#ixzz1RFsckE4k>; see also Randolph J. May, *Rolling Back Regulation at the FCC*, NATIONAL REVIEW ONLINE, (Apr. 11, 2011), <http://www.nationalreview.com/articles/print/264898>.

telecom rules every two years to determine “whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition,”⁷ and to “repeal or modify any regulation it determines to be no longer necessary in the public interest.”⁸ Removing unneeded rules can liberate capital currently spent on lawyers and filing fees – capital that would be better spent on powerful innovations. Accordingly, it is my hope that the FCC stays faithful to Congress’s intent, as embodied in Section 11, by promptly initiating a full and thorough review of *every* FCC rule, not just those that apply to telecom companies, but all rules that apply to any entity regulated by the Commission. The presumption of the FCC’s review should be that a rule is not necessary unless we find compelling evidence to the contrary.

RECENT FCC PROCEEDINGS PROPOSE SOME REGULATORY STREAMLINING.

Chairman Genachowski has already initiated some proceedings in the past couple years that will help clear away some of the regulatory underbrush, and he should be commended for those efforts. For instance, in May, the Commission adopted a Notice of Proposed Rulemaking (NPRM) that proposed to eliminate certain reporting requirements for international telephone service. Also, in January of 2010, the FCC issued an NPRM that proposes to streamline the application process for satellite and earth stations. In addition, the agency issued an NPRM this past February which seeks comment on ways the FCC can reform and modernize its Form 477 data collection processes. I look forward to continuing to work with my colleagues on these pending proceedings.

MANY MORE FCC RULES SHOULD BE REPEALED.

Much more work remains to be done. The first set of rules I would discard would be the recently issued Internet network management regulatory regime, also known as “net neutrality.”

⁷ 47 U.S.C. §161(a)(2).

⁸ 47 U.S.C. §161(b).

As I have stated several times, those rules are unnecessary at best, and will deter investment in badly needed next-generation infrastructure at worst. There has been no evidence of systemic market failure that justifies these overly burdensome regulations. Moreover, language in the net neutrality order itself concedes that the Commission did not conduct a market power analysis or make a market power finding.⁹ Notably, even though the FCC adopted the net neutrality rules last December, they have yet to become effective. In the interim, America's Internet remains open and freedom-enhancing, as it *always* has been. Now, before the new rules go into effect and cause uncertainty and unintended consequences in the marketplace, is the perfect time to repeal them.

While perhaps not as controversial as net neutrality, there are many other unnecessary rules still on the books. For instance, a good number of phone companies are still required to read aloud to new customers a list of independent long-distance companies. This so-called "equal access" scripting requirement is a dusty old vestige from the break-up of the AT&T long-distance monopoly. Ma Bell's long-distance arm was declared "non-dominant" way back in 1995. In other words, the long distance market has been competitive for almost 16 years, yet our antiquated rules live on. Ironically, these rules no longer apply to the Baby Bells or their successors. It is *smaller* phone companies that must bear the burden of living under them. Such costs – be they regulations or taxes on companies – are always paid for, ultimately, by consumers.

Furthermore, the FCC has too many forms. As I mentioned, the Chairman has launched an initiative which seeks to reform the FCC's data collection processes. I support these efforts and hope that this exercise results in comprehensive reform of the FCC's burdensome data

⁹ *Preserving the Open Internet, Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, n. 49 (2010) ("Open Internet Order").

collection procedures as opposed to simply shaving them around the edges. To give you an example of the current processes, there is Form 603; Form 611-T; Form 175; Form 601; Form 492; Form 477; Form 323; and Forms 396, 396-C, 397 and 398, among others. While a few forms may be necessary, many could be eliminated or simplified. Several forms require companies to submit data that is no longer needed or is supplied elsewhere. Take, for example, my “favorite” form, the Enhanced Disclosure form. Back in late 2007, over my dissent, the Commission voted to require TV licensees to fill out a form describing to the government what kind of programming they were airing to the public and when they were airing it. Broadcasters estimated that it would cost them up to two full-time jobs to hire people to do nothing all day but fill out the form and send it to Washington bureaucrats. Also, unless I’m missing something, TV stations don’t aim to keep their work product a secret from anyone. If the government wants to know what is being aired, it can turn on the TV.

There is some good news on this front, however. First, the Office of Management and Budget under both Presidents Bush and Obama have prevented the Enhanced Disclosure form from going into effect because of concerns that the mandate violates Paperwork Reduction Act prohibitions. Second, a recent FCC staff report analyzing the “Information Needs of Communities”¹⁰ recommends that the Commission scrap the form – a recommendation I heartily endorse – and replace it with a more streamlined online disclosure system. I am skeptical of any potential replacement because of the risk that it might simply resurrect the Enhanced Disclosure form’s pointless and burdensome mandates in a new electronic guise. Nevertheless, I hope the FCC moves forward on a rulemaking effort to eliminate the form quickly.

¹⁰ Steve Waldman and the FCC Working Group, *The Information Needs of Communities: The changing media landscape in a broadband age* (June 2011).

