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NOMINATION OF SUSAN NESS, TO BE A MEMBER OF THE FEDERAL COMMUNICATIONS COMMISSION

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

MARCH 22, 2000

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ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

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CONTENTS

	Page
Hearing held on March 22, 2000	1
Statement of Senator Burns	1
Prepared statement	1
Statement of Senator Dorgan	19
Statement of Senator Hollings	2
Prepared statement	2
Statement of Senator Inouye	7
Statement of Senator Rockefeller	5
Statement of Senator Snowe	26
Prepared statement	27

WITNESSES

Mikulski, Hon. Barbara A., U.S. Senator from Maryland	4
Prepared statement	5
Ness, Hon. Susan, Commissioner, Federal Communications Commission	7
Prepared statement	8
Biographical information	9
Sarbanes, Hon. Paul S., U.S. Senator from Maryland	3

APPENDIX

Response to written questions submitted by Hon. Sam Brownback to:	
Susan Ness	35
Response to written questions submitted by Hon. Conrad Burns to:	
Susan Ness	40
Response to written questions submitted by Hon. Max Cleland to:	
Susan Ness	43
Response to written questions submitted by Hon. Trent Lott to:	
Susan Ness	45
Response to written questions submitted by Hon. John McCain to:	
Susan Ness	45

NOMINATION OF SUSAN NESS, TO BE A MEMBER OF THE FEDERAL COMMUNICATIONS COMMISSION

WEDNESDAY, MARCH 22, 2000

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The committee met, pursuant to notice, at 9:30 a.m. in room SR–253, Russell Senate Office Building, Hon. Conrad Burns presiding.

Staff members assigned to this hearing: Virginia Pounds, Republican Professional Staff; and Jonathan Oakman, Democratic Staff Assistant.

OPENING STATEMENT OF HON. CONRAD BURNS, U.S. SENATOR FROM MONTANA

Senator BURNS. I call the Committee to order, and thank you for coming this morning. Our special guest this morning as we have our first hearing or the hearing for the reappointment of Ms. Ness to the Federal Communications Commission. We welcome you here this morning and appreciate you coming. We also welcome our two guests. I don't have much of a statement to make prior to the—I will reflect that in my questions, and I would move my spotlight to my ranking member on this Committee, Senator Hollings.

[The prepared statement of Senator Burns follows:]

PREPARED STATEMENT OF HON. CONRAD BURNS, U.S. SENATOR FROM MONTANA

I would like to welcome everyone to today's hearing. Without question, the Federal Communications Commission is one of the most critical agencies in ensuring this nation's future, particularly given the explosion of information technologies and the Internet. Given this fact, today's hearing on the reconfirmation of Commissioner Ness takes on added gravity.

I certainly am impressed with Commissioner Ness' commitment to public service and her reputation for accessibility. The Commissioner has always had an open-door policy and I applaud her for that. I am concerned, however, with three issues in particular: the continuing failure of the Commission to properly implement Section 706, its ill-conceived low power radio proposal and lack of common sense on the cross-ownership issue. I look forward to hearing more from the Commissioner about her positions on these issues.

I am very disturbed by the Commission's delay in properly using the authority granted to it under Section 706 of the Telecommunications Act. I authored Section 706 during the crafting of the Act to provide deregulatory incentives so that telecommunications firms would invest in broadband technologies. The Section directs the FCC to make these technologies available to "all Americans." Yet in its report on broadband deployment last year, the Commission refused to use its Section 706 authority, citing the spread of broadband technologies across the nation, even though only 2% of Americans had broadband access. Simple common sense dictates that less than two percent deployment does not equal "all Americans."

I will not allow Section 706 to be dismantled through FCC inaction. Broadband access is as important to our small businesses in Montana as water is to agriculture. With broadband access, high-tech Montana companies can compete on the same basis as large corporations in the global markets being made possible by the surge in e-commerce. The Communications Subcommittee will be holding a hearing on broadband deployment and Section 706 next Tuesday and I expect it will be one of the most important hearings of the year.

I am also very concerned about the Commission's recent actions on low power radio. I remain to be convinced that the concerns about interference with existing broadcasters have been properly addressed. I should note that public radio has been among the most vocal critics of this proposal. Instead of essentially legalizing pirate radio in the guise of serving some vague public interest goal, the Commission should be working with nonprofits to take advantage of new technologies. In the last six months, there has been an explosion of Internet radio broadcasting, for instance. Using the Internet, individuals and small nonprofits have been creating their own global broadcasting distribution networks with minimal costs and no interference issues.

Yet the Commission continues to ram forward with this ill-conceived scheme. I certainly look forward to Commissioner Ness further explaining her thinking and actions on this issue.

The Commission's outdated position on cross-ownership is also of great concern to me. Broadcasters and newspaper owners have consistently urged that the newspaper-broadcast cross-ownership ban should be eliminated, arguing in particular that unprecedented growth in the number of new communications outlets make the rule an anachronism. I agree with that view. One cannot credibly say that a "scarcity" of communications voices exists today.

I am also concerned about the Commission's continuing delay in issuing a comprehensive universal service order, among other issues. I look forward to further exploring these matters today. Thank you.

STATEMENT OF HON. ERNEST F. HOLLINGS, U.S. SENATOR FROM SOUTH CAROLINA

Senator HOLLINGS. I include my statement in the record and yield to our distinguished Senators who are prepared to introduce the witness.

[The prepared statement of Senator Hollings follows:]

PREPARED STATEMENT OF HON. ERNEST F. HOLLINGS, U.S. SENATOR FROM SOUTH CAROLINA

I thank Chairman McCain for agreeing to holding this nomination hearing for Commissioner Ness early in the legislative year. Commissioner Ness has served as a Commissioner since 1994 during a challenging and exciting time at the FCC. She has worked diligently to implement the Telecommunications Act of 1996 and has been an advocate for competition. In addition, to her day-to-day duties, Commissioner Ness has immersed herself in issues of international telecommunications policy and chairs the Federal-State Joint Board on Universal Service. I thank her for her service and for her dedication to developing sound telecommunications policy.

As the FCC fulfills its duty of regulating the telecommunications industry, there are two specific challenges that the FCC must meet successfully. The first is promoting competition in the local phone market, and the second is protecting the public interest.

Soon after the passage of the Telecommunications Act of 1996 a slate of 271 applications that did not meet the 14 point checklist were filed at the FCC. However, today companies are beginning to take the 271 process more seriously. This has resulted in the FCC granting Bell Atlantic's 271 application in New York. I understand that Bell Atlantic has since had some problems meeting the requirements of Section 271, and has entered a consent decree with the FCC to pay $27 million in fines. Therefore, as the FCC reviews 271 applications it is important that the FCC grants only those applications that truly meet the requirements of Section 271, and at a minimum, meet the standard in its Bell Atlantic decision. The FCC must also have in place the necessary enforcement tools to address compliance issues that may arise.

The drafters of the Communications Act of 1934 had considerable foresight when they included provisions in the Act requiring the FCC to make decisions in accord-

ance with the public interest. This standard is particularly important in light of the great number of mergers occurring in the telecommunications market. We have seen the number of Bell phone companies go from seven to four because of mergers, and the FCC recently authorized the merger of a Bell company and a long distance company. There has been tremendous consolidation in the radio industry and there are now pending mergers such as AOL and Time Warner which, if approved, would allow the merged company to leverage its market power across several media platforms. In this environment the FCC must be able to utilize its public interest standard to ensure that: consumers are protected, rates are reasonable and affordable, service offerings are responsive to consumer needs, and companies continue to provide new and innovative services.

I welcome Commissioner Ness today and look forward to hearing her testimony.

Senator BURNS. Mr. Brownback?

Senator BROWNBACK. I want to hear from our distinguished colleagues.

Senator BURNS. We appreciate your coming this morning and your interest in this appointment, and I would ask at this time is Mr. Sarbanes ready to introduce his special guest?

STATEMENT OF HON. PAUL S. SARBANES, U.S. SENATOR FROM MARYLAND

Senator SARBANES. Thank you very much, Mr. Chairman, Senator Hollings, Senator Brownback. I'm very pleased to be here to indicate my very strong support for the reconfirmation of Susan Ness as the Commissioner of the Federal Communications Commission. In my view, she's done an outstanding job in this role. I think she's served our nation well.

As you know, she was appointed to the Commission in 1994. During her tenure there, she's chaired the Commission's Federal/State Joint Board charged with addressing universal telephone service issues. She's been the Commission's lead representative for the 1995–1997 World Radio Communications Conference. She's currently a member of the National Association of Regulatory Utility Commissioners Committee on Communications and the Federal Communications Bar Association.

The Committee knows well that she's been an active proponent of fair competition both domestically and globally. She's worked hard to promote the advancement of new technologies, expand economic opportunities, reduce regulatory uncertainty. She's played a key role in shaping policies for the efficient management of the radio spectrum. She's credited with helping to forge a consensus on the digital television standard, on guidelines to improve the quality and quantity of children's educational television program. She's worked tirelessly to facilitate delivery of advanced telecommunications systems to the classroom and to community libraries so that all children can participate in the telecommunications and information revolution.

She had a very distinguished record before coming to the Commission, although obviously her performance there is a critical standard in judging her reconfirmation. She has been a senior lender to communication companies as the vice-president of a regional financial institution. She has been assistant counsel in a House Committee on banking currency in housing. She has been a very active leader in our community in Maryland, a Chair of the Montgomery County Charter Review Commission, Vice Chair of the County's Task Force on Community Access to Television.

She has done I think a terrific job in handling some very tough problems before the Commission. I think she's reflected prudence, intelligence, fair and balanced judgment and I strongly urge the Committee to permit her to carry forward her good work by reconfirming her for another term on the FCC.

Thank you very much.

Senator BURNS. Thank you, Senator Sarbanes. Senator Mikulski.

STATEMENT OF HON. BARBARA A. MIKULSKI, U.S. SENATOR FROM MARYLAND

Senator MIKULSKI. Thank you very much, Mr. Chairman. I will just highlight some additional comments. I believe my senior colleague covered a lot of the information that I wish to convey as well and ask unanimous consent that my statement go into the record.

Senator BURNS. Without objection.

Senator MIKULSKI. Mr. Chairman, I, too, wholeheartedly endorse the renomination of Susan Ness to be a Commissioner at the FCC. I think she brings competence, I think she brings experience and I think she brings a sense of community because sometimes we get so fascinated by technology—what are the new regulatory—we forget that really ultimately, telecommunications is to serve the consumer and to help bring the world together, either business to business or business to consumers or people to people. I believe she brings that backbone and those insights.

She brought to the Commission initially an incredible educational background, a graduate from Douglass College, in addition to that, a law degree from Boston College and then went on and got a Master's Degree in Business Administration from Wharton. Now, that's a pretty excellent background to bring to the technical issues facing FCC and the need to understand both the law as well as the business aspects.

We have been particularly proud of the job she's done in the FCC and the challenges that she's taken a very keen interest in improving children's educational TV, promoting universal service and universal access, again, a very keen interest to be sure that you don't have a digital divide in the United States of America between our children who have access to technology and those who don't, the roll-out of digital television, new wireless service, expanding competition in telephone and video, efficient spectrum management. Then she's also taken the work of unnecessary regulations, not what else can we do but what don't we have to do so we don't have to shackle this new world of E business and E buzz.

In her work at the Federal/State Joint Board, she has represented us in World Radio Communications conferences in Switzerland. She was the FCC's rep in 1995 and 1997 and one of the areas that she's expressed interest in, I know the Committee was very strong in this, this opening overseas market. If we invent it, we want to be able to sell it and I think she's been a real champion of that.

She's been recognized by her peers, a recipient of the International Radio and TV Society Foundation. Electronic Media named her as one of 12 to watch in 1997 and she was honored by

the Women of Wireless and the American Women in Radio and TV for all of her efforts.

I know that her family's here and they have been very proud of her work as the two Senators have, and I believe that she will ably do it, continue to do a very able job on the Commission. And I think anybody who brings her owns mitts is always prepared for anything that lies ahead so I wholeheartedly endorse her renomination.

[The prepared statement of Senator Mikulski follows:]

PREPARED STATEMENT OF HON. BARBARA A. MIKULSKI,
U.S. SENATOR FROM MARYLAND

I am happy to be here this morning to introduce FCC Commissioner Susan Ness for reconfirmation to the FCC.

Commissioner Ness was originally appointed to the FCC by President Clinton in 1994 and has been the Commission's senior member since November 1997. Commissioner Ness has been a dedicated and tireless worker in helping to formulate communications policies that will benefit the quality of life for future generations. Commissioner Ness currently chairs the Federal-State Joint Board which is charged with addressing universal telephone service issues and has served as the FCC's lead representative at the 1995 and 1997 World Radiocommunication Conferences in Geneva, Switzerland.

Among her many accomplishments during her FCC tenure, Commissioner Ness has worked to: improve children's educational television; promote universal telephone service; connect classrooms and libraries to the Internet; roll out digital television service; introduce new wireless services; expand telephone and video competition; promote efficient spectrum management; open overseas markets; and eliminate unnecessary regulations.

In recognition of her accomplishments Commissioner Ness was chosen as a recipient of the International Radio and Television Society Foundation Award and was selected one of Electronic Media's "12 to Watch in 1997." She has also been honored by Women of Wireless and by the American Women in Radio and Television for her efforts on behalf of women.

Prior to coming to the FCC, Commissioner Ness was a senior lender to communications companies as a vice president of a regional financial institution. A lawyer by profession, she also served as Assistant Counsel to the Committee on Banking, Currency and Housing in the U.S. House of Representatives. She also founded and directed the Judicial Appointments Project of the National Women's Political Caucus.

Commissioner Ness is a graduate of Douglass College where she received a B.A. in 1970. There she served on the Board of Directors of WRSU Radio. She received a Juris Doctor, cum laude from Boston College Law School and a Masters in Business Administration from The Wharton School of The University of Pennsylvania.

Another 5 years for Commissioner Ness will be good for the FCC and good for the country. I wholeheartedly support Commissioner Ness's renomination and urge a swift reconfirmation.

Senator BURNS. Thank you, Senator Mikulski. Before we take your statement, Commissioner, we have been joined by the distinguished Senator from West Virginia. Mr. Rockefeller, do you have a statement? We have already made ours.

STATEMENT OF HON. JOHN D. ROCKEFELLER, IV, U.S. SENATOR FROM WEST VIRGINIA

Senator ROCKEFELLER. I know it and that is the reason I called you last night with great respect to ask your permission if I could talk for about 60 seconds, and you said yes. I want to do that because I so strongly support Susan Ness and I think it is incredibly important for the FCC that she be renominated.

This has been a two-year process. She has more experience than anybody on the FCC. She's taken from the telecommunication to

regulation act every single aspect of that and worked it through. We've spent endless hours working together overcoming problems and she's patient, understanding, knows it. I didn't even know about The Wharton School until I was reading about it last night, but that's just another dimension.

She's been very strong on universal service, she's been very strong on consumer interest, and very strong on trying to get compromise for a digital television standard effective on that. She's pushed to move new technologies toward the marketplace as quickly as possible, which I think is important for a Commissioner, and she's been a very effective advocate for spectrum management policies that create a level playing field for all kinds of technologies.

But given all that, still I think the experience is the thing which is so important, the stability which is needed on the FCC. I sorely suspect that they're understaffed, that they're under-funded, and I will have questions for her on that, but I'm extremely supportive of her renomination. I think it's an absolute must for the success of the FCC in a situation where all the work that she does is moving much more quickly than we in Congress, where our committees were set up just after the second World War are prepared to deal with them, so we really need Susan Ness.

Thank you, Mr. Chairman.

Senator BURNS. Thank you, Senator. Now we'll have a statement from Ms. Ness and welcome this morning and before this Committee.

Senator HOLLINGS. Mr. Chairman, let me just say hearing all these laudatory statements, that I think of the comment made by Winston Churchill in July 1945. We had VE Day on May the 8th of 1945 and the end of July, Mr. Churchill was voted out of office by Clement Atlee, and under the rule in the United Kingdom, you're supposed to be outside, which he was, of 10 Downing with his clothing rack and his chest of drawers.

And the BBC said, "Mr. Prime Minister, what is your comment?"

He said, "The British people are a funny lot. They show their gratitude for a job well done by promptly voting you out of office."

Here was a fellow who had won the war to end all wars and in just 3 months' time they were getting rid of him. And Ms. Ness has been held up now since, what, almost a year, having done an outstanding job. As Churchill says, don't look for gratitude, which she's got some good friends here, and you waited entirely too long.

The only reason I asked, Mr. Chairman, for you to yield just a second is because I wanted to commend the Commission on its rulings with respect to Section 271 now that we have had Bell Atlantic. You've instituted an Enforcement Bureau, and let's continue with that, because that's highly important that we don't think to just get approval and then they don't have to still comply with their 14-point checklist. The lawyers for the Bell companies wrote those 14 points, and I'm very, very much along with Senator Rockefeller in support of your renomination, and I hope we can get it in the next markup here so we can get it to the floor. Thank you, Mr. Chairman.

Senator BURNS. Thank you, Senator. I was doing pretty good about keeping the speeches down up here.

Senator HOLLINGS. Well, she deserved the comment, and I've got to get to another one.

[The prepared statement of Senator Inouye follows:]

PREPARED STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII

I thank the Chairman for holding a hearing on the nomination of Commissioner Susan Ness for a second term as Commissioner of the Federal Communications Commission (FCC). Commissioner Ness' term expired last year and given her work at the FCC, it is important that this committee take a serious look at renominating her to serve a second term at the FCC.

Prior to going to the FCC, Commissioner Ness had a great deal of experience in the communications world, particularly in the area of finance, and while at the FCC, she has built admirably on that experience. Commissioner Ness spent nearly 10 years in the communications industries division of the American Securities Bank in Washington, D.C. she also served as an Assistant Counsel to the House Committee on Banking, Currency, and Housing.

At the FCC, Commissioner Ness has certainly distinguished herself. She has taken a special interest in international and wireless communications policy and has represented the United States and the FCC well in international arenas. I would also like to recognize Commissioner Ness for her dedicated service as Commissioner during a historic and challenging time at the FCC as it implements the Telecommunications Act of 1996. In this context, Commissioner Ness has had to deal with difficult issues such as universal service, access charge reform, and opening the local phone markets to competition.

I welcome Commissioner Ness. I thank her for her hard work at the FCC, and I look forward to hearing her testimony.

Senator BURNS. Well, I think maybe with citing Churchill and his demise after World War II, it stood by the old Presbyterian saying that no good deed shall go unpunished, and we may be in that sort of a situation, but I understand that it is the Chairman of—the full Committee's intent is to move this nomination out of Committee, and that's what I understand now, anyway, and I think that's a good sign.

Ms. Ness, we look forward to your opening statement and thank you for coming this morning and, you know, if the other two Senators want to be excused, I know they don't have anything else to do today. You might want to introduce your family, if you'd like.

STATEMENT OF HON. SUSAN NESS, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Ms. NESS. Thank you very much, Mr. Chairman. I would like to introduce the members of my family who are here today. First, my husband, Larry Schneider, my best friend for the last 25 years. My daughter Elisabeth Schneider—why don't you stand? And my eleven-year-old son and computer advisor, David Schneider.

Senator BURNS. He taught you how to use it, didn't he? I know about that.

Ms. NESS. I'd also like to acknowledge my mother, Ruth Ness, who would have liked to have been here today but she is with my 102-year-old grandmother who unfortunately entered the hospital earlier this week. And I know during my last confirmation hearing, my then 97-year-old grandmother had watched on C–SPAN and had alerted the family to the fact that it was being covered. I see that C–SPAN is here today. Hopefully, my grandmother is in a position to watch once again. I know she would be if she can.

I also want to thank Chairman McCain for agreeing to hold the hearing today, and thank you very much, Chairman Burns, for agreeing to preside today.

I also would like to thank Senator Hollings for all of his help in providing me with this opportunity today, and my home Senators Barbara Mikulski and Paul Sarbanes for their very, very generous introduction, their support and their friendship.

I have been privileged to serve our country at a time of explosive growth and change in the telecommunications industry. We, the Commission, are at the epicenter of a fundamental transition that is changing the way we live, work and play. We're transitioning from a monopoly based to a competitive-based industry, from an analog to a digital world, from narrowband to broadband, from fixed applications to mobile applications, from circuit-switched to packet-switched and from a traditional economy to an Internet-based economy.

Lest we be complacent, the Commission is also transitioning from the implementation stage of the Telecommunications Act to the enforcement stage of that Act. And all of this has been happening on my watch. New technologies, new media, new business plans are emerging every day. Our challenge at the Commission is to facilitate innovation and encourage investment in this dynamic information age.

And our commitment is to ensure that all Americans have access to the telecommunications tools so vital in this new economy. I'm invigorated by the challenge and both inspired and humbled by this commitment to the American people. For me, there could be no better place to serve the country than at the FCC, and at this time. With your consent I would like very much to continue to serve, and I thank you for this extraordinary opportunity.

[The prepared statement and biographical information of Ms. Ness follow:]

PREPARED STATEMENT OF HON. SUSAN NESS, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. Chairman and distinguished members of the Committee:

It is an honor to appear before you today.

I want to begin by thanking both the Committee Chairman, Senator McCain, for scheduling this hearing and the Subcommittee Chairman, Senator Burns, for agreeing to chair it. I also want to thank the Ranking Member, Senator Hollings, for his invaluable assistance, and the senators from my home state of Maryland, Senator Mikulski and Senator Sarbanes, for their support and friendship.

It is a great privilege to be entrusted—along with my four colleagues and a staff of dedicated employees—with implementation of our Nation's communications laws. Through the Commission's implementation of those laws, we seek to effectuate your vision—that I share—of competition and innovation throughout the communications industry; of access for all Americans to advanced services; of elimination of outdated regulations; and of opened global markets. I appreciate the opportunity you have given me to serve in a position to promote these goals, and with your consent, I will continue to do so.

I have been fortunate to serve at an extraordinary time. When I first appeared before this Committee in 1994, the Internet was still a nascent network used predominantly by academia. Less than 10 percent of Americans had cellular phones. Spectrum licenses were awarded by lotteries, not auctions. There was no direct broadcast satellite service. And local telephone competition was largely a dream.

Today, the Internet has revolutionized the way we live, work, and play. Over sixty percent of Americans now use the World Wide Web on a regular basis. Eighty million Americans subscribe to mobile telephone service. Over 8,000 spectrum licenses

have been awarded by auction. Direct broadcast satellite is the fastest-growing video service. And there are a multitude of new companies aiming to provide consumers with choices for their local and advanced telecommunications services.

But the best is yet to come.

Over the next five years and beyond, the Internet will profoundly change the way we live and work. The convergence of previously separate industries will allow information and content, whether voice, data or video, to be transmitted virtually any time and any place over an ever-expanding number of paths. Multiple broadband pipelines, both wired and wireless, will bring a new generation of applications to consumers. Millions of devices, from soda machines to mobile phones will communicate directly on the Internet. New technologies such as software defined radio and spread spectrum devices, will fundamentally challenge the way we think of spectrum allocation. Together, these innovations will provide consumers with a wealth of new choices and lower prices. Our task is to insure that all Americans have access to the wealth of benefits and opportunities flowing from this telecommunications revolution.

Mr. Chairman, the future depends upon innovation. And the Commission plays an important role. We foster innovation when we create opportunities for new technologies, whether wired or wireless, to reach users. We foster innovation when we reform rules and practices that impede competitive forces. And we foster innovation when we reduce barriers to investment and open markets to competition. But we must do so at a pace consistent with digital age speed and efficiency.

We live in a global economy. Countries around the world have looked to the leadership of the United States in opening telecommunications markets to competition. We can be proud of our record at home and abroad.

Mr. Chairman, I am excited about the future. That is why I am so enthusiastic about participating in the effort to transform your vision into reality. That is why I would be honored to serve the American people during this time of unprecedented change.

Thank you.

A. BIOGRAPHICAL INFORMATION

1. Name: (Include any former names or nick names used.) Susan Paula Ness.

2. Position to which nominated: Commissioner, Federal Communications Commission.

3. Date of nomination: July 19, 1999.

4. Address: (List current place of residence and office addresses.) Residence: 5505 Devon Road Bethesda, Maryland 20814. Office: Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554.