Similar repeal initiatives should be on our plates soon. For example, as I noted in a speech in May, the Fairness Doctrine is literally still codified in the CFR.^{11 12} The Fairness Doctrine was a rule that thrust the government’s coercive reach into editorial decisions of broadcasters. In short, the Doctrine regulated political speech. Political speech is core protected speech under the First Amendment, and the Fairness Doctrine is patently unconstitutional. In fact, the FCC decided as much in 1987, when everyone assumed the agency had killed it. Instead, it appears that the Commission merely opted not to enforce the rule. To his credit, Chairman Genachowski recently informed your committee that he supports removing references to the Fairness Doctrine (and its corollaries) from the CFR and intends to move forward on this effort in August. I look forward to helping him fulfill that promise.

Similarly, it is time to eliminate the outdated newspaper/broadcast cross-ownership rule in our upcoming quadrennial review of our media ownership regulations. Evidence suggests that the old cross-ownership ban may have caused the unintended effect of reducing the number of media voices – especially newspapers – in scores of American communities. The FCC staff’s *Information Needs of Communities* report is replete with data documenting the declining state of American newspapers, including the fact that more than 230 papers have closed their doors since 2007.¹³ Although it is impossible to attribute the deaths of all those papers to the FCC restriction, I note that many knowledgeable observers for years have attributed the hobbling and

¹¹ 47 C.F.R. § 73.1910 (“broadcasting”); 47 C.F.R. § 76.209 (“origination cablecasting”). See also 47 C.F.R. §§ 76.1612-13 (Fairness Doctrine corollaries applied to origination cablecasting).

¹² Attached as Exhibit A for the Subcommittee’s convenience are copies of the speech on regulatory reform that I gave on May 19 to the Telecommunications Industry Association as well as letters I sent to Acting Chairman Copps and Chairman Genachowski in 2009 on FCC reform in general.

¹³ Steve Waldman and the FCC Working Group, *The Information Needs of Communities: The changing media landscape in a broadband age* (June 2011) at 41, http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0609/DOC-307406A1.pdf (providing list of developments concerning shuttered papers between 2007 and 2010). Another 18 newspapers moved to online-only editions. *Id.*

eventual disappearance of the old *Washington Star*, once the city's premier daily, to the cross-ownership ban which forced the paper to separate from its radio and TV operations.¹⁴ But how many modern-day *Washington Stars* could have survived the Internet's effect on traditional business models if they already had been part of a stronger, multi-platform news operation?

WHERE THE FCC SHOULD GO FROM HERE.

Although I have appreciated the FCC's review of various rules on an ad hoc basis, a more constructive approach would be to initiate a *comprehensive and sustained* effort to repeal or, where appropriate, streamline unnecessary, outdated or harmful FCC rules. The FCC should review every rule and should adopt the presumption that a rule is not necessary unless it finds compelling evidence to the contrary. A large-scale and aggressive review would signal to investors that the Commission takes seriously Congress's and the President's calls to deregulate.

In addition to a review of current regulations, the agency should approach the adoption of any new rule with caution and humility. First, all future regulatory proceedings should start with a thorough market analysis that assesses the state of competition in a sober and clear-eyed manner. Furthermore, if the FCC opts not to include a market analysis, it should explain why. It has been my philosophy that in the absence of market failure, unnecessary regulations in the name of serving the public interest can have the perverse effect of harming consumers by inhibiting the constructive risk-taking that produces investment, innovation, competition, lower prices and jobs.

Second, the FCC should view its statutory mission through a *deregulatory* lens, as Congress intended. The trend in recent years has been the opposite, unfortunately. One stark

¹⁴ See James Gattuso, *The FCC's Cross-Ownership Rule: Turning the Page on Media*, Heritage Foundation Backgrounder on Internet and Technology (May 6, 2008), <http://www.heritage.org/research/reports/2008/05/the-fccs-crossownership-rule-turning-the-page-on-media> (citing, e.g., Testimony of Jerald N. Fritz, Allbritton Communications Company, before Committee on Energy and Commerce, U.S. House of Representatives, Dec. 5, 2007, available at http://energycommerce.house.gov/cmte_mtgs/110-ti-hrg.120507.Fritz-testimony.pdf).

example is the FCC’s use of Section 706 of the 1996 Telecom Act, which had previously been widely viewed as a deregulatory section.¹⁵ Section 706 requires the FCC to determine whether “advanced telecommunications capability [broadband] is being deployed to all Americans in a reasonable and timely fashion.”¹⁶ In all of the reports starting with the first in 1999, the FCC has answered “yes” to that question. In 2010, however, the Commission dramatically reversed course and answered “no.”¹⁷ This year, the FCC made the same flawed finding.¹⁸ I dissented from both of those Section 706 reports. The reports were unsettling, considering that America has made impressive improvements in developing and deploying broadband infrastructure and services. In addition to my concern that the reports were outcome driven, I also warned that the conclusions could be used as a pretext to impose unnecessary new rules. Unfortunately, my fears were realized only five months after the issuance of the 2010 Section 706 Report. The Commission then, in a 3-2 vote, relied heavily on the findings in that report in an attempt to

¹⁵ Congress stated that “[i]f the Commission’s determination is negative, it shall take immediate action to accelerate deployment of such capability by *removing barriers* to infrastructure investment and by promoting competition in the telecommunications market.” 47 U.S.C. § 1302(b) (emphasis added) (Section 706 of the Telecommunications Act of 1996 has since been codified in Title 47, Chapter 12 of the United States Code but is commonly referred to as “Section 706”). Clearly, Congress envisioned the Commission “removing barriers” if it determined that broadband was not being deployed in a timely manner. Adding new rules, such as those regulating Internet network management, erects new barriers contrary to the directive to remove them.

¹⁶ 47 U.S.C. § 1302(b).

¹⁷ See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 09-137, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Sixth Broadband Deployment Report, 25 FCC Rcd 9556 (2010) (“2010 Section 706 Report”). In fact, the 2010 Section 706 Report explicitly included in its caption and referenced findings from the National Broadband Plan that “95% of the U.S. population lives in housing units with access to terrestrial, fixed broadband infrastructure capable of supporting actual download speeds of at least 4 Mbps.”

¹⁸ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 10-159; Seventh Broadband Progress Report and Order on Reconsideration, FCC 11-78 (May 20, 2011) (“2011 Section 706 Report”).

manufacture a legal foundation for the net neutrality order.¹⁹ Given this history, it is reasonable to be concerned that reiteration of the negative Section 706 finding two years in a row may be used to bolster additional FCC regulatory efforts in other areas where Congress has not given the FCC legal authority to do so.

In sum, decreasing the burdens of onerous or unnecessary regulations increases investment, spurs innovation, accelerates competition, lowers prices, creates jobs and serves consumers. I look forward to working with all of you as we find ways to scale back unnecessary and harmful regulations.

Thank you again for the opportunity to appear before you today.

¹⁹ See ¶ 6 of 2011 Section 706 Report. See also *Open Internet Order*, 25 FCC Rcd 17905 (2010).

Exhibit A

Remarks of FCC Commissioner Robert M. McDowell delivered to
Telecommunications Industry Association (May 19, 2011).

Letter from FCC Commissioner Robert M. McDowell to FCC Chairman
Julius Genachowski (July 20, 2009).

Letter from FCC Commissioner Robert M. McDowell to FCC Acting Chairman
Michael Copps (January 27, 2009).

**Remarks of FCC Commissioner Robert M. McDowell
Telecommunications Industry Association
TIA 2011: Inside the Network**

**Thursday, May 19, 2011
The Gaylord Texan
Dallas, Texas**

As prepared for delivery

Thank you, Grant. You and your team have put together another impressive show.

It's great to be back in Texas. My family has deep roots in the Lone Star State – more than five generations worth, in fact. My great-great grandfather, James Knox McDowell, was an abolitionist who moved here before the Civil War. As a fan of Abe Lincoln's, he helped found a fledgling new political party, known as the Republican Party. That started a long line of Republicans in the McDowell family. Of course, back in those days, you could ride across the dusty plains of Texas for days and never see any sign of another Republican. There were so few Republicans here that James cast the only vote in his county against secession – the *only* vote.

After enduring a great deal of hardship during and after the War, including surviving a failed lynching at the hands of the Klan, James and his wife, Victoria, went on to raise five sons. One of them, C.K. McDowell, my great grandfather, went from working as a ranch hand and cowboy living in a frontier dugout, to reading the law and becoming an attorney. After the turn of the century, somehow he was elected chief judge of Val Verde County. Upon his election, a riot broke out in the town of Del Rio because he was ... well, a Republican. The Texas Rangers had to be called in to quell the violence. (Not the baseball team, the horsemen with guns.) But his picture still hangs on a wall in the old courthouse in Del Rio. For decades, he was the *only* Republican on that wall.

In his later years, he went on to run for governor of Texas and won the Republican nomination in 1942. Keep in mind that back then the Republican Party of Texas could have held its convention in a phone booth. For all I know, he was nominated by default because no one else wanted the “honor.” But while writing this speech, I thought I would look up the election results from his race. Ready? It ends up that the incumbent governor, Coke R. Stevenson, garnered 280,735 votes. Judge Caswell Kelliston McDowell hauled in 9,204 votes. That translated into a whopping 3.17 percent. Some would call that a “rounding error.”

So what does any of this have to do with the FCC? Well ... it seems that we McDowells have a knack for picking places where we end up being the *only* Republican. And while there are a lot more Republicans in Texas these days, there are no more Texas Republicans on the FCC. I had no idea that my family history was preparing me for such loneliness and being on the short end of votes – the shortest of short ends, in fact. But it all makes sense to me now.

3.17 percent. That’s quite a number. So let’s change the subject and take a look at another number: 463. That was the total number of pages in the FCC’s portion of the Code of Federal Regulations – the “CFR” – 50 years ago. The CFR is the book that contains most of the federal government’s regulations affecting our country’s economy. And at the time of then-FCC Chairman Newt Minow’s famous “TV is a vast wasteland” speech, in 1961, all of the FCC’s rules governing radio, television, telegraphs, telephones and such could fit neatly into 463 pages. Keep in mind, in 1961 Americans only had a choice of three TV networks and one phone company. Today, over-the-air and cable TV, satellite TV and radio, and the millions of content suppliers on the Internet are overwhelming consumers with choices. In other words, the American communications economy was far less competitive in 1961 than it is today, yet it operated under fewer rules.