5. Date and place of birth: August 11, 1948, Elizabeth, New Jersey.

6. Marital status: (Include maiden name of wife or husband's name.) Married to Lawrence Alan Schneider.

7. Names and ages of children: (Include stepchildren and children from previous marriages.) Elisabeth Ness Schneider, August 14, 1984 (14 years old); David Ness Schneider, July 6, 1988 (11 years old).

8. Education: (List secondary and higher education institutions, dates attended, degree received and date degree granted.) The Wharton School, Graduate Division (University of Pennsylvania), September 1981–May 1983, MBA, May 1983; Boston College Law School, September 1971–May 1974, J.D., May 1974; Douglass College (Rutgers University), September 1966–May 1970, B.A., May 1970; Sarah Lawrence College (Geneva, Switzerland program), Oct. 1968–May 1969; Verona High School, Verona, NJ, Diploma, June 1966.

9. Employment record: (List *all* jobs held since college, including the title or description of job, name of employer, location of work, and dates of employment.)

1994–Present	Federal Communications Commission, Washington, D.C., Commissioner.
1983–1992	American Security Bank, Communications Industries Division, Washington, D.C., VP/Group Head (1988–1992), Vice President (1986–1992), Asst. Vice President (1984–86), Asst. Treasurer (1984), Corp. Banking Rep. (1983–84).
1978–1981	National Women's Political Caucus, Washington, D.C., Director, Judicial Appointments Project.
1977–1982	Consultant (self employed), Bethesda, Maryland, Consultant, Consumer Credit/Government Relations.

1975–1977	Committee on Banking, Currency & Housing—U.S. House of Representatives, Washington, D.C., Assistant Counsel (Full Committee).
1974–1975	Consumer Product Safety Commission, Washington, D.C., Attorney/Advisor.
Summer 1973	Nessen & Csaplar, Boston, MA, Summer Associate.
Summer 1972	San Francisco Neighborhood Legal Services, San Francisco, CA, Summer Law Clerk.
1970–1971	Harvard School of Public Health, Boston, MA, Administrative Assistant.
Summer 1970	NBBS (Dutch Student Travel Bureau), Leiden, The Netherlands, U.S. Representative (Student Tours).

10. Government experience: (List any advisory, consultative, honorary or other part-time service or positions with Federal, State, or local governments, other than those listed above.)

1987–1994	Montgomery County Charter Review Commission, Montgomery County (MD), Chair 1991–1994, Member 1987–1994.
1984	Montgomery County Task Force on Community Access Television, Montgomery County (MD), Vice Chair.
1978	Dept. of Housing & Urban Development, Project on Women & Mortgage Credit, Washington, D.C., Project consultant.
1978–81	Montgomery County Commission for Women, Montgomery County, MD, President 1980–1981, Financial Officer 1979–80, Member 1978–80.
1977	Department of Commerce, Office of Legislative Affairs, Washington, D.C., 30 Day Consultant.

11. Business relationships: (List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, educational or other institution.) Trustee of Trust Under Will of Edward S. Ness (father) (simple testamentary trust); Member, Advisory Board, Gruss Public Policy Fellowship Program, The Wharton School, University of Pennsylvania (unpaid).

12. Memberships: (List all memberships and offices held in professional, fraternal, scholarly, civic, business, charitable and other organizations.) I am admitted to the practice of law in the District of Columbia and maintain active membership status. I am also admitted to the practice of law in the State of Maryland, but have taken inactive status for the duration of my time at the FCC. Other memberships: Federal Communications Bar Association, Leadership Washington (Class of 1988), Wharton Alumni Club of Washington, Boston College Law School Alumni Association, South Bradley Hills Neighborhood Association, National Association of Women Judges (associate member), Smithsonian Institution (Resident Associate), WETA contributor, United States Holocaust Memorial Museum, American Women in Radio and Television (honorary member), Walt Whitman Parent, Student, Teacher Association, Maret Parent Teacher Association, DNC Women's Leadership Forum, Renaissance Weekend, Har Shalom Synagogue, Emily's List.

13. Political affiliations and activities:

(a) List all offices with a political party which you have held or any public office for which you have been a candidate. Democratic Precinct Chair (Resigned 1994).

(b) List all memberships and offices held in and services rendered to all political parties or election committees during the last 10 years. During the past 10 years (prior to entering government service) I was active in numerous national and local Democratic party campaigns and political activities as a volunteer advisor and/or financial contributor. Since entering government service, I have limited my activities to certain memberships and financial contributions, as indicated below:

Clinton for President 1991–92 (Co-Chair, Montgomery County, MD primary and general election, National Finance Committee), Bruce Adams for County Executive (Montgomery County, MD (1992–94) (Treasurer)), Bruce Adams for County Council (Montgomery County, MD) (Finance Chair), DNC Business Council (member 1992–94), DNC Trustee (1993), DNC Women's Leadership Forum (current member), Maryland Democratic Party (current member), Democratic Leadership Council (current member), EMILY's List (current member).

(c) Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of $500 or more for the past 10 years.

1990	Friends of Sid Kramer	$500
1991	Clinton Committee '91	$1,000
1991	Clinton Committee '91	$1,000 (spouse)
1992	Democratic National Committee	$650 (convention package)
1992	Don Bonker for Senate	$500
1992	Don Bonker for Senate	$500
1992	DNC Victory Fund	$2,000 (joint)
1993	Friends of Bruce Adams	$500
1993	Maryland Democratic Party	$500
1994	Women's Forum, DNC	$1,000
1995	Clinton/Gore '96 Primary Committee	$1,000
1995	Clinton/Gore '96 Primary Committee	$1,000 (spouse)
1996	DNC Federal Account	$2,000 (spouse)
1996	Friends of Chris Dodd	$500 (spouse)
1996	Women's Leadership Forum, DNC	$1,000
1998	Mikulski For Senate	$500
1998	Power & Leadership in U.S. Senate	$500
1998	Women's Leadership Forum, DNC	$1,000
1999	Gore 2000	$1,000 (spouse)

14. Honors and awards: (List *all* scholarships, fellowships, honorary degrees, honorary society memberships, military medals and any other special recognition for outstanding service or achievements.) International Radio and Television Society Foundation, award for achievements in electronic media, New York, NY (May 1999); Rutgers University Hall of Distinguished Alumni, elected in 1998; Douglass Society, Douglass College, elected 1997; Women of Wireless, Certificate of Achievement; American Women in Radio and Television Award; Boston College Law School, Juris Doctor, cum laude.

15. Published writings: (List the titles, publishers, and dates of books, articles, reports, or other published materials which you have written.) Ness, Gender Stereotypes Still Need to Change, (letter), *Wireless Week*, March 8, 1999; Ness, Auction Integrity Vital, *Wireless Week*, January 26, 1998; Ness, Heads Up Call for Children's TV, (letter), *Washington Post*, October 4, 1997; Ness, Libraries: A Critical Lane on the Information Superhighway, *llinois Libraries*, Vol. 79 No. 2, Spring 1997; Ness, Spectrum Management Principles for the Twenty First Century, *The National Regulatory Research Institute Quarterly Bulletin*, Volume 3, Fall 1996; Ness, Upgrading What TV Offers Children, *Washington Times*, September 14, 1996, at A13; Ness, Responsible TV, *Washington Post*, October 27, 1995, at A24; Ness, Reflections on the Sixtieth Anniversary of the Communications Act, *Federal Communications Law Journal,* Volume 47, No. 2., December 1994, at 311; Wechsler & Ness, Power Plays, *Ms. Magazine*, February 1980, at 27; Ness & Wechsler, Women Judges—Why so Few?, *Graduate Woman*, November–December 1979, at 10; Ness, A Sexist Process Keeps Qualified Women Off the Bench, *Washington Post*, March 26, 1978, Outlook Section, at C–6; Various Reports of the Montgomery County Commission for Women (1979–80); Report of the Montgomery County Task Force on Community Access Television, March 1, 1984; Report of the Montgomery County Charter Review Commission, May 1, 1992; Report of the Montgomery County Charter Review Commission, May 1, 1990.

16. Speeches: Provide the Committee with two copies of any formal speeches you have delivered during the last 5 years which you have copies of on topics relevant to the position for which you have been nominated. Package and index attached.*

17. Selection:

(a) Do you know why you were chosen for this nomination by the President? Although I have not spoken with the President about his decision, I assume that he chose to nominate me for the same reasons he did five years ago, as well as his assessment of my track record over the past five years. Initially, I believe he selected me for my expertise in communications finance, and for my dedication to serve the American public. Over the past five years, I believe I have established myself as thoughtful, hard-working, knowledgeable, and fair, with a strong commitment to promoting competition and serving the interests of consumers.

(b) What do you believe in your background or employment experience affirmatively qualifies you for this particular appointment? My five year record as an FCC Commissioner best qualifies me for reappointment. I am the only Commissioner at

*The speeches have been retained in the Committee's files.

present who has served more than two years and the only one who has participated throughout the Commission's implementation of the Telecommunications Act of 1996. I have a thorough knowledge of the legal, policy, technical, and economic issues with which the Commission has been grappling as we transition from a monopoly to a competitive marketplace. I also have considerable experience in the art of consensus-building, and have demonstrated the ability to interpret and follow the law, and to meet statutory deadlines. I believe I have an excellent working relationship with the industry, with our colleagues in state and local government, with consumers, and with our global trading partners. I have worked closely and cooperatively with the Congress, especially with our oversight committee.

Prior to becoming a Commissioner, I was vice president and group head of the Communications Industries Division of a regional bank. I worked closely with communications companies nationwide that were expanding their businesses, creating jobs and contributing to economic growth. As a result, I developed an understanding of the financial circumstances and business plans of rural telephone companies, long distance providers, wireless carriers, satellite companies, radio and TV broadcasters, and cable companies and programmers, among others, and the impact of government regulation on these entities. I have brought this business perspective—as well as my earlier experience on Capitol Hill and as a consumer advocate—to my work as a Commissioner.

In addition to my professional career, prior to joining the Commission, I served my local community as the chair or vice chair of several county government commissions. My work on the FCC reflects my sensitivity to community needs.

So much of what the Commission does will impact the lives of future generations. I am fortunate that my two children actively use and benefit from information age technologies. I am committed to doing what I can to spur the availability and affordability of broadband networks so that children from all walks of life are empowered to achieve their full potential.

B. FUTURE EMPLOYMENT RELATIONSHIPS

1. Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate? I did so prior to joining the Federal Communications Commission in 1994.

2. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, explain. No.

3. Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization? No.

4. Has anybody made a commitment to employ your services in any capacity after you leave government service? No.

5. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable? If confirmed, I would be honored to serve my full term.

C. POTENTIAL CONFLICTS OF INTEREST

1. Describe *all* financial arrangements, deferred compensation agreements, and other continuing dealings with business associates, clients or customers. I have a vested interest in a defined benefits pension fund from NationsBank, successor to American Security Bank, which will pay a monthly annuity, beginning, September 1, 2014. I have no control over the funds, and do not know the value of the pension, who manages the pension funds, or the assets in which the fund is invested.

2. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest in the position to which you have been nominated. When I joined the Commission in 1994, my husband converted from an equity partner to a contract partner in the law firm of Arnold & Porter to insulate our family from any earnings resulting from the firm's representation of communications clients. Nonetheless, I consider whether it is necessary to recuse myself if Arnold & Porter represents a client in an adjudicatory proceeding, and I confer with the Commission's Office of General Counsel as necessary to ensure that I avoid any appearance of conflict of interest.

3. Describe any business relationship, dealing, or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated? I am aware of no such potential conflicts of interest.

4. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration and execution of law or public policy. My primary responsibility as a Commissioner has been to implement the laws that Congress writes, not to lobby for changes in those laws. Nonetheless, during my tenure at the FCC, I have occasionally expressed to Members of the Senate and House, and in public meetings, my views on legislation. For example, I spoke publicly and privately in 1994 and 1995 of my hope that Congress would enact comprehensive communications legislation, as ultimately occurred in 1996. I have also testified on slamming issues at several Senate field hearings.

Occasionally, I joined with other Commissioners in suggesting various revisions in the Communications Act (many of these were enacted in the Telecommunications Act of 1996). At one point I recall joining my colleagues in a letter concerning the adequacy of the Commission's annual appropriation. I have spoken about the desirability of amending the Government in the Sunshine Act, and of confirming the public ownership of radio spectrum. I also have answered questions in private meetings with Representatives and Senators, and in public oversight hearings, concerning various other legislative proposals.

I participated in the negotiation of the World Trade Organization agreement on telecommunications services, and I have served as a senior member of the FCC delegation in bilateral and multilateral negotiations on WTO implementation, the World Radio Conferences of 1995 and 1997, and various related international matters. In these activities, I have conferred from time to time with members of Congress, as well as with officials of the Department of Commerce, State Department, and U.S. Trade Representative.

And, within the specified jurisdiction of the Commission, I have affected the administration or execution of law or public policy in hundreds of proceedings over the past five years, both through my participation in the Commission's deliberations and through the votes that I have cast.

Prior to joining the FCC, I participated actively at the state and local level on public policy matters in my home state of Maryland. I served as the chair of the Montgomery County Charter Review Commission. In that capacity, I testified before our County Council and the State legislature on county charter matters.

5. Explain how you will resolve any potential conflict of interest, including any that may be disclosed by your responses to the above items. (Please provide a copy of any trust or other agreements.) I try to conduct myself in a manner that minimizes the potential for any conflicts of interest—or appearances of conflict—to arise. Whenever an ethical issue is presented, I consult my conscience, my advisors and, where appropriate, our Office of General Counsel ethics experts, for guidance. I recognize that public office is a public trust, and I am committed to maintaining a high ethical standard for myself and for my staff.

6. Do you agree to have written opinions provided to the Committee by the designated agency ethics officer of the agency to which you are nominated and by the Office of Government Ethics concerning potential conflicts of interest or any legal impediments to your serving in this position? Yes.

D. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details. No.

2. Have you ever been investigated, arrested, charged or held by any Federal, State, or other law enforcement authority for violation of any Federal, State, county, or municipal law, regulation or ordinance, other than a minor traffic offense? If so, provide details. No.

3. Have you or any business of which you are or were an officer ever been involved as a party in interest in an administrative agency proceeding or civil litigation? If so, provide details? No.

4. Have you ever been convicted (including pleas of guilty or nolo contendere) of any criminal violation other than a minor traffic offense? No.

5. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination. I have nothing specific to add at this time, but would be pleased to respond to any additional questions the Committee may ask.

E. RELATIONSHIP WITH COMMITTEE

1. Will you ensure that your department/agency complies with deadlines set by congressional committees for information? I will do everything within my power to ensure that the FCC complies with deadlines set by congressional committees for information.

2. Will you ensure that your department/agency does whatever it can to protect congressional witnesses and whistle blowers from reprisal for their testimony and disclosures? I will do everything within my power to ensure that the FCC protects congressional witnesses and whistle blowers from reprisal for their testimony and disclosures.

3. Will you cooperate in providing the committee with requested witnesses, to include technical experts and career employees with firsthand knowledge of matters of interest to the committee? I will cooperate fully with the Committee to provide it with the witnesses it needs and desires.

4. Are you willing to appear and testify before any duly constituted committee of the Congress on such occasions as you may be reasonably requested to do so? Yes, I would be happy to appear and testify.

F. GENERAL QUALIFICATIONS AND VIEWS

1. Please describe how your previous professional experience and education qualifies you for the position for which you have been nominated. I believe my experience as a lawyer (including service on one congressional committee staff) and as a banker (working with virtually every sector of the communications industry) were excellent training for this position. But at this juncture I believe it is my experience as a Commissioner, making literally thousands of decisions and dealing with virtually every provision of the Communication Act and related laws, that is most relevant. I have worked diligently to implement the laws Congress has enacted; I have listened carefully to the concerns of industry and consumers; and I have forged a strong working relationship with my FCC colleagues and with our state commission counterparts to expedite the arrival of competition, streamline or eliminate regulation, and preserve access to telecommunications and information services at affordable prices for all.

2. What skills do you believe you may be lacking which may be necessary to successfully carry out this position? What steps can be taken to obtain those skills? I believe that I have the skills necessary to successfully carry out my responsibilities as a member of the FCC. Nonetheless, if confirmed to another term, as I have done over the past five years, I would strive to increase my knowledge and improve my skills to continue to merit the public trust.

3. Why do you wish to serve in the position for which you have been nominated? I am deeply committed to serving the American public, and believe I can best do so at this time by continuing in my position as an FCC Commissioner. I care passionately about the issues before us. We are at a pivotal time in the transition from monopoly to competition in communications and much is left to be done. If confirmed by the Senate, I would welcome the opportunity to continue to play a role in ensuring that the communications laws are properly implemented.

In carrying out the laws Congress has enacted, we have greatly enhanced the lives of Americans, from accelerating the introduction of new technologies and services, to establishing rules that will enable people with disabilities to have meaningful access to telecommunications products and services, and children—especially from low income and rural districts—to have classroom access to the Internet. I believe that I have contributed significantly to the decisions which this Commission has rendered over the past five years.

As I noted, there is much left to be done. I want to promote increased competition in all communications markets (especially local telephony and multichannel video services), ensure that rural Americans participate fully in the benefits of communications advances, eliminate unnecessary regulation, promote efficient spectrum usage, open overseas markets, and protect the interests of children (V-chip, E-rate, and children's educational television programming).

I believe that the quality of FCC decision making on these and other issues will be strengthened by my continued participation. The agency has four relatively new Commissioners. I provide continuity, institutional knowledge, and historical insights that might otherwise be lacking.

4. What goals have you established for your first two years in this position, if confirmed? If confirmed, my principal goal would be to continue faithfully to implement the communications laws of the United States for the benefit of the American public. Specific priorities during the next two years include: (1) further strengthening of the support regime for telephone service in high-cost areas; (2) approving meri-

torious applications for long distance relief filed by Bell companies; (3) promoting the deployment of advanced (broadband) communications services to all Americans; (4) expediting review of telecommunications mergers; (5) completing revisions to broadcast ownership rules; (6) eliminating regulations that are no longer needed and streamlining those that are more burdensome than necessary; (7) ensuring a successful implementation of digital television; (8) advancing the interests of U.S. companies and U.S. consumers in the next World Radio Conference; (9) nurturing the growth of wireless services (terrestrial and satellite); and (10) promoting policies for efficient spectrum management. For further elaboration, see answer to Question F.6. below.

5. Please discuss your philosophical views on the role of government. Include a discussion of when you believe the government should involve itself in the private sector, when should society's problems be left to the private sector, and what standards should be used to determine when a government program is no longer necessary. First and foremost, I want to distinguish between the role of Congress in making the laws and that of an FCC Commissioner in implementing them. My principal responsibility as a Commissioner is to follow faithfully the law as Congress wrote it, regardless of whether I might have chosen a different course if I had discretion to do so.

Generally speaking, I tend not to believe in "big government" or "no government" but in "smart government." I believe in the supremacy of markets in allocating resources, setting prices, picking winners and losers, etc. But government can play an important role in correcting market failures, mediating disputes, and protecting consumers.

The role of government can better be assessed in the context of specific examples than in the abstract. In the case of digital television, for example, I thought it was right for the government to add its imprimatur to the standard that had been developed by industry; virtually all industry representatives felt this would assist in expediting a successful transition to DTV. In the case of Personal Communications Services, however, I elected for the government not to mandate a particular transmission methodology, and I believe the competition between GSM, TDMA, and CDMA has been beneficial. I believe government still plays a useful role in spectrum allocations, but in the assignment process I believe that a market mechanism (auctions) produces fairer and faster results when there are competing applications than other approaches (such as comparative hearings, which require subjective decisions).

Often, the issue is not whether "government" or the "market" is better, but how government can help to create conditions that will allow greater reliance on competition, and less on regulation. Local telephone competition is a case in point. Here, Section 251 requires some significant government intervention to create opportunities for greater competition, but as that competition emerges the need for entry, exit, and price regulation will diminish, and such regulation may well hamper greater competition.

Wireless services provide another example, but one where the evolution of competition is more advanced. Early in my tenure, we adopted the PCS band plan and PCS auction rules and then conducted the A and B block auctions. Those actions, by government, enabled the introduction of additional competition in a market that had previously been a duopoly. Soon thereafter, we were confronted with petitions by states that wished to continue to regulate the prices for commercial mobile radio services. Based on our assessment of the prospects for competition, we denied the petitions, and ended rate regulation for CMRS. The results have been every bit as good as we had hoped they would be. Yet even the robust wireless competition that has emerged in the larger markets has not eliminated the need to address such wireless issues as hearing aid compatibility, E911 location information, or issues relating to the Communications Assistance to Law Enforcement Act.

Congress has provided the FCC with appropriate guidance—and authority—concerning the removal of unnecessary regulations. Under Section 10 of the Communications Act—a tool I find very useful—we can and must eliminate any regulation that is not necessary to maintain just and reasonable prices, practices, etc., that is not necessary for the protection of consumers, and where removal is consistent with the public interest. We have repeatedly used that authority to examine our rules and to eliminate those which are no longer needed. I am also an advocate for the use of properly tailored sunset provisions in regulations.

Finally, given the dizzying speed with which telecommunications technology and the marketplace are changing, it is critical for the Commission to step back and review our rules to determine whether the underlying purpose is still valid, whether the rules are in fact achieving that objective, and whether there is a less burdensome way to accomplish it. The biennial review provision of the Telecommunications

Act (Section 11) is one vehicle for conducting such a review. I will not hesitate to revisit decisions which I have rendered where changed market conditions warrant.

6. *In your own words,* please describe the agency's current missions, major programs, and major operational objectives. The Commission's mission is outlined in the Conference Report accompanying the Telecommunications Act of 1996: "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . ."

Much of our present focus is on completing orders to implement the provisions of the Act. In our otherwise successful defense of our local competition order, the Supreme Court remanded one piece—what constitutes an unbundled network element (UNE) (Section 251(c)(3),(d)(2))—to the Commission for further review. In addition to the UNE remand, we must further refine support mechanisms for telephone service in high-cost areas (Section 254), and evaluate forthcoming applications for Bell company entry into long distance (Section 271). We must conduct thorough but expeditious evaluations of proposed mergers (Sections 214 and 310), combat slamming (Section 258), and implement the Communications Assistance to Law Enforcement Act (Section 229).

We are finally completing our review of our broadcast ownership and attribution rules, and finding ways to accelerate review of future broadcast transactions. We must continue to oversee the transition from analog to digital television broadcasting, facilitate the introduction of digital radio broadcasting, ensure compliance with the V-Chip law and the Children's Television Act, and ensure that advanced telecommunications capabilities are being deployed to all Americans on a reasonable and timely basis.

Our mission also includes managing the radio spectrum for non-government uses. A major focus is WRC 2000, in which spectrum managers around the globe will convene to establish the spectrum rules of the road. We must engage in these debates—well in advance of WRC 2000—if we are to have an impact on outcomes that will affect billions of dollars of U.S. business.

7. In reference to question number six, what forces are likely to result in changes to the mission of this agency over the coming five years? The communications marketplace is changing and, as it does, so too must the FCC. The most notable change that we are working to bring about is to increase competition in all markets, especially those currently characterized by little competition today (local telephone service and multi-channel video service). Increased competition will mean less prescriptive regulation, and we will need to adjust and streamline our rules as competitive developments warrant. Our efforts will be assisted by changes in technology, which are blurring the lines between previously discrete fields and making it easier, for example, for cable companies to offer telephone services, telephone companies to offer video services, and both to offer high-speed Internet access services.

Increasingly, our spectrum policies are being challenged by new proposals for band sharing. We must refine our spectrum management policies to expedite the deployment of new wireless technologies while protecting existing services from unacceptable levels of interference.

Chairman Kennard has initiated a process to plan for the FCC of the future. A wide variety of stakeholders has been consulted. My colleagues and I need to review the many suggestions that have been received and work together to see which ones make sense and which do not, and to determine the appropriate scope and timing of the various changes we do decide to make. Structural changes (such as the recent proposal to create an Enforcement Bureau and a Public Information Bureau) and potential statutory changes will, of course, be presented to Congress for review.