By late 1995, right before the Telecommunications Act of 1996 became law, the FCC's portion of the CFR had grown to 2,933 pages – up from 463 pages 34 years earlier. With the '96 Act, Congress envisioned allowing potential rivals, such as cable and phone companies and new entrants, to compete. Added competition, lawmakers thought, would obviate the need for more rules. The plain language of the statute, plus its legislative history, tell us that as competition grew, deregulation – *DE*regulation – in this economic sector should take place. The legislative intent of key parts of the '96 Act, such as Sections 10, 11, 202(h) and 706 – just to name a few – was to *reduce* the amount of regulation in telecommunications, information services and broadcasting. In fact, the Act states that the FCC should “promote competition and reduce regulation.”¹ But, as it ends up, just the opposite occurred. As of the most recent printing of the CFR last October, it contained a mind-numbing 3,695 pages of rules. That's right, after a landmark *deregulatory* act of Congress, the FCC *added* hundreds more pages of government mandates.

To put it another way, the FCC's rules, measured in pages, have grown by almost 800 percent over the course of 50 years, all while the communications marketplace has enjoyed more competition. During this same period of regulatory growth of 800 percent, America's GDP grew by a substantially smaller number: 357 percent.² In short, this is one imperfect but relevant metric illustrating growth in government outpacing economic growth.

To be fair to the Commission, some of those thousands of pages of rules were written due to congressional mandates. And sometimes the FCC does remove rules from its books as the

¹ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996).

² The growth rate was calculated based on historical figures reported by the Commerce Department's Bureau of Economic Analysis. *See generally* Bureau of Economic Analysis, U.S. Dep't of Commerce, "National Economic Accounts," <http://www.bea.gov/national/index.htm#gdp>; *see also id.*, "Current and Real Gross Domestic Product," <http://www.bea.gov/national/xls/gdplev.xls>.

result of forbearance petitions, or by its own accord, just as we did last week with some international reporting requirements. But all in all, the FCC's regulatory reach has grown despite congressional attempts to reverse that trend.

Now at this point I need to issue a warning. For the next couple of minutes, I'm going to sound like a lawyer.

As both former FCC Commissioner Harold Furchgott-Roth and the Free State Foundation's Randy May have written recently, Congress ordered the FCC through Section 10 of the '96 Act to "forbear" from applying a regulation or statutory provision that is not needed to ensure that telecom carriers' market behavior is reasonable and "not necessary for the protection of consumers."³ Similarly, Section 11, the less famous sibling of Section 10, requires the FCC to conduct reviews of telecom rules every two years to determine "whether any such regulation is no longer in the public interest as the result of meaningful economic competition,"⁴ and to "repeal or modify any regulation it determines to be no longer necessary in the public interest."⁵

Please keep in mind that removing unnecessary or harmful rules is by no means a partisan concept. The '96 Act passed both houses of a Republican Congress with a large bipartisan vote and was signed into law by a Democratic president. And on January 18 of this year, President Obama issued an executive order directing agencies to review existing regulations to determine whether they are "outmoded, ineffective, insufficient, or excessively burdensome."⁶ As he wrote in the *Wall Street Journal*, he is seeking to "remove outdated regulations that stifle job creation and make our economy less competitive."⁷

³ 47 U.S.C. §160(a)(2).

⁴ 47 U.S.C. §161(a)(2).

⁵ 47 U.S.C. §161(b).

⁶ Exec. Order No. 13,563, 76 Fed. Reg. 3821 (2011).

⁷ President Barack Obama, *Toward a 21st-Century Regulatory System*, WALL ST. J., Jan. 18, 2011.

So, having established that we have strong bipartisan support to deregulate, let's get to work. Removing unneeded rules can liberate capital currently spent on lawyers and filing fees – capital that would be better spent on powerful new communications equipment. Accordingly, I call on the Chairman and my fellow commissioners to stay faithful to Congress's intent, as embodied in Section 11, by promptly initiating a full and thorough review of *every* FCC rule, not just those that apply to telecom companies, but all rules that apply to any entity regulated by the Commission. The presumption of our review should be that a rule is not necessary unless we find compelling evidence to the contrary.

Of course, the first set of rules I would discard would be the recently issued Internet network management regulatory regime, also known as “net neutrality.” As I have stated numerous times, those rules are unnecessary at best, and will deter investment in badly needed next-generation infrastructure at worst. But to be realistic, reversal of them will have to be at the hands of the courts or Congress.

Similarly, it would take congressional action to start to erase the regulatory stovepipes created by Titles I, II, III and VI. Products and services are converging across platforms. So should the statute.

But here are a few other rules the FCC could get rid of itself.

Did you know that many phone companies are still required to read aloud to new customers a list of available independent long distance companies? This so-called “equal access” scripting requirement is a dusty old vestige from the break-up of the AT&T long distance monopoly. Ma Bell's long distance arm was declared “non-dominant” way back in 1995. In other words, the long distance market has been competitive for almost 16 years, yet our antiquated rules live on like a slumbering Rip Van Winkle who fell asleep in the 1980s.