8. In further reference to question number six, what are the likely outside forces which may prevent the agency from accomplishing its mission? What do you believe to be the top three challenges facing the board/commission and why? The FCC's ability to do its job is dependent first and foremost on our professional staff of lawyers, engineers, economists, analysts, and other experts. We are extremely fortunate to have exceptionally knowledgeable and talented people working diligently to administer the Communications Act, and we are also fortunate that Congress has appropriated the funds necessary to fulfill our responsibilities and to deploy efficiency-enhancing technology (e.g., for electronic filing initiatives). But budget limitations have nonetheless hindered our ability to attract new talent to replace those who have left.

The propensity for service providers to litigate instead of compete unnecessarily delays the implementation of FCC decisions. Judicial review (though a vital element of our system of laws) is an "outside force" that sometimes impedes the Commission from accomplishing its mission. The Supreme Court eventually overturned the 8th

Circuit's ruling on the FCC's local competition order, but for two intervening years the environment for investment and competition was clouded.

Our highest priority is to ensure that all Americans can enjoy the best communications and information services possible, at affordable prices. The three top challenges in meeting this priority are to (1) promote competition whenever possible, (2) continue to address the unique needs of rural Americans and those with low incomes, and (3) eliminate those rules that have outlived their usefulness. As we pursue these and related issues, we can expect occasional criticism from industry participants, consumers, reviewing courts, and others, but we need to see this transition through with decisions that are clear, fair, prompt, and consistent with the law.

9. In further reference to question number six, what factors in your opinion have kept the board/commission from achieving its missions over the past several years? I believe that the FCC is achieving its missions. The Commission embraced the many assignments in the Telecommunications Act with a firm commitment to implement the law faithfully and to meet the many statutory deadlines. I am proud of so many hard-working staff members whose efforts led to completion of every rulemaking on time. I am also proud that my colleagues on the Hundt Commission were able to achieve unanimity throughout that process.

It is not inconsistent with the foregoing to observe that our work is not yet completed. I have always believed, for example, that replacing the telephone monopoly with a competitive telecommunications environment would take a number of years. Unnecessary litigation and footdragging have been a source of delay, but fundamentally the process of opening the telephone network to competition (with resale, unbundled network elements, collocation, number portability, construction and interconnection of new facilities, etc.) is inevitably complicated and slow. Moreover, our authority to effectuate changes is shared with our state colleagues. But (as I described more fully in a January 1999 speech supplied in response to Question A. 16), I believe we are generally on track and beginning to see the desired results. Generally speaking, most Americans are receiving more and better communications services, and paying less, than ever before.

Similarly, with respect to telephone service in rural areas, we have not yet completed adapting federal support mechanisms to a competitive environment. The analytic and political difficulties are quite substantial. But while we try to craft a compromise regime that will assure affordable universal service for all, we have taken steps to ensure that there is no diminution of support available to rural subscribers, and telephone service remains affordable throughout the nation.

One indication of the FCC's success in achieving its missions is the tendency of other nations to follow the U.S. example. The policies of the Communications Act and of FCC rulemakings as well as the concept of an independent commission are being emulated in many countries around the world.

10. Who are the stakeholders in the work of this agency? Our principal stakeholders are the 273 million Americans who depend on communications to conduct their businesses, communicate with their families and friends, obtain news and information, and be entertained. Various statutory provisions also require particularized attention to the needs of low-income consumers, those in rural, insular, and high-cost areas, students and teachers, library patrons, rural health care providers, and people with disabilities. Other stakeholders include various industry sectors: large and small incumbent and competitive telephone companies, cable operators and programmers, radio and TV broadcasters, wireless carriers, satellite operators, international carriers, equipment manufacturers, law enforcement officials, public safety officials, and information service providers, among others.

11. What is the proper relationship between your position, if confirmed, and the stakeholders identified in question number ten. In every proceeding presented to the Commissioners, I believe it is our responsibility to review the law, afford all interested parties an opportunity to express their views, consider these views and the recommendations of our staff and to reach our best possible independent judgment on the merits. I do not believe we should favor or disfavor any particular consumer group or industry sector but rather provide a neutral forum that rules fairly, wisely, consistently, and expeditiously. Ultimately, our responsibility is to the law and to the American people, subject to your oversight and that of the courts, not to any particular group or sector.

12. Please describe your philosophy of supervisor/employee relationships. Generally, what supervisory model do you follow? Have any employee complaints been brought against you? I have a personal staff of five—three professionals and two administrative. As a result, I find it reasonably easy to stay informed of their activities and provide whatever direction is required. Each of my advisors has direct access to me at any time, day or night, and we communicate regularly in person, by e-mail,

and by telephone. I rely on my staff for their expertise, judgment, and discretion, but I alone am responsible for the decisions I make.

No employee complaints have been brought to my attention. Indeed, I have been fortunate to have an exceptionally able staff that has served for unusually long periods of time relative to the average tenure for legal advisors.

13. Describe your working relationship, if any, with the Congress. Does your professional experience include working with committees of Congress? If yes, please describe. The Commission was established by Congress to implement its communications laws, and I am committed to consulting with Congress to insure that we are fulfilling our duties to the American public. Over the past five years, I have worked closely with Congress in a variety of ways. Throughout my tenure, I have regularly made myself available to Members of Congress, on both sides of the aisle and both sides of Capitol Hill to discuss issues, brief them on developments at the Commission, and solicit their views and concerns. I have participated in numerous group and one-on-one meetings with Senators and Representatives and conferred in person or by telephone on scores of occasions with congressional staff.

More formally, I have testified at periodic oversight hearings held by the House and Senate Commerce Committees, and their Communications Subcommittees. I have also testified before several Senate Commerce Communications Subcommittee field hearings on slamming, before the Senate Government Operations subcommittee on slamming, and before the House Judiciary Committee on mergers. I have responded to many congressional letters.

Prior to my experience at the Commission, I worked with committees of Congress both as assistant counsel to the House Banking Committee and, later, as the head of a coalition striving to increase the number of women in the federal judiciary.

If confirmed, I pledge to continue to work closely with Congress to ensure that the laws are faithfully implemented.

14. Please explain how you will work with this Committee and other stakeholders to ensure that regulations issued by your board/commission comply with the spirit of the laws passed by Congress. Over the past five years, I have tried my best to take into account the views and concerns of the members of this Committee and to keep you informed of our activities. If I am confirmed for another term, I will continue to listen to any Member, at any time, regarding whatever issues we are considering.

I recognize that members at times have differing views about the meaning of various statutory provisions. I will read and reread the law; and I will stand ready to explain the reasons why I believe every vote that I cast is consistent with the letter and spirit of the laws passed by Congress.

15. In the areas under the board/commission jurisdiction, what legislative action(s) should Congress consider as priorities? Please state your personal views. I hope Congress will pass legislation confirming that a license to use radio spectrum is a conditional privilege and is not an asset that can be treated as part of an estate in bankruptcy and therefore tied up for years. I also hope Congress will support (though no legislation is needed) the proposed establishment of a new Enforcement Bureau and Consumer Information Bureau. I look forward to Congress completing action on the Satellite Home Viewer Act and Intelsat privatization. I also hope that Congress adopts a program for tax certificates to facilitate first-time minority and female owners' investment in broadcast properties.

I would like Congress to consider giving the Commission authority to set fees for private use of the radio frequency spectrum so that the American public reaps the benefit of spectrum usage.

16. Please discuss your views on the appropriate relationship between a voting member of an independent board or commission and the wishes of a particular president. Fundamentally, I believe that FCC Commissioners must exercise independent judgment on all matters coming before the Commission. I listen closely to, and consider carefully, whatever recommendations are made by industry chieftains, members of the public, and political leaders, both in the Congress and in the Administration (including the President), but at the end of the day I believe that each Commissioner must exercise his or her own best judgment, within the statutory framework established by Congress.

Senator BURNS. Thank you very much, Commissioner. We've been joined by the distinguished Senator from North Dakota, west of the river, we might add, Senator Dorgan.

STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

Senator DORGAN. Mr. Chairman, thank you very much. I'm pleased to be here to support the nomination of Commissioner Ness. I think Senator Rockefeller indicated that this is a Commission that very much needs her continued leadership. We have four other members of the Commission who are relatively new. I voted for all of them and I'm proud they're there, but Commissioner Ness has been there and is the, as Senator Rockefeller indicated, the institutional memory.

But, more important from my standpoint and I think the standpoint of perhaps you and others, Mr. Chairman, is as we implement the Telecommunications Act, the use of the Universal Service Fund to build out the infrastructure for advanced telecommunications services will have a lot to do with how this country looks in the future. It will have a lot to do with where people live, where jobs are created, where people move, where people do business.

If we have a country in which there is a digital divide and small towns and rural areas do not have the larger pipes or the advanced services through which data can move, they are destined not to attract economic development and jobs and new opportunities. They are destined to be in that circumstance. We must avoid that at all cost, and we must take steps and actions to make sure that the Universal Service Fund is used as the Act was written and intended.

The Universal Service Fund in the Telecommunications Act is designed not only to facilitate the services of telephones at affordable prices, and comparable service but in addition to that, we wrote into the Act that it relates to advanced telecommunications services or broadband, as well, so the connection of the Universal Service Fund to that requirement and that opportunity is critically important. There's no one on the Commission who has a better understanding of that or understands the urgency of that better than Commissioner Ness. As someone representing a rural state, it is imperative that we keep Commissioner Ness on that Commission fighting for those issues.

This is not a case of her fighting our fight on these issues at the expense of someone else. This isn't a zero-sum game. It is the fact that the implementation of the Telecommunications Act is working quite well in some areas of the country. There is robust, aggressive competition where there is an income stream to justify it, and we all understand that.

I just had a meeting a moment ago when a colleague of mine, Senator Burns, took out his Palm VII and someone said, "Is that wireless?"

He said, "Yes, but it doesn't work in Montana."

And the point he was making just by answering the inquiry was yeah, this is wireless and it's wonderful, I'm glad I have it this morning in Washington, DC but in Montana, it doesn't work. Wouldn't work in North Dakota, either, because we don't have ubiquitous services all across this country and the build-out isn't occurring at the same pace in all areas.

I think everyone at this dais at this point has an interest in seeing that rural areas experience the full flower of opportunity com-

ing from the Telecommunications Act. No one on the Commission has as strong a voice on those issues as Commissioner Ness. That is why this hearing is important. I deeply appreciate your holding it. I hope we can move expeditiously on this nomination.

Senator BURNS. Well, like I said, the Chairman has already indicated that he is going to move this nomination out of Committee so we're happy about that.

Commissioner Ness, thank you for coming this morning. Let me start off by—I don't know of anybody that I've had the opportunity to work with since I come to Washington, DC, and since you were put on the Commission that we have had a very, very good working relationship and I want—and I appreciate your accessibility. Also, we've done some things in the country and you've been very, very, very active in furthering those things, and those things we are concerned about in rural areas and how universal service works and how we are seeing the roll-out.

There's a couple of areas that I have concerns about, if you would just help me along a little bit, that has to do with Section 706, of course, in the Telecom Act. I had quite a lot to do with that Section and the build-out of technology into rural areas and this type thing and broadband deployment in this thing.

Could you give the Committee your view of the current state of that broadband roll-out in America and specifically in rural areas? How do you think we're progressing in implementing 706?

Ms. NESS. Thank you, Senator. We have been working very hard to implement Section 706. I think it was an inspired section of the Act because it is vital that all areas of the country have access to advanced communications under a roll-out that is reasonable and timely.

We have convened, together with our colleagues at the State Commissions, a Joint Commission to hold a series of hearings across the country. I'm going to be participating in a number of those hearings to determine to what extent the roll-out is taking place and what impediments there may be to a more rapid roll-out. We've instituted a couple of proceedings, one of which is dealing primarily with Indian reservations, to ensure that advanced communications do not stop at the door of the reservations.

We are working with rural telephone companies to make sure that they are full participants in this process.

Senator BURNS. Do you think the Commission has been aggressive, as aggressive as it should have been in implementing 706?

Ms. NESS. Senator, we can always do more, as we attempt to implement that section. We are hoping, by virtue of our upcoming report, to look over all of the issues soup to nuts.

Senator DORGAN. Give me an idea of when you start looking at a section like that in the deployment of broadband, have we had a disagreement on the Commission on how it should be implemented or what the Commission should be doing. We're seeing now some broadband move into rural areas. Now, let's face it, now, in my state of Montana and like the state of West Virginia and the state of North Dakota, we are not exactly—Billings, Montana may be rural by the measurement that we use nationwide, and then when we go to Lewistown, Montana, that's frontier, and going back to some old terms used in Medicare and things. But we're seeing

some things happen out there. We think probably it just hasn't happened fast enough.

Ms. NESS. Senator, the transition from narrowband to a broadband economy is happening far more rapidly than anyone would have expected. It does require a tremendous amount of investment on the part of providers of these services. We're trying to do everything we can to have multiple opportunities. For example, in some rural areas it could very well be that wireless is a great solution to reach hard-to-reach areas. Satellites may very well be a way of reaching many of these communities and so we have, in fact, a proceeding underway on satellites to determine how they can participate more actively in providing universal service with broadband facilities. Again, this is vitally important and we are trying to see where the impediments are and what we can do, proactively, to move it along more rapidly.

Senator BURNS. Senator Dorgan is exactly right on the build-out, and if we're going to have any kind of economic chance to stay up with the rest of the world in a national or a global economy, broadband is essential out there. We've got a situation now in rural America that is not a very pretty picture, and until America wants to pay more for its bread, we're going to continue to be in a very, very—in an economic state that we're very uncomfortable in in our area, so we know it's very important. Senator Brownback?

Senator BROWNBACK. Thank you very much, Mr. Chairman. Thank you, Commissioner Ness, for coming in front of the group and answering some questions.

I want to turn if I could to some specific questions regarding particularly Bell Atlantic's application to get into in-region long distance service in New York, but not so much that but the template it sets for future roll-outs there.

In the separate statement that you issued in conjunction with the Commission's approval of Bell Atlantic's application to provide in-region long distance service in New York, you indicated that it would have been in your words unfair to penalize Bell Atlantic for its record on DSL loop performance at this time, close quote. You state that, quote, because the consumer market for broadband services has only recently begun to develop, end quote, the FCC collaborative process did not adequately address the ordering and provisioning of DSL-capable loops. Then you go on to say that our evaluation of future applications will be focused on this issue.

Now, in reading all of those together it sounds a lot like that you may be favoring an ever-expanding checklist before other applicants are going to be allowed these same opportunities that were provided to Bell Atlantic, and I'm concerned if that is the case, if there's going to be more items on the checklist, that people don't know about, and I would like for you to tell us today, is the checklist set now for applicants seeking to provide that long distance service?

Ms. NESS. Yes, Senator, the checklist is set. When Congress enacted the Telecom Act, the checklist was very clear. In implementing that act, we have been working cooperatively with the carriers so that they know what is expected of them.

Broadband delivery of DSL services is a telecommunications service. Loops must be made available. There are technical issues

associated with providing DSL-ready loops. We have been trying to work through these technical issues with the carriers. I felt in the case of New York that during the collaborative process, we had not talked sufficiently about DSL service because it was just beginning to roll out, and I thought it would be unfair to weigh that piece so heavily.

Going forward, DSL, as we talked a few minutes ago, is rolling out much more rapidly than we would have earlier envisioned. It is important competitively and it is one service that we are and will be focusing on.

Senator BROWNBACK. So the checklist for future applications will remain the same as it was for Bell Atlantic's application when it went through the FCC?

Ms. NESS. The requirement to make loops available, yes.

Senator BROWNBACK. And there will not be additional items added to the checklist.

Ms. NESS. I do not believe this is an additional item, it is focusing on specifically making sure that there are telecommunications loops available.

Senator BROWNBACK. I want to make sure that companies in making their applications know here's the hurdles we have to clear and that they're set and there are not additional ones that are put after the first one has been cleared.

We passed the Act in 1996. We're now in 2000 and it seems like it's taken quite a while to implement this Act, and I would hope that those checklists could be set, firmed up and everybody know what they have to meet to get into long distance services.

In your statement accompanying the Commission's May 7, 1997 Universal Service Order you indicated you thought the FCC had made substantial progress and established a clear timetable for implementation of that Telecommunications Act which was enacted into law February 8th of 1996, which in telecommunications development is ancient history, I suppose, given this rate of change.

Did you really think that 4 years after the bill became law that the FCC would still not have fully implemented the high-cost provisions of Section 254? Do you consider how long it has taken and how much further we have to go for a clear timetable there?

Ms. NESS. Senator, certainly universal service, in particular, high cost, is an area we care about tremendously. That's one of the cornerstones of the Act. I would have liked to have taken less time. It is very complex. We have been proceeding in a manner to ensure particularly in rural and high-cost areas that everyone has access to telecommunications at comparable rates and comparable services. When you try to revise pieces of this, you want to do it carefully so that you don't cause any harm, and we believe that we've done that. We've completed work with the larger carriers. We're working closely with the rural carriers to ensure that they can continue to provide the wonderful services that they provide to the rural community without displacement. We have come a long way to accomplish that working with our colleagues in the states and I think we're well on track to have completed that.

Senator BROWNBACK. If I might submit to you, 4 years is a long time, given the rate of change that's taken place in telecommunications and the platform for the new economy that it's providing,

and by not having this issue resolved, it further impedes investment into rural and other high-cost areas. I would really hope we could step, you know, step up the implementation of that so the rural areas and those providing telephony and other services would know what they've got to work with. I think that's just an important thing to have.

One final question, if I could. Last year I introduced legislation that prohibits the application of spectrum caps to new spectrum that is auctioned in the future. One of the reasons I introduced the bill was to accelerate the introduction of advance services, including wireless Internet access and other data services, for which operators need substantially more spectrum in order to provide the service. Given the fact that some of the spectrums from C and F block licenses is not currently being used, is it safe to conclude that relief from the spectrum cap could be granted for these licenses without risking industry consolidation? If so, shouldn't relief be granted to ensure that advance wireless services develop without behind relevancies?

Ms. NESS. Senator, I care very much about competition and the availability of advanced services, particularly wireless services. This is a matter that is currently before us, and we will take your views under advisement. Recently, we implemented another requirement, which is to make available by auction channels 60 to 69. We did so without putting a spectrum cap on that. That's another swath of spectrum that will be available for advanced services.

Senator BROWNBACK. Well, I'd hoped that we could provide those and make them available so that more of the advance services would be available. Mr. Chairman, thank you very much.

Senator BURNS. Senator Rockefeller?

Senator ROCKEFELLER. Thank you, Mr. Chairman.

Commissioner Ness, when I made my introductory remarks——

Senator BURNS. Excuse me, Senator, I don't want to interrupt you but we've got a vote on. How do you want to do this? I'll go vote.

Senator ROCKEFELLER. OK, and then we'll come back.

Senator BURNS. OK.

Senator ROCKEFELLER. It's very interesting, in fact, that our Committee system was in fact set up many, many years ago having absolutely no idea of the science and technology kinds of changes. Then you have the phenomenon of a Senate where, oh, I guess there's maybe a couple in their 40's, 50's, 60's, 70's, 80's and 90's are the ages, and so therefore, our making a policy or deciding not to make policy for the purposes of the advancement of science and technology in telecommunications is very important. But it also, I think, means that the Federal Communications Commission is even more important, because we really don't have the experience by virtue of generation, although many of us are trying, that the Commission does, and particularly you, because as I indicated, you are the only member of the Commission who has served since, you know, the Telecommunications Act was passed.

Senator Brownback indicated that that was really a very long time ago, but it seems like yesterday, and what I would like to do, if you would sort of reflect on some of the issues that—you've

learned from this very kind of difficult transition from what appeared to be a relatively clear act to the four years. That includes, as I indicated, under-funding, getting sued for every single thing that you do or whatever. But what is it that you've learned? Because I think your experience is really important here.

Ms. NESS. Thank you very much, Senator. Yes, I have participated in the implementation of the entire Act and, as a result of that, I've had a chance to see the interplay of all of the sections of the Act, in particular, how we go about meeting the goals, the interplay of the goals of competition, for example, and serving rural communities.

I'm very sensitive to these types of issues. It's given me an opportunity to understand the relationships that we have with the states, how we work together to provide seamless transition from monopoly to competition. It's given me an opportunity to work with some of our foreign colleagues, to find ways to work together to introduce competition abroad.

We stand as a model for many countries in how one opens the market to competition and so the experience of implementing our Act has helped us to work globally as well as nationally.

Lastly, it has also shown me the impact that all of our activities have on consumers. I want to make sure that the consumers at the end of the day reap the benefits of all that is going on in the communications arena. Thank you.

Senator ROCKEFELLER. Thank you. Senator Snowe and I later this week are going to be introducing a rural telecommunications bill that addresses what Senator Dorgan is also very concerned about, and that is the build-out of broadband in rural areas or, rather, the lack of build-out. And it's very interesting to look at what Bell Atlantic and others plan in terms of broadband in West Virginia, and it basically covers five of our 55 counties and ignores all the others. And that gets you into another definition of the digital divide, not just the use of computers but the use of data flow, individual, you know, flow, and all the rest of it and at what speed—you know, what's the upload, what's the download time, et cetera.

And so Senator Snowe and I are going to be introducing this bill which provides a tax credit to them. And I'm not necessarily a tax credit type of Senator, but I think that, you know, if that will help telecommunications expand and build out into rural areas, and we define rural areas in a particular way—and this doesn't go on forever. This is sunsetted after 3 years, but we want to give them the start.

Can you sort of look out at the future on the question of the digital divide? Most people on this Committee come from rural states and very much like the Finance Committee, which used to be an Oil and Gas Committee, is now pretty much a rural Committee, and I would just be interested in your concept in terms of what it might be like in 10 years or what needs to happen over those 10 years.

Ms. NESS. Senator, the beauty of telecommunications and broadband communications is you can create industries any time, any place. This presents a great opportunity for rejuvenation of rural economies, so I'm very excited. In fact, I'm bullish on doing

what we can to make sure that the rural areas have access to broadband telecommunications facilities. Just because a fiber line passes by a rural community doesn't necessarily mean that the inhabitants of that community will have access to those facilities. We want to find ways that we can make that happen.

But in my view, there will be, because of changes in technology, declining costs in so many of these delivery mechanisms. We have an opportunity to make sure that rural areas can partake and benefit from these technologies.

Senator ROCKEFELLER. You know, Senator Dorgan said that comparable services include not just universal service but also broadband, and that's in the law, and yet here I am offering a tax credit bill to try and entice companies to do something which under the law they ought to be doing, and that worries me. And even the tax credit bill which Senator Snowe and I are going to introduce, I think the telecommunications companies like that but, on the other hand, even that will not cover all of West Virginia. It's only going to be—or all of Maine or all of North Dakota. It's just going to be an increment of improvement and I think that, you know, I just think that's terribly important.

I visited in one of our most remote communities last week. I was in two of them, and in one of them, there was an Internet company because there had been a special build-out for them but for nobody else within a hundred miles in any direction.

Ms. NESS. One of the things that I've asked the Joint Board to do this year is to re-examine the definition of universal service. It is an evolving set of obligations and we will be looking at that probably beginning this summer.

Senator ROCKEFELLER. Thank you.

Senator DORGAN. Commissioner, I believe neither Senator Snowe nor I have voted and there's a vote probably about to finish so we will have to leave in a moment, and I'm unable to come back because I'm Ranking Member on an appropriations subcommittee that is meeting as well, so I have to be there. But let me mention a couple of quick items, and I'll be very brief. First of all, there's no living American who can interpret his or her phone bill these days. You know, you get a phone bill for 25 dollars and it's eight and a half pages and completely not understandable.

I mean, there's no way to interpret or to understand it. And I actually just made some calls to the carrier some while ago just for fun to see if they could explain it to me and they couldn't, so the people who sent me the bill don't know why they send me the bill, and it's eight to ten pages for $30. So that's not your fault, but would you work on that?

Ms. NESS. We have approved a truth-in-billing rulemaking to try to address some of these problems so that everyone knows exactly what is on their bill and that there is simple language identifying the charges. But I sympathize with you, Senator. Just recently I received a bill and I looked at it and I could not believe the charges because I made one international phone call and had not presubscribed to an international plan.