Ironically, these rules no longer apply to the Baby Bells or their successors, and have never applied to wireless carriers. It is smaller phone companies that must bear the burden of living under them. Such costs – be they regulations or taxes on companies – are always paid for, ultimately, by consumers. It took the Commission about a year to put out for public comment a 2008 petition to eliminate these dinosaurs, and we are several years overdue to repeal them.

Similarly, it is smaller non-Bell companies that must live under cost allocation requirements and ARMIS (Automatic Reporting Management Information System) reporting mandates. For carriers living under flexible price cap rules in an environment that is more competitive than a few years ago, these cumbersome and costly requirements make no sense.

Then there are the forms – lots of forms. Government bureaucracies *love* to require people to fill out forms. There is Form 603; Form 611-T; Form 175; Form 601; Form 492; Form 477; Form 323; and Forms 396, 396-C, 397 and 398, among others. Several forms require companies to submit data that is no longer needed or is supplied elsewhere. Take for example, my “favorite” form, the enhanced disclosure form. Back in late 2007, over my dissent, the Commission voted to require TV licensees to fill out a form describing to the government what kind of programming they were airing to the public and when they were airing it. Broadcasters estimated that it would cost them up to two full-time jobs to hire people to do nothing all day but fill out the form and send it to Washington bureaucrats. Proponents of this rule may have meant well. In fact, at the time of its adoption I overheard one advocate exclaim joyfully, “Two full-time jobs? That’s terrific. That’s job creation!” Of course, they didn’t realize that the new requirement would result in the *elimination* of two jobs elsewhere at the station, such as the newsroom, to pay for the new mandate.

Also, unless I'm missing something, TV stations don't aim to keep their work product a secret from anyone. If the government wants to know what is being aired, it can turn on the TV – all Big Brother and First Amendment concerns aside.

The good news is that the enhanced disclosure form has been held up by the Office of Management and Budget (OMB) since 2008 because it raises Paperwork Reduction Act problems, among other things. And, yes, that's the same office that has temporarily held up the effectiveness of the net neutrality rules. Given that both the Bush and Obama White Houses have kept it from going into effect, why don't we just put it out of its – and our – misery and repeal it?

I'm not saying that all forms are unnecessary. But multiple forms sometimes collect the same data, such as Form 477 collecting the same ownership information required by Form 602. Do we really need to kill America's information economy with a thousand paper cuts?

And now, if you have fallen asleep, this last part should wake you up. In fact, the likely headline coming out of this speech will have nothing to do with telecom equipment. Sorry about that. Are you ready? It is rare that the English language can come up with two words that, when put together, generate so much controversy. This is potent stuff, so you'd better brace yourself. The ... Fairness Doctrine. It still exists! No, it doesn't still exist the way Elvis "still exists." The Fairness Doctrine is literally still codified in the CFR.⁸ We stumbled on this forgotten fact while researching material for this speech.

For those of you who have no idea what I am talking about, the Fairness Doctrine was a rule ... well, still IS a rule, apparently ... that thrust the government's coercive reach into editorial decisions of broadcasters. In short, the Doctrine regulated political speech. Suffice it to say that political speech is core protected speech under the First Amendment, and the Fairness

⁸ 47 C.F.R. § 73.1910 (broadcasting); 47 C.F.R. § 76.209 ("origination cablecasting").

Doctrine is patently unconstitutional. The FCC decided as much in 1987 when everyone assumed the FCC killed it. We thought that this monster's dead and stinking corpse was left to rot in a government graveyard. Instead, it appears that the Commission merely opted not to enforce the rule. Its words still defile the pages of the CFR, and we should erase it with a repeal order immediately.

In closing, a comprehensive and sustained effort to repeal and streamline unnecessary, outdated or harmful FCC rules would signal to investors that the Commission takes seriously Congress's and the President's calls to deregulate. With the certainty that the Commission will not only refrain from issuing new unneeded rules, but weed out old ones as well, investment capital is more likely to start flowing again.

Congress could do its part as well. Adoption of tax policies that accelerate depreciation schedules for tech equipment and classify some capital investments as expenses have a history of stimulating economic activity and job creation. By some estimates, every one dollar in accelerated depreciation tax incentives generates nine dollars in GDP growth.⁹ One study estimated that the tech tax incentives of 2002 and 2003 may have increased GDP by \$20 billion and affected the creation and retention of up to 200,000 jobs.¹⁰

The bottom line is the bottom line. History teaches us over and over again: Decreasing the burdens of onerous regulatory and taxation policies increases investment (which means more purchases of telecom equipment), spurs innovation, accelerates competition, lowers prices, creates jobs and pleases consumers. So what is there not to like? Let's get on with such a program right away.

⁹ Robbins, Aldona and Gary, *What's the Most Potent Way to Stimulate the Economy?*, INSTITUTE FOR POLICY INNOVATION (Oct. 10, 2001).

¹⁰ House, Christopher L. and Shapiro, Matthew D., *Temporary Investment Tax Incentives: Theory with Evidence from Bonus Depreciation*, Am. Economic Rev. (2008).

Thank you for having me here today, and I look forward to your questions.



Office of Commissioner Robert M. McDowell
Federal Communications Commission
Washington, D.C. 20554

July 20, 2009

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Dear ~~Mr. Chairman:~~^{Julius}

Once again, congratulations on your nomination and confirmation as Chairman. I am greatly encouraged and energized to know that you, Commissioner Copps and I will be working together on a plethora of communications policy challenges facing the economy and American consumers. Although you have only been here for three weeks, I applaud the steps you have already taken to reform the agency. Your recent statements regarding boosting employee morale, promoting greater transparency, and creating a more informed, collaborative and considerate decision-making process are heartening. Anything we could do to advance the timely and orderly resolution of Commission business would be constructive. I am confident that you will agree that the preliminary steps Mike took during his interim chairmanship have provided a sound footing upon which to build.

Accordingly, in the collaborative and transparent spirit of my January 29, 2009, letter to Mike, I offer below a number of suggestions on achieving the important public interest objectives of reforming this agency. As you and I have already discussed, these thoughts are intended as a starting point for a more public discussion that should examine a larger constellation of ideas for moving forward together to improve the public's ability to participate in our work, as well as our overall decision-making abilities. Many of these ideas have been discussed by many people for a long period of time, and if we don't care who gets the credit we can accomplish a great deal.

Operational, financial and ethics audit.

I would first recommend that we commence a thorough operational, financial and ethics audit of the Commission and its related entities, such as the Universal Service Administrative Company, the National Exchange Carrier Association and the federal advisory committees. Just as you recently articulated in your June 30 request for information on the Commission's safety preparedness, I would envision this audit as an examination akin to a due diligence review of a company as part of a proposed merger or acquisition, or after a change in top management. I would not envision the process taking a lot of time; yet, upon completion, we would be better positioned to identify and assess the current condition of the FCC and its related entities, as well as how they operate.

This undertaking would be a meaningful first step on the road to improving the agency. As with all FCC reform endeavors, I hope that all of the commissioners would be involved in this process, including its development and initiation. We should seek comment from the public and the Commission staff, and we should provide Commission employees with additional opportunities to submit comments anonymously. I also propose that we hold a series of "town hall" meetings at the FCC's Washington headquarters, at a few field offices, as well as in a few locations around the country to allow our fellow citizens to attend and voice their opinions directly to us.

As part of a financial review, it is crucially important that we examine the Commission's contracting process, as well as the processes relating to the collection and distribution of administrative and regulatory fees currently conducted exclusively by the Office of Managing Director. For instance, we should consider whether the full Commission should receive notice prior to the finalization of significant contracts or other large transactions.

In the same vein, it is time to examine the Commission's assessment of fees. Regulatory fees are the primary means by which the Commission funds its operations. You may be aware that the FCC actually makes money for the tax payers. As Mike has also noted, our methodology for collecting these fees may be imperfect. At first blush, it appears that we may have over-collected by more than \$10 million for each of the last two years. Some have raised questions regarding how the fee burden is allocated. Our recent further notice of proposed rulemaking could lead to a methodology that lowers regulatory fees and levies them in a more nondiscriminatory and competitively neutral manner.

We should also work with Congress to examine Section 8 of the Act and the Commission's duty to collect administrative fees. I am hopeful that we will examine why we continue to levy a tax of sorts of allegedly \$25 million or so per year on industry, after the Commission has fully funded its operations through regulatory fees. As you may know, that money goes straight to the Treasury and is not used to fund the agency. Every year, we increase those fees to stay current with the Consumer Price Index. At the same time, our regulatees pass along those costs to consumers and they are the ones who ultimately pay higher prices for telecommunications services.

Further, given the significant concerns raised about the numbers and the way the audits have been conducted, I recommend that we examine the financial management of the universal service fund. You may know that the Commission's Inspector General reported last year that the estimated erroneous payment rate for the High Cost program between July 2006 and June 2007 was 23.3 percent, with total estimated erroneous payments of \$971.2 million. While I am pleased that the OIG identified this error, it is time that we get to the bottom of this matter and remedy it.

In the same spirit, an ethics audit should ensure that all of our protocols, rules and conduct are up to the highest standards of government best practices. Faith in the ethics of government officials has, in some cases, eroded over the years and we should make sure that we are doing all that we can to maintain the public's trust.

Update and republish the FCC strategic plan.

Also in connection with this review, I hope that we can work together to update and republish the Commission's strategic plan. Like me, you may find that, as we toil on day-to-day tasks, it can be easy to lose sight of our strategic direction. Completing this task would create a solid framework for future actions and demonstrate our commitment to transparency and orderliness, each of which is critical to effective decision making.

Potential restructuring of the agency.

The findings of our review, combined with our work to develop a new strategic plan, would provide us with the information and ideas necessary for considering a potential restructuring of the agency. As you know, the Commission has been reorganized over the years – for instance, the creation of the Enforcement Bureau under Chairman Kennard and the Public Safety and Homeland Security Bureau under Chairman Martin. Close coordination among the staff in pursuit of functional commonality historically has improved the Commission's effectiveness. Nonetheless, the time is coming again to reconsider this option.