Senator DORGAN. Second on the issue of truth in billing, I have felt that you should connect access charge reform to universal service. What's happened is you're giving companies access charge re-

ductions to the tune of billions of dollars and they take those reductions and they smile and they say that's fine, we like that, but now what we're going to do is to tell the consumer in one line on our billing the universal service requirement. So they put a few dollars on that phone bill that says, "Here's what we've got to do because the government says we have to do it." This is the additional charge. They don't tell the consumer the full story. They also had a reduction, incidentally, that exceeds that additional charge. Truth in billing would require that they tell the customer the whole story, and that is something we ought to be concerned about. I think you ought to tie access charge reform specifically to universal service—connect those two numbers.

Finally, the Senator from Kansas raised a point I just want to make briefly. We set up the checklist not as a barrier, necessarily. We want those companies that want to meet the checklist, go through it, and become competitive and do long distance. We want them to do that and so we want the checklist not to be an insurmountable barrier, but the reason that this hasn't happened as quickly as some would suggest. The Senator from Kansas wondered why some companies have not made it a decision, and they want to make the checklist. It requires a company that says my company's goal is to meet this checklist, then take steps to do it.

Some companies have been pretty slow off the blocks in that regard, but for those that want to (and now many of them do), we don't want meeting the checklist to be an insurmountable barrier—we want it to be reasonable. I'm going to ask—Bob Rowe from the National Association of Rural Utility Commissioners is working on a regional test to OSS testing under the 271 process. I would like for you to share your thoughts with the Committee on that. And I probably won't be able to listen to them, and so if you will perhaps send me a note on that, I would appreciate it. I've got to go vote. Did you vote?

Senator BURNS. Yes.

Senator DORGAN. Well, easy for you to laugh, then. We haven't voted and I have been taking some time that Senator Snowe perhaps wants to take as well, so Commissioner Ness, consider those issues. Thank you for being here. I'm a strong supporter of your nomination. Thank you very much.

Senator BURNS. Senator Snowe.

STATEMENT OF HON. OLYMPIA J. SNOWE, U.S. SENATOR FROM MAINE

Senator SNOWE. Thank you, Mr. Chairman. I'm sorry that I wasn't able to be here earlier but there are so many conflicting meetings this morning.

I want to take this opportunity to welcome Commissioner Ness to this Committee and for her nomination for a second term on the FCC. I applaud her for the work that she has done, particularly in the area in upholding the universal service subsidy and providing the discounts to schools and libraries and health care facilities in all parts of the country. And beyond her commitment in providing leadership at the FCC and chairing the Joint State-Federal Board on Universal Service. Commissioner Ness also is very knowledgeable and experienced in so many of the telecommunications mat-

ters that are going to have an impact on the future of this country and is also committed to enforcing the laws as Congress intended.

Commissioner Ness, we appreciate your commitment to enforcing the laws according to the spirit of the statutes as passed by Congress over the years concerning telecommunications.

As Senator Rockefeller indicated, I do share his concern about the extent to which competition has reached the rural areas. Certainly, the intent of the Telecommunications Act in the deregulation of the telecommunications industry was to bring competition to the rural areas of the country, as well. That has been much slower, and I hope that the FCC and you will give it specific attention, particularly in terms of bringing broadband to rural areas, and that's why Senator Rockefeller and I are looking at providing a tax credit as a way of expediting broadband delivery to rural areas. In addition, I hope that you can address this Committee in terms of what the FCC is doing to bring about competition in all areas because it is going to continue to make a difference in the have and have-nots technologically in America.

The second area of interest and of concern perhaps is the mergers that are taking place. And obviously, we've seen a groundbreaking, unprecedented merger between AOL and Time-Warner that may or may not have advantages or disadvantages at this time. I think it is difficult to say, but I would also appreciate your views and perspective on these mergers and what kind of benefits or disadvantages do they bring to the consumers and what can we expect in the future.

So again, Commissioner Ness, thank you for the work that you have done and I hope that we can expedite your reconfirmation here because I think you have done a superb job on the Commission. Thank you, Mr. Chairman.

[The prepared statement of Senator Snowe follows:]

PREPARED STATEMENT OF HON. OLYMPIA J. SNOWE, U.S. SENATOR FROM MAINE

Mr. Chairman, the world of telecommunications is changing and advancing at an unprecedented pace, which leads to ever-increasing demands on the FCC. In light of these rapid changes and increasing demands, it is critical that prospective FCC Commissioners have the knowledge, experience, and ability to forge coalitions that are needed to effectively do their jobs. All of these attributes are possessed by Commissioner Ness, and I strongly support her re-appointment accordingly.

Mr. Chairman, I believe that Susan Ness is not only well-qualified to serve at the FCC during this critical juncture in telecommunications history, but she has also proven herself to be invaluable member of the commission who would leave a substantial void if the full Senate fails to re-confirm her in the weeks/months ahead.

For instance, not only does Commissioner Ness chair the Federal-State Board on Universal Service—a job that requires a close working relationship and ability to build coalitions with state and local governments and private companies—but she has also led the charge for American interests as the lead representative from the FCC at the 1995 and 1997 World Radio Conferences.

However, there is more to being an FCC Commissioner than simply being knowledgeable of the issues or the leader of a delegation—there is also a need to be a stalwart for enforcing the laws passed by Congress as intended, and to have a vision for how the numerous policies carried out by the FCC will converge and impact Americans for years to come.

Again, I believe that Commissioner Ness has a proven record in this regard, and I hope that she will use today's hearing to highlight not only her credentials and experience, but also her zealousness to enforce the laws as intended and her vision of telecommunications in the next century.

In the process of laying out her vision for the 21st Century, I do not ask that Commissioner Ness pre-judge matters that are currently before the FCC or that will

likely be before the Commission in the upcoming months. Rather, I am hopeful that she will give us a broad view of how she sees telecommunications technologies affecting the lives of the American people and what role she sees the FCC playing to facilitate the development and introduction of these technologies in the marketplace. Because ultimately, new technologies are not created to simply "build a better mousetrap"—rather, they are built to better people's lives.

I would like to thank Commissioner Ness for being with us this morning, and look forward to a robust discussion of her experience and vision that will shape her approach to numerous telecommunications issues in the years ahead.

Ultimately, I believe Commissioner Ness stands second to none in terms of her experience and qualifications to serve a second term at the FCC, and urge that my colleagues move toward the rapid consideration and re-confirmation of Commissioner Ness in the weeks ahead. Thank you, Mr. Chairman.

Senator BURNS. Did you want to react to that question of the effect of the mergers?

Ms. NESS. I would be happy to. First, to the question as to what we expect to see in the future, I think we're in line for many, many more mergers as companies are going global. As companies continue to consolidate, it is a time of uncertainty, and one way of addressing uncertainty oftentimes is to combine. Many of these mergers will provide great consumer benefits, some will not. And it's the role of the Commission to make a determination whether a merger is in the public interest and, if not, is there something that can be done to ensure that it would be in the public interest?

We have tried to exercise that obligation with sensitivity and restraint. What we have not done as well as we should is to do it more rapidly, and that is one commitment that I make to try to see to it that our process works more rapidly, because when you're in the middle of a merger, you lose out on many of the benefits of competition in the marketplace because you are so focused on completing that merger.

Senator SNOWE. Thank you.

Senator BURNS. Thank you, Senator Snowe. Going on in this, in some mergers I think you're entirely correct, some mergers are beneficial to the consumer and also the way we do business, some are not, and you have to look I guess at mergers on a case-by-case basis.

It's interesting the AOL and the Time-Warner. Up until this point, I think the Internet was sort of technology driven. And we knew at some date content would take over and be the driving force of the Internet, and I think we have entered the era of that. There are some areas of that that concern you, there are some areas that I think will be very beneficial.

Sometimes when mergers happen, everybody that is under that same tent it seems like it's very competitive with each other, and if that competition continues, why, I think that's a very good sign.

Let's go into another area. And I still have some concerns about low-power radio. It just seems like the Commission without the direction of Congress just took off and started making policy with regard to low-power radio, and some of our most vocal critics has been those folks in public radio, the translater interference, this kind of interference, and I would just like your view on low power. Why do you think the Commission has to take an active role that goes beyond the intent, what I believe is not the intent of Congress?

Ms. NESS. Senator, we have seen a great consolidation in radio, and as a result of that, many community groups are not in a position to be able to take advantage of this extremely important medium. I care very much about enabling these voices to have an opportunity to broadcast, but I also care very much that we do not destroy the integrity of the FM band and thus, my involvement in this has been to ensure that the integrity of the FM band is preserved, that we do not have interference with existing radio stations. I also want to make sure that existing radio stations can transition into the digital world by going digital. So I took it upon myself to look at those issues as we considered this new service.

I've been told by our engineers this is not a problem. I am very concerned about translators. And if it turns out that there is a specific problem, I would like to address it.

Senator BURNS. Why would we—even though the engineers at the FCC maybe do not have the same concerns as engineers across the country, I mean, I've not been into one major market and talked to engineering people that do not have concerns. Why do we have this difference of opinion?

Ms. NESS. Senator, I am concerned about interference. I can tell you that the engineers at the Commission are very dedicated engineers. They've looked at it in a number of different ways. We did not go ahead with second adjacent channel. I made sure that was completely off the table. We did not go ahead with thousand-watt stations. I made sure that was completely off the table. I wanted to make sure that if someone had to move from one tower to the next, for example, because there was a digital television station coming in, whatever it might be, that they would be protected.

I am concerned about translators. They provide a wonderful service in the United States. I am told that the engineering works. If it does not work, if there is interference, we need to know about it and we need to address it.

Senator BURNS. That's sort of trying to address the stolen property after the horse has left the barn. If you do have problems, it's pretty hard to recall those licenses.

Ms. NESS. Our engineers who have been involved in broadcast for a very long time tell us that under these parameters, the parameters that have been set, that this should not cause undue interference. I will be vigilant to ensure that such is the case because, as I said when we started the conversation, I care very much about the integrity of the FM band.

Senator BURNS. Let's go from that, from low power. You see, I have the opinion that even though low power and some folks who want to put a low-power station should go through the same rigors of establishing a radio station that any other commercial broadcaster or public broadcaster makes when they establish an entity to do that and apply for spectrum in order to do it.

Let's go from there to cross-ownership, your views on cross-ownership. We have between newspapers and cable and broadcast industries and those entities, I would like your views on that, please.

Ms. NESS. Certainly, Senator. The world has changed. The world has changed dramatically over the last couple of years and it seems to me that it is timely for us to be looking at the cross-ownership rules. I believe an item was just delivered to us that will address

cross-ownership of both television and radio with newspapers, and I intend to look very carefully at the issues raised when I vote that item.

Senator BURNS. Do you have a guiding principle whenever you start making these decisions on cross-ownership?

Ms. NESS. I look at the marketplace, not as it has been, but where it is and where it is going in the future. I do not believe in regulation if it is not essential to preserve certain underlying values. I care about diversity of voices in the marketplace but again, I want to make sure that our rules are not overly restrictive. And certainly, the broadcast ownership rules that we approved last summer suggest that it is a very different world based upon the underlying values of the Telecom Act.

Senator BURNS. Give me a for-instance. We have—let's just take my home town. We've got I think five or six FMs and maybe four AMs and one newspaper. Is there any way that you have a philosophy on should the newspaper be able to own—and we have three television stations. Any guiding light on should a newspaper in Billings, Montana be able to own a broadcast property there under those conditions?

Ms. NESS. Senator, I'm not familiar with your market. As an underlying principle I would say once again if there is diversity of voices, that is important, but I would also—I also understand that there are a number of different proposals that are on the table that would look at size of market, for example, and until I've had an opportunity to hear those proposals and talk with folks, I would be hesitant to give you an opinion. The only thing I will commit to is that I will look very carefully at the issues because we're in a changing economy, and I know that all broadcasters and newspaper publishers are trying their best to compete in what is a rapidly changing world.

Senator BURNS. Thank you, Commissioner. We have been joined by Senator Cleland. Senator? We welcome your comments and if you have any questions of the Commissioner. Thank you for coming.

Senator CLELAND. Well, thank you very much, Mr. Chairman. I couldn't help but compare your home town with my home town. My home town had no radios, no television, no newspaper, which is why I got elected. Mr. Chairman, today——

Senator BURNS. That's like the old Harry Truman statement: Spend the first 6 months when you're here trying to figure out how you got here, then the next 6 months trying to figure out how everybody else got here.

Senator CLELAND. Glad to be with you, Ms. Ness. Thank you for the job that you've done.

Ms. NESS. Thank you, Senator Cleland.

Senator CLELAND. May I say that you're asking us for an additional 5-year term as a member of the FCC. In Georgia, your oversight as a member of the FCC is pretty important to us. It means millions of dollars in funding for school children and libraries to access the Internet. It means children's educational programming. It means insuring spectrum access for utility workers after a tornado enabling the troops of the 82d Airborne at Fort Benning to have more than adequate communication capability with their com-

manding officers when performing defense maneuvers. I'm an old Army Signal Officer so I know that very well.

It means guidance along the road to local telephone competition. It means developing further robust competition among Internet service providers. More and more of them are making their homes in my state and access to broadband services—a number of services in addition to just telephone. It means media integrity.

I look forward to hearing some of your ideas about your philosophy of the last 5 years of service and what you would like to do the next five. Mr. Chairman, I have a couple of questions.

Senator BURNS. You may proceed.

Senator CLELAND. Ms. Ness, as you know, Section 706 of the 1996 Telecommunications Act encourages the deployment of "advanced telecommunications capability." The report the FCC issued in response stated that this technology is being deployed on a timely basis. I would like to know what is your opinion on the employment of advanced services and what type of role do you see the E rate Program playing in achieving the goals of Section 706?

Ms. NESS. Senator, we have endeavored to review the deployment of advanced services every year. That report was a snapshot at the very beginning. We are conducting hearings around the country together with our state colleagues to see how well the deployment is progressing and whether it is leaving certain communities behind. We hope to identify any barriers to deployment, and to take action on those barriers. So while the initial report suggested that it was rolling out in timely fashion, we are continuing to be vigilant to see if that continues to be the case and whether any communities are being left behind. It is a vital opportunity, particularly for rural communities, for economic growth to have access to broadband, and we're committed to ensuring that it happens.

Senator CLELAND. The 1996 act also requires co-location and interconnection with existing ILECs, incumbent local exchange carriers in their facilities. In your statement following the approval of Bell Atlantic's Section 271 application you indicated that previous FCC decisions, "adequately addressed the ordering and provisioning of extant DSL loops;" however, you said our evaluation of future applications will, indeed, focus on this issue.

What does this mean for future applicants? I know that Bell South is seeking the same kind of approval as Bell Atlantic.

Ms. NESS. On 271, Senator, I think we turned the corner. I'm very encouraged by the hard work that the Bell operating companies and the State Commissions and the competitive carriers are engaging in to make this work. There's a demonstrable advancement that is taking place certainly over the past year or so. We approved one application. We expect to approve more. DSL and broadband services are very important to the communities and we hope to see the provisioning of lines that are DSL capable to roll out expeditiously as well to make those available to competitors.

Senator CLELAND. You believe your reviews are being done in a timely manner?

Ms. NESS. Section 271 requires us to reach our conclusions in 90 days. We have met every deadline.

Senator CLELAND. That is quite a challenge and well done.

Ms. NESS. Again, I want to commend the states, because they have really labored very hard to make sure that we have the information available, and I want to commend the carriers who have been working very hard to implement the tasks needed to open the markets to competition.

Senator CLELAND. Thank you very much. Well said. I've been informed of the excellent work the FCC's wireless bureau has done in reducing its backlog of paperwork. A great deal of the work the wireless bureau does directly impacts the spectrum allocation in the United States, which I hear is increasingly a challenge.

As you know, there's a great deal of exciting wireless technology that claims to reduce the amount of spectrum needed for this technology to operate while increasing the power and capability of wireless products.

Ms. Ness, I believe you're aware of the importance of spectrum management. Would you like to comment on the emphasis the wireless bureau has placed on acting on technology of the claims to increase the amount of spectrum available?

Ms. NESS. I'm very excited about the possibility of new technologies that will turn spectrum management essentially on its head. We just initiated a proceeding on software defined radio. We have another proceeding underway on ultra wideband. Both of these technologies will work to provide more opportunities for both broadband deployment and specialized services throughout the bands of spectrum. These are very complex issues, and one of the biggest responsibilities of the Commission is to ensure that spectrum is made available and in a manner that does not interfere with existing users of spectrum. We take that responsibility very seriously. I would like to see us work even more closely with our colleagues at NTIA to ensure that bands can be made available for newer services.

Senator CLELAND. Ms. Ness, just kind of a philosophical question here. Five years ago when you were approved by the Senate to sit on the FCC, so much of the technology and so many of the companies that are out there today in many ways didn't even exist or, shall we say, were not even on the radar screen 5 years ago. Just seeing that incredible advance of technology, and the incredible investment in information and telecommunications technologies and companies that raise hair on our heads whenever we contemplate the billions and hundreds of billions invested in these companies, isn't it quite a challenge as we walk into the 21st century together that over the next 5 years, just what might happen? You might see a need for the FCC to update or revamp or come up to speed on, and adjust or reform some of its practices and its own workings in order to keep up with the world that is growing exponentially at an incredible rate of speed.

Ms. NESS. Yes, Senator, there are a number of things that we are doing to modernize the FCC, if you will, including streamlining application requirements. We are looking at restructuring the agency along more functional lines. This might be very helpful because of convergence to be able to have the expertise within a bureau to address those policy concerns.

As I mentioned earlier, we are really moving, transitioning from implementing the Act to enforcing the Act and thus, we have set

up an enforcement bureau to respond rapidly when there are violations under the Act so that folks cannot game the regulatory process. It seems to me we need to be more responsive by eliminating, through forbearance, unnecessary regulations, and I suspect we will be moving more rapidly in that direction.

Lastly, I know Senator Rockefeller had asked about resources at the Commission. One area where we desperately need more resources is in engineering. I would like to see us more and more work with industries to ensure that new technologies can be rolled out as rapidly as possible without interfering with existing users of the spectrum, and that is going to take even more engineers than we have today, but I think that that is a worthy goal. It is a complex world and we would like to get as many new services out as rapidly as possible in a responsible manner.

Senator CLELAND. When I look at just the last 5 years and look at the prospect of what might happen in the information technology and telecommunications in the next 5 years, it's stunning what might happen in the next ten. So I just offer my word of support not only for your nomination and your further service on the FCC, but count on me to help you adapt to the need for speed in this incredible world where government hopefully can adapt quickly enough and surely enough to be responsive to industry but also continue to protect the public interest. Thank you very much for your service. Thank you, Mr. Chairman.

Senator BURNS. Thank you, Senator. I had another line of questioning. I didn't get all the information I wanted.

Senator Rockefeller, do you have any other questions at this time or any comment?

Senator ROCKEFELLER. No, Mr. Chairman, but I would like to note that which I did not before, that Commissioner Tristani is here and I just think that's very nice.

Ms. NESS. I want to thank all of my colleagues on the Commission. They have been terrific to work with.

Senator BURNS. I want to do some followup with you, Commissioner, with regard to I want to ask you—and I think this is better done in probably a private conversation, not keeping it from anyone, but I have some concerns about how we deal with spectrum and how we go through the auction business and how we handle it if it's repossessed and how we should use that and the FCC's role. I think we're going to consider in Congress how we deal with spectrum once it is owned and how much control do we have to relinquish as a government, or do we lose complete control of that spectrum?

I would like to kind of ferret that out a little bit with you, and I think we can do that in private conversation, but there are some things happening that does concern Congress or at least this Member of Congress, anyway, with regard to dealing with spectrum and allocations and its use.

And there are other Senators who have indicated they have some questions for you, also. I would ask you that you might respond to the individual Senators and to the Committee for its review, and that's all the questions I have today, other than the fact that I'll be in touch with you as far as the spectrum is concerned.

But I want to thank you for coming today and responding to the questions, and appreciate your cooperation and I look forward in moving this nomination.

Ms. NESS. Thank you very much, Senator.

Senator BURNS. This hearing is closed.

[Whereupon, at 10:45 a.m., the committee adjourned.]

APPENDIX

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. SAM BROWNBACK TO SUSAN NESS

Question 1. In the separate statement that you issued in conjunction with the Commission's approval of Bell Atlantic's application to provide in-region, long-distance service in New York, you indicated that it would have been "unfair to penalize Bell Atlantic for its record on DSL loop performance at this time." You state that "[b]ecause the consumer market for broadband services has only recently begun to develop, the FCC's collaborative process did not adequately address the ordering and provisioning of xDSL-capable loops."

You go on to say that "our evaluation of future applications . . . will indeed focus on this issue." Are you saying that we do not know today all the criteria that will be used to evaluate future applications? Are you saying that you anticipate that the goalposts for a successful 271 petition could change with each new application if something new happens in the marketplace?

Answer. The statute makes clear that the Commission cannot limit or extend the competitive checklist in section 271. The section 271 checklist requires that Bell companies make unbundled loops available to competitors. In 1996, in the Local Competition Order, the Commission made clear that access to loops includes an obligation to provide unbundled loops capable of supporting xDSL technologies.

Nevertheless, although the obligation to provide access to xDSL-capable loops was clear before the first section 271 application was filed, I believed it would have been unfair to deny Bell Atlantic's application on this basis for several reasons. First, competitors had been ordering xDSL-capable loops from Bell Atlantic for a limited period of time. Second, there was a surge in requests for xDSL-capable loops in the month immediately prior to the filing of the application. Third, because competitors had only recently begun to order large numbers of such loops, the New York Public Service Commission had not addressed xDSL-specific issues until August 1999 when it initiated a collaborative process to resolve competitors' concerns. Similarly, neither Bell companies nor competitors had raised the ordering and provisioning of xDSL-capable loops in either the collaborative process or previous section 271 proceedings, and therefore, the Commission had not previously been presented with the issue in those contexts.

Thus, given this set of circumstances, I concluded that it would have been unfair to penalize Bell Atlantic due to the evolving data in the record on Bell Atlantic's provisioning of xDSL-capable loops. Nevertheless, it would not be unfair to look at this market-opening obligation in future section 271 applications, because competitors are ordering increasing numbers of xDSL-capable loops and states are developing performance measurements and standards in this area.

Question 2. I would like to ask you about a statement you made in conjunction with the approval of the SBC-Ameritech merger. You stated that "[a]bsent conditions, the record is compelling that the combination of SBC and Ameritech would not serve the public interest." Where do you think that the FCC derives the authority to impose the onerous conditions that were imposed upon SBC and Ameritech in order for their merger to be approved? You forced these companies, as you have done with many companies in other merger approvals, to agree to conditions that you could not have mustered 3 votes to force them to accept in a general rulemaking. Why do you think that the FCC has the authority to impose conditions in the context of approving a merger that it could not impose in a general rulemaking? And if you think that such terms could be imposed in a general rulemaking, why didn't the FCC initiate one and impose these conditions on SBC and Ameritech that way?

Answer. In the case of SBC/Ameritech, the record indicated that, on balance, the proposed transaction would not have been in the public interest absent conditions. The merger of two of the largest incumbent phone companies that together comprise one-third of the nation's access lines threatened specific harms identified in the Commission's decision, including the elimination of a significant competitor both

within and outside of each company's region, increased incentive and ability to discriminate against other service providers, and less ability to use benchmarks to detect discrimination and monitor compliance with the statute and the Commission's rules. Although the Commission determined that the public interest harms of this transaction outweighed the benefits, the conditions that were proposed offset the harms that the transaction would cause. These proposed conditions were placed on the public record for comment.

These conditions addressed the harms of the transaction by, among other things, helping to ensure that the local market is open to competition and that this transaction would lead to improved services for consumers. Some argue that certain of these conditions were not tailored in a sufficiently narrow manner to address only the harms caused by the merger. In this case, I believed, on balance, that the transaction, as presented to the Commission with these conditions, served the public interest.

As to whether a condition should be adopted in the context of an application, as opposed to a rulemaking of general applicability, it may be appropriate to impose or accept conditions as part of an application when the specific consolidation may harm competition or have other consequences that are adverse to the objectives of the Communications Act. A condition that commits the merging parties to actions that would reduce or offset the damage that would otherwise be caused by the consolidation may shift the balance in favor of approval. Since the harm in question may be merger-specific, it may be appropriate for the relief also to be merger-specific, and not to apply to other parties who will not be receiving the benefits of consolidation. For example, in U S WEST/Qwest, although opponents of the transaction sought similar market-opening improvements, the Commission expressly declined to impose those conditions, because it concluded that the public interest benefits of the transaction outweighed the harms without the need for any such conditions.

Question 3. Should the unbundling obligations of Section 251(c)(3) be a permanent requirement? If there are three or more facilities-based competitors in a market, should Section 251(c)(3) of the Act cease to apply to an ILEC? What about five or more facilities-based competitors? Does it matter whether the facilities-based competitors are all wireline carriers? What if five facilities-based carriers are offering voice services, but not data services?

Answer. The Commission made clear in the order adopted last September that the unbundling obligations in Section 251(c)(3) are not permanent obligations. Rather, the Commission noted that, as market conditions change and new technologies develop, elements that currently must be unbundled will likely no longer meet the criteria for unbundling. Accordingly, the Commission concluded that it should periodically reexamine the availability of alternative sources of network elements to determine whether specific elements must continue to be unbundled. As competition takes hold, I fully expect that the unbundling requirements will be scaled back further.

The existence of a significant level of facilities-based competition provides significant probative evidence that an efficient competitor is able to self-provision a network element or obtain it from a third-party. Nevertheless, there is no specific metric that definitively demonstrates when an element no longer needs to be unbundled. As the question recognizes, facilities-based competitors may only be serving certain customers or offering certain services. As a result, the Commission established specific criteria to be used to determine when, as a practical matter, a requesting carrier ought reasonably to be expected to be capable of self-provisioning an element or obtaining it from other market participants.

Moreover, beyond modifications to the list of elements that must be unbundled, Congress indicated that the Commission can forbear from the requirements in Section 251(c)(3) once those requirements have been fully implemented and the statutory criteria in section 10 have been met.

Question 4. You initially voted to incorporate groundbreaking Commission policy in an approval of the transfer of a television license involving WQED Pittsburgh. You, Chairman Kennard, and Commissioner Tristani voted to impose "guidelines" that would have tread rather recklessly on the programming decisions made by noncommercial educational broadcast licensees.

In your separate statement that you issued in conjunction with the order, you indicated that you and your colleagues "have an obligation to provide additional guidance to FCC staff, as well as to applicants and existing licensees, if we are to be able to assess whether a broadcaster's judgment is reasonable." Yet, you also indicated that "[w]hile there may be additional guidance concerning the types of programming that would or would not qualify, . . . I do not believe that it would be

appropriate to go beyond our elaboration today, absent public discussion and comment."

My question to you is how you draw a distinction between what programming content regulation can and should be imposed in the context of a license swap and what can only occur through public discussion and comment? Why did you initially think that any programming content regulation could be imposed other than in the normal notice and comment process?

Answer. I do not believe that the Commission should impose new programming content regulations in the context of license assignment proceedings. On occasion, in adjudicating petitions to deny an application for Commission consent to the assignment of a license, the FCC is called upon to interpret existing rules or policies to resolve the contested matters. The Supreme Court has recognized that on occasion administrative agencies must have the power to interpret and apply their substantive rules on a case-by-case basis. SEC v. Chenery, 332 U.S. 194, 203 (1947).

In the WQED, Pittsburgh case, at the time of the initial vote, I believed that the Commission was interpreting a rule already on the books pursuant to the authority recognized by the Supreme Court in Chenery. While it understandably may appear hard to discern from the actual language of the additional guidance, it was my intention to avoid having the Commission tread "recklessly on the programming decisions made by non-commercial educational broadcast licensees." Indeed, in my separate statement I indicated that I "would continue to defer to the judgment of an applicant or licensee concerning the educational nature of its programming," unless that judgment was arbitrary or unreasonable. See Separate Statement, at 4 citing Way of the Cross, 102 F.C.C.2d at 1372 n.8 (1985).

After issuing the decision, I realized that I had made a mistake and immediately took steps to correct it by rescinding the additional guidance. Had I followed more carefully my own guidance in supporting the grant of the application, including the concern you cite regarding an elaboration without public comment, I might have reached this conclusion prior to the issuance of the initial decision. The case highlights for me the importance of narrowly applying the authority recognized in Chenery, especially where the interpretation may be construed as imposing additional content regulation.

Question 5. In your statement regarding the Federal-State Joint Board's November 23, 1998 recommendations, you state that "[a] model is the only tool that has been identified to permit objective assessment of special needs that may require increased federal support to particular study areas. But we will not use this tool unless it has achieved a level of accuracy, predictability, and openness that earns it broad acceptance."

Do you really think that the model implemented by the Commission this past Fall has earned broad acceptance? There has been a substantial amount of criticism about the model that it takes too long to run, that the numbers still don't add up. How is the model accurate, predictable, and open?

Answer. No economic model is perfect. Despite the criticisms of the cost model, however, no one has proposed a better alternative for objectively estimating non-rural carriers' forward-looking cost of providing service, which is the basis for prices in a competitive market. When used to estimate forward-looking costs on a statewide basis, the model appears to have gained a reasonable level of acceptance.

Core principles underlying the Commission's adoption of the cost model are that the model and the process used to create it be open and predictable. Because the Commission has adhered to these principles, interested parties have been able to replicate and verify the cost model's results. The benefits of a transparent system were seen recently when industry members brought to the Commission's attention a transcription and programming error that has since been corrected.

In addition, this open process enables parties to critique the cost model and propose modifications that can improve it. As the Commission recognized in the orders it adopted last fall, it will need to continue to study how the model itself should change to reflect changing circumstances. FCC staff and staff of the Federal-State Joint Board on Universal Service continue to analyze the model in an effort to make it even more accurate. We need to continue these efforts and watch closely the implementation of the model to ensure that it achieves the objective of estimating forward-looking costs in an accurate and predictable manner. As issues come to light, we need to address them.

Question 6. In your statement accompanying the Commission's May 7, 1997 universal service order, you indicated that you thought that the FCC had made "substantial progress" and established "a clear timetable for implementation." The Telecommunications Act was enacted into law on February 8, 1996. Did you really think that four years after the bill became law that the FCC would still not have fully

implemented the high-cost provisions of Section 254? Do you consider how long it has taken and how much farther we have to go a clear timetable?

Answer. I share your frustration regarding the time it has taken to complete universal service reform. I would have preferred to complete the process earlier. Nevertheless, the Commission has made substantial progress and I believe we are on the right track.

We have reformed the high-cost mechanism for non-rural carriers, and they are making the transition to a support mechanism based on forward-looking costs. We have also made universal service support portable so that competitors who win customers can receive the same support that the incumbent would have received.

Nevertheless, although we have made significant progress on these complex issues, much remains to be done. Recognizing the unique circumstances facing rural carriers, the FCC worked with rural carrier associations to establish a separate track for rural carriers. The Federal-State Joint Board on Universal Service convened a Rural Task Force that must recommend by October 1st, an appropriate universal service regime that reflects the different cost structures of rural carriers. Once the Rural Task Force has issued its recommendation, I will urge the Joint Board and the FCC to move as rapidly as possible to complete the process. I recognize that uncertainty can be a major impediment to investment. At the same time, however, we must take the time to ensure that any mechanism we adopt makes sense for rural carriers and is faithful to the Communications Act's core principle that all Americans should have access to reasonably comparable services at reasonably comparable rates. This effort is too important not to get right. In the meantime, we have sought to ensure that rural carriers receive adequate support from the current mechanism in order to prevent upward pressure on rates in rural areas.

I would also have preferred to proceed concurrently with reform of high cost support and access charges. If we are going to get universal service mechanisms for high cost areas right, we must identify high cost support that is implicit in access charges. We are currently considering an industry proposal for access charge reform for price-cap carriers. In addition, numerous rural carriers, along with their associations, are developing an analogous proposal that would address access charges, universal service, and separations. We must make resolution of these complex and interrelated issues a top priority. At the same time, as we address access charge reform, we need to make sure that consumers, including residential and low-volume consumers, will receive the benefits of cost savings due to access charge reductions.

Question 7. The FCC has expressed its intent to reauction certain C and F block PCS licenses in July of this year. These licenses were previously auctioned, but never built out and never paid for. Last year, I introduced legislation that prohibits the application of spectrum caps to new spectrum that is auctioned in the future. One of the reasons that I introduced this bill was to accelerate the introduction of advanced services including wireless Internet access and other data services for which operators need substantially more spectrum in order to provide the service. Given the fact that some of the spectrum from C and F block licenses is not currently being used, is it safe to conclude that relief from the spectrum cap could be granted for these licenses without risking industry consolidation? If so, shouldn't relief be granted to ensure that advanced wireless services develop without hindrance? If not, why not?

Answer. The Commission presently has pending before it a number of requests and responsive pleadings concerning the reauction of certain C and F block PCS licenses, including issues related to Section 20.6 of the FCC's rules (the "spectrum cap"). We will receive additional pleadings on the issues later this month. I do not wish to prejudge the issues raised in these requests and pleadings.

Strong arguments have been made that removing those licenses not presently being used to provide service from the application of the spectrum cap would not cause industry consolidation. It is also important for the FCC to enable licensees to provide advanced wireless services if they choose to do so. It was precisely for that reason that I supported language in our spectrum cap decision last fall to provide for waivers to facilitate the deployment of next generation wireless services. As a general matter, I would like to see more spectrum made available to new entrants and existing licensees for the provision of advanced services.

Question 8. In the order adopting licensing and service rules governing the 36 MHz of commercial spectrum located in the 700 MHz band to be auctioned this Spring, the FCC found that "the spectrum cap for the existing 180 megahertz of CMRS spectrum provides a sufficient safeguard against excessive consolidation of CMRS spectrum." If you agree with this statement, do you support my legislation that would preclude the FCC from applying the spectrum cap to all future auctions, which would leave the rules governing the existing 180 megahertz intact?

Answer. I supported our conclusion that "the spectrum cap for the existing 180 megahertz of CMRS spectrum provides a sufficient safeguard against excessive consolidation of CMRS spectrum." Indeed, I elected not to apply the spectrum cap to the 30 MHz in Channels 60–69 to be auctioned this spring. I would be extremely hesitant to apply Section 20.6 to any further allocations of spectrum, and believe that parties seeking the applicability of such restrictions would bear a heavy, if not insurmountable, burden. Of course, if a party were to argue that we should make the restrictions of Section 20.6 applicable to a new allocation of spectrum, I would be obligated to consider that argument on the basis of the laws and factual record applicable to that proceeding.

Question 9. With recent industry consolidation, there are now five national wireless carriers. How many carriers need to offer service in a given market before the current wireless spectrum is no longer necessary?

Answer. The Commission released its most recent order on spectrum aggregation limits on September 22, 1999. In that order, the Commission cited certain theory and research that tended to show that the competitive nature of a market was enhanced significantly when the number of competitors in a market was increased from three competitors to four competitors, and again when increased to five competitors. Beyond five competitors, the evidence and theory did not establish as significant a change in the competitiveness of the market.

Question 10. Given the FCC's new duopoly and one-to-a-market rules, why should the newspaper/broadcast crossownership rule remain unchanged? Why should newspapers be precluded from the broadcasting business when one single owner can have as many as two television stations and six radio stations in the same market? Do you support issuing a notice of proposed rulemaking on this issue?

Answer. Yes, I support reexamining this rule in light of sweeping changes in the media marketplace since the inception of the rule. Such an assessment is timely. The Commission is in the process of completing its Biennial Review of broadcast ownership rules. I plan to carefully consider the changing marketplace, including the consolidation of radio and television properties within a market, cable clustering, access to information over the Internet, DBS, and other forms of information distribution, as well as other probative information on the record before I draw any conclusions.

Question 11. Given events such as the AOL-Time Warner merger, the announced acquisition of Times Mirror by Tribune, and the consolidation of cable companies, is the 35% national ownership cap for television broadcasters still necessary? If so, what goals does the cap accomplish considering the current makeup of the marketplace for video programming and distribution, as well as the Internet?

Answer. The 35% cap is a subject of our currently pending Biennial Review and adjudicatory proceedings. I want to consider all viewpoints before deciding whether we should alter or remove the cap. Questions have been raised as to whether the underlying purpose of the rule in ensuring viewpoint diversity by limiting the market reach of any single broadcaster is still relevant today. I will examine all of the facts presented before determining whether the rule should be modified or eliminated.

Question 12. Is a strong must-carry requirement for cable systems to carry DTV signals necessary to achieve a successful transition by television broadcasters from analog to digital operations?

Answer. As a general matter, I prefer to see resolution of this issue through marketplace forces, to the extent possible. There is little dispute that broadcasters' digital signals will be carried in lieu of the analog signals once conversion is completed.

As cable systems expand and modernize to accommodate digital channels and Internet access, they will add capacity that could be used to carry the digital broadcast signal. Some cable multiple system operators have pledged to carry the digital broadcast signal in addition to the analog signal if the programming is different and of interest to subscribers. I have strongly encouraged cable operators and broadcasters to sit down and discuss digital cable carriage in conjunction with retransmission consent negotiations. When a must-carry rulemaking is presented for a vote, I will consider the extent to which cable operators and broadcasters have worked together to craft digital carriage arrangements.

If broadcasters' digital signals are not carried by cable operators, the digital transition could be hindered. Given cable television's current market penetration rate of less than 70%, however, cable carriage by itself would not be sufficient to complete the transition under the 85% DTV penetration benchmark set by Congress in the Balanced Budget Act of 1997.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. CONRAD BURNS TO SUSAN NESS

(1) I am concerned that the FCC refuses to acknowledge the property rights of winning bidders of spectrum licenses in those licenses and that the Commission apparently considers itself exempt from the Bankruptcy Code and its automatic stay provisions. The FCC cannot simply repossess people's property, including spectrum, except by due process of law, including bankruptcy law.

The Commission has sought exemption from the bankruptcy laws to repossess spectrum in recent appropriations bills, and Chairman Kennard recently asked a Senate Committee to give the Commission such special treatment. Congress has refused to do so, and I agree with the lawmakers who have jurisdiction over the Bankruptcy Code that the FCC should not be given special treatment superior to that of other private, secured creditors.

Question. In your view, does the Commission deserve special dispensation from the Bankruptcy Code? If so, why?

Answer. In my view, the FCC is not receiving special dispensation from the Bankruptcy Code. Instead, the FCC has acted consistently with the principle that a licensee has only the rights specified in the terms of the license. The licenses issued by the FCC to which you refer expressly stated on the face of the license that failure to comply with the condition for full and timely payment pursuant to the Commission's rules resulted in the automatic cancellation of the license. In seeking to enforce its rules and the terms of its licenses, the Commission seeks only to protect the integrity of its auction licensing process established under Section 309 of the Act, not to obtain special dispensation from the Bankruptcy Code. The United States Court of Appeals for the Second Circuit already has held that bankruptcy courts cannot change the terms and conditions of FCC licenses, including payment requirements. NextWave Personal Comm., Inc. v. FCC, 200 F.3d 43 (2d Cir. 1999). While I recognize that these issues are still being litigated in the courts, my goal is to preserve the integrity of the auction process and to prevent purchasers of licenses at auction from using the Bankruptcy Code to escape their obligation to comply with their commitments to the American people.

Question. Please describe your views on spectrum management.

Answer. Here are some of my thoughts on spectrum policy and spectrum management:

My goal is to make spectrum available in ways that provide maximum benefits for the American public. Allocations and service rules for spectrum should be as flexible as possible to enable the licensee to respond to a rapidly changing marketplace without having to obtain regulatory dispensation. We should inform the public as far in advance as possible of our plans to make spectrum bands available so that prospective licensees can develop and execute viable business plans. To the extent feasible, we should recognize international implications of spectrum use, and consult with our trading partners to harmonize spectrum band allocations to spread the cost of equipment development across more users, thereby lowering the cost of service to the consumer and facilitating global communications. We should be technology neutral, yet encourage open systems and connectivity where appropriate. Auctions are the most efficient means of swiftly and equitably licensing providers to expedite commercial service to the public. However, we must also ensure that adequate spectrum is available for public safely, amateur, scientific, and other applications where auctions are not appropriate. The FCC should also make available adequate unlicensed spectrum so that entrepreneurs can develop a host of new and innovative services.

We must streamline our processes to eliminate unnecessary delay in the approval of new technologies. The FCC plays a critical role in ensuring that licensees can operate free of harmful interference. We must find better ways of resolving competing and contradictory analyses of interference for new technologies or new sharing proposals so that we can make most efficient use of spectrum. One approach might be for the FCC to oversee an interference testing plan, in which all interested parties are invited to participate. That could alleviate the battle of the engineering reports. Finally, we must adopt processes that swiftly resolve interference claims when they occur.

Question. Do you consider spectrum a public resource?

Answer. Yes.

Question. Is the primary goal of spectrum management the maximization of revenue or the most efficient technological use of the spectrum?

Answer. The primary goal of spectrum management is to ensure that the public reaps the greatest benefit from services provided through the use of spectrum. As a general matter we rely on market forces to achieve that goal. Through its rules, the FCC also encourages the most efficient technological use of the spectrum.

Question. What improvements do think can be made in spectrum management policy?

Answer. We need to look more holistically at the spectrum available for commercial applications. Previously, we focused on spectrum issues on an ad hoc basis, one band at a time. In establishing rules for a single band, we addressed policy issues that affected many bands. Because the FCC focused on one band at a time, industry did not know what other spectrum would be made available at a later point in time. And the policies we adopted in wireless proceedings had the potential to conflict with our international objectives.

To address these issues, we have elevated the spectrum policy function at the Commission through the establishment of the Spectrum Policy Executive Committee, which is comprised of the Wireless, International, Mass Media bureau chiefs, and the head of the Office of Engineering and Technology. That body formulates spectrum policies for Commission approval. Last fall, the Commission adopted a Spectrum Policy Statement, which described our spectrum policies and listed a multitude of spectrum bands that the FCC was considering making available for use. Such policies include, among others, providing flexibility in spectrum allocations and service rules and being technology neutral. These changes have been beneficial.

In addition to the changes we have already begun to implement, we must redouble our efforts to resolve more rapidly conflicting performance and interference issues. We must do so even in the face of increasing demand for spectrum, increasing technical complexity, and rapid technological change. Also, we must continue to work with our counterparts abroad for more global harmonization of spectrum allocations, where feasible.

Question. Please describe your views on private property rights as they apply to spectrum management policy.

Answer. As a general matter, I believe that licensees should have the flexibility and discretion to decide the most desirable method for serving the public. Nevertheless, licensees cannot have the authority to violate the Commission's rules or disserve express Commission policy, especially based on claims that they hold property rights in the license. Moreover, the Commission appropriately retains the ability, where justified by the broad public interest, to reallocate spectrum from one use to another, and to move incumbents in order to introduce new and more efficient services.

The "property" right of licensees in their licenses is prescribed by the Communications Act. Under Section 301 of the Communications Act, each licensee only holds its license pursuant to "the terms and conditions of the license" and has no "ownership" interest in the spectrum (which belongs to the American people). Section 309(j)(6)(C) specifically provides that "Nothing in this subsection or the use of competitive bidding shall diminish the authority of the Commission under other provisions of this Act to regulate or reclaim spectrum licenses."

(2) Last year, the Commission granted waivers of its rules to allow the introduction of "ultra-wide band" ("UWB") equipment capable of transmitting across large swaths of bandwidth, including spectrum dedicated for critical safety operations. The waiver limited the number of units that could be introduced into the market; one of the ostensible purposes of the waiver was to allow for the testing of UWB equipment for its ability to operate without interfering with existing users of the affected spectrum.

As I understand it, this equipment has not been tested and serious concerns have been raised over whether this equipment can operate without interfering with operational public safety services. Nonetheless, I am informed, the Commission is close to issuing a Notice of Proposed Rulemaking ("NPRM") for the purpose of establishing rules and procedures for commercial exploitation of UWB equipment.

Question. What is motivating the federal government to move so quickly on a rulemaking strategy that could well affect public safety in the absence of thorough technical studies?

Answer. The Commission has moved cautiously and with great sensitivity in evaluating proposals regarding UWB. For a number of years, proponents of this technology have been requesting Commission action simply to investigate the possibility of establishing rules that would permit the deployment of UWB. In September of 1998, the Commission issued a Notice of Inquiry ("NOI") asking questions about the UWB technology, and has received over 125 responses to the NOI. The Commission

has taken over 18 months to consider the responses, and to work with NTIA in an effort to reach a better understanding on issues involving UWB.

Our approach to a rulemaking for UWB is to ask the public to comment on a wide range of issues regarding the technology and potential for interference. The NOI provided us with an appropriate basis to proceed further—again, cautiously—with a proposed rulemaking that does not necessarily assume a particular outcome, but rather asks questions about appropriate rules for UWB. I have met with members of the GPS community who believe they could be adversely affected by UWB operation and I have assured them that no final rules will be adopted permitting deployment of UWB that could impact on GPS operations unless and until the Commission has determined that UWB will not cause harmful interference—especially where public safety is concerned. I believe this process will be enhanced by conducting a general rulemaking that has as its goal the development of a record on potential interference issues. I view the rulemaking process as an opportunity to ask appropriate questions to resolve the issues that have been in contention for some time.

I have called for joint testing of UWB by the GPS and UWB communities—ideally with the direct involvement of NTIA and FCC staff. This testing should be concluded before any rules are finalized that could adversely impact public safety. The Commission has a statutory obligation to protect public safety uses of the spectrum as well as a statutory obligation to foster the development of new and beneficial technologies, including those that support public safety.

Question. From a procedural standpoint, why is the Commission considering leapfrogging the established practice of testing new equipment and services prior to initiating a rulemaking proceeding? Shouldn't the Commission first conduct verifiable tests of the interoperability of UWBs with existing services before it commences a NPRM that establishes rules for UWB operations?

Answer. The Commission is not proposing to leapfrog the established process. The Commission has conducted initial testing in connection with granting the very limited waivers you reference. As discussed above, the Commission already has proceeded with a Notice of Inquiry, issued more than 18 months ago. As I discussed above, any NPRM addressing UWB will ask questions, explore alternatives and to seek data to support rules for the operation of UWB that will insure that there will not be harmful interference. Again, rules will not be adopted until the UWB and public safety community undertake appropriate tests and we are satisfied that we have adequately addressed interference questions.

Question. Recently industry suggested to me that they have been informed by government representatives that the UWB NPRM is on a "fast-track."

Is it the FCC's position that this NPRM is on a "fast track?"

Answer. The process for assessing potential rules for UWB operation has not proceeded on a faster track than traditional rulemaking proceedings; indeed, we have been criticized for proceeding too slowly. The supporters of UWB technology first contacted the Commission many years ago. The NOI was initiated more than 18 months ago. As discussed above, an NPRM will further the goal of resolving questions of potential interference by seeking comment from the public on specific issues.

Question. Wouldn't you agree that, because public safety is implicated by this application, the Commission should at a minimum ensure that the UWB equipment has been tested by independent entities and the results of these tests clearly show that UWB equipment will not interfere with critical public safety services prior to initiating the NPRM?

Answer. I agree that the Commission has an obligation to protect public safety uses of spectrum. I also expect that the record developed in response to the issuance of an NPRM will include the results of testing that addresses interference questions that have emerged in the UWB debate. Historically, the Commission has invited the submission of test data in response to technical issues raised in rulemakings involving new technologies or services. The issuance of an NPRM can clarify the issues that must be addressed in subsequent testing. There is no safety risk to the public, because an NPRM does not adopt any rules; it builds an appropriate and complete record for Commission consideration.

Question. What is preventing the Commission from immediately delaying the rulemaking process until independent and complete technical studies are undertaken regarding the impact of UWB applications on the frequency bands involving safety-of-life services?

Answer. The Commission is obligated to protect public safety and to serve the public interest by authorizing new services that do not conflict with that goal. Indeed, the FCC has a duty not to hinder technological innovation. See 47 U.S.C. § 7(b). In furthering these goals, we have an obligation to reach prudent decisions

without undue delay. Therefore the Commission should not delay asking the appropriate questions regarding interference until after completion of testing. The questions posed in an NPRM both spur and guide appropriate testing.