I am not suggesting that we make change for the sake of change. After all, we would agree that the agency needs to be flexible and must be responsive to its myriad stakeholders, most importantly American consumers. There are, however, additional improvements we can make to increase our efficiency. As Mike emphasized, the Commission's most precious resource, really our *only* resource, are its people. Many of our most valued team members are nearing retirement age. We need to do more to recruit and retain highly-qualified professionals to fill their large shoes. I hope our next budget will give us adequate resources to address this growing challenge.

Next, I would encourage consideration of filling many of the numerous open positions with highly-qualified applicants and making more efficient use of non-attorney professionals. For example, there is no reason why we cannot use engineers to help investigate complaints and petitions that involve technical and engineering questions. This would be especially useful as we continue to consider matters pertaining to network management. Similarly, our economists could be better used to help assess the economic effects of our proposed actions.

Improve external communication.

As you and I have also discussed, we need to improve our external communications regarding FCC processes and actions. I greatly appreciate Mike's promptness in posting the Open Meeting dates covering his tenure. I am hopeful that we will swiftly establish and publish Open Meeting dates for the entire 2009 calendar year. The public, not to mention the staff, would also greatly benefit if we would provide at least six months' notice on meeting dates for 2010 and beyond.

As part of these communications improvements, I look forward providing input as to updating the Commission's IT and web systems. I applaud your commitment to this endeavor and Mike's success in securing additional funding toward this end. Clear, concise and well-organized information systems will ensure that all public information is available, easily located and understandable. I also recommend that we update the General Counsel's part of the website to include litigation calendars, as well as access to pleadings filed by all the parties. Additionally, I suspect that our customers would prefer that licenses of all stripes be housed in one database, rather than separate databases spread across the stovepipes of our several bureaus. We should seek comment on this, and other similar administrative reform matters.

In addition, I propose that we create, publish on the website and update regularly an easy-to-read matrix setting forth a listing of all pending proceedings and the status of each. This matrix would include those matters being addressed on delegated authority. The taxpayers should know what they are paying for.

Similarly, I suggest that we establish and release a schedule for the production of all statistical reports and analyses regularly conducted by the Commission, and publish annual updates of that schedule. This would include, for example: the *Wireless Competition Report*, which has traditionally been released each September; the *Video Competition Report*, which until recently, was released at the end of each year; and the *High-Speed Services Report*, which, at one point, was released biannually. Similarly, quite some time before your arrival, I went on record calling for giving the American public the opportunity to view and comment on at least a draft or outline of the National Broadband Plan. I look forward to working with you to increase public awareness regarding the status and substance of our work on this plan. The goal here would be not only to ensure that the public is fully aware of what we are working on and when, but also to give these valuable analyses to their owners – the American people – with regularity.

In the same vein, Congress, the American public and consumers, among other stakeholders – not to mention your fellow commissioners – would greatly appreciate it if notices of proposed rulemakings actually contained *proposed rules*.

Improve internal communication.

Also, we need to overhaul our internal information flow, collaboration and processes. I am eager to work with you, Mike, and our future colleagues, to identify and implement additional measures to increase coordination among the commissioner offices, between commissioner offices and the staff, as well as among the staff. It is important that we cooperate with each other to foster open and thoughtful consideration of potential actions well before jumping into the drafting process. The bottom line is simple: No commissioner should learn of official actions through the trade press.

An effective FCC would be one where, for instance, Commissioner offices would receive options memoranda and briefing materials long before votes need to be cast. For example, for all rulemakings, within 30 days of a comment period closing, perhaps all commissioners could

receive identical comment summaries. Also, within a fixed timeframe after receiving comment summaries, say 60 to 90 days, all commissioners could receive options memos complete with policy, legal, technical and economic analyses. In preparation for legislative hearings, it would be helpful if all commissioners received briefing materials, including witness lists, at least five business days prior to the hearing date. For FCC *en banc* hearings or meetings, we should aim to distribute briefing materials to all commissioners at least one week prior to the event date. The details here are less important than the upshot: all commissioners should have unfettered access to the agency's experts, and receive the benefit of their work. Again, I am grateful to Mike for his preliminary efforts in this regard.

Also along these lines, I hope that your team will reestablish the practice of regular meetings among the senior legal advisors for the purpose of discussing "big picture" policy matters, administrative issues, as well as to plan events and meetings that involve all of the offices. Given the numerous tasks we have before us, I trust you will agree that regular meetings among this group will improve our efficiencies, and go a long way toward lessening, if not eliminating, unpleasant surprises.

Just as important would be to hold regular meetings among the substantive advisors and relevant staff, including the Office of General Counsel. Having ample opportunity to review and discuss pending proceedings and the various options at the early stages of, and throughout the drafting process would allow us to capitalize on our in-house expertise early and often. Taking such precautions might also bolster the Commission's track record on appeal. Indeed, this type of close collaboration might lead to more logical, clear and concise policy outcomes that better serve the public interest.