Question. Industry has suggested that the approach that the Commission is considering with respect to this "fast track rule-making process" has effectively shifted the burden of proof from an applicant seeking to introduce a new device into a public safety arena to already existing safety-of-life services.

Is it the Commission's intention to shift the burden here?

Do you think that it is wise for the Commission to shift the burden where safety of life services are implicated?

Answer. I do not believe the Commission will shift the burden in a manner inconsistent with the mandate of Congress. Section 7(a) of the Communications Act of 1934, as amended, plainly states that "[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the Commission who opposes a new technology or service proposed to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest." In evaluating the public interest, the Commission makes every effort to ensure that spectrum used for public safety services is protected.

Question. With the rapid emergence of wireless communications applications, and urgent need to protect the integrity of the aviation safety zone (e.g., passengers not allowed to operate laptops and cell phones during the ascent and descent phases), why hasn't the government initiated spectrum harmonization studies?

Answer. To a great extent, electromagnetic compatibility issues involving uses of spectrum are addressed in the context of specific proposals. This is why the Commission seeks comments on out-of-band emissions limits in nearly any rulemaking concerning the allocation of spectrum for new services. Beyond the Commission's direct efforts, however, standards bodies, other agencies and joint government-industry organizations also deal with such compatibility issues. For example, the Radio Technical Commission for Aeronautics ("RTCA") examined the use of passenger-carried electronic devices aboard aircraft and the FAA commissioned the Applied Physics Laboratory of Johns Hopkins University to study interference threats to aviation's use of GPS. I believe the RTCA is examining compatibility between aviation's use of GPS and UWB.

Finally, I understand that the Commission's Technological Advisory Council is considering a study that will examine the overall noise floor and the implications of additional operations that contribute to the noise floor. A study of this kind will necessarily involve much more than just consideration of what contribution to the noise floor might result from UWB.

Question. The National Research Council has indicated it would take 18 months and half a million dollars to test UWB equipment's compatibility with existing public safety services.

Have any studies of this nature been initiated or funded?

Answer. I do not believe that the NRC proposal has been initiated or funded. I have heard that NTIA anticipates studying UWB compatibility with certain government uses and that the Department of Transportation plans to do so as well. I would, note, however, that many of the subjects proposed for review in the NRC study are matters addressed in the Commission's NOI proceeding and are matters on which we would invite comment in any NPRM.

Question. How is this consistent with the NPRM time scale?

Answer. The Commission has no predetermined time scale for conclusion of its NPRM. I believe that any interference tests should take as long as necessary to provide the information needed to answer questions posed in an NPRM.

Question. Are these studies underway by the Commission or under the oversight of any agency of the Federal Government?

Answer. As noted above, I understand that both NTIA and DOT plan to conduct studies. I also expect that various other interested parties will have testing conducted by independent laboratories. As noted above, I have encouraged the parties to agree upon joint testing under the auspices of NTIA.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MAX CLELAND TO SUSAN NESS

Question 1. Could you please comment on the status of FCC merger reviews? Do you believe these reviews are done in a timely manner?

Answer. In most cases, the Commission expeditiously processes applications for approval of the assignment or transfer of control of licenses. I am concerned, however, that in certain cases, the Commission has not moved with sufficient speed to render a decision on merger applications. I understand that delay creates uncertainty that makes it difficult for businesses to develop and implement plans that will lead to a more competitive telecommunications marketplace.

The Commission needs to do a better job of deciding promptly which mergers will serve the public interest and which will not. To accomplish this objective, the Commission should commit to a more predictable timetable for identifying and resolving the issues presented by mergers. In particular, the Commission should take the following steps: (1) place applications on public notice expeditiously upon receipt, and call for the filing of comments and petitions to deny on appropriate dates, usually within 30 days; (2) commit to a specific time frame for identifying any additional information that the applicants must submit, or any issues that the applicants must address; and (3) limit the time period during which any permitted ex parte communications are permitted to occur, and after that time period, proceed expeditiously to a decision. As a general matter, I believe that reviews of complex transactions should be completed within 180 days, if proponents submit requested documentation in timely fashion. Time constraints, however, should not enable merger applicants to game the process by running out the clock.

Question 2. For the most part, the FCC has chosen to forbear on regulating advanced services. However, as you know, telephone companies are subject to regulation with respect to their deployment of DSL service. Obviously, they are thought of as "different" in the eyes of regulators. How do you view the phone companies as a different kind of player with respect to their role in developing broadband communications?

Answer. The Internet has grown enormously in recent years with minimal government regulation. The FCC has not regulated the Internet in the past, does not do so now, and has no intention of doing so in the future. The underlying services provided by telephone companies that consumers use to access the Internet, however, are telecommunications services subject to the framework that Congress established in the Communications Act. The Act does not distinguish between voice and data services. Rather, Congress established a regime to promote competition throughout all telecommunications markets.

The Commission, for its part, has sought to carry out Congress' pro-competitive and deregulatory objectives in all telecommunications markets, including the advanced services market. For instance, to promote competition in broadband services, the Commission adopted rules to ensure that competitors can obtain access to loops and collocation space. At the same time, however, the Commission also determined that incumbent carriers generally are not required to unbundle facilities they use to provide advanced services, including packet switches and DSLAMs. Moreover, the Commission has held that, when a carrier sells advanced services in bulk to an Internet provider, those services are not subject to the wholesale discount requirement in Section 251(c)(4).

With respect to the rollout of broadband, I am committed to ensuring that advanced communications are made available to all Americans on a reasonable and timely basis. In a world that is increasingly dependent on information technology, access to broadband services is becoming the key to economic prosperity. The government's role is not to pick winners and losers. Rather, as underscored in Section 706 of the Telecommunications Act of 1996, our job is to reduce barriers to deployment and competition so that companies are able to invest and innovate. In this way, we can make sure that broadband services roll out as quickly as the technology and the economics allow in all areas of the country, including rural and lower-income areas.

The Commission is currently in the middle of its second inquiry on the deployment of advanced services pursuant to Section 706. In this proceeding, we are examining steps we can take not only to promote the deployment of advanced telecommunications capability but also to facilitate consumer choice among broadband service suppliers.

Question 3. I understand the Commission recently relaxed its ownership restrictions on local television stations and is now permitting greater joint ownership among television stations serving the same market. I also understand that newspapers are seeking similar relief. Do you foresee Commission action on behalf of newspaper owners?

Answer. The Commission currently has before it a draft Biennial Review report addressing the newspaper/broadcast cross ownership prohibition, among other things. I am committed to reviewing this report carefully and acting on it promptly.

The Biennial Review provides an opportunity to consider developments in the media marketplace and determine whether they warrant elimination or modification of some or all of our cross-ownership and multiple ownership rules.

The communications marketplace has changed significantly during the course of the past few years. In addition to newspapers, radio and television, consumers increasingly have access to a wide assortment of other sources of news and information. Cable television, satellite services, and the Internet have had a profound effect on the marketplace. Growing access to those sources must be balanced against the fact that newspapers and television stations remain the dominant sources of local news and information for most consumers.

The new local ownership rules to which you refer also are an important factor to be considered in determining whether to relax the prohibition against cross ownership of newspapers and radio stations and newspapers and television stations in a local market.

I am aware of several proposals to amend the current newspaper/broadcast cross-ownership prohibition. While I cannot predict what action the Commission will take, I will carefully consider these proposals as I examine the Biennial Review report.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TRENT LOTT TO SUSAN NESS

Question. As you are aware, the ultrawide band industry has been seeking regulatory approval for its important technology for several years. However, the companies that would utilize this technology still do not have the authorizations necessary to bring their revolutionary products to U.S. customers. I am concerned about this delay. As highlighted in recent press articles, there are numerous public safety benefits of UWB technology. Also, UWB technology may alleviate the impending wireless bottleneck by utilizing previously ignored parts of the radio spectrum.

I commend you for your role in advancing and accelerating the deployment of new technologies, and would appreciate hearing your views on the status of the rulemaking process and the necessary testing to deploy the UWB technology.

Answer. I look forward to the Commission's release of a notice of proposed rulemaking (NPRM) on UWB in the near future. I share your view that UWB technology may prove to be extremely beneficial on a variety of fronts, including public safety. At the same time, I am mindful of the fact that there have been claims that the introduction of UWB technology could create harmful interference, especially to public safety services. As the agency charged with managing non-federal uses of the electromagnetic spectrum, I believe we must guard against such interference. Any NPRM will build upon the experience gained with initial testing of UWB devices in connection with the waivers issued last summer for such equipment, the record in response to the Notice of Inquiry we issued in September 1998 concerning UWB, and the FCC's experience with other devices. At the same time, I believe that the Commission must encourage and consider additional testing in order to assist in the resolution of conflicting claims as to the compatibility of UWB with existing services. Testing should be used as a light in the search for truth, however, and not as a means for casting the long shadow of undue delay.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN MCCAIN TO SUSAN NESS

1. General

Question. If you had the chance to change only one of the many votes you have cast during your tenure as a Commissioner, which one would it be?

Answer. Out of the approximately 2,500 votes I have cast since joining the FCC, I most regret having voted to permit winning bidders for the "C" Block licenses in the personal communications service ("PCS") to pay for their licenses by making installment payments. Although Section 309(j)(4)(A) of the Communications Act of 1934, as amended, instructed the Commission to consider the use of installment payments, it did not mandate the use of such payments. The Commission had hoped to enable entrepreneurial companies with limited access to up-front capital to be able to bid at auction, construct a network, and compete to offer services to the public. Some licensees are successfully doing so today. Unfortunately, some bidders became over-extended and ultimately failed to make timely payments for their licenses. The unintended consequences of authorizing installment payments have been delays in the provision of service to the public and protracted litigation in which the Commission has had to protect the integrity of its licensing process.

Question. What are the three most important problems facing the FCC today, and what would you do to address them?

Answer. First, the FCC must allocate suitable spectrum for the provision of new and advanced wireless services. Often such allocations necessitate resolving difficult spectrum sharing issues between varied users of the spectrum. The Commission is also evaluating proposals to authorize the operation of devices that use spectrum in fundamentally different ways, which also raise questions concerning potential interference with existing services and the Commission's ability to police such interference.

Given the rapidly changing marketplace for wireless communications, the Commission should provide for flexible use of the spectrum wherever such flexibility will not compromise protecting other primary users from harmful interference. In some cases, the Commission simply will have to make difficult choices regarding allocations, and then promulgate rules that provide incentive for the most efficient resolution of sharing or relocation issues through the operation of market forces. Also, the Commission should expend every effort to encourage and participate in the testing of new spectrally efficient technologies so that they may be authorized under conditions that do not adversely interfere with current users. These technologies hold the promise of reducing the constraints on the allocation and use of spectrum.

Our spectrum responsibilities make it especially important that the Commission be able to attract qualified engineers and other staff with sufficient industry and technical expertise to resolve questions concerning spectrum interference and other technical questions related to the use of spectrum. While the Commission has attracted a number of superb engineers and technical experts, time and time again the resolution of many of our most difficult questions depends upon answers to complicated claims regarding interference and spectrally efficient operation of equipment. The FCC must continue to attract and develop quality technical expertise and personnel to address these issues.

Second, the FCC is seeking to foster the deployment of advanced services across the nation in a manner that makes the benefits of these advanced services available to all Americans. At the same time, it is seeking to rely on the competitive forces of the marketplace and avoid burdensome regulation and upward pressure on the cost of providing telecommunications services.

The Commission must continue to exercise restraint in the regulation of advanced services. It must continue to license the provision of as many wireless and satellite services as possible, not only to provide for competition, but to permit these services to reach segments of our population that are not reached as easily through wired networks. The Commission must continue to educate itself about the needs of rural and urban communities and ensure that the universal service funding mechanisms adopted by the Commission serve the objectives that were the basis of Congress' adoption of the Telecommunications Act of 1996.

Third, the Commission needs to do a better job of managing its review of mergers. I discuss this issue in greater detail in response to question 3 below.

2. International Spectrum Issues

Question. Based on your experience in past World Administrative Radio Conferences, what improvements would you make to the process by which the U.S. plans for, and participates in, international spectrum allocation meetings?

Answer. World Administrative Radio Conference decisions have a profound impact on U.S. business, domestically and globally. The U.S. is but one vote out of more than 150 countries represented. Historically, the U.S. has been slow to formulate its positions and to circulate them to other administrations, and slow to depart from a position even when changes in the international environment indicate adopting a different course would be advantageous. Often, the U.S. has entered negotiations with other administrations too late in the process to avoid major clashes at conferences.

We have learned from our mistakes. After the 1997 conference, I advocated that a number of changes be made. Many have been adopted, which should lead to a better outcome at the WRC–2000 conference this May. The FCC submitted its recommendations early, and the U.S. circulated its draft positions in advance of regional conferences so that other administrations could work with us to reach consensus on proposals. The White House appointed our head of delegation early enough to enable meaningful participation in bilateral and multilateral meetings, and has given high level attention to WRC issues so that disputes within the U.S. government could be resolved quickly. Finally, regional conferences of spectrum managers are now open to outside observers, enabling countries to exchange information earlier in the process. This should reduce the number and magnitude of issues remaining in dispute at the opening of WRC–2000.

I have one other recommendation: The U.S. government should earmark additional funds to enable more participation by U.S. government experts in regional and bilateral meetings. The FCC is a vital member of the U.S. team. We have the technical expertise and global relationships to resolve difficult issues, but we lack the budget to do so. When the U.S. has taken the time to visit other delegations, the outcome has been greater support for our proposals.

3. FCC Merger Reviews

Question. I realize that you support continuing the FCC's authority to review telecom mergers. Based on your five years' experience, is there any aspect of the current process that needs improvement, and, if so, what specific changes would you make?

Answer. While I support the FCC's continued authority to review mergers of communications companies, I believe we can and should improve the process. Specifically, the Commission needs to ensure that its review of the largest and most complicated mergers is conducted in a more expeditious and transparent manner under standards that are consistently and equitably applied. Undue delays stifle the development of competition.

In most cases, the Commission expeditiously processes routine applications for approval of the assignment or transfer of control of licenses. Over the past several years, however, the Commission has been called upon to rule on several exceptionally large mergers. These transactions have posed significant public policy considerations and have implicated existing FCC rules. Often they have engendered significant opposition, not just from competitors or customers of the licensees, but from members of the public as well. While I generally believe that our efforts to resolve the issues raised in the application proceedings have had positive intentions and results, we can and should make changes to expedite the process and to make it more transparent to the public.

First, the Commission should commit to a more predictable timetable for identifying and resolving the issues presented by mergers. The Commission should place applications on public notice immediately upon receipt, and call for the filing of comments and petitions to deny on appropriate dates, usually within 30 days. The Commission should commit to a specific time frame for identifying any additional information that the applicants must submit, or any issues that the applicants must address. As a general matter, I believe that reviews of complex transactions should be completed within 180 days, if proponents submit requested documentation in timely fashion. Time constraints should not enable merger applicants to game the process by running out the clock.

Second, the Commission should ensure that its processes are open and transparent. The Commission should be judicious in its use of the "permit but disclose" process in license transfer proceedings, and limit the period for such interaction when it is used. The Commission should be diligent in ensuring that the contents of any claims or proposals made in such meetings appear in the public record. Commission requests for information should be reduced to writing and placed in the public record.

Finally, the Commission should be prepared to so rule when a proposed transaction, as originally proposed, is not in the public interest. If we consider conditioning the grant, such conditions should be narrowly tailored and designed to address identified merger-specific ills. We should refrain from imposing conditions that are more appropriate for a rulemaking of general applicability.

4. Newspaper and Mass Media Ownership Restrictions

Question. Would you agree that radio and TV stations, cable TV channels, newspapers and the Internet are among the many competing sources of news and information available to consumers today?

Answer. Yes. The media landscape has changed significantly. Cable TV channels have become important sources of news and information for some consumers. Others turn regularly to the Internet. Newspapers and magazines continue to be major sources of news and information as well.

Question. If so, why does the Commission count ONLY radio and TV stations for purposes of applying its new local broadcast ownership rules?

Answer. In applying the radio/TV cross-ownership rule, in addition to broadcast stations, the Commission counts both a cable system and a daily newspaper as marketplace voices.

In the TV duopoly rule, in order to simplify the test, the Commission limited its voice count to radio and television stations, but set the threshold number of voices at a level that recognized the impact of cable television, satellites, newspapers and Internet access on marketplace diversity.

Radio and television stations are the only communications vehicles licensed by the Commission. In most markets, there are far more applicants than there are licenses available. Therefore, given the continued reliance by the public on television and radio for most news and information, it remains in the public interest to broadly disseminate broadcast licenses.

Question. When the local cable TV operator can offer (and even own) dozens of different channels of cable programming, why does the Commission prohibit a local newspaper from owning even one local TV station?

Answer. Broadcast television stations and newspapers remain the most influential sources of local news and information for the public. To promote viewpoint diversity, the Commission historically has prohibited the common ownership of broadcast and newspapers in the same market.

I believe that the competitive marketplace has changed significantly over the past few years, propelled by the clustering of cable systems within a geographic market, the advent of the Internet, local stations carried on satellite, digital television and other emerging sources of information. Moreover, relationships between content providers and distribution outlets are shifting dramatically, changing the underlying economics of information and entertainment production and dissemination. Therefore, I believe that it is timely for us to revisit our newspaper/broadcast cross-ownership rules to determine whether they continue to serve the public interest. The Commission is examining all of our broadcast rules under its Biennial Review, and I plan to take a fresh look at both the radio and television cross-ownership rules in the course of that review.

Question. When the Internet enables any user to interact with a virtually endless variety of different sources of information and viewpoints, how does the Commission justify retaining ANY broadcast ownership restrictions based on the need to assure "viewpoint diversity"?

Answer. As noted above, I agree that the marketplace has changed dramatically over the past few years. Last summer, the FCC significantly relaxed the one-to-a-market rule and television duopoly rules to reflect marketplace realities. Our Biennial Review, currently before the Commission, provides an opportunity to reexamine all of our rules to determine whether they continue to serve the public interest. I plan to take a fresh look at these rules.

While I agree that the Internet provides an endless variety of sources of information and viewpoints, not all of the population has access to the Internet at home. Far fewer still enjoy broadband Internet access. As we examine our ownership rules, I look forward to reviewing any studies that may be submitted regarding how the Internet is changing the public's consumption of information and whether it is reducing the preeminent role historically played by the broadcast industry.

5. Deregulation and Forbearance

Question. You have said that the FCC must know "not just when to regulate, but when to deregulate." Section 10 of the 1996 Telecom Act states that the FCC *must* abstain from regulation if it determines that (1) enforcement is not necessary to ensure that charges and practices are just and reasonable; (2) enforcement is not necessary for protection of consumers; and (3) forbearance is consistent with the public interest.

What competitive indicators do you look for, and what type of record showing do you require, in evaluating forbearance requests?

Answer. An important objective of the Telecommunications Act of 1996 is deregulation of telecommunications markets. As competition develops and expands in telecommunications markets, many rules and statutory provisions designed for monopoly markets may no longer be necessary, and indeed, may adversely affect innovation and competition. In Section 10, Congress provided the Commission with a powerful and precise deregulatory tool. I believe we must use this forbearance tool even more aggressively in the future as competition develops further.

We have used our forbearance authority, as well as our preexisting ability to eliminate or modify our rules, to reduce burdens on carriers. Among other things, we have eliminated and streamlined: (1) requirements for mid-sized and small carriers; (2) accounting requirements for all carriers; (3) tariff-filing requirements; and (4) pre-approval requirements prior to offering new or expanded services. We have also provided a blueprint for deregulating access services as competition increases. Sometimes we have chosen to address a problem raised in a forbearance petition by way of a rulemaking that would have broader applicability.

Regarding the record showing, the starting point for any forbearance analysis is the three-prong test in the statute. Parties seeking forbearance should set forth an explanation of how the statutory criteria are met. In applying the congressionally

mandated standards, the Commission should conduct a comprehensive and aggressive Section 10 analysis so that we can eliminate unnecessary regulations that detract from competition while preserving those that continue to serve vital purposes. I do not believe that the burden of proof lies exclusively on the shoulders of forbearance proponents.

As for competitive indicators, I would first note that the statutory criteria can be better assessed in the context of specific examples than in the abstract. In particular, where the forbearance petition relates to a congressional statute (as opposed to Commission regulation), I would consider carefully Congress's underlying policy objectives for that provision. If the statutory provision were enacted to address lack of competition in the marketplace, I would find it useful to review data demonstrating the changed competitive circumstances and dynamics of the relevant market(s).

Congress has given the Commission appropriate guidance in Section 10 concerning the removal of unnecessary regulation. The provision requires forbearance when market forces can ensure that prices and practices are just and reasonable, when consumers will be protected, and when the public interest will be served. As competition develops, we should rely to an even greater extent on market solutions, rather than traditional economic regulation. In addition, we should proactively use our forbearance power not only when the development of competition justifies the easing of regulation, but also when doing so will accelerate the development of competition without harming consumers.

6. Digital Television

Question. Recently the cable and consumer electronics industries came to an agreement on standards for cable-ready digital television sets. When can we expect to see similar progress between copyright holders and equipment manufacturers? What is the Commission's role in such negotiations?

Answer. The off-air availability of first quality digital product is a critical component of the broadcast transition from analog to digital. Few consumers will be interested in digital broadcast if compelling programming has not been made available.

Copyright holders and equipment manufacturers have been in protracted negotiations for well over a year on adoption of a copy protection technology and the terms for licensing its use. Currently, the leading contender is the "5C" technology, and the five companies that own the technology have been meeting periodically with major film companies to try to reach an agreement on the technology. I do not know when they will reach an agreement. The film companies apparently differ among themselves in their priorities and attitudes with respect to 5C.

I believe that government has the obligation to ensure that the American public has access to the best free digital broadcast system possible and that the transition from analog to digital is as smooth as possible for our citizenry.

The Commission can play a role in facilitating inter-industry agreements, preferably, without regulation. I have always favored marketplace solutions to these issues. To this end, I have occasionally convened meetings of the heads of all of the trade associations with a stake in the digital transition to identify outstanding issues and to set deadlines by which the parties would resolve them. The Commission, however, should intervene if parties fail to reach agreement, consumers are harmed, and the Commission has sufficient legal authority to act.

Further Questions

1. General:

Initial question. If you had the chance to change only one of the many votes you have cast during your tenure as a Commissioner, which one would it be?

Question 1. Further question: Your response to this question was that you most regret having voted in favor of allowing PCS C Block licensees to utilize installment payments, in part because, "The unintended consequences of authorizing installment payments have been delays in the provision of service to the public . . ."

In your judgment, do any of the Commission's other C Block implementing rules create a tension between the goals of increasing the number of small business competitors in the market and enhancing consumer welfare most effectively?

Answer. Whenever the Commission adopts rules that limit the availability of spectrum to specific uses or users—either through technical restrictions or through eligibility requirements—a tension is created between the benefits achieved by the restriction and the benefits that might be obtained from more flexible rules.

In the C Block service rules, I supported the Commission's efforts under Section 24.709 to ensure that consumers would reap the benefits of competition in the provision of personal communications services ("PCS") from small businesses and other

statutorily designated entities. The C Block rules, in their entirety, were designed to enable entrepreneurial companies with limited access to up-front capital required for auctions to enter the market, construct facilities, and offer service to the public.

A variety of qualifying entities have acquired C Block licenses, and are providing new, innovative and competitive communications services to the public as a result of the eligibility restrictions. Among other things, these services have addressed the need for more rapid deployment of service in rural areas and service plans that target users beyond high-end business consumers.

As you may be aware, we currently are considering requests to reevaluate these rules in conjunction with the reauction of C Block spectrum. As I review the requests to alter the eligibility rules for future C Block auctions, I will take into account the dynamics of the marketplace today to see whether the restrictions continue to serve the public interest.

Question 2. Other Commission rules and policies would appear to create similar tensions between these same goals. Please assess the extent to which the following ostensibly competition-enhancing rules do, or do not, unintentionally compromise the goal of efficiently giving better service to the average consumer: (a) the effect of the rules implementing Sections 251 and 271 in providing average residential consumers with more choices among competing providers of local and long-distance telephone service; (b) the effect the application of these rules has had in providing average residential consumers with more choices among competing providers of high-speed broadband service; and (c) the effect that maintaining the newspaper-broadcast cross-ownership restriction has in assuring that average consumers have access to a diverse array of print and electronic sources of news and information.

Answer. (a) The framework that Congress established in Sections 251 and 271, and the Commission's implementation of those sections, ensure that consumers reap the benefits of increased competition in both local and long-distance markets. Sections 251 and 271 enable Bell companies to participate in the long-distance market, but only after they have opened their local markets to competition. The experience in New York illustrates that, when barriers to competition are removed, competitors will enter all segments of the local market, including the facilities-based residential market. And once a Bell Company has fulfilled its responsibility to open its local market to competition, Bell Company participation in the long-distance market leads to intensified competition in that market.

(b) The Commission has sought to carry out Congress' pro-competitive and deregulatory objectives in the advanced services market not only to promote the deployment of broadband services, but also to facilitate consumer choice among broadband service suppliers. I am encouraged that companies in virtually all segments of the communications industry—including wireline, cable, wireless, and satellite—are rushing to deploy broadband services.

For instance, to promote competition in wireline broadband services, the Commission adopted rules to ensure that competitors can obtain access to loops and collocation space, as Congress directed in Section 251. In addition, the Commission ruled that customers of incumbent carriers may choose to receive high-speed broadband services from a competitor, while receiving voice services from the incumbent. At the same time, however, the Commission determined that incumbent carriers generally are not required to unbundle facilities they use to provide advanced services, including packet switches and DSLAMs. In addition, the Commission has held that, when a carrier sells advanced services in bulk to an Internet provider, those services are generally not subject to the wholesale discount requirement in Section 251(c)(4). In all of these actions, the Commission's objective has been to reduce barriers to competition so that companies are able to invest and innovate and consumers reap the benefits of a multiplicity of providers.

(c) In the case of the newspaper/broadcast cross ownership rule, the historic purpose of the rule has been to foster diversity of viewpoints between a local broadcaster and a local newspaper, maintaining two voices as opposed to one among the sources consumers traditionally rely upon for their news and information. To that extent, the intended purpose of the rule and the actual effect of the rule are the same.

However, as I have previously recognized, changes in the media marketplace warrant the Commission examining whether the historic purpose of the rule still has merit, and whether the rule should be modified to account for changes in the media landscape. I plan to take a fresh look at the newspaper/broadcast cross ownership rule in the context of the Biennial Review item currently before the Commission, at which time I will examine carefully the public record on this issue.

Initial question. What are the three most important problems facing the FCC today, and what would you do to address them?

Question 3. In your answer you alluded to the difficulty of attracting and retaining qualified technical experts, particularly engineers. As you know, the Commission's technical expertise in the technology and economics of the telecommunications industry is the principal factor limiting the scope of the judicial review that Congress authorized in the Administrative Procedure Act (the "APA"). The American Bar Association is currently preparing a Restatement of Administrative Law that will address this, and other, issues relating to the scope of judicial review of Commission action.

The following questions seek further information on your views on the Commission's technical expertise and the doctrines that govern the availability and scope of judicial review of Commission actions under the APA:

A. Although courts have articulated tests for distinguishing reviewable "final agency action" from non-reviewable agency actions, they have also called such tests "baffling," "confused" and "enshrouded in considerable smog." The Administrative Conference of the United States ("ACUS") has proposed that the Commission and other agencies should have to state affirmatively when they issue "guidances" or other documents that are not intended to have the force and effect of law that would render them immediately reviewable under the APA. Do you support the ACUS recommendation, and if not, what alternative standards would you propose for identifying those Commission actions that should be subject to judicial review?

Answer. As a general matter, I do not believe that the Federal Communications Commission, or other administrative agencies, should adopt "guidances" or other documents that affect the substantive legal rights of regulated entities and have such actions escape judicial review. Any final administrative action that affects the substantive legal rights of a party should be subject to judicial review.

B. The American Bar Association's Restatement of Administrative Law proceeds, for now, from a 1986 analysis that concludes that "[t]he vigor with which such review [of agency action] is conducted will depend on the individual judge's assessment of competing policies." See Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report,* 38 Admin. L. Rev. 233, 253 (1986). Do you support the so-called "hard look" line of cases that would allow reviewing courts to "extensively examin[e] the agency's analysis"? See id. at 260.

Answer. As the article cited in your question recognizes, the "hard look" doctrine for review of agency decisions raises some controversial issues and is met with some skepticism. *See* Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report,* 38 Admin. L. Rev. 233, 259 (1986) ("hard look" line of cases "should be read with some skepticism, for the type of judicial argument that they reflect is highly controversial, and the Supreme Court guidance concerning it is uncertain"). I do believe that rigorous judicial scrutiny of agency work product serves "a valuable quality control function" where it is accomplished through an intensive examination of the agency's own analysis. In this respect, the Commission is forced to take a "hard look" at its own decision making, which it should do regardless of the standard of judicial review that is applicable.

On the other hand, to the extent that such review involves the substitution of the judgment of judges on the merits, the "hard look" could impair the coherence of regulatory programs. Such review also may strain the technical competence of the judiciary in highly technical areas where the agency is authorized to develop and retain expert personnel. *See id.* at 260. Given these concerns, "hard look" review of agency action should permit the reviewing court to rigorously review the agency's analysis and rationale for its decision, but not substitute its own judgment for the judgement of the agency where the agency determination is reasonable or based upon agency expertise.

C. In *Fresno Mobile Radio. Inc.* v. *F.C.C.,* 165 F.3d 965, 970 (D.C. Cir. 1999), the D.C. Circuit rejected the Commission's conclusion that incumbent SMR license-holders would be more likely to warehouse SMR spectrum than EA license-holders. The Court called the Commission's conclusion "a foolish notion that should not be entertained by anyone who has had even a single undergraduate course in economics."

(1) Please explain why the D.C. Circuit was or was not correct when it concluded that the Commission's disparate treatment of EA and incumbent SMR licensees was based upon an economic analysis that constituted "a foolish notion that should not be entertained by anyone who has had even a single undergraduate course in economics?"

Answer. In Fresno Mobile Radio, Inc. v. FCC, 165 F.3d 965 (D.C. Cir. 1999), the court of appeals upheld the majority of the Commission's rules relating to a new class of radio spectrum licenses for bandwidth in the 800 MHz range. The one aspect of those rules that the court invalidated involved the Commission's interim con-

struction requirements. Under those requirements, licensees that had recently obtained licenses at auction (EA licensees) were allowed to provide service within their geographic areas more gradually than were incumbent SMR licensees that had received licenses under a different set of rules not involving a competitive bidding process. The Commission justified that distinction in treatment on two different grounds, both of which were rejected by the court. Your question relates to the second, alternative justification, which the Commission addressed in one sentence of its order: "Moreover, the competitive bidding process provides incentives for EA licenses to build out quickly, and thus reduces the likelihood that a longer construction period would lead to spectrum warehousing." Amendment of Part 90 of the Commission's Rules, Memorandum Opinion and Order on Reconsideration, 12 F.C.C. Rcd9972, ¶ 81 (1997).

As I understand this language, the Commission reasoned that a licensee that had recently secured the considerable financing necessary to prevail at auction would feel more pressure to earn an immediate return on its investment than would licensees that had never incurred any similar expense in obtaining their spectrum. As the D.C. Circuit explained, that reasoning, without more, is inconsistent with a basic textbook axiom of economic behavior, under which ideally rational actors ignore sunk costs when making business decisions. 165 F.3d at 969. The court suggested that the Commission's approach might have been justifiable if lenders or others had imposed "institutional constraint[s]" on the build-out choices of EA licensees, but, the court observed, the Commission had made no such finding, and its rationale thus lacked an empirical foundation. Id. On remand, the Commission addressed the court's concerns by, among other things, authorizing incumbent SMR licensees to choose a build-out regime similar to the one recently adopted for EA licensees. See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, FCC No. 99–399 (Dec. 23, 1999). I fully supported the decision to alter our rules rather than look to bolster the decision with an empirical foundation.

D. If you disagree with the D.C. Circuit's analysis, please provide citations to the briefs and the administrative record filed by the Commission that show that your arguments were presented and explained to private industry and the Court.

Answer. As explained above, I have accepted the D.C. Circuit's analysis in the Fresno Mobile Radio decision.

Question 4. In your response to the initial question, you state your goal of "promulgat[ing] rules that provide incentive for the most efficient resolution of sharing or relocation issues through the operation of market forces." Many would suggest that market forces, not regulation, provide the greatest incentives for efficient resolution of most problems, and that regulation often impedes, rather than helps, market forces achieve efficiency. Please give three examples of Commission rules that, in your judgment, have *facilitated* the operation of market forces. In each case, please explain what specific market incentives the rule provided that the market did not, what additional burdens or costs the rule imposed, and the specific reasons why you believe that the rule was justified in light of these costs.

Answer. In my response to the initial question, I acknowledged that at times, the Commission will have to make difficult choices regarding spectrum allocations, and then promulgate rules that provide incentive for the most efficient resolution of sharing or relocation issues through the operation of market forces. This acknowledgement arose specifically because I believe that market forces, not regulation, generally provide the greatest incentives for efficient resolution of most problems, and that regulation often impedes, rather than helps, market forces achieve efficiency.

Examples of Commission actions that have facilitated the operation of market forces include:

(1) In WT Docket No. 95–157, the Commission adopted rules covering the relocation of fixed microwave services from the 1850–1990 MHz frequencies to provide for the establishment of services using emerging technologies. These rules were part of the Commission's efforts to allocate spectrum for use in the provision of, among other things, new personal communications services ("PCS"). The Commission provided for first, a voluntary relocation period, and then, subsequently, a mandatory relocation period, to ensure that newly-licensed PCS operators could obtain the use of the spectrum that they won at auction. By providing for a separate voluntary relocation period followed by a mandatory relocation period, the Commission provided incentives for PCS operators and fixed microwave licensees to agree upon a market-based price for relocation. The relocation requirement for fixed microwave licensees was the "burden or cost" imposed by the rules. The relocation was justified by the

public interest in the allocation for PCS services and the need to prevent interference between PCS and microwave operations.

(2) Last fall, the Commission modified its rules requiring commercial mobile radio service providers to establish and implement plans to provide wireless emergency 911 ("E–911") services. In that action, the Commission adopted new rules that permit carriers to select from two different technologies to provide wireless E–911 service—"hand-set based" solutions and "network-based" solutions. Although slightly different timing and measurement requirements apply to each technology, the rules were designed to achieve regulatory parity for both technologies so that market forces would determine which technology a carrier selects. The "burden or cost" will be the cost to the carrier, and ultimately to the public, for electing an E–911 solution and implementing it within the time set forth in the FCC's rules. The rules are justified by the public benefit derived by expedited initiation of wireless E–911 service.

(3) As required by Congress, the Commission promulgated rules that call for an auction of the spectrum in the 746–806 MHz band. Specifically, in June 2000, the Commission will auction 30 MHz of spectrum. The spectrum will be auctioned in two paired 5 and 10 MHz blocks, with 6 regional licenses for each paired block. In adopting these frequency blocks and geographic regions, the Commission declined to allocate the spectrum in one nationwide 30 MHz block, and also declined to break the spectrum up into smaller regional or frequency blocks. Some parties advocated one nationwide 30 MHz license, to enable them to provide a nationwide fixed broadband service. Some wireless carriers planning to provide new "third generation" mobile services argued that a nationwide allocation of 30 MHz would hinder their ability to purchase the spectrum license for regional service. Some sought smaller allocations in 50 or 176 geographic regions. So that market forces—not government regulation—would determine the use of this spectrum, the Commission divided the spectrum into 6 large regional blocks of 10 or 20 MHz, and allowed the blocks to be aggregated. Admittedly, there is a "burden or cost" to aggregate six regions of 10 and 20 MHz blocks. However, the Commission's action was a practical way to allow bidders with different business plans to acquire the spectrum under a set of rules that did not favor one service over another.

Question 5. You further state in your initial response that the Commission must allocate "suitable spectrum" for the provision of new and advanced wireless services. In light of the ever-increasing scarcity of spectrum resources, how do you define "suitable spectrum?" Do you account for future growth in making this determination? If so, what time frame do you consider and what factors do you use to analyze growth projections?

Answer. In answering the first set of questions, I stated that the FCC must allocate "suitable spectrum" for the provision of new and advanced wireless services. In using the term "suitable spectrum," I meant spectrum that has the appropriate propagation characteristics and channel capacity to support advanced mobile, or fixed, wireless services. For example, it is difficult to provide mobile terrestrial services in bands well above 3GHz. It would be inappropriate to allow high powered services on bands where there would be interference with bands reserved for public safety users. Finally, the blocks should be wide enough to accommodate anticipated services, and large enough for both initial and future growth of the service.

When looking at potential allocations of spectrum, I do take into account future growth in service. An appropriate time frame should extend beyond a decade or more, although such projections are extremely difficult to make reliably given the dramatic changes that can occur. Generally, I consider projections submitted by the applicants, FCC technical experts, and other commenting parties. Also, I must consider the number of licenses to be awarded in the band.

In resolving difficult sharing issues, one must take into account, not just the original service provider, but the aggregate impact on existing and future services when multiple licensees are providing service in the band.

Question 6. Please elaborate on the specific steps the Commission takes in "resolving difficult spectrum sharing issues." Does the Commission conduct its own independent technical analysis? If not, what steps does the Commission take to verify contradictory technical analysis submitted to substantiate interference claims?

Answer. In cases where there is debate or conflict over spectrum sharing or interference issues, the Commission uses its own engineering experts, where feasible, to conduct an independent technical analysis. Such assessment may include a review of the literature, a detailed technical analysis of conflicting submissions by parties with divergent views, laboratory testing in our own facilities, or occasionally, field testing. Unfortunately, budgetary constraints at the FCC limit the extent of the FCC field tests.

The Commission relies on the knowledge and experience of its technical staff for analysis in resolving the contradictory technical claims submitted to substantiate interference. Occasionally, I have advocated joint testing, with FCC oversight, in cases where parties make contradictory technical assertions of interference. Such joint testing with Commission participation would reduce disputes based on methodology of the testing, and would resolve interference claims more quickly.

2. On international spectrum issues:

Initial question: Based on your experience in past World Administrative Radio Conferences, what improvements would you make to the process by which the U.S. plans for, and participates in, international spectrum allocation meetings?

Question 7. In your answer to this initial question, you indicate that the Commission needs more money in order to attract and retain qualified technical capacity. You also indicate that the FCC needs more money to send technical experts to the World Radiocommunication Conference. What criteria do you propose should be used to determine whether persons proposed for international travel are, in fact, technical experts whose presence will benefit U.S. industry? And what mechanism do you propose that Congress should use for holding the Commission accountable for these decisions? Finally, in your view, to what extent would this need for additional money be reduced if international travel were limited to satellite coordinations and WRC-related activities?

Answer. The private sector repeatedly has lauded the FCC members of the WRC and bilateral telecommunications delegations for their professionalism, expertise, and ability to work with industry as well as our government colleagues and other administrations to resolve difficult technical and policy issues. I have confidence in the ability of our bureau chiefs to select those employees best able to fill the staffing needs of a particular delegation. As a general matter, I would expect those individuals assigned to represent the United States government and the FCC at the WRC (and preparatory and regional sessions leading up to the Conference) to have the professional education, expertise and experience needed to analyze highly complex technical issues under pressure. These individuals also should possess a sound understanding of the practical or "real-world" consequences of complex technical proposals. Ideally, they should have experience in international negotiations on WRC issues and to have a reputation or authority that will command respect from negotiators from other administrations. Finally, it is desirable that such individuals possess an ability to work well in a team during long periods of intense negotiations.

I believe that the normal congressional oversight function is adequate to hold the Commission accountable for its spending on international travel. Members of Congress can ascertain the identity and background of any Commission personnel participating in the WRC or its preparatory process. The FCC should regularly brief Congress on the progress being made on WRC. In addition, Congressional staff members previously have attended such conferences and were able to assess directly the performance of delegation members. The FCC should be held accountable for its international travel expenditures, especially in light of our budgetary constraints.

Finally, in stating that the United States government earmark additional funds for participation in regional and bilateral meetings, I meant to encompass all aspects of WRC preparation, not just the regional and bilateral meetings. I have been told by industry representatives that our presence (or absence) at such meetings makes a difference. And of course, we must continue to fund satellite coordination activities. I would not recommend limiting FCC participation to international spectrum matters, however. Our participation in bilateral meetings with our counterparts from other countries has helped to open foreign markets to competition, lower international accounting rates, eliminate time-consuming type-approval processes for telecommunications equipment, and resolve other telecommunications licensing issues. These negotiations and agreements protect U.S. consumers, enhance competition domestically and globally, as well as protect critical military, public safety systems, and other services from interference.

Question 8. What do you believe are some of the issues that will pose the greatest challenges to the national security interests of the United States during WRC–2000?

Answer. I rely on the NTIA and their clients (i.e., the Department of Defense and the National Security Agency) to alert us to the critical issues implicating the national security of the United States as we plan for and participate in the world radio conferences. This year, I anticipate at least two issues at WRC–2000 of concern to DOD and the NSA: First, several administrations may seek to establish a mobile satellite service in frequency bands where the United States government uses global position systems and technology. Second; one of the frequency bands targeted by some administrations for third generation mobile services includes 1755–1850

MHz—frequencies that presently are allocated to the Department of Defense. Within the U.S. government, there have been extensive discussions early on with the Department of Defense so that the delegation would understand the Department's concerns.

Question 9. Over the past few years, the national security community has expressed concern with the reallocation of some spectrum from the Department of Defense to the commercial sector, and over reports of interference between systems of the Department of Defense and the private sector. Do you believe that the current process is adequate to ensure a fair allocation of spectrum to meet the needs of the government, and the Department of Defense in particular, as well as the needs of the commercial sector? What, if any changes would you recommend?

Answer. Under the current process, Congress has enacted legislation whenever it has determined that the public would best be served by reallocating spectrum from government use to the commercial sector. Given the current scarcity of unencumbered spectrum, the private sector understandably desires even greater access to spectrum reserved for federal government use and argues that government should be required to be more spectrally efficient. At the same time, the Department of Defense argues that its retention and use of spectrum is essential to protect the national security of the United States. I am encouraged that NTIA has initiated a dialogue with industry to explore ways to maximize the efficiency with which U.S. government uses spectrum.

These dialogues may also identify chunks of spectrum that can be used by industry without significant adverse effect on federal government operations. I have urged such exchanges in the past, and commend NTIA for this initiative.

Additionally, I recognize that the Commission must give serious consideration at an early stage to NTIA and DOD concerns regarding any proposed FCC spectrum allocations or rules that might adversely impact U.S. government operations. I support more regular exchanges between the FCC and NTIA/DOD on spectrum matters. I am pleased that the FCC's Spectrum Policy Executive Committee has begun to participate in such exchanges. We regularly try to obtain NTIA comments on proposals before releasing a notice of proposed rulemaking on matters that affect government systems. While the Commission must follow the Administrative Procedure Act in finalizing its rules, NTIA participation at an early stage ultimately will expedite resolution of issues.

Question 10. Do you support the development of better receiver standards to ensure that systems operating in adjacent frequencies do not receive interference from one another?

Answer. I support efforts by industry to develop receivers appropriate to the circumstances of the particular radio service in conjunction with which they are used. In some cases, voluntary industry standards may be a useful means of reducing the susceptibility of receivers to interference from undesired signals. While the Commission has authority to establish interference susceptibility standards for home electronic equipment, I am not aware that the Commission has ever chosen to use this authority except in conjunction with implementation of the All-Channel Receiver Act. Despite the FCC's historic restraint in adopting receiver standards, given the increased demand for spectrum, I am willing to explore all options for improving spectrum efficiency, including, as a last resort, proceedings to establish better receiver standards.

Question 11. Can we expect the U.S. to harmonize its spectrum allocations with the rest of the world in order to promote advanced wireless services such as 3G? Isn't such harmonization necessary for U.S. manufacturers and service providers to achieve parity with foreign competitors?

Answer. While it might be desirable for the United States and other administrations to harmonize spectrum allocations, particularly with respect to advanced wireless services such as 3G, such a result will be extremely difficult to accomplish. First, it is unlikely that the rest of the world will be able to agree on a frequency band or bands that will harmonize globally the spectrum in which 3G services will be provided. Europe, Canada, Asia and the South and Latin American countries have not suggested any consistent approach to harmonization of spectrum for 3G. Moreover, the bands that have emerged as the most popular proposals in certain regions of the world are, in the United States, either allocated to the Department of Defense or heavily encumbered by licensees of Instructional Fixed Television Service or Multichannel Multipoint Distribution Services.

U.S. and foreign manufacturers and 3G service providers would indeed benefit from a globally harmonized 3G allocation. This is one reason why products utilizing

software defined radio technology which permit operation in a much wider range of frequencies hold such promise to reduce the burdens of disparate allocations.

Question 12. Please explain your views on the appropriate government role on technology standards. Wouldn't the adoption of an FCC standard for advanced wireless technologies, such as 3G, improve U.S. competitiveness in the worldwide market?

Answer. As a general matter, I support the operation of market forces and voluntary industry initiatives to develop and establish technology standards. Such flexibility has facilitated technological innovation, as technologies compete in the marketplace. There are tradeoffs, however. A global standard enables manufacturers to amortize costs across a larger number of units, lowering the cost to consumers. Additionally, common equipment standards may increase service competition because the cost to the consumer of switching providers is less if the consumer does not have to buy a new handset. Moreover, where there is a common standard and common spectrum allocation, consumers are not inconvenienced when traveling abroad.

Because the U.S. has pursued a course of "flexibility" and Europe has maintained an industrial policy of establishing technical standards, many believe that the U.S. has fallen behind its trading partners in the provision of mobile wireless services. This divergence of approaches has been the source of much international negotiation over the past two years.

While in the short term, regulatory flexibility may permit the development of divergent standards that delay ubiquity or interoperability of service, in the long term, consumers will benefit from continued improvements in technology. The key may be to require interoperability of systems and where feasible, to look for global spectrum to allocate. Longer term, technologies such as software defined radio may eventually obviate the need for uniform global spectrum allocations or standards. And the U.S. should work with industry and our trading partners to identify early on common spectrum for advanced services.

Notwithstanding my general preference for flexible standards and allocations, I will not hesitate to press industry to adopt open standards. I also will not hesitate to ratify an industry-developed standard (such as digital television), if I am convinced such action is essential for consumers to reap the benefits of a new service.

3. On FCC Merger Reviews:

Initial question: I realize that you support continuing the FCC's authority to review telecom mergers. Based on your five years' experience, is there any aspect of the current process that needs improvement, and, if so, what specific changes would you make?

Question 13. You have indicated that when the Commission conducts merger review, it should impose only "voluntary conditions" that are "narrowly tailored and designed to address identified merger-specific ills" and that "refrain from imposing conditions that are more appropriate for a rulemaking of general applicability." Do you believe that "voluntary conditions" accepted by companies seeking to consummate a merger are "final agency action" reviewable under the APA, and if not, what language would you propose adding to the APA or the Communications Acts to ensure that even "voluntary" merger conditions can be reviewed by courts to ensure that they meet your proposed requirements for merger conditions?

Answer. Section 402(b) of the Communications Act of 1934, as amended, permits applicants to appeal from decisions and orders of the Commission if their application "is denied by the Commission." 47 U.S.C. § 402(b)(l–2). Under Section 402(b)(6) of the Act, appeals also are available to "any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application." Section 402(b) generally has been construed to prevent an applicant from seeking review of a decision granting its application, even where conditions have been imposed on the grant, an interpretation that is consistent with the Commission's rules.

If Congress wants to permit judicial review of conditions placed on a grant, it could amend Section 402(b)(6) to authorize appeals by "any person, including an applicant, who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application." I would agree with the notion that parties should be able to seek review of agency actions that adversely affect their interests, including conditions placed on the grants of their authorizations. On the other hand, if I were to support such review, it would be limited by two concerns. First, applicants generally are required to exhaust their administrative remedies before the agency prior to seeking review in court. If an applicant does not challenge the imposition of a condition before the agency, both the reviewing court

and the agency are placed in a difficult, if not untenable, position in considering the appeal. The agency, as a deliberative body, will not have had the opportunity to express its rationale for the imposition of the condition. Second, court actions eliminating or modifying conditions imposed on the grant of an application may alter the public interest analysis underlying the grant, and make decisions on remand from such reversal problematic, especially where, as usual, the transaction already has been consummated.