Another idea is to update and rewrite our guide to the Commission's internal procedures, currently entitled *Commissioner's Guide to the Agenda Process*. For instance, just as Mike has done with respect to the distribution of our daily press clips, I propose that we undertake a thorough review of the physical circulation process, including identifying and making changes to reduce the amount of paper unnecessarily distributed throughout the agency. Current procedures require that each office receive about eight copies of every document on circulation when one or two would suffice. I also wonder why our procedures mandate delivery of 30 paper copies of released Commission documents to our press office. The overwhelming majority of reporters who cover our agency pull the materials they need from our website. Perhaps this is another area where we could save money and help the environment all at the same time.

Coordinate with other facets of government.

Finally, on a more "macro" level, I propose that the commissioners work together to build an ongoing and meaningful rapport with other facets of government, especially in the consumer protection, homeland security, and technology areas. I am confident that close collaboration with our government colleagues with similar or overlapping responsibilities would greatly benefit the constituencies we serve.

The Honorable Julius Genachowski
July 20, 2009
Page 6

In closing, I again extend my warmest congratulations on your new position as Chairman. You are to be commended for the steps you have taken thus far toward rebuilding this agency. I look forward to working together with you, Mike and our new colleagues upon their confirmation to do even more.

Sincerely,

A handwritten signature in black ink that reads "Robert M. McDowell". The signature is written in a cursive, flowing style.

Robert M. McDowell

cc: The Honorable Michael J. Copps



Office of Commissioner Robert M. McDowell
Federal Communications Commission
Washington, D.C. 20554

January 27, 2009

The Honorable Michael J. Copps
Acting Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Dear Mike:

Once again, congratulations on being named Acting Chairman. Additionally, thank you for your dedication and commitment to public service and the Commission. It goes without saying that I am looking forward to continuing to work with you.

I am greatly encouraged and energized to know that you, Commissioner Adelstein and I will be working together toward the goals of boosting employee morale, promoting greater transparency, as well as creating a more informed, collaborative and considerate decision-making process, all aimed toward advancing the timely and orderly resolution of Commission business. Thank you for addressing these and many other issues within minutes of becoming Acting Chairman. I certainly appreciate the new atmosphere you are creating at the Commission, and I know that the FCC's talented and dedicated career employees appreciate your efforts as well. Accordingly, with the utmost respect for you, the Commission staff and the new Obama Administration, I offer below several preliminary suggestions on achieving the important public interest objectives of reforming this agency. My letter is intended to continue a thoughtful dialogue on moving forward together to improve the public's ability to participate in our work, as well as our overall decision-making abilities. Our collaborative efforts to rebuild the agency should not be limited to the thoughts outlined in this brief letter. As you and I have discussed many of these ideas already, let this merely serve as a starting point for a more public discussion that should examine a larger constellation of ideas.

I would first recommend that we commence a thorough operational, financial and ethics audit of the Commission and its related entities, such as the Universal Service Administrative Company and the Federal Advisory Committees. As with all FCC reform endeavors, I hope that all of the commissioners will be involved in this process, including its development and initiation. We should seek comment from the public and the Commission staff, and we should provide Commission employees with an opportunity to submit comments anonymously.

I would also suggest that we work to update and republish the Commission's strategic plan. Completing this task would create a solid framework for future actions and demonstrate our commitment to transparency and orderliness, each of which is critical to effective decision making.

The findings of our review, combined with our work to develop a new strategic plan, would provide us with the information and ideas necessary for considering a potential restructuring of the agency. I am not suggesting that we make change for the sake of change. After all, we agree that the agency needs to be flexible and must be responsive to its myriad stakeholders, most importantly American consumers. There are, however, steps we likely would want to implement to increase our efficiency. For example, as you have already stated, delegating some authority back to upper and mid-level management, filling many of the numerous open positions with highly-qualified applicants and making more efficient use of non-attorney professionals come to mind.

As we have also discussed previously, we need to improve our external communications regarding FCC processes and actions. As an immediate first step, I suggest that we swiftly establish and publish Open Meeting dates for the entire 2009 calendar year. The public, not to mention the staff, would also greatly benefit if we would provide at least six months' notice on meeting dates for 2010 and beyond.

Also, we agree that we need to overhaul our internal information flow, collaboration and processes. I am eager to continue to work with you and Commissioner Adelstein to identify and implement measures to increase coordination among the commissioner offices, between commissioner offices and the staff, as well as among the staff. It is important that we cooperate with each other to foster open and thoughtful consideration of potential actions well before jumping into the drafting process.

As part of these communications improvements, I share your desire to update the Commission's IT and web systems. They are in dire need of an overhaul. Clear, concise and well-organized information systems will ensure that all public information is available, easily located and understandable.

Finally, I propose that the commissioners work together to build an ongoing and meaningful rapport with other facets of government, especially in the consumer protection, homeland security, and technology areas. I am confident that close collaboration with our government colleagues with similar or overlapping responsibilities would greatly benefit the constituencies we serve.

In closing, Mike, I again extend my warmest congratulations on your designation as Acting Chairman. I look forward to working together with you and Commissioner Adelstein to improve our agency during the coming days and weeks.

Sincerely,

A handwritten signature in black ink that reads "Robert M. McDowell". The signature is written in a cursive style with a large, looping initial "R".

Robert M. McDowell

cc: The Honorable Jonathan S. Adelstein