These concerns only strengthen the belief I expressed in my initial answer that the process is best served where, conditions are "narrowly tailored and designed to address identified merger-specific ills." I note that in my initial answer, in stating this belief, I did not differentiate between "voluntary conditions" and "conditions."

Question 14. Please explain where, in the continuum between the following opposite views, your own views are:

(A) In a free market, regulated companies have a presumptive right to merge with other companies. Government bears the burden of showing how, and why, certain aspects of a proposed merger would harm the public interest, and any remedies or conditions imposed by government should be narrowly tailored to address the demonstrable harms that would otherwise occur by virtue of the merger's unconditioned consummation.

(B) In the interests of consumers, regulated companies have no presumptive right to merge. The companies, not the government, bear the burden of showing how, and why, a proposed merger would further the overall public interest. Government is free to impose conditions on a merger that in its judgment would advance the public interest, regardless of how closely related the conditions are to the prevention of demonstrable harm that would not occur but for the merger's unconditioned consummation.

Answer. My views come much closer to the first of these two statements than to the second. I differ only as to the burden of proof, which, as with other applications, lies with the applicant. But in the great majority of mergers reviewed by the Commission under Sections 214 and 310 of the Communications Act, this burden is easily and routinely met.

Question 15. Please show how the FCC's recent SBC/Ameritech, Bell Atlantic/NYNEX, AT&T/TCI and US WEST/Qwest merger decisions exemplify your views as you expressed them in your answer to the above question.

Answer. These mergers are several of the largest and most complex that the Commission has addressed during the past few years. Each of them has engendered significant opposition and has posed significant public policy considerations.

First, in evaluating these applications, we have sought to engage in a transparent process, consistently trying to improve it in a manner that encourages public comment. Each of these applications was put out for public comment, and, in certain cases, public forums were held at which time the public was encouraged to air its views. In the case of SBC/Ameritech, proposed conditions were also placed on the public record for comment. Nevertheless, as I stated in my responses to the original questions, this is an area in which the Commission can and should strive for improvement. We must engage in an open dialogue on the record with all stakeholders. In this way, we can ensure a decision that is widely accepted as fair.

Second, although the review of some of these transactions was completed in a reasonable period of time (the AT&T/TCI review, for example, was completed in less than 180 days), I am very concerned that the Commission did not move with sufficient speed to render a decision in all of these transactions. As I have stated publicly and repeatedly, the Commission should resolve such applications far more rapidly than it has in the past.

Third, in the vast majority of transactions the Commission reviews, the Commission has determined that the transactions would serve the public interest without conditions. At times, and in these transactions, the Commission has expressly declined to impose conditions that were requested by opponents, but that were not necessary to address merger-specific harms. For example, in AT&T/TCI, we expressly declined to impose "open access" requirements. In US WEST/Qwest, we expressly declined to require market-opening improvements or the creation of a separate affiliate.

At other times, the Commission has adopted conditions that ensure compliance with the statutes and the Commission's rules. For example, the Commission determined that the US WEST/Qwest merger would serve the public interest provided that the applicants comply with Section 271 by carrying out their proposal to divest their in-region interLATA customers.

In still other cases, the Commission has adopted conditions or accepted proposals designed to ensure that the public interest benefits of a transaction outweigh its

harms. Some argue that certain of these conditions were not tailored in a sufficiently narrow manner to address only the harms caused by the merger. In these complex cases, I supported the acceptance of these conditions because I believed, on balance, that the transaction, as presented to the Commission with these conditions, served the public interest. Nevertheless, as I have indicated, the Commission should endeavor to ensure that any conditions it imposes are designed to address merger-specific ills.

Question 16. Please indicate which paragraphs of the Commission's Bell Atlantic/NYNEX order do not duplicate the type of antitrust and competition analysis customarily performed by the Department of Justice in DOJ's merger review process.

Answer. In the Bell Atlantic/NYNEX order, the Commission undertook an analysis that differed in significant ways from the analysis performed by the Department of Justice (DOJ). A full comparison with the DOJ analysis is not possible, because unlike the FCC, the DOJ did not issue an extensive document setting forth the analysis. The Commission, unlike DOJ, has the obligation to enforce specific requirements and provisions of the Communications Act that are outside of the DOJ's merger review process. To carry out its responsibility, the Commission examined whether the transaction would further the aims of the Communications Act, and whether the public interest benefits of the transaction outweigh the harms. To demonstrate the differences in the analysis, an illustrative, although not exhaustive, list of paragraphs from the Bell Atlantic/NYNEX order follows the points below.

Although the DOJ and the Commission used a similar analysis to assess the relevant product and geographic markets, the analyses were not duplicative because the facts assessed were used to evaluate different statutory objectives. The DOJ, under the primary federal antitrust laws, examined whether the proposed merger would significantly lessen competition. The Commission examined whether, on balance, the transaction would promote the competition and deregulation that Congress sought to foster in the Telecommunications Act of 1996 ("1996 Act"). Recognizing that the relevant markets were undergoing a rapid and dynamic transition from monopoly to competition, the Commission assessed the impact on competition both during the implementation of the 1996 Act and as implementation of the statute alters market structure in the future. See, e.g., ¶¶ 7, 10, 37–48, 66, 96–100. The Commission also took into account declining entry barriers by, among other things, identifying as market participants not only firms that are currently in the market, but also those firms that were previously precluded from the market by barriers that the 1996 Act had sought to eliminate. See, e.g., ¶¶ 7, 58, 60, 80–94, 126–127.

Unlike the DOJ, the Commission further examined whether consolidation within the industry would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act. For example, the Commission examined the ability of the Commission to use benchmarks to detect discrimination and monitor compliance with the statute and the Commission's rules. See, e.g., ¶¶ 16, 147–152.

In addition, the Commission examined other benefits and harms of the merger, including the effects of the merger on the incentives for implementation of the market opening provisions of the 1996 Act. The Commission also examined whether the transaction would affect the quality of telecommunications services provided to consumers or would result in the provision of enhanced or new services to consumers. See, e.g., ¶¶ 153–176.

4. Newpaper and Mass Media Ownership Restrictions:

Initial question: Would you agree that radio and TV stations, cable TV channels, newspapers and the Internet are among the many competing sources of news and information available to consumers today?

Question 17. If so, why does the Commission count only radio and TV stations for purposes of applying its new local broadcast ownership rules?

Answer. With regard to local radio station ownership, Section 202(b)(1) of the Telecommunications Act of 1996 states unambiguously that the Commission "shall" revise its local radio ownership rules to correspond to the provisions of that Section, which states that a party may own, operate or control "up to" stated numbers of AM and/or FM stations, depending on the total number of stations in the local market. Although subsection (b)(2) states that the Commission has the discretion to allow parties to exceed the numerical limitations set forth in subsection (b)(1), the statute fails in any way to suggest that the Commission has the discretion to limit the number of local stations the statute would otherwise allow a party to acquire. The legislative history is consistent with this reading of the statute: "[Section 202(b)(1)] *directs the Commission to further modify its rules* with respect to the number of radio stations a party may own, operate, or control in a local market.

Subsection (b)(2) provides an exception to the local market limits, where the acquisition or interest in a radio station will result in an *increase* in the number of radio stations" (emphasis added).

Notwithstanding the evidently clear wording and intent of the law, the Commission is purported to be considering adopting more stringent limitations on local radio ownership, consisting of "guidelines" on the percentage of concentration in the local radio advertising revenues that a given local radio station consolidation would produce.

Question 18. How do you interpret the cited provisions of the 1996 Telecom Act and accompanying legislative history? Do you read them to empower the Commission to reduce the number of stations the statute otherwise permits one party to acquire, or do you read them to empower a party to acquire any number and complement of stations "up to" the limits set by the statute without other FCC regulatory constraint?

Answer. I do not believe that, under Section 202(b)(1) or (2), the Commission has discretion to reduce the numerical ownership limits established by the statute. Shortly after passage of the Telecommunications Act of 1996, the Commission amended its rules to account for the new statutory numerical limits.

Section 202(b), however, did not remove the Commission's longstanding obligation to consider the public interest, including market concentration, in any transfer of control or assignment application proceeding. Instead, Section 310(d) of the Communications Act of 1934 requires the Commission to review all assignment and transfer applications for broadcast licenses and to grant them only if so doing would serve the public interest, convenience and necessity.

The Commission has long considered the effect of a proposed transaction on competition in relevant broadcast markets to be a critical component of this public interest review, and the courts have long agreed with this approach. As the Supreme Court noted in FCC v. RCA Communications, Inc., "there can be no doubt that competition is a relevant factor in weighing the public interest." Had Congress intended to exclude a public interest analysis in all radio license transfers and assignments, it would have so stated. A radio merger that results in over 95% of a relevant market being controlled by the top two radio licensees, for example, poses a public interest concern, and merits Commission scrutiny even in cases where the numerical test is met. Notwithstanding the residual "public interest" analysis that is applied in assessing license assignment and transfer applications, the Commission's record is clear in effectuating the intent of Congress to allow significant radio market concentration.

Question 19. If you believe the Commission retains discretion to reduce the number of stations that may be acquired in a local market, do you believe that the degree of resulting concentration in the radio advertising market would be an appropriate benchmark? If so, please provide an analysis of why, including (a) an explanation of the correlation between the interests of the listening audience and the interests of local advertisers; (b) your analysis of the Commission's statutory authority, and its institutional expertise, in regulating commercial advertising.

Answer. Advertising revenue share may be an appropriate proxy for evaluating market concentration under the public interest test. The Commission's concern in avoiding the aggregation of market power by broadcast owners is directed not so much at protecting local advertisers in the first instance as at preventing adverse effects on listeners. If, for example, a single competitor acquires sufficient market power through consolidation, it may be able to exercise that power to deter entry, disadvantage rivals, or cause otherwise efficient rivals to exit from the market and thus deprive the consumer of independent voices. Moreover, vigorous competition among market stations compels competitors to produce a better product—better programming—which directly benefits the listening public.

This use of advertising market share as one of several indicators of market concentration is not "regulating commercial advertising." The Commission does not regulate the price, quantity, or quality of radio advertising aired by commercial radio stations. I do not believe that the Commission has either the statutory authority or the institutional expertise for such regulation.

Question 20. Please state whether the Commission is, or is not, considering the implementation of any such "guidelines." If so, please state (1) when their completion is anticipated; (2) whether to your knowledge any proposed radio station acquisitions otherwise consistent with Section 202(b)(1) are being held in abeyance pending their implementation; and (3) whether to your knowledge any other federal agency has jurisdiction to oversee issues involving competition in local advertising markets, including radio advertising.

Answer. (1) I do not know whether Chairman Kennard intends to address the radio merger review process through merger guidelines or a Notice of Proposed Rulemaking. As I do not control the agency's agenda, I cannot comment on if or when such action would be taken. I do believe that broadcasters and the public are entitled to voice their views on the factors the Commission should consider in determining whether an acquisition is in the public interest. When broadcasters were limited to only two AM and two FM stations in a market, there was little need to be concerned with abuse of market power. A rulemaking to establish guidelines (or rules) would provide the industry and other members of the public with an opportunity to examine the rapidly evolving marketplace and determine at what point, if at all, consolidation harms the public interest. I would prefer a public rulemaking.

(2) I do not support holding applications for radio station acquisitions in abeyance pending implementation of any guidelines or a rulemaking. The Commission should render its decisions quickly after an opportunity for notice and public comment. Extensive delays in ruling on applications imposes hardship on applicants. To my knowledge, action on pending radio merger transactions is not being withheld pending consideration of any possible guidelines.

(3) Other federal agencies, such as DOJ and FTC, have authority under the antitrust statutes to examine competition in local advertising markets. Their standard of review of competition issues in radio advertising markets differs from the Commission's public interest standard and the exercise of their jurisdiction to review radio merger cases is, unlike the Commission's, subject to the Department's discretion. As I have said, however, there should be improved coordination between the FCC and other federal agencies in the merger review process.

Initial question: When the local cable TV operator can offer (and even own) dozens of different channels of cable programming, why does the Commission prohibit a local newspaper from owning even one local TV station?

Question 21. In your response to this question, you state that, "television stations and newspapers remain the most influential sources of local news and information for the public," and that "[G]iven the continued reliance by the public on television and radio for most news and information, it remains in the public interest to broadly disseminate broadcast licenses," I presume your view is that broadcast television will remain an important source of news and information for the average consumer for the foreseeable future.

Answer. I do believe that broadcast television will remain an important source of news and information for the average consumer for the foreseeable future.

Question 22. Please indicate what evidence there is that a newspaper's ownership of a television station in any of the nation's fifty largest TV markets would reduce the diversity of voices in a market more sharply than a television station's ownership of a second television station in that market.

Answer. The Commission's adoption many years ago of the rule barring cross-ownership of a television station and a daily newspaper published within the service area of that television station was based on the record in that proceeding and its predictive judgment that such a combination would unduly harm diversity. Such predictive judgment historically has been founded on the unique position daily newspapers hold in local markets, as evidenced by, among other things, their limited number and the substantial share of local advertising revenues they typically garner. As I have stated, however, I believe it is timely for us to revisit our newspaper/broadcast cross-ownership rules as part of our biennial review. We should ascertain whether there are any material differences between newspaper/television station combinations and local television duopolies. We should also examine whether the size of market has an impact on the number of outlets for news and information.

Question 23. Given the fact that newspapers typically have more staff and resources than broadcast stations, and can therefore cover local issues more thoroughly, permitting common ownership of local newspapers and TV stations would allow the co-owned TV station to cover more events and issues and to cover them more thoroughly. In light of your statement that the public relies heavily on television for news and information, why wouldn't it benefit the public to allow common ownership of newspapers and television stations in the same market?

Answer. In some markets, both a broadcast station and a newspaper independently have staff and resources that will cover local issues thoroughly. These two independent sources of local news may well be the dominant sources of local news and information. In this instance, the public will not benefit if the competing viewpoints that might be fostered from separate ownership and control of these dominant sources of local news and information are brought under common control. Such a combination could be especially troubling if those seeking public office are pre-

cluded from coverage on the two most prevalent sources of news and information in a community because of common ownership.

Nevertheless, I have recognized that the media landscape has changed significantly in the years following the time that the Commission adopted its prohibition on newspaper/broadcast cross-ownership. With the advent of more broadcast stations, the growth in cable news and information channels, and the availability of news and information on the Internet and other outlets, newspapers and television stations may not be as dominant a source of local news and information as they once were. Moreover, the common ownership of local newspapers and television stations could enable a jointly owned television station to initiate greater and deeper coverage of news and issues than it would otherwise be able to do.

The Commission will examine all of its broadcast rules in its Biennial Review, and I plan to take a fresh look at both the radio and television cross-ownership rules in the course of that review.

Question 24. If the average consumer continues to depend on local television stations for news and information, why has the Commission not yet resolved the issue of local television broadcasters' digital must-carry rights?

Answer. I do not control the Commission agenda. There is great uncertainty in the marketplace, and broadcasters and cable operators alike need to know what rules, if any, will be imposed. I have expressed to the Chairman my desire to resolve the digital must carry item as soon as possible. The staff has had sufficient time to consider parties' arguments and prepare recommendations to the Commission.

Question 25. If the Commission were to decline to extend digital must-carry rights to all local television stations, how would the Commission justify requiring all broadcasters to provide a minimum of three hours per week of educational children's programming?

Answer. In the case of analog television broadcasting, where both must-carry and children's television rules have been prescribed, neither is dependent upon the other. There is no linkage between the two. Must-carry is an outgrowth of the Cable Act of 1992. The children's television rules (which do not establish a hard-and-fast three-hour-per-week requirement but rather allow licensees a measure of flexibility) were prescribed to implement the Children's Television Act of 1990 ("CTA"). In exchange for a free television broadcast license, broadcasters are expected to serve their communities. Congress in 1990 determined that children constitute a significant segment of the underserved community and that they are entitled to educational programming. Our rules implementing the CTA were designed to strike a fair balance.

The Commission has made no determinations regarding the applicability of must-carry rights to digital television signals or regarding the children's television programming requirements applicable to digital television broadcasting. The former is the subject of a pending notice of proposed rulemaking, and the latter is encompassed within a pending notice of inquiry. I will want to acquaint myself with the comments of interested parties, the recommendations of FCC staff, and the views of my colleagues before making any decision on either subject.

Initial question: When the Internet enables any user to interact with a virtually endless variety of different sources of information and viewpoints, how does the Commission justify retaining any broadcast ownership restrictions based on the need to assure "viewpoint diversity"?

Question 26. In responding to this question, your support for the current ownership rules appears to rely, in part, on the fact that "not all of the population has access to the Internet at home." In your view, at what point do you consider an alternative source of news and information to be "available" for the purpose of reducing or eliminating scarcity-based broadcast regulation?

Answer. I stated in my answer to your initial question that, "[a]s we examine our ownership rules [in the Biennial Review], I look forward to reviewing any studies that may be submitted regarding how the Internet is changing the public's consumption of information and whether [the Internet] is reducing the preeminent role historically played by the broadcast industry." If this appeared to be unqualified "support for current ownership rules," that certainly was not my intent.

Congress and the Supreme Court have treated broadcast media as uniquely able to reach a mass audience. For example, the enactment of the 1992 Cable Act and the Supreme Court's decision on the FCC's must carry rules in Turner Broadcasting System, Inc. v. FCC both were premised on findings that television broadcasting is uniquely able to reach a mass audience. If the Internet or other alternative sources of local news and information were able to reach the same mass audience to the same degree, the outcome in Turner may have been different.

Current Internet availability may justify reducing broadcast regulation to some extent, but the degree of such deregulation would depend entirely on evidence of the public's reliance on the Internet for local news and information. That is why I look forward to reviewing the studies to which I referred in my original answer, as we consider the issues raised in the Biennial Review.

Question 27. Should universal service subsidies be expanded to fund the deployment of data networks and computers to every home?

Answer. The Federal-State Joint Board on Universal Service is undertaking a proceeding this year to reexamine the definition of universal service. Section 254 makes clear that the definition of universal service is an evolving one that must take into account technological advances.

Through this proceeding, we will determine the extent to which specific services, including broadband services that would allow high-speed transmission of data and other information, meet the criteria that Congress established in section 254.

The Commission, however, consistent with Congress' directive in section 254, has not contemplated extending universal service support to provide computers to every home. Indeed, in implementing the schools and libraries support mechanism, the Commission, based on the Joint Board's recommendations, expressly declined to provide support for personal computers in the classroom.

5. On deregulation and forbearance:

Initial question: You have said that the FCC must know "not just when to regulate, but when to deregulate." Section 10 of the 1996 Telecom Act states that the FCC *must* abstain from regulation if it determines that (1) enforcement is not necessary to ensure that charges and practices are just and reasonable; (2) enforcement is not necessary for protection of consumers; and (3) forbearance is consistent with the public interest.

What competitive indicators do you look for, and what type of record showing do you require, in evaluating forbearance requests?

Question 28. In your response, you cite the fact that the Commission had "used our forbearance authority . . . to reduce burdens on carriers." Can you explain why it took the Commission fifteen months to issue a decision on the forbearance petition filed by ITTA and then another six weeks to issue the text of the order? Please explain what you will do to assure that the goals of fostering competition in a dynamic marketplace are not frustrated by inexcusable Commission delay in issuing decisions on forbearance petitions in the future.

Answer. I share your concern that, in certain cases, the Commission has not moved with sufficient speed to render a decision on forbearance petitions. I understand that delay creates uncertainty and unnecessary costs. Although I do not determine when orders addressing forbearance petitions are provided to the Commissioners, I would expect that the Commissioners would receive such orders as quickly as possible after the record closes. I have expressed my view that the Commissioners should receive draft orders in sufficient time so that the vast majority of petitions are acted on and issued within the twelve-month period provided in the statute. The statutory three-month extension should only be used in extraordinary circumstances. I currently have designated someone in my office to be primarily responsible for forbearance petitions, including tracking the status of any pending requests for forbearance.

Question 29. Please explain why you believe that the costs of requiring small and midsize telephone companies to comply with structural separations requirements outweighs the benefit of enhancing their ability to more efficiently optimize their networks and service offerings.

Answer. In response to a forbearance petition filed by the Independent Telephone and Telecommunications Alliance, the Commission took significant steps to reduce burdens on small and mid-sized carriers. One request that the Commission did not grant, however, was forbearance from the requirements that incumbent local exchange carriers must offer in-region long-distance and commercial mobile radio services ("CMRS") through separate affiliates. These requirements are intended to prevent carriers with market power from misallocating costs and to facilitate detection of discrimination against unaffiliated long-distance and CMRS providers.

These separation rules, however, were designed for markets that lack local competition. As competition develops further in the local exchange market, these rules should no longer be necessary. As I indicated when the Commission decided this issue, I look forward to working with small and mid-sized carriers to develop a record that demonstrates that the statutory forbearance criteria have been met. Moreover, I do not believe that the burden of proof lies exclusively on the shoulders of forbearance proponents. The Commission needs to be comprehensive and aggres-

sive in its forbearance analysis so that we can eliminate rules that are no longer necessary and that detract from competition and innovation.

Question 30. Manufacturers now must wait several months for FCC approval to market new equipment designs. What steps are being taken to improve the FCC processes so that domestic manufacturers are not subjected to unnecessary delays? Do competitive forces exist that may obviate the need for such rigorous FCC review?

Answer. The Commission has recently taken several actions to streamline its equipment authorization requirements. Many types of equipment that formerly required FCC approval can now be self-authorized by the manufacturer. Certain equipment that poses a high risk of interference or noncompliance currently requires certification by the Commission. Moreover, the Commission recently has reduced the speed-of-service for processing applications for certification to 36 days through implementation of electronic filing and other measures. In the near future the Commission plans to designate private sector Telecommunications Certification Bodies (TCBs) that will be empowered to certify equipment instead of the Commission. This should make the certification process more convenient and less time consuming for manufacturers. The Commission is also in the process of implementing Mutual Recognition Agreements with Europe and Asia that will allow TCBs from the United States to certify telecommunications equipment for direct export to foreign markets. The Commission also plans to initiate a proceeding to streamline its Part 68 requirements for equipment that connects to the public switched telephone network by relying increasingly on the industry to develop standards and authorize equipment.

6. On digital TV:

Initial question: Recently the cable and consumer electronics industries came to an agreement on standards for cable-ready digital television sets. When can we expect to see similar progress between copyright holders and equipment manufacturers? What is the Commission's role in such negotiations?

Question 31. What role do you expect the FCC to play in the voluntary negotiations between broadcast licensees operating on channels 52–69 and new commercial users that purchased their licenses for use of that spectrum at auction? What is the implication of these private negotiations on public safety use of the 700 MHz band allocation?

Answer. The Commission has adopted rules that will govern the purchase of licenses for frequencies between 746–806 MHz, covering the channels 60–69 on which some broadcasters currently operate. A number of parties have filed petitions for reconsideration in the Channel 60–69 proceeding. One petitioner has requested that the Commission adopt rules that will facilitate voluntary negotiations between new entrants and incumbent broadcasters that could lead to a more rapid transition to digital television as well as a more rapid use of the spectrum by new entrants for new digital services. I expect that any rules the Commission adopts will reflect the public interest in permitting voluntary relocation, the more rapid transition to digital television, and the more expeditious provision of new services in the band to the public. These concepts are still in formation, and we have not yet heard from the public. In reviewing proposed rules, I would expect the Commission to evaluate whether Commission action approving a request to implement the result of voluntary negotiations will violate its statutory authority or result in a loss of service to the public.

Private negotiations that result in a more rapid transition to digital television, hastening broadcast stations move to their digital channel assignments, will help public safety organizations to use this band more expeditiously. First, because of adjacent channel interference issues, new commercial licensees will want to clear the channels adjacent to their frequencies in order to operate without interference. I therefore expect that new commercial licensees will want to negotiate for a faster transition for broadcasters currently on television channels designated for use by public safety. Second, for the same adjacent channel interference reason, public safety users will benefit when a commercial operator negotiates with a broadcaster to move to its operation to a channel outside of the 746–806 MHz band.

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